

COMPETITION LAW

FINAL EXAM NOTES, SEMESTER 2, 2025

THE UNIVERSITY OF SYDNEY

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Restraint of Trade	A contractual doctrine where common law will not enforce contractual terms which restraint trade.		
Nordenfelt v Maxim Guns and Ammunition (1894) UK HoL	N manufactured weapons and sold his business for 200,000 pounds. The contract said that N would not manufacture guns anywhere globally for 25 years. He contravened this.	NOT unreasonable for the parties involved NOT unreasonable for the public interest	The restraint term is incidental to a valid purpose (business sale) and is not unreasonable. 200 pounds was a large sum, acting as consideration for the term. Lord Macnaghten at [565] "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. <i>All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void.</i> That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed <i>it is the only justification, if the restriction is reasonable</i>-reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public"
Lindner v Murdock's Garage (1950) HCA	M had a garage business in two towns which were 30 miles apart. L was a mechanic employed by M. The employment contract specified that L would not, for a year after terminating employment, work in a garage business within M's sales territory. L left and went to work for another in the same territory. M sought an injunction to restrain L working in the other town too.	IS unreasonable for the parties IS unreasonable for the public interest	<i>Any contractual restraint of trade is prima facie unlawful and Invalid.</i> Not a naked restraint, incidental to employment contract. HOWEVER M has the onus to prove that "it was reasonable for the parties" (Kitto J at [13]). Unreasonable as the geographical limits were too wide. Against the public interest due to labour shortage. Restraint would also force L to move homes.
Pearson v HRX Holdings (2012) FCA	Executive of consultancy business. 2-year restraint period with no geographic limit. However, Pearson would be paid for the 2-year restraint period.	NOT unreasonable for the parties involved NOT unreasonable for the public interest	Pearson agreed to the contract after negotiations as to the restraint period, and was paid for it. Lack of geographic restraint okay as had to be read as consistent with the purpose (protecting ANZ business), so didn't mean global operation.
Market	The essential first step. Competition is the state of affairs in a market. The market is the boundaries with which the court will determine if there has been the purpose, affect or likely effect of substantially lessening competition.		
CCA s 4E	"For the purposes of this Act, unless the contrary intention appears, market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."		
Air NZ v ACCC (2017) HCA	Air NZ said its marketing and negotiating occurred outside of Aus, so not a market in Aus.	IS within Aus	Australia was not merely the "end of the line" for the air cargo services but was also a vital source of demand for those services. The airlines' rivalrous pursuit of Australian customers, where the matching of supply with demand occurred, was in a market which included Australia.

Re QCMA (1976)	It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics, the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply? So, if high XED, product A affects product B, so therefore in the same market as they are strong substitutes.	
SSNIP test (Small but Significant Non-Transitory Increase in Price)	Imagine all firms in the candidate market (e.g. electric toothbrushes), merge into a hypothetical monopoly. If this new firm raises price profitably by a small but significant non-transitory amount (5-10%) → what happens? - If consumers can switch to another product (e.g. manual toothbrushes), market must be widened to include these substitutes - If consumers wouldn't switch, electric toothbrushes are their own product market - If producers of manual toothbrushes can start producing electric toothbrushes and enter the market, market must be widened - If producers can't (low supply-side substitution), electric is their own market US v DuPont (1956) → cellophane fallacy - DuPont had already raised the cellophane price well above competitive levels, with consumers substituting to aluminium foil. Hence court thought the market was wider 'flexible packaging materials'. - Court was perhaps wrong, as SSNIP test is if a price above competitive price would cause substitution, not a SSNIP above an already inflated price.	
Market Dimensions	Product (substitutes, XED and XES) Geographic (transport costs, nature and perishability of product) Functional (levels of supply chain as to manufacturing, distribution, wholesale and retail) Temporal (short run impact or long run)	
Re Tooth & Tooheys (1979)	Tooth and Tooheys produce beers. They sought authorisation of various agreements between themselves and the distributors. Those agreements governed leases, licences, mortgages and supplies of equipment. Those agreements include a tie, that is, the distributors are confined to purchase bulk beers from the brewers.	Product: bulk and bottled beers are closely related in demand and supply Geographic: Substitution between club, hotel beers; NSW and interstate beers Functional: Two wholesale suppliers, but many participants at retail level Temporal: long run situation The structure and width of the market lessen the significance of the ties as a source of anti-competitive detriments.
VARIATIONS	<u>Submarkets:</u> Where industry/public recognition is of a separate market due to peculiar characteristics/uses <u>Cluster markets:</u> A market of bundled services due to cost advantages and consumer preferences (e.g. telco services for a package of landline, internet, mobile etc.) ACCC v Universal Music: question whether all recorded music was one market or each CD was a separate market → market was for chart music, CD demand changed over time <u>Single Brand markets:</u> US v DuPont: argued cellophane was a market by itself as product covered by patent and competitors had no functional product <u>Two-sided market:</u> Business is a platform connecting two groups of users. E.g. advertisers and users on social media, need to grow both sides, network effects	

Market definition is the initial step in determining the state of competition

Market definition is purposive – cannot be separated from the conduct under investigation

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

Arnotts v TPC

- Biscuit manufacturers do not concern themselves with the activities of manufacturers of non-biscuit products
- Retailers tend to not consider non-biscuit product products with purchasing or promoting the sale of
- Retailers displayed biscuits in a location separate to those which snack foods and confectionery was displayed
- Salesperson employed by biscuit manufacturers to sell biscuits did not take non-biscuit products into consideration when selling biscuits
- The fact that on some occasions are consumer might select a non-biscuit product for a biscuit product was neither here or there. There were many consumers who routinely consumed biscuits and for whom no other product provided and acceptable substitute with little regard to price variations and alternatives. Biscuits have distinct characteristics which set them aside from other products. Manufacturers recognize this and retailers recognize this.

MARKET POWER

Identify the existence, exercise or increase in market power.

Re QCMA: It is the possibilities of substitution that sets limits on the ability of any firm to give less and charge more

Queensland Wire: “Market power is the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the products”

Mason CJ & Wilson J consider:

- Market concentration
- Barriers to entry (‘Sellers have little to no enduring power over price when entry barriers are non-existent’) such as IP, licenses, commercial information about customers, economies of scale, access to bottleneck facilities/inputs
- Brand loyalty
- Vertical integrations

Boral (HCA): Can include more than price – the ability to lower services or quality without losing customers or to dictate terms of supply, require supplier to share in supplier marketing or other costs

ACCC Guidelines: A firm with market power is able to act with a degree of freedom from actual competitors, potential competitors, suppliers and customers. The most observable manifestation of market power is the ability of a firm to profitably sustain prices above competitive levels. Substantial market power may also enable a firm to raise barriers to entry, profitably reduce the quality of goods or services or slow innovation.

ss 45, 46, 46, 50 require a SLC analysis	Purpose, effect, or likely effect of substantially lessening competition Court is required to make a comparison between two future market scenarios: 1. Factual: future levels of competition with the impugned conduct 2. Counterfactual: future levels of competition without the impugned conduct Outboard Marine: in considering the state of competition a detailed evaluation of the market structure seems to be required [including] assessment of the nature and extent of the market, the probable nature and extent of competition, which would exist therein but for the conducting question, the operation of the market and the extent of the contemplated listening.
	1. Define the market (SEE PAGE 2) 2. Assess the structure of the market and any barriers to entry 3. Assess the market power the firm(s) may have, having regard to market structure 4. Assess the performance of the market by reference to the counter-factual test a. What is the likely future market structure with the conduct in issue? b. What is the likely future market structure without the conduct in issue? 5. Now compare the two scenarios. What are the price-setting (and any qualitative or innovative constraints) that are imposed on incumbents by: a) Actual competitors (ie market concentration) b) Potential competitors (ie potential for new entry) c) Buyers/customers d) Sellers/suppliers 6. In relation to potential rivalry, the court will look at the heights and endurance of barriers to entry. Is the entry likely, sufficient to impose an effective competitive constraint, and timely. 7. The test of Substantially Lessening Competition (SLC) is satisfied when there is likely a change in the structure of the future market by reason of the conduct in issue, having regard to the constraints on price-setting by incumbents.
‘likely’	- The real chance standard for proving the probability of future events based on current evidence is considered lower than the balance of probabilities standard of proof.
‘substantially’	Rural Press v ACCC [2003] HCA → used in the sense of being meaningful or relevant to the competitive process.
APPLICATION TO GOV ENTITIES	NT Power Generation v Power and Water Authority(PAWA) [2004] HCA: - PAWA’s own internal documents revealed that its officers treated it as a business - The conduct complained of need not be itself the business that is carried on. - As long as PAWA is conducting a business, subject to the provisions of s 46 DERIVATIVE CROWN IMMUNITY: Baxter Healthcare → “A conclusion that, in carrying on dealings with a government in the course of its own business, it enjoyed a general immunity not available to the government when the government was carrying on a business itself would be remarkable” NSW Ports Operations Hold Co Pty Ltd → The ACCC had alleged that agreements entered into by NSW Ports at the time the State of NSW privatised the Ports of Botany and Kembla were anti-competitive. The agreements, known as the Port Commitment Deeds, oblige the State of NSW to compensate the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle is above a minimal specified cap. The decision to privatise and to grant the leases to NSW Ports, including the compensation provisions, was a political decision. As such, NSW Ports entitled to a derivative Crown immunity

CARTEL CONDUCT (per se prohibition, apart from s 45)

S 45AA sets out parallel offences and civil penalty provisions relating to cartel conduct.

- A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
- A cartel provision is 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.

MAKE a k, arrangement or understanding (KAU): CRIMINAL → **s 45AF** CIVIL → **s 45AJ**

GIVE EFFECT TO a KAU: CRIMINAL → **s 45AG** CIVIL → **s 45AK**

- **S 4 CCA** defines 'give effect' as 'to to do an act or thing in pursuance of or in accordance with or enforce or purport to enforce'

1. KAU	K = enforceable at law A & U = Requires communication, consensus and commitment - Communication → Express = arrangement → Tacit = understanding - Consensus → Meeting of two or more minds: <i>Top Performance Motors</i> - Commitment: only for an arrangement, not for an understanding?
TPC v Email	Lockhart J: - The mere sharing of price lists is not sufficient, nothing sinister behind sharing the price lists – Warburton could have got it from any of Email's customers - To find an A or U, there had to be evidence of a consensus or meeting of minds of those said to be parties to the A or U as to what is to be done and not a mere hope that it will be done - Independently held beliefs are not enough
Stationers Supply v Victorian Agencies	- A meeting of minds requires more than a mere expectation or hope that others would participate in the proposed arrangement - A meeting of minds requires communication or negotiation, so all have knowledge of what is to be done or not to be done under an arrangement - Consensus requires an element of mutual obligation or at least evidence at one party to the arrangement has assumed an obligation or given an assurance that they will act in a certain way
ACCC v CC	- A mere expectation that as a matter of fact a party will act in a certain way not enough even if it has been acknowledged by that party.
Rural Press v ACCC	- High Court held that consensus as well as commitment could be inferred from the circumstances - The evidence showed that Rural Press threatened Waikerie in writing that if it did not withdraw its newspaper distribution from one are then Rural Press would compete in another - Waikerie decided to withdraw, communicated its decision to Rural Press
APCO V ACCC	- FFC determined that Anderson was a passive recipient of the information and made his own decisions as to whether or not to increase prices
Morphett Arms v TPC	- There is no requirement that the commitment imposed on parties must be mutual for there to be an arrangement or understanding. - An understanding that one will pursue an obligation without any mutual requirement will still fall foul of the CCA - The obligations do not have to be reciprocal
'hub and spoke'	News Ltd v ARL → The Commitment Agreements were evidence of a mutual consent and commitment between the clubs to commit to the ARL for the purposes of excluding a rival league competition. The agreements were executed in substantially identical form. the clubs executed the agreements within a short time of each other and there was knowledge between the clubs that they were entering into substantially identical contracts for the purposes of carrying out a common purpose ACCC v Colgate-Palmolive → Colgate, Unilever and Cussons' simultaneous shift to concentrated detergents did not amount to a collusive "understanding." Even though they all transitioned at the same time, the court found this could be fully explained by each supplier independently responding to the same commercial pressures—especially supermarket expectations and consumer confusion risks.

2. CARTEL PROVISIONS	s45AD(8) and (9) – offending provision may be considered with other provisions or contracts or agreements, provided there is at least one common party to the K,A or U. - Price Fixing (purpose and effect) - Restricting Capacity, Production, Supply or Acquisition (purpose) - Allocating customers, suppliers or territories (purpose) - Bid-Rigging (purpose) Purpose of the provision: “Purpose is to be distinguished from motive. The purpose of the conduct is the end sought to be accomplished by the conduct. The motive for the conduct is a reason for seeking that and in the context of competition law it is necessary to identify purpose by describing what is sought to be achieved by reference to what is relevant in market terms” Gleeson CJ, <i>News Ltd v ARL</i> Purpose is SUBJECTIVE: <i>News Ltd v South Sydney RL Club (HCA)</i> Gummow: the purpose of a provision is to be ascertain 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 Seven Network v News: It is <u>sufficient if one party responsible for inserting the provision had the requisite prescribed purpose.</u> Section 4F(b): If there are multiple purposes, it is sufficient that the requisite purpose is one among other purposes so long as it is a substantial purpose.
PRICE FIXING S 45 AD(2)(a)	(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a cartel provision if: (a) either of the following conditions is satisfied in relation to the provision: (i) the purpose/effect condition set out in subsection (2); (ii) the purpose condition set out in subsection (3); and (b) the competition condition set out in subsection (4) is satisfied <u>Purpose/effect condition</u> (2) The purpose/effect condition is satisfied if the 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 [the supply or acquisition of goods and services] <u>Competition condition</u> (4) The competition condition is 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
Radio 2UE Sydney v Stereo FM	- Does not mean an element of permanency but suggest the settling or determining of the price for a period of time that is not instantaneous or ephemeral
PURPOSE CONDITION (CARTEL PROVISIONS IN S 45AD)	<u>Purpose condition</u> (3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly: (a) preventing, restricting or limiting [production; capacity; supply of acquisition to or from persons or classes of persons] (b) allocating between any or all of the parties to the contract, arrangement or understanding [customers, suppliers, geographical areas] (c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services [the bids are rigged providing instances of rigging bids]