# LAWS5119 COMPETITION LAW

# FINAL EXAM NOTES

# SEMESTER 2, 2026

# JURIS DOCTOR

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# 2. KEY LEGAL AND ECONOMIC CONCEPTS OF COMPETITION LAW & THE SCOPE AND APPLICATION OF THE CCA

**STEP 1 → IDENTIFY A MARKET – market identification is an economic tool (*QWI* per Mason and Wilson JJ)**

1. **Purposive exercise:** *Market definition is a purposive economic exercise directed at identifying the competitive constraints relevant to the impugned conduct (QWI). Here, [X's conduct] allegedly affects [Y's ability to compete] in relation to [goods/services]. Accordingly, the relevant inquiry concerns [identified competitive activities and affected parties], rather than an abstract market definition (Flight Centre).*
2. **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. If able to switch quickly without much cost – competition → they are substitutable and so belong to the same market
    *b. Under s4E, the market includes gs or ss that are substitutable for, or otherwise competitive with, one another. The market is the field of close competition, determined by demand and supply substitution in response to changing prices (Re QCMA). Here, [products/suppliers] are [close/not close] substitutes because [evidence of switching, availability and associated costs].*
3. **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. **[A] Product Market**

    *The relevant product market is arguably [X], encompassing [products/services] given their [similar functions, characteristics, consumer preferences and switching costs]. On the demand side, customers [would/would not] switch to [alternative] following a price increase. On the supply side, [suppliers could/could not] readily redirect production towards [alternative], given [costs, technology, capacity or regulatory barriers].*

        i. Consider the products that are close substitutes
        ii. Also existing or potential competitors who could enter the market to produce a substitute

# 3. HORIZONTAL RESTRAINTS: AGREEMENTS BETWEEN COMPETITORS

**PART IV, DIV 1 SUMMARY**

1. **s45AA Cartel Conduct Prohibition:** A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision
    a. **Cartel provision: a provision relating to:**
        i. Price-fixing; OR
        ii. Restricting outputs in the product and supply chain; or
        iii. Allocating customers, suppliers or territories; OR
        iv. bid-rigging;

        By the parties that are, or would otherwise be, in competition with each other
2. **s45AD cartel conduct:**
    a. Subdiv B – ss45AF-45AI offences
    b. Subdiv C – ss45AJ-45AK CPP
    c. Subdiv D – exceptions
3. **s45 – CATCH ALL PROVISION**
4. **Party definition**
    a. **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 bc of this section), each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding
5. **s45AF (Crim), s45AJ (civil)**
    a. **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
    b. **Criminal fault element:** knowledge or belief for subsec (1)(b) (s45AG(2)

**CIVIL CARTEL PROHIBITION PROOF OF 4 ELEMENTS**

(1) Was there an agreement involving a CAU? – Element 1
(2) Which term/provision is allegedly anti-competitive? – Element 2
(3) Purpose/effect OR purpose condition, AND competition cond – Element 3
(4) Making the CAU (s45AJ) OR giving effect (s45AK) – Element 4

*The issue is whether [companies] have contravened ss45AJ and 45AK. Four elements must be satisfied.*

iv. **Independent explanation:** [there is no credible independent explanation for this, because __] / [this may be explained by __, such as common costs or price leadership (cf Email)[.

v. **NO communication/consensus/commitment:**

1. Merely, communicating, exchanging info, or independently behaving in the same way is insufficient. There must be evidence of a consensus involving commitment.
2. **{Email had interest in keeping Warburton in buss – check and balance against each other, concentrated market}** – TPC v Email → the mere sharing of price lists, not comms b/w parties. Independently held beliefs are not enough.
3. **{Mere expectation, knowledge or hope X}** – Stationers Supply
4. **{Passive recipient of pricing}** – APCO v ACCC → passive recipients of calls but making independent decision based on his own assessment of market
5. 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

vi. **YES communication/consensus/commitment:**

1. Evidence that at least one party to the arrangement has assumed an obligation or given an assurance that they will act in a certain way (Stationers Supply)
    a. But not unilateral conduct: nodding or saying OK when told the winning tenderer would pay a $1m fee did not create an understanding, whereas agreeing the winner would pay each loser 750k and then paying it, did (ACCC v CC)
2. Knowledge to what needs to be done or not to be done (Stationers Supply)
3. {understanding inferred where Waikerie withdrew newspaper distribution from Mannum after Rural Press threatened it in writing} Rural Press v ACCC
4. Facilitated by 3rdP pressing comms, so competitors never deal direcly (News Ltd v ARL)

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

*The alleged cartel provision must be identified within the CAU. In determining its purpose or effect, regard may be had to related provisions, including those in other CAUs involving a common party (ss 45AD(8)-(9)).*

i. Are at least 2 parties to the agrmt competitors, or would they at least be competitors if the agrmt did not exist? This matters bc cartel provisions are designed to prohibit certain forms of coordination b/w competitors.

ii. **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: {the gs or ss that are the subject of the impugned cartel provisions}

1. (c) supply in t/c
2. (d) acquisition in t/c
3. (e) supply to re-supplier
4. (f) production in t/c
5. (g) services supply capacity
6. (h) restricted supply, t/c
7. (i) restricted acquisition t/c
8. (j) bid-rigged supply
9. (k) bid-rigged acquisition

**iii. In competition:**

1. **AGENCY:**
    a. **YES {Agency where Platform Flight Centre decided to sell tickets directly to customers + have flight Co to be looped on this platform}** ACCC v Flight Centre (No 2) → flight centre was competitor of airlines in a market for the supply of contractual rights to international air carriage to customers or, in short, a market for sale of international airline tickets
        i. Kiefel and Gageler JJ: if agent free to act and for own interest, nothing precluded agent from competing with principal
        ii. Gordon: if one sells, then another does not = competition
    b. **NO**: ACCC v ANZ → ANZ only sold ANZ products, mG brokers did all sorts of work/offered a numbering of different products. ANZ acts in its own best interest, mG brokers had to act in best interest of customers. No competition - cf *Flight Centre* — ANZ only offered its own stuff
        i. No purpose → ANZ was promoting its own packages
        ii. What was the nature of service of the impugned firm?
            1. Brokering service very tailored cf flight centre – just flight ticket prices
2. **MERGING PARTIES:**

i. Ss 96(a), (b), (c) and (f)
ii. Supplier actually supplying gs or ss and controlling or attempting to control the resale price

b. Indirect RPM:
i. ss96(d) and (e)
ii. Gs and ss are being withheld by the supplier for the reason that the reseller has sold, or is likely to sell, gs at a price less than that specified by the supplier

**STEP 1 → RULE**

1. *Under s48(1), a corporation must not engage in RPM, unless an ACCC notification is in force (s48(2)). RPM encompasses the conduct prescribed by s96(3), pursuant to s96(1), and extends to services by virtue of s96A, with 'services' broadly defined under s4. Where the same conduct falls within multiple limbs of s96(3), it constitutes a single contravention of s48(1) (Dermalogica)*

**STEP 2 → HAS THE SUPPLIER SPECIFIED A MINIMUM RESALE PRICE?**

*[1] Under ss96(3)(a)-(e), RPM requires an identifiable min resale price specified by the supplier (Prestige Motors). The price need not be numerically fixed and may be ascertainable by reference to [a recommended price/ 3rdP price/ formula/industry standard/prior document] (ss96(4)-(5); Bata Shoes; Safeway; Mobil Oil; Heating Centre)*

*[2] Here, [X] specified [price or pricing benchmark] thru [comms/conduct], which[Y] could ascertain as the min permissible resale price. Altho expressed as [a recommendation/vague pricing expectation], [contextual facts] demonstrate that it operated as an identifiable minimum, analogous to [relevant case]. Conversely, [ambiguity] may render the specification insufficient (Penfolds Wines).*

*[3] Accordingly, a specified MSP is [established/not established]*

1. **Rule:** for RPM under ss 96(3)(a)--(e), the supplier must have specified an identifiable minimum resale price (TPC v Prestige Motors). 'Price' includes discounts, allowances, rebates, and credits, while 'specified' does not require an exact monetary figure: the price may be ascertainable from an agent, 3rdP, formula, comparative price or industry standard (ss 96(4)-(5)). Importantly, s96(3)(f) instead requires a stmt likely to be understood as a min resale price
2. The key Q is whether the retailer could reasonably ascertain the minimum price below which it was not permitted to resell
3. **When is a min resale price specified?**
   a. **Not to sell below recommended price absent approval**

i. Prestige Motors: dealers were prohibited from discounting below recommended or advertised prices w/o approval, under threat of discontinued supply **{YES specified resale price}**

**b. Reference to another retailer's price; reference to a range or approximation of a particular figure:**

i. Bata Shoes: a price described by reference to Gowings' selling price could sufficiently identify the min resale price, despite being couched as a recommendation. It only becomes problematic where the supplier seeks to enforce it as a minimum **{YES specified resale price}**

**c. Reference to a formula or calculation:**

i. Aus Safeway: a min price can be specified thru a formula or equation allowing the price to be calculated **{YES specified resale price}**

**d. Min SP may also be ascertained by a standard that is known to the relevant parties in the industry**

i. Mobil Oil: a min price may be ascertainable from an est pricing benchmark understood by the parties **{YES specified resale price}**

**e. Not necessary for there to be a precise communication b/w what the supplier actually says and the language used in s96(3)(a) & may be specified by an anterior doc**

i. Heating Centre: the supplier need not repeat the precise price if its comms **sufficiently** identify an earlier document specifying it **{YES specified resale price}**

**f. Imprecise or ambiguous communication:**

i. Penfolds Wines: A vague demand to increase prices may be insufficient where the relevant minimum price or conditional consequence is not adequately established **{NOT specified resale price}**

1. Witness called in and said that "he did not want us to be any cheaper, he wanted us to align with his price"

**STEP 3 → DOES THE CONDUCT FALL WITHIN S96(3)**

Acts constituting engaging in RPM that would result in the contravention of s48:

**1. s96(3)(a): MAKING IT KNOWN:**

a. (a) no supply unless reseller agrees minimum price

b. Intention of ceasing supply **made known** to acquirer unless they **agree** not to sell less than specified price

c. **Rule:** requires (1) Conditional threat not to supply gs; AND (2) agreement is sought by supplier (Dermalogica)

i. Agreement may be inferred from the acquirer's acquiescence, submission or silence in response to the supplier's unilateral demand, w/o requiring express acceptance

**ELEMENTS:**

1. **Conduct must be in 'trade or commerce' (S47(1))**

   *Under s47(1), the conduct must occur in 'trade or commerce', broadly construed to extend beyond ordinary commercial dealings, without requiring a dominant profit-making objective (Ku-ring-gai Cooperative Building Soc - Deane J). Here, [X's conduct in supplying/acquiring gs or ss] constitutes trade or commerce bc [relevant commercial circumstances]. Accordingly, s47(1) is satisfied.*

   a. **Rule:** 'trade or commerce' is broadly construed, extending beyond ordinary commercial activities and not requiring a dominant profit-making objective
      i. *Kuringgai cooperative Building society* – Deane J: The terms are of the widest import, not confined to arms-length dealings, open market or transactions b/w strangers. They may include commercial dealings outside ordinary buss activities, even where characterised by altruism rather than profit-making

2. **The conduct must fall within the definitions of s47(2)-(9) as a practice of exclusive dealing**

   a. **Summary:**
      i. **Even-numbered subsecs (direct):** supply or acquisition of gs or services subject to restrictive conds
      ii. **Odd numbered subsecs (indirect):** refusal to supply or acquire gs or ss bc the other party will not accept restrictive conds
      iii. s47(2)-(7) defined the practice of the exclusive dealing in relation to supply or acquisition of gs and ss
      iv. ss47(8) and (9) define exclusive dealing in relation to a lease or licence over land

   b. **Supply, resupply, acquires – defined in s4(1)**

   *Under s4(1), supply, resupply and acquire are broadly defined, encompassing the sale, exchange, lease, hire, or h-p of gs, and provision, grant or conferral of services. Here, [X] [supplied/resupplied/acquired] [gs / ss] thru [relevant transaction], satisfying s4(1).*
      i. Defined broadly to capture conditions of supply and resupply in relation to sale, exchange, lease, hire or hire-purchase
      ii. For services, incl provisions, grants or conferrals
      iii. **Agency exception**→ indirect (TPC v Legion Cabs)

      *An agency relo does not ordinarily constitute supply or resupply where the agent does not acquire title to the gs (TPC v Legion Cabs; Castlemaine). Here, [X] acted as [agent/prinicpal]with [Y] retaining [title and risk of loss]. Accordingly, [the transaction does/does not] constitute supply or resupply. Nevertheless, the agent's conduct may be attributed to the corporate principal where undertaken within actual or apparent authority (ss84(2), (4)).*

1. Does not incl exchanges in an agency relo bc the agent does not acquire title to the gs which means the supplier still carries the risk of loss or declining price in the event that the products are not sold
2. 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 s4
3. 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

**c. What constitutes a 'condition' (s47(13)(a))**

*A 'condition' under s47(13)(a) need not be legally enforceable but requires compulsion beyond mere hope or expectation (Stationers Supply). Compulsion and futurity are relevant (SWB Family Credit Union), assessed against the entire factual matrix (ACCC v Bill Express).*

*Here, [X] required [Y] to [comply with restriction], with non-compliance resulting in [commercial consequence]. Accordingly, [a cond is/is not] established, as [Y] [faced compulsion/merely received an optional benefit].*

i. **Rule:** A condition need not be legally enforceable but must involve an **element of compulsion**, beyond mere hope or expectation (Stationers Supply). It requires compulsion and futurity (SWB Family Credit Union), assessed in the light of the entire factual matrix (ACCC v Bill Express)

ii. **NO condition:**

1. {Lack of obligation imposed upon person dealing w 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 the 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
2. {No competitor when Ramsay imposed "condition" not to work w competitor on its surgeons} Ramsay Health Care → surgeons have open lists at private hospitals based on the number of surgeries. Ramsay said w cannot guarantee your status if you don't meet the condition → you don't acquire services from Ramsay's competitor (yet to be opened up)
    a. Rather the ACCC's case was based on the proposition that this would only occur after the new day surgery opened, which would

| | |
|---|---|
| | the price cuts were a defensive response to survive, and recoupment was impossible. |
| | Epic Games v Apple; Epic Games v Google:<br>app stores and in-app payments. Apple banned sideloading and rival app stores and required its own in-app payment system (IAP), with commissions of up to 30% and anti-steering rules. Google imposed distribution and billing restrictions on Android. Held: both contravened s 46. For Apple, there was SLC purpose and effect in iOS app distribution, and effect in payments. Security wasn't a trump card, and there is no US-style balancing. For Google, the platform's technical openness (sideloading allowed) didn't prevent SLC. |
| | Melway:<br>refusal to protect a distribution system. Melway, with about 80–90% of Melbourne street directories, refused to supply Hicks, a wholesaler that wouldn't stay within its allocated segment. Held (HCA): no s 46 breach. Melway adopted the segmented system as a start-up without market power, and a firm without power would do the same, so it didn't use its power. Restricting intra-brand competition can promote inter-brand competition. Distinguished QWI: Melway wasn't vertically integrated, the sole producer, or supplying an essential input. |
| | NT Power v PAWA:<br>refusing access to essential infrastructure. PAWA, a statutory authority, owned NT's electricity transmission and distribution network. It refused NT Power access to sell electricity, citing a future access regime. Held (HCA): contravention. A market for access existed despite no prior supply. PAWA acted in trade or commerce, and property rights are no shield. It used its control of the facility to exclude an entrant, and good motives were no defence. |
| | Qld Wire v BHP:<br>constructive refusal to supply. BHP, with about 97% of Australian steel and the sole maker of Y-bar, supplied only its subsidiary AWI. It offered QWI Y-bar only at an uncompetitive price, blocking QWI from competing in star pickets. Held (HCA): contravention. SMP was the ability to raise prices without losing customers. A market can exist without transactions. "Take advantage" means use, not a moral judgment. In a competitive market BHP couldn't have refused, so it used its power to exclude QWI. |
| | Rural Press: |