

Step 1: Identify a market – market identification is an economic tool (Queensland Wire per Mason and Wilson JJ)

- **Purposive exercise:** be related to the specific anti-competitive conduct under consideration in the case
- **Cross-elasticity of demand and/or supply** → Ask: “if a firm were to give less and charge more would there be ... much of a reaction? And if so, from whom? (*Re QCMA*)
 - a. **This is the concept of substitution** – as between one product and another and between suppliers
 - b. If able to switch quickly without much cost – competition → they are substitutable and so belong to the same market
 - c. In *QCMA* the Tribunal **defined market as the field of rivalry between firms in which there is 'substitution between one product and another, and between one source of supply and another, in response to changing prices.'**
- **Hypothetical Monopolist Test (HMT)**
 1. **Identify Potential Products and Area:** Begin by looking at the products and geographic area where the merging or investigated firms operate.

Dimensions of the Market

- **[A] Product Market**
 - Consider the products that are **close substitutes**
 - Also existing or potential competitors who could enter the market to produce a substitute
 - **Demand considerations**
 - Function or end use of the product
 - Physical or technical characteristic of the product
 - Costs and convenience of switching
 - Consumer preference - evidence of customers switching
 - Importance of the goods relative to budget
 - Product Differentiation – brand loyalty
 - **Supply considerations**
 - Can supplier profitably switch to producing different goods quickly and without substantial cost?
 - Costs of deploying production and distribution systems to produce a new line
 - Whether other producers have done the same?
 - Whether govt regulation and intellectual property rights can restrict the manufacturer or supplier from switching from particulars of services to substitute good source services eg patents
 - Past behaviour of suppliers in response to price decisions of potential substitute goods or services on their own pricing decisions
 - Relative price levels and price movement of the goods of services compared to potential substitutes
- **[B] Geographic Market**
 - Transport costs
 - Nature and perishability of the product itself
 - A product in a particular geographic region is a close substitute if a significant portion of sales will likely switch in response to a small but significant increase in a firm’s product, quickly and without significant switching costs
 - **Considerations**
 - Portability of the product determined by weight, perishability
 - Consumer willingness to travel
 - Transportation costs
 - Costs of obtaining supply from other regions
 - Regulatory or import cost constraints
 - Costs of switching production or distribution systems
 - Narrow markets: groceries, liquor, petrol, childcare, radiography, hospitals
 - Wide or national markets: electricity grid, internet sellers
 - **Recall s4E definition: “...market in Australia”**

- a. **Boral** → whilst one dominant player, there are a number of other competitors who may be in a position to and are ready to increase supply
- 2. Height of barriers to entry
- 3. Product differentiation and sales promotion
- 4. Character of vertical relationships
- 5. Nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities

Step 3: Lessening of competition

- **Rule:** compare two future market scenarios (**Outboard Marine**)
 1. Factual: future levels of competition with the impugned conduct
 2. Counterfactual: future levels of competition without the impugned conduct

Step 4: "Effect or Likely Effect"

- **Likely:** real chance or a finite probability → lower than the balance of probabilities standard of proof. Real commercial likelihood (**Re QCMA**)

Step 5: "Substantially"

- **Rule:** sense of being meaningful or relevant to the competitive process (**Rural Press**)

SCOPE OF CCA

- "Trade and Commerce" C power
- "Carries on a business" – broadly defined (**NT Power Generation**) – so long the entity is carrying on a business is fine, the conduct complained of need not be itself the business
- **Derivative crown immunity**
 - Derivative Crown immunity, a doctrine affirmed in the Bradken case (1979), protects private parties dealing with the Crown from the Act's application if that application would interfere with the Crown's legal interests.
 - **ACCC v Baxter** – did not enjoy derivative crown immunity
 - **Purpose of the Act:** The judges reasoned that allowing derivative immunity for all private entities contracting with the government would undermine the purpose of the Trade Practices Act (TPA) to promote competition and fair trading.
 - **Government Procurement:** The decision confirmed that government procurement is a significant part of the economy and that companies engaged in it should not be exempt from competition laws.
 - Cf **ACCC v NSW Ports Operations Hold Co Pty Ltd [2023] FCAFC 16**
 - the Full Federal Court found that derivative crown immunity did apply because applying the Competition and Consumer Act would "**adversely affect some proprietary right or interest of the Crown**".

SUMMARY OF 'MARKET DEFINITION'

- **General:**
 - **Object of Market definition:** Market definition is the initial step in determining the state of competition
 - Market definition is **purposive** – cannot be separated from the conduct under investigation ie we ask:
 1. What is the alleged against the firm in question (the conduct)?
 2. What productive activities of the firm generate that conduct?
 3. What region and particular product(s) or related products of the firm should be the centre of the analysis?
 - a) identify the product(s)
 - b) Apply the SSNIP Test
 - c) Consider the impact on both the demand and the supply side
 - d) Continue with substitution process to expand the product and geographic dimensions until the firm that supplies all those products cannot profitably institute a SSNIP
 - **ACCC v Flight Centre Travel Group:** Market definition should not construct or deconstruct and reconstruct markets divorced from the commercial context of the putative contravention that precipitates the analysis
- Product and geographic market definitions are the most common to be issues in dispute between firms and the ACCC and usually include temporal and functional considerations
- Are there **temporal or functional considerations** that need to be taken into account?
- If we are looking at **functional issues** such as where a firm is vertically integrated, then ask:
 1. What is the product(s) supplied by the parties who are the subject of the case?
 2. Upon whom was the restriction placed:

PART IV, Div 1 Summary

- **s45AA Cartel Conduct Prohibition:** A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a **cartel provision**.
 - **Cartel Provision:** A provision relating to:
 1. Price-fixing; OR
 2. Restricting outputs in the production and supply chain; or
 3. Allocating customers, suppliers or territories; OR
 4. Bid-rigging;
 - By parties that are, or would otherwise be, in competition with each other
- s45AD cartel conduct:
 - Subdivision B – ss45AF-45AI offences
 - Subdivision C – ss45AJ-s45AK civil penalty provisions
 - Subdivision D – exceptions
- S45 - CATCH ALL PROVISION
- **Party Definition**
 - **s45AC Extended meaning of party:** For the purposes of this Division, if a body corporate is a **party** to a **contract**, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a **party** to that **contract**, arrangement or understanding.

s45AF (Crim), s45AJ (civil)

- **Rule:** (1) A corporation commits an offence if (a) the corporation makes a contract or arrangement, or arrives at an understanding; and (b) the contract, arrangement or understanding contains a cartel provision
- **Criminal fault element:** knowledge or belief for subsection (1)(b) (s45AF(2))

s45AG (crim), s45AK (civil)

- **Rule:** (1) A corporation commits an offence if (a) the corporation makes a contract or arrangement, or arrives at an understanding; and (b) the corporation gives effect to the cartel provision
- **Criminal fault element:** knowledge or belief for subsection (1)(b) (s45AG(2))

Civil Cartel Prohibition Proof of 4 elements

1. **A contract, arrangement or understanding** (ss45AJ,45AK(1)(a))
 - **Contract** – something enforceable at law
 - **Arrangement or understanding** – to catch consensual dealings that are less formal and would not give rise to a legally binding contract
 - **Rule:** Requires (1) communication (express = arrangement; tacit = understanding), (2) consensus (meeting of two or more minds: *Top Performance Motors*) and (3) commitment (only for arrangement). Need not be reciprocal (*Morphett Arms v TPC*)
 - **NO communication/consensus/commitment**
 - **[Email had interest in keep Warburton in business – check and balance against each other, concentrated market] – TPC v Email** → The mere sharing of price lists, not communication between parties. Independently held beliefs are not enough
 - **[Mere expectation] – Stationers Supply v Victorian Agencies**
 - **[passive recipient of pricing] – APCO v ACCC [2004] per FFC** → Passive recipient of calls but making independent decision based on his own assessment of market
 - Manufacturers uniform transition to concentrated detergents (*ACCC v Colgate-Palmolive*) → could be result of independently made responses to underlying market forces and the commercial interests of the supermarket chains, Coles and Woolworths
 - **YES communication/consensus/commitment**
 - Mutual obligation or evidence that one party to the arrangement has assumed an obligation or given an assurance that they will act in a certain way (*Stationers Supply*)
 - But need to have arrangement of just one party acting unilaterally (*ACCC v CC*)
 - Knowledge to what needs to be done or not to be done (*Stationers Supply*)
 - **[inferred where Waikerie withdrew newspaper distribution from Mannum after Rural Press threatened it in writing] – Rural Press v ACCC**
 - Facilitated by third party (*News Limited v Australian Rugby League (ARL)*)

2. That contains cartel provision (ss45AJ,45AK(1)(b))

- **Rule:** Offending provision may be considered with other provisions of the contract or other contracts or agreements, provided there is at least one common party to the K, A or U (**s45AD(8) and (9)**).
 - **Price fixing (Purpose and effect)**
 - **Restricting Capacity, Production, Supply or Acquisition (Purpose)**
 - **Allocating customers, suppliers or territories (Purpose)**
 - **Bid-Rigging Provisions (Purpose)**

3. Cartel Provision definition as per s45AD:

a. Either **purpose/effect condition** in s45AD(2) satisfied (s45AD(1)(a)(i)) **OR**

- **Rule: s45AD(2)** Provision has the **purpose**, or **has** or is **likely to have the effect**, of directly or indirectly:
(a) fixing, controlling or maintaining; or (b) providing for the fixing controlling or maintaining of the **price** for, or a **discount, allowance, rebate or credit** in relation to:
 - (c) **goods or services supplied, or likely to be supplied**, by **any or all of the parties to the contract**, arrangement or understanding; or
 - (d) **goods or services acquired, or likely to be acquired**, by any or all of the parties to the contract, arrangement or understanding; or
 - (e) **goods or services re - supplied, or likely to be re - supplied**, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
 - (f) **goods or services likely to be re-supplied by persons** or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.
- **Purpose:** of motive. Purpose is the end sought to be accomplished by the conduct – what is sought to be achieved by reference to what is relevant in market terms. Motive is a reason for seeking the conduct. (*News Ltd v ARL* per Gleeson CJ). Subjective (**South Sydney**)
 - **Substantial purpose if multiple (s4F(b)):** **Subjective purpose - ascertained from the evidence of the mental states of the parties that drafted and inserted** it as to the effect they sort to achieve as well as the wording of the provision itself looked at in the context of the relevant agreement or arrangement as a whole (**News Ltd v South Sydney RL Club (HCA)**).
 - Not necessary that all parties responsible for inserting a provision to have the prescribed purpose, sufficient if one party responsible had the requisite prescribed purpose (**Seven Network v News**)
- **s45AD(2)(a) Price Fixing, controlling, maintaining**
 - **To capture:** joint price setting by suppliers a good or service, joint price setting in relation to the acquisition of goods and services including joint procurement collaborations, joint price setting by suppliers in relation to the resale prices of goods and services
 - **Fix:** Need not be permanent but generally requires settling or determining for a period of time that is not instantaneous or mere ephemeral (**Radio 2UE Sydney V stereo FM**)
 - **Maintain:** Similar to fix but has element of continuity not nearly being momentary or transitory, to maintain = assumes price fixed beforehand (**Radio 2UE Sydney V stereo FM**)
 - **Court will consider effect (detrimental) of fixing on competition – (Radio 2UE Sydney V stereo FM)** → Stations were free to vary their individual advertising rates at any time. Advertisers could also continue to deal with each company separately if they chose to do so. HELD: Not all price fixing is bad on competition therefore not all unlawful.
 - NB: Lecturer considers this to be odd, the legislation does not require consideration of detrimental effect on competition

b. **Purpose condition** in s45AD(3) satisfied (s45AD(1)(a)(ii)); **AND**

- **Rule: s45AD(3)** The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
 - (a) **preventing, restricting or limiting:**
 - (i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or **[Production of goods]**
 - **Not necessary to show that parties agreed to a common or single course of action designed to restrict limit or prevent supply (ACCC v Australian Egg Corporation)**
 - **YES —**

- (ii) 2 or more parties to the [contract](#), arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or
- (iii) 2 or more parties to the [contract](#), arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or
- (iv) 2 or more parties to the [contract](#), arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or
- (v) 2 or more parties to the [contract](#), arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the [contract](#), arrangement or understanding.

1. **Cover pricing**

- **What is it:** firms agree in advance who is going to win the tender and contrive their bids accordingly, so only winner has lowest bid/best terms
- **[Logan J: seeking and communicating a cover Price gave rise to an arrangement or understanding] – ACCC v TF Woollam & Son** → Kelly sought cover price from Woollam, put in higher price; it didn't want to tender but wanted to be seen to tender. State approved contractors invited to tender for the Callemondah Project.

2. **Bid rotation**

- **What is it:** Take turns at winning tenders, unsuccessful bidders are compensated either with promise of next tender or compensation payments
- **ACCC v Pioneer Concrete (Qld)** → Pioneer, Boral and CSR agreed in advance which company would submit the winning tender for major construction projects in Southeast Queensland. Either tender at price higher than agreed winning price or not tender.

3. **Bid suppression**

- **What is it:** some or all agree not to submit tenders
- **[Wrote email to others requesting not to tender; second email acknowledged that some responded positively, asking the rest as well] – ACCC v ARM Architecture** → ARM won tender to design, prior to second stage (tendering again), sent email to at least 8 other architecture firms which said "Please don't submit tender as we are relying on this project to keep our practice alive". Sent follow up email "we have received very positive response from Architectus and JWA". ARM fined \$900K, Director \$75K
 - Clear communication
 - Two people responded — meeting of minds – consensus = commitment
- Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the [supply](#) of after - hours medical [services](#) if the roster does not prevent, restrict or limit the [supply](#) of [services](#).
- Note 2: The purpose condition can be satisfied when a [provision](#) is considered with related [provisions](#)--see [subsection](#) (9).

c. **Competition condition** in s45AD(4) satisfied (s45AD(1)(b))

- **Rule: s45AD(4)** Competition condition satisfied if **at least 2 of the parties to the [contract](#), arrangement or understanding:** (a) are or are likely to be; or (b) but for any [contract](#), arrangement or understanding, would be or would be likely to be; in [competition](#) with each other **in relation to: [to the goods or services that are the subject of the impugned cartel provisions]**
 - (c) if [paragraph](#) (2)(c) or (3)(b) applies in relation to a [supply](#), or likely [supply](#), of [goods](#) or [services](#)--the [supply](#) of those [goods](#) or [services](#) in [trade or commerce](#); or
 - (d) if [paragraph](#) (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of [goods](#) or [services](#)--the acquisition of those [goods](#) or [services](#) in [trade or commerce](#); or
 - (e) if [paragraph](#) (2)(e) or (f) applies in relation to a re - [supply](#), or likely re - [supply](#), of [goods](#) or [services](#)--the [supply](#) of those [goods](#) or [services](#) in [trade or commerce](#) to that re - supplier; or
 - (f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of [goods](#)--the production of those [goods](#) in [trade or commerce](#); or

- Likely apply to cartel provisions concerning re-supply but not by competitors who supply → franchisors who sets maximum resale price obligations on all franchisees for products supplied by the franchisor will be protected
- **COMPETITION AND CONSUMER ACT 2010 - SECT 48 Resale price maintenance**
 - (1) A [corporation](#) or other person shall not engage in the [practice of resale price maintenance](#).
 - (2) [Subsection](#) (1) does not apply to a [corporation](#) or other person engaging in [conduct](#) that constitutes the [practice of resale price maintenance](#) if:
 - (a) the [corporation](#) or other person has [given](#) the [Commission](#) a notice under [subsection](#) 93(1) describing the [conduct](#); and
 - (b) the notice is in force under section [93](#).

S45AR: EXCLUSIVE DEALING

- **Rule:** Cartel prohibitions do not apply if amounts to contravention of s47 exclusive dealing, civil cartels dont apply (s45AR(1)) and criminal cartels (S45AR(2))
- **S47 exclusive dealing:** having purpose, effect or likely effect of substantially lessening competition

S45AT: ACQUISITION OF SHARES OR ASSETS

- **Rule:** Cartel prohibitions do not apply to a CAU containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of (a) any **shares in the capital of a body corporate**; or (b) any **assets of a person** (s45AT)
- **Legislation:** s45AT(1) Sections [45AF](#), [45AG](#), [45AJ](#) and [45AK](#) do not apply in relation to a [contract](#), arrangement or understanding containing a [cartel provision](#), in so far as the [cartel provision](#) provides directly or indirectly for the acquisition of:
 - (a) any [shares](#) in the capital of a body corporate; or
 - (b) any assets of a person.
- Note: A defendant bears an evidential burden in relation to the matter in [subsection](#) (1) (see [subsection](#) 13.3(3) of the *Criminal Code* and [subsection](#) (2) of this section).
 - (2) A person who wishes to rely on [subsection](#) (1) in relation to a [contravention](#) of section [45AJ](#) or [45AK](#) bears an evidential burden in relation to that matter.
 - (3) Sections [45AF](#), [45AG](#), [45AJ](#) and [45AK](#) do not apply in relation to a [contract](#), arrangement or understanding containing a [cartel provision](#), in so far as the [cartel provision](#) provides for an acquisition, if the acquisition is a [notified acquisition](#).
- Note: A defendant bears an evidential burden in relation to the matter in this [subsection](#) (see [subsection](#) 13.3(3) of the *Criminal Code* and [subsection](#) (4) of this section).
 - (4) A person who wishes to rely on [subsection](#) (3) in relation to a [contravention](#) of section [45AJ](#) or [45AK](#) bears an evidential burden in relation to that matter.

S45 CATCH-ALL PROVISION Contracts, arrangements or understandings that restrict dealings or affect competition

- (1) A [corporation must not](#):
 - (a) **[MAKE or Arrive at CAUs, with purpose/likely effect/effect of SLC] make a [contract](#) or arrangement, or [arrive at](#) an understanding, if a [provision](#) of the proposed [contract](#), arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening [competition](#); OR**
 - (b) **[GIVE EFFECT TO CAU, with purpose/likely effect/effect of SLC] [give effect to a provision](#) of a [contract](#), arrangement or understanding, if that [provision](#) has the purpose, or has or is likely to have the [effect](#), of substantially lessening [competition](#); OR**
 - (c) **[CONCERTED PRACTICE with purpose/likely effect/effect of SLC] engage with one or more persons in a [concerted practice](#) that has the purpose, or has or is likely to have the effect, of substantially lessening [competition](#).**
- (2) [Paragraph](#) (1)(b) applies in relation to [contracts](#) or arrangements made, or understandings arrived at, before or after the commencement of this section. **[Retrospective and Prospective application]**
- (3) For the purposes of this section, [competition](#) means: **[COMPETITION DEFINITION]**
 - (a) in relation to a [provision](#) of a [contract](#), arrangement or understanding or of a proposed [contract](#), arrangement or understanding--competition in any [market](#) in which:

- (i) a [corporation](#) that is a [party](#) to the [contract](#), arrangement or understanding, or would be a [party](#) to the proposed [contract](#), arrangement or understanding; or
- (ii) any body corporate related to such a [corporation](#);
- supplies or [acquires](#), or is likely to [supply](#) or [acquire](#), [goods](#) or [services](#) or would, but for the [provision](#), [supply](#) or [acquire](#), or be likely to [supply](#) or [acquire](#), [goods](#) or [services](#); or
- (b) in relation to a concerted practice--competition in any [market](#) in which:
 - (i) a [corporation](#) that is a [party](#) to the practice; or
 - (ii) any body corporate related to such a [corporation](#);
 - supplies or [acquires](#), or is likely to [supply](#) or [acquire](#), [goods](#) or [services](#) or would, but for the practice, [supply](#) or [acquire](#), or be likely to [supply](#) or [acquire](#), [goods](#) or [services](#).
- (4) **[Aggregation of terms and contracts to determine purpose or effect]** For the purposes of the application of this section in relation to a particular [corporation](#), a [provision](#) of a [contract](#), arrangement or understanding or of a proposed [contract](#), arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening [competition](#) if that [provision](#) and any one or more of the following [provisions](#), namely:
 - (a) the other [provisions](#) of that [contract](#), arrangement or understanding or proposed [contract](#), arrangement or understanding; and
 - (b) the [provisions](#) of any other [contract](#), arrangement or understanding or proposed [contract](#), arrangement or understanding to which the [corporation](#) or a body corporate related to the [corporation](#) is or would be a [party](#); together have or are likely to have that effect.
- **ANTI-OVERLAP**
 - Sections 45(5), (5A), (6) and (7) are anti-overlap provisions
 - **Acquisition of shares in the capital of a body corporate or any asset of a person (s45(7))**
 - **If fall in others specifically, no s45(1):** If both s45 and either ss45D, 47, 48, or 50 apply to the impugned provision, then s45(1) is excluded to avoid an overlap
 - **If no others wholly, s45(1):** However, if an imputed provision of an agreement is not wholly within one of the specific provisions named above, the provision will not apply and the provision can also be considered under the general prohibition in section 45(1).

- Elements

1. Corporation
2. Making ((1)(a)), giving effect to ((1)(b)), engaging ((1)(c)) in
3. Contract, arrangement or understanding or Concerted practice
 - CAU → 'spectrum of consensual dealings' (*ACCC v Leahy Petroleum*)
 - Concerted practice (s45(1)(c))

Concerted Practices: s45(1)(c) CCA — (1) A corporation must not: ... (c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition

- **Broad conducts captured:** ... "**any form of cooperation** between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition (**Explanatory memo**).
- Originated from European Union
 - Article 101(1) of Treaty on the Functioning of the European Union (TFEU): Prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market..."
- **ACCC Guidelines on concerted practice** → pattern of cooperative behaviour or communications between two or more persons, sacrifices/reducing independent decision making
- **Roofers example** → Mr Kerkenezov sending msg/making posts about roofers to increase price, set lowest min etc. Few liked the post. ACCC contended there was communication. Defendant pled guilty:
 - **were likely an attempt to contravene**, or induce a contravention of, section 45AJ of the Competition and Consumer Act (CCA) by fixing, maintaining or controlling the prices for certain roofing services; and

1. This is because Waikerie's expansion was successful and could have led to further incremental expansions. But for the agreement, Waikerie could have been an effective competitor in the Mannum area.

4. Assess competition

a. STRUCTURAL FEATURES OF THE MARKET (*Queensland Wire*)

- a. Market concentration/share
- b. **Height of barriers to entry** (what was the most important factor: *Re QCMA; Outboard Marine*)
 - i. Ease of new entry
 - ii. Regulatory restrictions
- c. Product differentiation and sales promotion
- d. Character of vertical relationships
- e. Nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities

6. Effect on efficiencies

- a. **Allocative efficiency:** allocate resource to uses that provide greatest benefit. Directly impacts living standards. PPF Relationship: Only one point is allocatively efficient, representing the optimal mix of goods and services that maximises societal wellbeing. **[What goods are produced]**
- b. **Technical/Productive efficiency:** individual firms produce the goods and services that they offer at least cost. PPF Relationship: All points on the PPF are productively efficient because it is not possible to increase the production of one good without decreasing the production of another, given existing resources and technology. Producing inside the PPF is productively inefficient. **[How goods are produced]**
- c. **Dynamic efficiency:** industries make timely changes to technology and products in demand or supply side changes. PPF Relationship: Dynamic efficiency influences the speed of movement from one point on the PPF to another, reflecting the economy's ability to adapt to changing preferences. Also shifts the PPF outwards over time. **[Economy's ability to adapt & innovate over time]**

- Examples of concerted practices

- Market division

- Geographic or territorial division → *Rural Press*
- Customer characteristics

- **[Allocating share of customer business 50/50] – *Gallagher v Pioneer Concrete*** → Lorry owner drivers (LOD) engaged in rotation system to share work & equalise income, restrict the number of trucks available; and prevent Pioneer engaging TP's to deliver concrete. Substantial lessening of competition

- Information exchange

- **Can be pro or anti competitive** depending on whether info sharing enables informed choices or collusion
- Might be concerted practice s45(1)(c) under current law **[Email had interest in keep Warburton in business – check and balance against each other, concentrated market] – *TPC v Email*** → The mere sharing of price lists, not communication between parties. Independently held beliefs are not enough

- Professional codes

Theme	Section	Provision	Related provisions
Prohibition	s 47(1)	Prohibition on exclusive dealing	Anti-overlap provisions: ss 45(6), 45AR
Practices of exclusive dealing	s 47(2)-(3)	Exclusive dealing involving the conditional supply of goods / services	This breaks down s47 primarily by supply vs acquisition – I will also break this down by type of practice
	s 47(4)-(5)	Exclusive dealing involving the conditional acquisition of goods / services	
	s 47(6)-(7)	Third line forcing	
	s 47(8)-(9)	Exclusive dealing in relation to a lease or licence over land	
Other provisions	s 47(10)	Exclusive dealing must have the purpose, effect, or likely effect of SLC	
	s 47(13)	Definition of ' competition ' for the purposes of s 47	

Rule: s47(1) [Subject](#) to this section, a [corporation](#) shall not, in [trade or commerce](#), engage in the [practice of exclusive dealing](#).

Elements:

1. Conduct must be in 'trade or commerce' [s47(1)]

- **Rule:** Broad definition, could include dealings which are not within the mainstream of ordinary commercial activities, need not be specifically compatible with a dominant objective of profit-making.
 - The terms are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of development of trade, commerce and commercial communication, the terms are clearly of the **widest import...** They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to **include** commercial or business dealings in finance between a company and its members which are **not within the mainstream of ordinary commercial activities** and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making." *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd (1978) 36 FLR 134 at 167, per Deane J*

2. The conduct must fall within the definitions of s 47(2)-(9) as a 'practice of exclusive dealing'

- **Summary**
 - **Even** numbered subsections each apply to a positive or direct form of exclusive dealing (supply or acquisition of goods or services subject to some restrictive condition)
 - **Odd** numbered subsections apply to a corresponding form of negative or indirect form of exclusivity (the refusal to supply or acquire because there would be supplier or acquire would not accept a proposed restricted condition).

- Section 47 (2)-(7) defined the practice of the exclusive dealing in relation to supply or acquisition of **goods and services**
- Sections 47 (8) and (9) define exclusive dealing in relation to a **lease or license over land**
- **Supply, resupply, acquires – defined in s4(1) CCA**
 - Defined broadly to capture conditions of supply and resupply in relation to sale, exchange, lease, hire or hire purchase
 - For services, includes provisions, grants or conferrals
 - Agency → indirect (*TPC v Legion Cabs*)
 - Does not include exchanges in an agency relationship because the agent does not acquire title to the goods which means the supplier still carries the risk of loss or declining price in the event that the products are not sold
 - In *Castlemaine Tooheys, HCA* said when an agent is engaged to act on behalf of the supplier, it does not constitute a supply or resupply within the meaning of section 4 of the CCA
 - S84(2) and (4) – provisions which deem the conduct of an agent to be that of a corporate principal as long as the agent is **acting within the scope** of the agents actual or apparent authority
- **On condition — s47(13(a) – consequences of non-compliance need be felt**
 - **Rule:** More than mere hope or expectation in the person for whose benefit the condition was attached, requires **element of compulsion** (*Stationers Supply, Ryan J*). Consider entire factual matrix (*ACCC v Bill Express (in liq), Blue J*). **Compulsion and futurity (SWB Family Credit Union)**
 - **NO**
 - **[Lack of obligation imposed upon person dealing with the impugned corporation = no condition] – SWB Family Credit Union** → This was not the supply services by the credit union (the service of providing the rebate) on condition that the member acquired services from another. The rebate did not amount to the “provision of the service” There was no obligation to acquire such services, the benefit merely followed if the member chose to use the travel agent recommended to the member
 - **[No competitor when Ramsay imposed “condition” to not do work with competitor on its surgeons] – Ramsay Health Care** → Surgeons have open lists at private hospitals based on the number of surgeries. Ramsay said we cannot guarantee your status if you dont meet condition — you dont acquire services from Ramsay’s competitor (yet to be opened up).
 - Rather the ACCC’s case was based on the proposition that this would only occur after the new day surgery opened, which would not occur for at least 2 to 3 years, assuming that all the obstacles could be overcome.

- Types of Exclusive Dealings

- **s47(2)-(3) Product exclusivity**
 - **Restrictions on the supplier s47(4) [NB: S47(5) is in same terms except not conditional refusal; it is for the reason the supplier has supplied or has NOT agreed NOT to supply]**
 - **Necessary to establish that**
 - (a) There was an acquisition of goods and services by one party from another party
 - (b) It was made conditional on the supplier not supplying goods or services to any other person
 - Not necessary for the target of the condition to be a competitor of the acquirer
 - Not necessary for the condition imposed to relate to the same good services being purchased by the acquirer.
 - **Legislation**

(4) A corporation also engages in the practice of exclusive dealing if the corporation:

- (a) acquires, or offers to acquire, goods or services; or
- (b) acquires, or offers to acquire, goods or services at a particular price;

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

- **ACCC v FILA Sports** → Fila imposed conditions in each wholesale market that by supplying Licensed apparel to retailers on the condition that the retailers would not acquire team spirit apparel from suppliers which were competitors of FILA
 - Licensing of AFL apparel was exclusive to FILA → exclusive dealing if they imposed condition that to acquire FILA supply then cannot acquire FILA's competitor's
- **Universal Music v ACCC** → there was a time where parallel importing was illegal in AU, importing from another country cheaper so you cut-price. 1998, parallel importing no longer prohibited; retailers no longer needed to buy from Warner Brothers re CDs. WB said if you buy from importers then I will not supply you.
 1. Did the Universal Music and WB tell the retailers that if they bought non-infringing copies from competitors the two would stop supply?
 - a. Yes they did
 2. Did the words "competitor" in ss47(2)(d) and 47(3)(d) require the identification of a particular person or persons at the time the condition was imposed?
 - a. No, competition law looks at existing competitors and potential new entrants
 3. Did the conduct pleaded have the purpose, effect or likely effect of Substantial Lessening Competition in the relevant market?
 - a. Yes, had the purpose and likely effect of SLC in the wholesale market for CDs and other sound recordings, including CDs containing chart music
 - i. FCA affirmed the trial judge on the determination as to purpose but not likely effect
- **YES**
 - **Conditional discounts** – I will supply you if you not acquire from a competitor (s47(2)(d))
 - **Partial obligations** – e.g. to purchase all or some of the supplier's goods (s47(2)(a))
 - **Customer exclusivity (s47(2)(f)(i))**
 - (f) in the case where the corporation supplies or would supply goods or services, will not re - supply the goods or services to any person, or will not, or will not except to a limited extent, re - supply the goods or services: **[impugned corp supplies on condition that purchaser not resupply goods or services]**
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or **[to particular persons]**
 - **Territorial exclusivity (s47(2)(f)(ii))**
 - (f) in the case where the corporation supplies or would supply goods or services, will not re - supply the goods or services to any person, or will not, or will not except to a limited extent, re - supply the goods or services: **[impugned corp supplies on condition that purchaser not resupply goods or services]**
 - (ii) in particular places or classes of places or in places other than particular places or classes of places. **[in particular territories]**
- **NOT**
 - **Minimum quantity obligations** given at the time of the supply the purchaser is entirely free to decide whether or not to purchase additional quantities from other suppliers
 - **[Tying/bundling but no restriction imposed on buyer to prevent them from buying second product from competitor] (Monroe Topple v Institute of Chartered Accountants [2002] FCAFC)** → Only the institute of chartered accountants offered course to become CA. Monroe Topple supplied notes, course material etc as well. ICA decided that it was going to bundle everything for the same price; MT lost all its stakes overnight. MT argued that ICA made a contract

Statutory overlay

Theme	Provision	Section	Related provisions
Prohibition	Prohibition on resale price maintenance	s 48	Anti-overlap provisions: ss 45(5), 45AQ
Definition	Definition of resale price maintenance	s 4(1)	
Acts constituting RPM	'Making it known'	s 96(3)(a)	
	'Inducing, or attempting to induce'	s 96(3)(b)	'Recommended prices' exemption: s 97
	'Entering into an agreement'	s 96(3)(c)	
	'Withholding the supply of goods'	s 96(3)(d)-(e)	<ul style="list-style-type: none"> • Conduct deemed 'withholding the supply of goods': s 98(1) • Loss leading defence: s 98(2) • Reference to 'reason': s 4F • Rebuttable presumption on 'reason': s 100
	'Statement of price'	s 96(3)(f)	Statements as to the minimum price of goods: s 99
Other provisions	RPM applies equally to services	s 96A	

- **Preliminaries:**

- **What is it:** Vertical arrangements that restrict price
- **S4(1) definition:** "practice of resale price maintenance" means the practice of resale price maintenance referred to in Pt VIII"
- **S6 in Trade and Commerce** → **read widely Extended application of this Act to persons who are not corporations**
 - (2) (b)(ii) The following provisions in Part VIII (RPM) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:
 - (iv) trade or commerce between Australia and places outside Australia; or
 - (v) trade or commerce among the States; or
 - (vi) trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
 - (vii) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth
 - 2(h) ...a reference in this Act to a corporation, except a reference in section 4, 48, 49, 50, 50A, 77A, 81, 151AE or 151AJ or in section 229 of the Australian Consumer Law, included a reference to a person not being a corporation

- **Rationale**

- To create conditions in which the public will benefit from traders competing with each other in respect of prices unfettered by price restraints imposed by suppliers of goods upon retailers (**TPC v Stihl Chain**)
- Related bodies exempted (s96(8) CCA)
- **Harper Review Submissions**
 - Considered but refused to change the nature of the prohibition despite many submissions that it should be treated as a competition-based test.
 - s96(8) inserted to provide an exemption for related bodies corporate that engage in the practice of RPM i.e. companies within a corporate group are not considered to be competitors
- **Pro-competition benefits of Resale Price maintenance**

1. Protecting or preserving the brand image of goods and services
 - a. “quality certification theory”: certain higher end goods and services experience greater demand when the price of those goods or services is higher and, in the long run, sales will increase as brand recognition increases. An ongoing maintenance of that reputation for exclusivity and quality must be maintained and can only be maintained through RPM on downstream suppliers.
 2. Encourage supply for low profit goods
 - a. RPM imposed → stock products that are competitive → lower the price of those goods
 3. Free rider issues
 - a. Pre-sale • Free rider issue arises where retailers who charge lower prices for goods without offering any additional pre-sale customer service services take advantage of or “free-ride” off another (ridden) retailer which provides additional presale services to customers • Usually, the ridden retailer must still sell the goods at a higher price in order to recruit the cost of providing the additional pre-sale Customer Service • A free rider made direct potential customers to the free Customer Service provided by the ridden retailer, but then sell those customers the same goods at a lower price Post-sale • Free rider issue also arises where retailers provide additional post-sale customer Services • A free-rider may inform its potential customers that it can purchase the goods from them at a cheaper price to that of the ridden retailer and then get the benefit of Post sale customer services provided by the ridden retailer • This may result in the ridden retailer either reducing or removing the additional post-sale customer services for the goods Some suppliers believe that a minimum RPM will reduce or eliminate free rider issues in particular industries such as industries supplying technology or products requiring ongoing specialist services
 4. Gaining preferential treatment
 - a. On shelf space → Retailers less inclined to give low profit margin goods prime shelf space – therefore those RPM imposed usually more profitable – given shelf space
 5. Prevent ‘Loss Leader’ selling
 - a. Comp sells good below cost price to bait consumers, then sell higher price goods
 6. Increase competition and efficiency
- **Anti-competition Concerns**
1. Facilitating collusion between suppliers
 2. Facilitating collusion between retailers
 3. Supplier exclusion
 4. Retailer exclusion

S48 RESALE PRICE MAINTENANCE

- **Step 0: Rule:** Cannot engage in the practice of RPM (**s48(1) CCA**), subs(1) does not apply if your notice to ACCC was accepted (**s48(2)**). In relation to goods, corporations constitute engaging in RPM by doing any of the acts listed in s96(3) (s96(1)). This applies in relation to services, reference to goods is to be read as references to services (s96A). Broad definition for services provided, granted or conferred under various contracts but not contract of service (**s4 CCA**). **All conducts under s96(3) taken as a single violation under s48(1) (Dermalogica (2005):** Where the same conduct falls within one or more of the subparagraphs under 96(3), it will constitute a single violation under s48(1).)
- **Legislation:**
- **S48 Resale Price Maintenance**
 - (1) A corporation or other person shall not engage in the practice of resale price maintenance.
 - (2) Subsection (1) does not apply to a corporation or other person engaging in conduct that constitutes the practice of resale price maintenance if:
 - a) the corporation or other person has given the Commission a notice under subsection 93(1) describing the conduct; and
 - b) the notice is in force under section 93.
 - **s96A**
 - (1) This Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods.
 - (2) For the purposes of subsection (1), this Part is to be read with appropriate modifications, including the following modifications:
 - a) references in this Part to goods are to be read as references to services;

- b) references to the sale of goods are to be read as references to the re - supply of services.
- **S4 Interpretation "services"** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred **under: [various contracts except contract of service]**
- **S96 CCA – Acts constituting engaging in resale price maintenance → that would result in contravention of s48**
 - (1) Subject to this Part, a **corporation** (in this section called the supplier) **engages in the practice of resale price maintenance** if that corporation does an act referred to in any of the **paragraphs of subsection (3)**.
 - (2) Subject to this Part, a person (not being a corporation and also in this section called the supplier) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.
- **Overview**
 - **Direct RPM**
 - Sections 96(a), (b), (c) and (f)
 - Supplier actually supplying goods or services and controlling or attempting to control the resale price.
 - **Indirect RPM**
 - Sections 96(d) and (e)
 - Goods and services are being withheld by the supplier for the reason that the reseller has sold, or is likely to sell, goods at a price less than that specified by the supplier.

Step 1: Is there a minimum resale Price Specified by the supplier?

- **RULE: RPM: “will sell or has sold”** – necessary to show that **“a price was specified by a supplier”** as the minimum resale price (*TPC v Prestige Motors*). **Price:** includes a charge of any description which includes a specification with regard to discounts, allowances, rebates or credits given or allowed in relation to the resale of goods or services. **Specified means** to identify a price in some way (**s96(4)**). Somehow make clear it is a conditional threat (*TPC v Penfolds Wines; TPC v Mobil Oil*)
- **YES – Specified Minimum RP**
 - **[Not to sell below recommended price absent approval] – TPC v Prestige Motors** → Instructed dealers that they could not make an offer that involved a discount, and if they were to sell any car below recommended price without approval of Prestige or adv comps, they would delete supply; and cannot sell under adv price fixed by Prestige.
 - **Price specified by a supplier (s96(3)(a)-(e))**
 - Does not apply to 3(f) which is a statement of price
 - Need not be actual price stipulated; but at some stage the parties are capable of understanding of what that price includes
 - Specified definition (s96(4)) – includes prices specified by an agent, third-party, formula, calculation or through reference to comparative goods or services
 - **[Couched in terms of recommendation does not prevent it from constituting “specified price”; a recommended range may also be SP] – TPC v Bata Shoes** → specified price was “somewhere near the selling price of Gowings Limited in Sydney”. Gowings were discounting Bata quite heavily
 - **[Reference to formula or equation is also SP] – ACCC v Australian Safeway** → sufficient if a price is specified by reference to a formula or equation the calculates a particular price below which the retailers cannot sell
 - **[Minimum SP may also be ascertained by a standard that is known to the relevant parties in the industry] — TPC v Mobil Oil** → If you were one of their retailers and were experiencing intense price competition, you could get rebates from Mobil. Dealer-Tank-Wagon price set; if you lower than that we will withdraw the incentive.
 - Two retailers reduced prices below those levels, Mobil terminated it; the retailers brought it to ACCC.
 - Statements such as “you are destabilizing the market with that discount”, “we want the price up”, “you’ll get no help or support from us until the price is back up” when made in connection with the goods being sold will likely be collectively understood by the retailer as the minimum price.
 - **Not necessary for there to be precise communication between what the supplier actually says and the language used in s96(3)(a) – Heating Centre v TPC (1986) FCAFC**

- General: unilateral acts by a firm with high degree of market power more likely to distort the competitive process and ultimately harm consumer welfare than conduct by a firm that has no or little market power (**OECD Policy Roundtables, Evidentiary Issues in Proving Dominance, 2006, page 7**)
 - **US:** focus on conduct which monopolises the market
 - **EU:** focuses on abuse or dominance of a certain market position
 - **AU:** focuses on conduct which has the purpose or effect or likely effect of substantially lessening competition

Previous law	Current law (post-Harper)
Section 46 only applies to corporations with substantial market power.	Section 46 only applies to corporations with substantial market power.
The focus is on "a misuse" of market power	The reference is made only to the word "conduct"
The conduct must have one of three specific purposes, related to damaging an actual or potential competitor.	The conduct must have the purpose, effect or likely effect of substantially lessening competition.
The conduct may occur in any market.	The conduct must occur in a market where there is an actual or likely supply or acquisition of goods or services, by the corporation – whether directly or indirectly
The conduct must 'take advantage' of substantial market power.	The conduct does not need to 'take advantage' of substantial market power.
Predatory pricing and other specific forms of conduct are expressly prohibited.	There is a general provision only, with no specific prohibition on predatory pricing or other forms of conduct

- **Object of s46CCA:** to protect the interests of consumers, assuming competition is a means to that end. Competition is deliberate and ruthless. S46 is designed to foster injuries as a result of competition (**QWI v BHP 1989 167 CLR 177**)
- **NOW:** Need not take advantage of its market power, this statutory requirement abolished (**cf** plaintiffs in **Melway**)
 - **Previous:** conduct is not taking adv where the firm without market power would have the same incentives to adopt such a distribution system as **Melway** had done at a time when it did not possess market power.
 - **Test re taking adv:** would or could a competitive firm in the same market likely engage in the impugned conduct? If yes, the conduct does not involve taking adv
 - **[No causal connection bw taking adv and impugned conduct — RP conduct did not amount to taking advantage of market power because it could make a threat to enter the Riverland area regardless of whether it had market power in the Murray Bridge District or not.] — Rural Press** → Rural Press, through a subsidiary (Bridge), published a regional newspaper (the Murray Valley Standard). The Standard was circulated in Mannum and around Murray Bridge in South Australia. In this region Rural Press was a near monopolist.
 - Waikerie Printing published and circulated a regional paper (River News) up the river around the town of Waikerie; they also sold a few copies in Mannum.
 - Waikerie subsequently began circulating the River News in Mannum where they competed with the Murray River Standard for customers and advertising. In response Rural Press threatened to establish a rival newspaper in River News' prime circulation area unless Waikerie withdrew from Mannum.
 - ACCC alleged this constituted a contravention of s 45 (that Rural Press had given effect to an exclusionary provision) and s 46 (misuse of market power).
- **Rule:** A corporation that has **[A] a substantial degree of power in a market** must NOT **[B] engage in conduct** that has the **[C] purpose, or has or is likely to have the effect, of substantially lessening competition** in: (s46)
 - **[D] (a) that market or**
 - **(b) any other market the corporation or its related body corporate**
 - (i) **supplies/likely supplies goods or services,** or
 - (ii) subs(i) but **indirectly** through one or more other persons or
 - **(c) any other market in which the corporation or its related body corporate**
 - (i) **acquires/likely acquires goods or services;** or
 - (ii) subsection(ii) but **indirectly** through one or more other persons
 - **S46 Legislation Misuse of market power**

(1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:

(a) that market; or

(b) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) supplies goods or services, or is likely to supply goods or services; or

(ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or

(c) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) acquires goods or services, or is likely to acquire goods or services; or

(ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

- **STEP 0: DEFINE THE MARKET THE CORPORATION IS IN & ITS STRUCTURE**

- **Market:** [PAGE 1]

- **Re QCMA – factors for determining competitive constraint in the relevant market**

1. Number and size distribution of independent sellers, especially degree of market concentration
2. **Height of various to entry, that is the ease with which NEW firms may enter and secure a viable market;**
3. The extent to the products of the industry, characterized by extreme product differentiation and sales promotion;
4. The character of any vertical relationships with customers and with suppliers and the extent of vertical integration; and
5. The nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities

- **NB #2:** the ease with which firms may enter which establishes the possibilities of market concentration overtime and the threat of new entry or a new plant can operate as the ultimate regulator of competitive conduct

- **Step [A]: Is there Substantial degree of Market Power?**

- **Rule:** Substantial degree of MP is the **aggregated or combined MP (s46(3))**, taken to have substantial degree in a market if **(a)** the corporation's related body corporate(s) together have a substantial degree of power or **(b)** the corporation & its related body corporate(s) together have a substantial degree of power. **Assessed at the time of the impugned conduct (ACCC v Pfizer Australia), persistent of temporal (Universal Music v ACCC (2003) FFC)** can it increase prices above supply costs? Will customers switch to competitors or will a new firm enter to compete? (*Queensland Wire*).

- **Market power:** the **ability to raise prices above the supply cost without rivals taking away customers in due time**, supply cost being a minimum cost than an effective firm would incur in producing the product (*Queensland Wire per Mason CJ and Wilson J*). **Financial strength is not MP (Rural Press; Boral** → defensive price cutting to protect market share; *Cement Australia* → buying excess supplies of an input to disrupt and cause shortages in the supply of concrete grade fly Ash in the relevant region)

- **Where zero-price search service i.e. customers not charged for access traditional price assessment not possible (US v Google)** → turned to quality considerations i.e.

- **Restricting output:** not in the Google case because responding to new query was near \$0, no incentive to restrict output

- **HYPOTHETICAL THOUGH EXPERIMENT (rejected but for test):** What would it take for a new market entrant to convince Mozilla— a small distribution channel—to walk away from Google as the default? The following would have to happen: First, the new entrant would have to surmount the entry barriers to create a GSE of comparable quality to Google. Second, it would have to build an ads platform that could monetize search on par with Google. Third, it would have to promise to offset any revenue shortfall that might arise either from reduced query volume (because some users would elect to stay with Google) or from inferior ad monetization (because fewer users could mean fewer advertisers and

2. [Refusal of access to ticket-related services platform] – *ACCC v Ticketek* [2011] FCA

→ Promoter required Ticketek to allow Lastix to display discount price types on its platform, Ticketek refused on 4 separate occasions. Lastix supplied ticket related services to promote the sale of tickets which it by selling discount ticket offers for certain events as a means of promoting that event. **Ticketek admitted:**

- a. **Market:** Australia wide market for the sale and acquisition of ticketing related services.
- b. **Substantial market power:** Supplier of ticket related services to venue operators and promoters of live entertainment events, often operating under exclusive agreements with venue operators or promoters. Yes
- c. **Purpose:** Deterring or preventing Lastix from supplying certain ticket related services in the relevant market
- d. **Taking adv:** refused to implement, or by removing, discounted price types requested by venue operators and promoters – it could only achieve that because it faced no competitive constraints from other ticketing suppliers.

d. **Refusal to license intellectual property**

- i. **Rule:** IP rights, esp where indispensable for competitors to compete in an upstream or downstream market = essential input or falling within the essential facility doctrine (*Eastman Kodak*). Misuse of substantial degree of market power with purpose/effect or likely effect of SLC (*Epic Games v Apple; Google*).

1. **Is it removal of app from app store case?**

- a. Does it allow downloading from web/other stores access — i.e. *Epic Games v Google; cf Epic Games v Apple?*
 - i. Does not matter → still breach of s46 on app distribution

2. **Does it mandate exclusive use of proprietary in-app payment systems?**

- a. Yes → breach s46 (*Epic Games v Apple; Google*)

- ii. [SLC for both app distribution & payment solutions] – *Epic Games v Apple Inc* [2025] FCA 901 (Beach J) → Epic Games had Fortnite APP, released on App Store and Google Play Store. EG then pushed update but embedded secret codes so users who update through EG's own payment route would get 20% discount, violated Apple and Google policies. Defendants then removed the Fortnite App. Key difference between Apple and Google → Android phones could access multiple app stores and download directly from websites.

1. EG alleged the defendants misused market power.

- a. **Requiring all apps to be distributed solely through their own app stores** (App Store and Google Play);
- b. **Mandating exclusive use of their proprietary in-app payment systems** for digital content, typically charging a 30% commission
- c. **Blocking alternative app stores and payment processors**, thereby foreclosing competition and enabling the extraction of supra-competitive fees from developers.

2. **Apple forced contracts on developers “iOS restrictive terms” which had the effect of:**

- a. requiring developers to appoint Apple as the developer's agent for 'marketing and downloading apps on the Australian App Store';
- b. prohibiting the distribution of iOS apps to iOS devices other than by way of the App Store;
- c. prohibiting app stores other than Apple's App Store on iOS devices; and
- d. prohibiting iOS device users from downloading iOS apps from websites.

3. **Markets:** (1) [IOS Distribution Market](#) (2) [IOS In-App Payment Processing Market](#)

4. **Substantial degree of Market Power:** Apple had substantial degree of market power in both markets at all relevant times, essentially a monopoly by reason of its closed iOS in the in-app payment solutions market. Apple **charged a monopoly price**; “well in excess of the commissions charged by payment solution providers on out of-app purchases which range between 2 and 8% with a midpoint of 5%”. This, in addition to the **power to prohibit the installation of other app stores on iOS devices**, informed his Honour's view of Apple's

significant market power. In sum, TJ held that Apple's "walled garden" gave it substantial market power

5. **Purpose of SLC:** Apple alleged it has legitimate reasons, to protect Apple IP and protect user privacy and security. Cannot be substantial purpose for SLC. A lot of fraudulent apps made onto the App Store.
 6. **Effect of SLC:** Apple allege security rationale, rejected. Apple's restrictive practices prohibited app sideloading and blocking alternative payment methods contravened s46 "iOS restrictive terms". The terms were supplemented by anti-steering provisions contained in the App Store review guidelines"which prevented"developers from directing iOS users to alternative methods to purchase content."
 - a. "conduct that prevents or prohibits the direct downloading or sideloading of native apps and prevents or prohibits developers and users from using alternative payments" was in breach of s 46 of the CCA.
 - b. Market power cannot be used to fence in innovation or fence out competition.
- iii. **[SLC for app distribution and payment solutions despite users able to download on web] — Epic Games v Google [2025] FCA 901 (Beach J)** → Epic Games had Fortnite APP, released on App Store and Google Play Store. EG then pushed update but embedded secrete codes so users who update through EG's own payment route would get 20% discount, violated Apple and Google policies. Defendants then removed the Fortnite App. **Key difference between Apple and Google → Android phones could access multiple app stores and download directly from websites.**
1. EG alleged the defendants misused market power.
 - a. **Requiring all apps to be distributed solely through their own app stores** (App Store and Google Play);
 - b. **Mandating exclusive use of their proprietary in-app payment systems** for digital content, typically charging a 30% commission
 - c. **Blocking alternative app stores and payment processors**, thereby foreclosing competition and enabling the extraction of supra-competitive fees from developers.
 2. **Markets:** (1) Supply of the Mobile Operating System (OS) Licensing to Original Equipment Manufacturers (OEM) Market (2) the Android App Distribution Market (3) the Android In-App Payment Solutions Market
 3. **Substantial degree of Market Power:** Google had substantial degree of market power in all three markets.
 4. **Purpose of SLC:** Security and privacy concerns used to deploy the contravening prohibitions did not outweigh the anti-competitive effects.
 5. **Effect of SLC:** Google's restrictive payment systems had the effect of SLC, enabled Google to charge supra-competitive prices for access to its app platforms.
- iv. **Not sure if there is purpose/effect/likely effect of SLC [Unsure of market power] – Unlocked v Google Asia Pacific [2018] FCA 828** → Google removed Unlocked's app from Google play store, considering it was outside the T&Cs governing how advertising is presented to users on android phones. Unlocked was an app that had customers watch ads in return for credits to buy mobile phone credit/frequent flyer points. **Injunction ordered for Google's removal.**
- v. **[US Case under Sherman Act; limitation on supply of goods in order to limit competition in market for service of those goods = breach] – Eastman Kodak v Image Technical Services 504 US 451 (1992)** → Kodak manufactured and sold photocopiers and micrographic equipment, together with servcie and replacement parts for its equipment. 18 independant service organizaitons began servicing Kodak copying and micrographic equipment, Kodak then limited availability of parts to ISOs and to make it more difficult for ISOs to compete with Kodak in servicing Kodak equipment. Kodak held 220 patents on these, argued was exercising IP rights.
1. **Market:** (1) market for supply of Kodak parts (2) market for supply of services and maintenance of Kodak equipment
 2. **HELD: Kodak used monopoly in first market to gain monopoly in second**
 3. **US test (FTC v Qualcomm Inc; section 2 Sherman):** (1) possession of monopoly power in the relevant market; (2) wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident (3) there must be causal anti-trust injury

4. Need evidence that the incumbent has strategically and durably deterred entry and entrenching its monopoly for eg by enhancing its reputation as a firm that will punish new entry or existing market participants
 - ii. **What is it:** Firm substantially reduces its prices below its own cost of supply for a sustained period for the purposes of (1) cause competition to exit the market in the short term AND (2) discipline or damage competitors in the long run or (3) discourage potential new entry (**ACCC**). Gains need not be limited of the market where the predatory pricing occurred.
- b. Three elements**
- i. (1) The predatory corporation must have **considerable financial resources relative to its competitors** (whether on its own or derive from a parent company or other related bodies corporate) which are **sufficient enough to sustain the losses of profits** for the entire period of Price reductions
 - ii. (2) The predatory corporation must have a **substantial degree of market power** in a market or **some level of control over prices** (a high level of market share is not necessary)
 - iii. (3) The **barriers to entry to the relevant market must be high**
- c. Two tests used by Courts**
- i. **Rule:** Cost analysis remain relevant as a measure for whether a sustained low pricing campaign could induce exit or deter entry even where the incumbent firm is pricing above its own avoidable costs (**Boral HCA**)
 - ii. (1) **Cost based Test:**
 - **Rule:** reliance on this alone is insufficient (**Boral HCA**), mere fact prices fixed below variable cost is inconclusive.
 - **Formula: Average avoidable cost = (total avoidable costs)/(additional quantity sold)**
 - **Avoidable cost:** average per unit cost of making the predatory sales or the cost a firm would avoid if it did not engage in predatory selling; during the period of predatory conduct
 - iii. (2) **Recoupment Test (US requires it: *Brooke Group v Brown*)**
 - **Rule:** Be considered together with cost test, McHugh J considers it essential in determining if firm was taking ADV [not required under current s46](**Boral**)
 - **What is it:** reasonable prospect that the predatory corporation will be able to recover the losses incurred during the period of price reduction – no rational firm will do so if it is unable to recoup it.
 - **Formula: Quantitative + qualitative measures pre-predatory conduct**
 - **Quantitative:** short-run losses over the period of price reduction, compared with the estimated long run gains that the corporation has, or will likely, achieve. **Need not be money gains, could have highly price but lower quality productions in the future = also gain to producer/impugned corp (Boral)**
 - Relies on arithmetic calculations, using either or both of the following tests:
 - (1) **the absolute test:** subtracting the actual short run losses from the actual or expected long run gains
 - (2) **counterfactual test:** comparison of the expected short run losses and long run profits of the predatory corporation with the predatory pricing relative to the expected short run losses and long profits of the predatory corporation without the predatory price
 - **Qualitative:** observe market structure and behaviour of participants, market shares, barriers to entry and vertical integration, assess financial resources of the company compared to others i.e. competitors and potential entrants
- d. YES Predatory**
- i. **[Undercutting egg prices temporary] – *Victorian Egg Marketing Board v Parkwood Eggs (1978)*** → Board temporary action designed for the purpose of substantially damaging Parkwood. Exclusionary purpose established by other evidence so not necessary for court to consider costs or recoupment.
 - ii. **[Temporary discounts at \$10 less than cost of fuel and wages when faced with new entrant] – *ACCC v Eurong Beach Resort [2005] FCA 1134*** → EBR conducted a self-propelled barge between the Queensland mainland and hook point on Fraser Island. When it was sole

Step 0: Mandatory Notification Regime

- **Rule:** A corporation will not be prevented from making the acquisition if the corporation is granted an authorisation for the acquisition under section 88.
- **Step 0.1 Must the corporation make a notification? [SUNSETTING Period: 1 July 2025 – 31 December 2025]**
 - **Rule:** Mandatory from 1 January 2026, voluntary from 1 July 2025 to 31 December 2025
 - (1) **Australian turnover of the combined businesses is above A\$200 million**, and **either the business or assets being acquired has Australian turnover of more than A\$50 million** or **global transaction value above A\$250 million**.
 - (2) A very large business with **Australian turnover of more than A\$500 million** buying a smaller business or assets with **Australian turnover above A\$10 million**.
 - (3) All merger businesses with **combined Australian turnover of more than \$200 million**, where the **cumulative Australian turnover from acquisitions in the same or substitutable goods or services over a three-year period is at least A\$50 million**, will be captured, or **A\$10 million if a very large business** is involved.
 - ACCC can look at combined turnovers of all acquisitions and mergers over a 3-year period
 - **Safe harbour for certain listed targets:** No acquisition control where transaction result in acquirer obtaining shareholding of 20% or less; or if already has over 20%
- **Step 0.2: AUTHORISATION? [IF MADE BEFORE 30 June 2026; cannot make re s50 after this → can only notify]**
 - **Rule:** Parties can no longer circumvent ACCC notification process under new regime (cf *Vodafone v ACCC [2020] FCA*) – i.e. no more *de novo* declaration of non-contravention from FCA, parties can only seek judicial review with the FCA after tribunal has considered an application for review.
 - **S88 Commission may grant authorisations**
 - (1) Subject to this Part, the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply
 - **Was it made before 30 June 2025? (s88(1A)) → all authorisation applications re s50 must be made before then to be considered.**
 - **S90 Determination of applications for authorisation**
 - (7) The **Commission MUST NOT make a determination granting an authorisation** under section 88 in relation to conduct **unless**:
 - (a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; **OR [satisfied in all circ no effect/likely effect of SLC]**
 - (b) the Commission is satisfied in all the circumstances that: **[Likely effect/effect of benefit to public AND benefit > detriment]**
 - (i) the conduct would result, or be likely to result, in a benefit to the public; **AND**
 - (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct; **OR**
 - (c) all of the following apply: **[national emergencies... inserted in response to COVID]**
 - **NO**
 - **Market exit or failing firm argument** → where evidence suggests that if M&A does not proceed one of the participants likely exit market (*Virgin Airlines acquisition of Tiger Airways*)
- **Designated Sectors Requiring Notification**
 - **Rule:** Treasurer has indicated an intention to designate mandatory notification for:
 1. All supermarket mergers
 2. interests of 20% or more in private or unlisted companies if one of the parties has turnover of more than A\$200 million
 3. the top four sub-industries for serial acquisitions, childcare, aged care, medical GPs and dentists
 4. fuel, liquor and oncology radiology mergers.

Step 1: No authorisation/Will ACCC oppose merger? → Does it fall under s50 prohibition?

- **Corporations acquiring from corporation or individuals** →

- ACCC did not give informal clearance, subsequently commence proceedings for contravention of section 50
- **Body Corporates viewed together: s51ABZH: (2)** Commissioner MUST have regard to all relevant matters, without limitations, may have regard to **(3)(a) CAU or proposed CAUs** pursuant to which the acquisition is to take place **(3)(b) commercial relationship of the parties to the acquisition including the parties' related body corporate(s).**
- **THE NEW MERGER ACCC ASSESSMENT SLC:**
 - **Creating, strengthening or entrenching SMP:** May have SLC effect if the acquisition, in all the circumstances, would have the effect or be likely to have the effect of creating, strengthening or entrenching a substantial degree of market power in the market (**s51ABZH(4)**)
 - **ACCC Merger Guidelines:**
 - Unilateral effects of removing or weaken competitive constraints so merged firm MP increases. Merged firm becomes profitable by raising prices, reduce output or exercise MP it has gained.
 - Coordinated effects in pricing output or related commercial decisions, alter the interdependence bw rivals; coordinated conduct more likely, more complete or more sustainable
- **NON-EXHAUSTIVE FACTORS for SLC**
 - **S50(3)** Without limiting the matters that may be taken into account for the purposes of [subsections \(1\) and \(2\)](#) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening [competition](#) in a [market](#), the following matters must be taken into account:
 - (a) the **actual and potential level of import competition** in the [market](#);
 - **Rule:** Strong import competition constrain unilateral exercise of MP by emerged entity and disrupt coordinated conduct by the remaining firms.
 - **Factors:**
 - At least 10% total sales from independent imports,
 - price of imports at least comparable,
 - no restrictions on the quantity of independent imports,
 - imported products strong substitute (quality, range, price), and
 - low barriers to entry in relation to import competition.
 - (b) the **height of barriers to entry** to the [market](#);
 - **Factors (Re QCMA)**
 - Timely new entrant, likely and sufficient
 - Any feature which may place efficient prospective entrance at a significant disadv compared to incumbents:
 - **[A] Legal or regulatory barriers (ACCC Merger Guidelines)**
 1. Licensing conditions
 2. Tariffs
 3. Explicit restrictions on the number of market participants and other government regulations e.g Taxi licenses, limits on numbers of trucks allowed on the roads during certain periods of the day
 4. Legally enforceable intellectual property rights
 5. Environmental regulations that can raise the cost of entry or limit the ability for customers to switch suppliers
 - **[B] Structural or tech barriers** (sunk costs, economies of scale, control of essential inputs) (**ACCC Merger Guidelines**)
 1. Product development
 2. Adv and promotion to establish sufficient reputation in market
 3. Construction of specialised facilities
 4. Substantial economies of scale which may limit the viability of new entry below a certain minimum efficient scale

Mechanism	Theme	Section	Provision
Authorisation	Power to grant authorisations	s 88(1)	The ACCC may grant authorisations with respect to one or more Part IV provisions
	Operation	ss 88(2)-(7)	Effect of authorisations, ability to attach conditions, no retrospective authorisations
	Decision-making rule	ss 90(7)-(8)	Outlines the reasons for which the ACCC may grant an authorisation
	Availability of notifications	ss 93(1)(a)-(b), 93AB	Notifications are available with respect to exclusive dealing, RPM and small business collective bargaining
Notification	Decision-making rule	ss 93(3)-(3A), 93AC	Outlines the reasons for which the ACCC may issue a 'notice'
	Class exemptions	ss 95AA-AB	The ACCC may issue class exemptions, and withdraw the benefit of a class exemption from any person

- **Role of authorisation and notification:** Recognise exceptional circumstances where conduct associated with lessening competition may not harm competition, or may benefit society where benefit > harm (*Re 7 Eleven Stores; ACCC Guideline for Authorisation of Conduct (Non-Merger) [1.6]*)
- **Onus:** on party seeking authorisation that any public benefit outweigh the public detriments

#	Process	Timeline
1	Pre-lodgement discussion with ACCC	
2	Lodgement of application and supporting submission, and commencement of public consultation	Within 1 week of lodgement
3	Decision on interim authorisation, if requested	Decision on interim authorisation within 28 days, if requested
4	Public consultation closes, and submissions provided to applicant for response	
5	Draft determination issued by ACCC. Applicant may request a conference to discuss draft determination.	Draft determination issued within 3-4 months of lodgement (usually earlier)
6	Public consultation on draft consultation	Deadline to request conference 2 weeks after draft determination issue
7	Conference held (if requested)	Conference held within 30 days of date nominated for calling conference. Submissions following conference provided within 2-4 weeks of conference.
8	8. Draft determination issued by ACCC	Final determination issued within 5-6 months of lodgement, or extended if e.g., conference is held

[A] AUTHORISATION

Step 0: Authorisations

- **Rule Power to authorise:** Commissioner **may on application by a person grant authorisation** to engage in conduct specified in the authorisation to which one or more provisions of Part IV specified in the authorisation would or might apply (s88(1)). The **effect** while the authorisation remains in force is that **Pt IV does not apply in relation to conduct by the applicant** (s88(2)(a)); and **any other person named/referred to in the application as a person who may engage in conduct** (s88(2)(b)); **any particular persons or classes or persons specified in the authorisation** (s88(2)(c)).
 - **Powers:**
 - **Single authorisation or multiple:** ACCC may grant single authorisation for all conduct specified in application OR separate authorisations (s88(5)).
 - **Prohibitions & Duties:**
 - **Cannot authorise past conduct:** for conduct engaged in before the Commission decides the application for the authorisation (s88(6))
 - **Must keep a public register of authorisations (s89(3) and (4)),** applications for authorisation and any documents furnished to the ACCC from applicants and interested parties in relation to the application
 - **Applicant**
 - May by writing to the Commissioner, withdraw an application at any time (s88(7))
- **Section 88 Commissioner may grant authorisations**

Granting an [authorisation](#)

- (1) [Subject](#) to this Part, the [Commission](#) may, on an application by a person, grant an [authorisation](#) to a person to engage in [conduct](#), specified in the [authorisation](#), to which one or more [provisions](#) of Division 1 or 2 of Part IV specified in the [authorisation](#) would or might apply.

Note: For an extended meaning of engaging in [conduct](#), see [subsection 4\(2\)](#).

- (1A) The application must be made on or before 30 June 2025 if any of the specified [provisions](#) is section [50](#).

Effect of an [authorisation](#)

- (2) While the [authorisation](#) remains in force, the [provisions](#) of Division 1 or 2 of Part IV specified in the [authorisation](#) do not apply in relation to the [conduct](#) to the extent that it is engaged in by:
 - (a) the applicant; and
 - (b) any other person named or referred to in the application as a person who is engaged in, or who is proposed to be engaged in, the [conduct](#); and
 - (c) any particular persons or classes of persons, as specified in the [authorisation](#), who become engaged in the [conduct](#).

Step 1: Does it satisfy the s90(7) Statutory Test for authorisations?

Part IV Provision	Decision Making Rule
A 'competition' provision to which SLC applies	Do not authorise unless: <ul style="list-style-type: none"> · s 90(7)(a): The conduct does not SLC; or · s 90(7)(b): The public benefits arising from the conduct outweigh the public detriments; or · s 90(7)(c): [national emergency] – added in 2020
A 'per se' prohibition (e.g., Div 1 of Part IV, RPM)	Do not authorise unless: <ul style="list-style-type: none"> · s 90(7)(b): The public benefits arising from the conduct outweigh the public detriments · s 90(7)(c): [national emergency]

S90 Determination of applications for authorisation

- (1) The [Commission](#) may accept a written undertaking [given](#) by a person for the purposes of this section in connection with a matter in relation to which the [Commission](#) has a power or function under [this Act](#) (other than Part X), a [gas market instrument](#) or the [consumer data rules](#).
- (1A) The [Commission](#) may accept a written undertaking [given](#) by a person for the purposes of this section in connection with a [merger authorisation](#).
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the [Commission](#).
- (3) If the [Commission](#) considers that the person who gave the undertaking has breached any of its terms, the [Commission](#) may apply to [the Court](#) for an order under [subsection](#) (4).
- (4) If [the Court](#) is satisfied that the person has breached a term of the undertaking, [the Court](#) may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that [the Court](#) considers appropriate directing the person to compensate any other person who has suffered loss or [damage](#) as a result of the breach;
 - (d) any other order that [the Court](#) considers appropriate.

- **Conditions aimed at increasing the likelihood that the public benefits said to flow from conduct could be realised (*Application by Medicines Australia Inc*)**
 - **Facts:** MA proposed a code of conduct to govern the pharmaceuticals industry.
 - **Commission's Conditions:** (1) that Medicines Australia, as the peak body representing the pharmaceutical industry, publish on its website: the details of events held by members, and (2) the type and cost of hospitality supplied to medical practitioners at each event. Authorisation limited to 3 year period
- **Time limits (s91)**
 - **Rule:** S91(1) give the ACCC the power to impose a time limit on the period of the authorisation, up to 5 years.
 - **[3 year period] – *Application by Medicines Australia Inc*** → MA proposed a code of conduct to govern the pharmaceuticals industry. **Commission's Conditions:** (1) that Medicines Australia, as the peak body representing the pharmaceutical industry, publish on its website: the details of events held by members, and (2) the type and cost of hospitality supplied to medical practitioners at each event.
- **Step 4: Revocation of authorisations**
 - **Rule:** May revoke authorisation if:
 - **(a) false or misleading material particular,** OR
 - **(b) condition not complied with,** OR
 - **(c) material change of circumstances** since the authorisation was granted (**s91B(3)**).
 - **Rule (Tribunal's approach): (*Re AGL Cooper Basin Natural Gas Supply Arrangements*)**
 - **(1) Assess circumstances** at the time of authorisations, not limited to what is found by the Commissioner. Assess circumstances now. Material change includes one of a significant impact on the benefits to the public or detriment, including anti-competitive detriment
 - The Market: e.g. changing competitive environments from government policies/statutes; expanding market therefore increasing demands; greater knowledge of gas reserves and prospects for alternative supply and marketing
 - **(2) Does change warrant revocation – i.e. magnitude or significance**
 - **(3) Should new authorisation be ordered** in substitution?
 - **[Tribunal Review acknowledged material change but because public benefit (long-term contracts) > harm (exclusive dealing); restored original authorisation] – *Re AGL Cooper Basin Natural Gas Supply Arrangements*** →
 - **Material change:** AGL was no longer the only source of metered gas to domestic and industrial consumers in Sydney and regional NSW. Other producers including from the Gippsland basin, finding it less difficult to compete in the market for the supply of gas to distributors and end users.
 - **Balance of anticompetitive detriment and public benefit:**

- **Detriment:** Right a first refusal, take or pay clause and the exclusive dealing clause of the authorized agreement had anti-competitive effects.
- **Public Benefit:** Public benefits associated with use of long-term contracts in underwriting the significant capital expenditure in exploration, production, and transportation infrastructure.

- **PROCEDURE**

- **MUST GIVE notice to persons & invite submissions to revocation (s91B(3)):**
 - by notice in writing given to any interested persons (Commissioner believes) (d) inform them ACCC is considering revocation **AND**
 - (e) indicate the basis on which revocation is being proposed **AND**
 - (f) invite submissions in respect of the revocation within a period specified by the Commissioner
- **If objection included in submissions**, Commissioner **MUST NOT revoke** unless satisfied that it would, if the authorisation had not already been granted, be prevented under subsection 90(7) from granting the authorisation (s91B(5)). **[Assume no original authorisation, may only revoke if fails s90(7) test → Step 1]**

- **Step 5: Merits and Judicial Review [PAGE 67]**

[B] NOTIFICATION

- **SUMMARY**

- **Step 0: Is it an exempted class, so no need to apply?**
 - **If no → next step**
- **Step 0.1: Has there been a rejected authorisation application?**
 - **If no → next step**
 - **If yes → Tribunal Review/Judicial**
- **Step 1: Is Notification available for the type of conduct?**
 - **If no → Go to authorisation**
 - **If yes → next step**
- **Step 2: WILL ACCC Determine to Remove Immunity by providing notice?**
 - **Step 2.1: The relevant tests – Exclusive dealing, RPM, Collective bargaining**
 - **Step 2.2: Assessing Public Benefits and Detriments**
 - **If yes → next step**
- **Step 3: Process → Draft notice of removal, invite to conference, if no conference consider issue final draft**
- **Step 4: MERITS AND JUDICIAL REVIEW**
- **Step 0: Is it an exempted class? (s95AA(5))**

Provision	Description
95AA(5): Effect of a class exemption	Removes the need for individual businesses to apply for notification or lodge notifications
95AA(1): ACCC may issue a class exemption	ACCC may issue a class exemption if satisfied that: <ul style="list-style-type: none"> · s 95AA(1)(a): The conduct of that kind would not SLC · s 95AA(1)(b): Public benefits arising from the conduct would outweigh public detriments
95AB(1)(b): ACCC may withdraw benefit of exemption	ACCC may notify a person that the class exemption does not apply to them if the particular conduct: <ul style="list-style-type: none"> · s 95AB(1)(b)(i): Would SLC · s 95AB(1)(b)(ii): Public benefits arising from the conduct would not outweigh public detriments

- Chicken farmers seeking to collectively bargain with TasFoods
- Medical practitioner contractors seeking to bargain with the operator of Northern Beaches Hospital
- Cinema operator members seeking to bargain with movie distributors
- **Step 0.1: Has there been a rejected authorisation application?**
 - **NO** → Can consider notification
 - **YES** → cannot (**S93(2)**)
- **Step 1: Is Notification available for the type of conduct?**
 - **Rule:** Available for:
 - Exclusive dealing s47 (**s93(1)(a)**,

- **Step 2: WILL ACCC Determine to Remove Immunity by providing notice?**
 - **Step 2.1: The relevant tests:**
 - **(1) Exclusive dealing**
 - **Rule:** MAY provide notice to remove immunity if:
 - **s93(3)(a):** The conduct has purpose/effect/likely effect of SLC; and
 - **s93(3)(b):** (i) No/unlikely Public benefit (ii) Public benefits arising from the conduct would not outweigh public detriments
 - **Written notice + statement of reasons:** the [Commission](#) may at any time [give](#) notice in writing to the [corporation](#) stating that the [Commission](#) is so satisfied and accompanied by a statement setting out its reasons for being so satisfied (**s93(3)**).
 - **(2) Resale Price Maintenance**
 - **Rule:** MAY provide notice to remove immunity if:
 - **s93(3A)(b):** Public benefits arising from the conduct would not outweigh public detriments
 - **Written notice + statement of reasons:** the [Commission](#) may [give](#) the [corporation](#) or other [person](#) a written notice stating that the [Commission](#) is so satisfied and accompanied by a statement setting out its reasons for being so satisfied (**s93(3A)**).
 - **(3) Collective bargaining in relation to cartel**
 - **Rule:** MAY provide notice to remove immunity if:
 - **s93AC(1)(b):** Public benefits arising from the conduct would not outweigh public detriments
 - **Written notice + statement of reasons:** the [Commission](#) may [give](#) the [corporation](#) a written notice (the **objection notice**) stating that it is so satisfied (**s93AC(1), s93AC(3)**).
 - (3) The [Commission](#) must, at the time it [gives](#) a [corporation](#) an objection notice, [give](#) the [corporation](#) a written statement of its reasons for giving the notice.
 - **(4) Collective bargaining in relation to s45(1)(a)-(b)**
 - **Rule:** MAY provide notice to remove immunity if:
 - **s93AC(2)(a):** The conduct has purpose/effect/likely effect of SLC; and
 - **s93AC(2)(b):** (i) No/unlikely Public benefit (ii) Public benefits arising from the conduct would not outweigh public detriments
 - **Written notice + statement of reasons:** [give](#) the [corporation](#) a written notice (the **objection notice**) stating that it is so satisfied (**S93AC(2), s93AC(3)**).
 - (3) The [Commission](#) must, at the time it [gives](#) a [corporation](#) an objection notice, [give](#) the [corporation](#) a written statement of its reasons for giving the notice.
 - **Step 2.2: Assessing Public Benefits and Detriments**
 - In substance, a 3 part undertaking:
 1. **Counterfactual** to determine if there is an SLC
 - a. **Rule:** Real chance of mere possibility of the benefit or detriment eventuating. Real commercial likelihood that the applicants will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit or the lessening of competition giving rise to the public detriment (**Re Qantas Airways Limited (2004) ATPR 42-027**)
 - i. **Factual:** likely future with the conduct that is subject of the authorisation or notification
 - ii. **Counterfactual:** likely future without the conduct that is the subject of the authorisation or notification
 - b. **Step 1: Identify the relevant market or markets in which the conduct takes place**
 - i. Purpose being to identify the degree of competitive constraint on existing players in the market in light of the market structure and any barriers to entry]
 - c. **Step 2: Determine whether there has been or will be an SLC**
 - i. By examining likely concentration levels, various to entry in the future market and constraints that market participants such as rivals, buyers, suppliers, place on any firms ability to exercise market power
 - ii. Barriers to entry, determined by the extent to which existing competitors will be constrained by the threat of new entry (ACCC considers the history of past market entry as an indicator of the likelihood of future entry)