

Topic 5: Anti-Competitive Arrangements

Competitors will be tempted to enter into agreements, arrangements or understandings to avoid competition. Agreements which substantially lessen competition are prohibited. Some agreements between competitors are prohibited per se, e.g. price-fixing and exclusionary provisions (boycotts and market-sharing agreements). This topic will examine the original prohibition in s 45 of the Act and how this has been interpreted by the courts. A key concept here is that of 'agreement' – a concept that raises problems of definition, proof and role. The cartel provisions, which apply criminal sanctions against certain conduct of competitors acting in concert, will also be examined, together with the price signaling laws.

Rationale for Regulating Horizontal Restraints

- S 45 and the cartel provisions in Div 1 of Pt IV of the CCA regulate agreements among competitors about how they will compete or refrain from competing with each other.
- By acting in concert firms can acquire market power that they would not possess alone and this can have the same anti-competitive effects a merger has without the formal integration of a merger
- Recently, provisions to tackle 'price signaling' have been introduced to Div 1A of Pt IV – this conduct falls short of agreement and is therefore outside the scope of s 45 and the cartel conduct provisions.

Terms and Elements of s 45 and s 4D

S 45: Contracts, arrangements or understandings that restrict dealings or affect competition

...

- (2) A corporation shall not:
 - a) make a **contract or arrangement, or arrive at an understanding**, if:
 - i) the proposed contract, arrangement or understanding contains an **exclusionary provision; OR**
 - ii) 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 a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
 - i) is an exclusionary provision; or
 - ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- (3) For the purposes of this section, competition, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which 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 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.

S 4D: Exclusionary provisions

- (1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
- (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, **between persons any 2 or more of whom are competitive with each other; AND**
 - (b) the provision has the **purpose of preventing, restricting or limiting:**
 - i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
 - ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

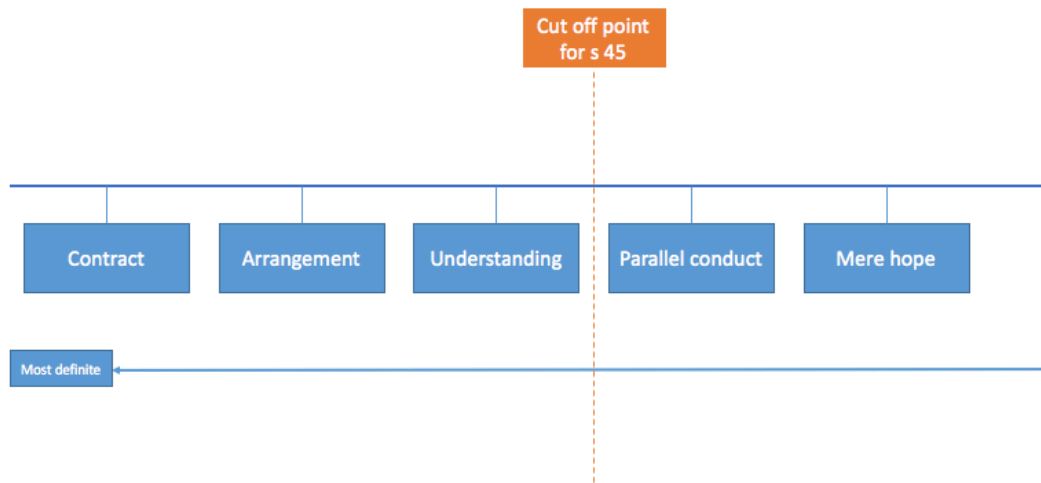
- (2) A person shall be deemed to be competitive with another person for the purposes of **subsection (1)** if, and only if, the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.
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Elements of s 45

1. A corporation
2. Contract, arrangement or understanding
3. Exclusionary provision **OR** has purpose, effect or likely effect of SLC

Contract arrangement or understanding

In *Leahy* Gray J posited the notion of a 'spectrum of consensual dealings' with contract at one end and a mere hope at the other:



Contract

- ‘Contract’ in s 45 must refer to something that looks like a contract but is not necessarily enforceable i.e. would not be if breaches CCA (*Leahy per Gray J*)

Arrangement

- **Definition:** It connotes consensual dealing falling short of a contract (*Leahy per Gray J*)
- Gray J in *Leahy* stated that a dealing with all elements of a contract but w/o intention would be an example of an arrangement

2 key requirements:

- Requires a ‘meeting of the minds’ and an ‘expectation of certain behaviour’ (*Email per Lockhart J*)
 - Must involve an obligation/expectation on both parties to act a certain way that is ‘morally binding or binding in honour’ (*Leahy per Gray J*)
- Requires express communication (*Email; Leahy*)
- Does there need to be reciprocity?
 - As per *Email* there must be a ‘meeting of the minds’ and Lockhart J said reciprocity of obligations/commitments was required
 - One could have an understanding between two persons restricted to conduct which one of them will pursue without an element of mutual obligation – per Bowen CJ obiter in *Morphett Arms v TPC (1980)*

How do you prove it?

- Parallel market behaviour may evidence an arrangement or understanding unless there is a ‘credible explanation’ (*Email per Lockhart J*)
- While parallel market behaviour may point towards the existence of a contract, arrangement or understanding it may be explained by economic theories such as price leadership or oligopolistic interdependence (*G Hay article*)
- Oligopolistic interdependence means firms consider actions of other (*Hay*)
- Even conscious parallel conduct is acceptable as prices in competitive markets for commodities or homogenous products tend to be uniform (*Leahy per Gray J*)

Understanding

- The word ‘understanding’ connotes ‘a less precise dealing than either a contract or arrangement’ but it must be consensual (i.e. involve a meeting of the minds) (*Leahy per Gray J*)
- Unlike an arrangement an understanding can be ‘tacit’ – i.e. it may be implied by conduct (to ‘arrive at an understanding’ does not require express communication: *Leahy*).
- In each case the *subject matter* must be a particular course of conduct, i.e. that at least one party will act in a certain way, more than a mere hope or expectation (*Leahy per Gray J*)
 - information ‘conveyed by some dealers to the uncommitted dealer may have been useful to the uncommitted dealer in enabling him to have his franchisees check competitors’ prices and know when to raise his own prices if he chose to do so, but the absence of any expectation that he would do so was fatal to the existence of any understanding.’ (*Leahy per Gray J*)

How do you prove it?

- See above in arrangement

TPC v Email Ltd (1980) 31 ALR 53

Facts:

- Email and Warburton Franki (WF) each carried on the business of manufacturing and supplying kilowatt hour meters.
- Both firms issued identical price lists; submitted identical tenders; adopted the same price variation clause; sent to each other their respective price lists; and corresponded whenever they changed prices.
- Commission argued that there was an arrangement or understanding that the respondents would forward each other their respective price lists or alternatively if Email forwarded its price lists to WF then WF would reciprocate.
- Commission relied on circumstantial evidence from which it alleged one could infer the requisite arrangement or understanding – this was essentially parallel conduct.

Issue: Was there an arrangement or understanding?

Judgment:

- **Lockhart J** said an ‘arrangement or understanding’ requires a ‘meeting of the minds’ – there must be a consensus about ‘what is to be done and not just a mere hope or prediction as to what might be done or happen’ and there must be an ‘expectation of certain behaviour’
- **Lockhart J** stated that an arrangement or understanding can be proved by direct evidence, or can be proved by circumstantial evidence unless a ‘credible explanation is given by the defendant’
- **Lockhart J** noted that Email called an expert witness who explained that this parallel conduct could result from the market being an oligopoly due to ‘barometric price leadership’
- The essence of the TPC’s claim was that ‘communication by Email direct to Warburton Franki and, less significantly, vice versa, of the price which it proposed to charge, was in breach of the Act.’
- **Lockhart J** said there is a ‘fundamental distinction’ between ‘a hope or prediction of future behaviour’ and the ‘expectation of certain behaviour’ –

here there was no communication between the parties setting an expectation that WF would follow Email's prices and therefore there was no understanding or arrangement. Furthermore, this purported arrangement lacked 'reciprocity'

- It is hard to envisage an understanding involving commitment by one party, as a party usually requires reciprocity; however, mutual commitment is not necessary, though such cases would be rare (in obiter)

Principles: 1. Definition of arrangement/understanding; 2. Role of circumstantial evidence; 3. Certain expectation; 4. Reciprocity