



# Professional Practice in Engineering Management

University of Sydney Faculty of  
Engineering & Information  
Technologies

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# Competition Law – an overview

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# Legislation framework

- Key parts of the Trade Practices Act
  - Part IIIA - Access to Services
  - Part IV - Restrictive Trade Practices
  - Part IVA - Unconscionable Conduct
  - Part V - Consumer Protection
  - Part VB - Price Exploitation
  - Part VI - Enforcement and Remedies
  - Part VII – Authorisation and Notification
  - Part XIB - Anti-Competitive Conduct in Telecommunications
  - Part XIC - Access in Telecommunications



# Part IV

## Anti-competitive Conduct



# Per se and SLC Contraventions

- Two categories of contravention under Part IV of the TPA
  - contraventions subject to the competition test, ie only contravene if have the purpose, effect or likely effect of substantially lessening competition in a market:
    - anticompetitive agreements
    - exclusive dealing
    - mergers and acquisitions
    - misuse of market power (test differs but market analysis still required)
  - per se contraventions:
    - price fixing
    - collective boycotts (exclusionary provisions)
    - resale price maintenance
    - third line forcing



# Market Competition Analysis Prohibitions



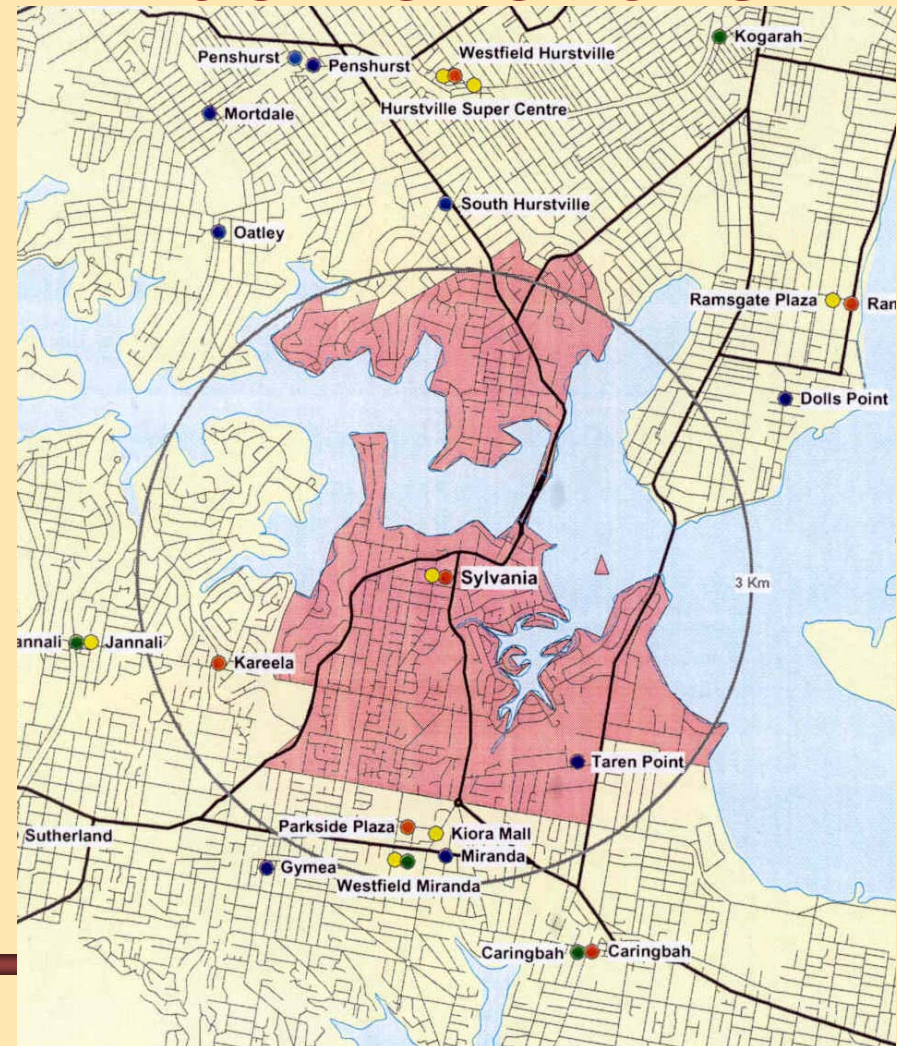
# Substantial lessening of competition in a market

- Market
  - Section 4E - market in Australia - emphasis on substitution
  - “A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another - in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, given sufficient price incentive.” Tribunal in Re QCMA
  - One measure of substitutability - cross elasticities of supply and demand
- Four dimensions
  - product
  - geographic
  - functional
  - temporal (long run substitution is the focus)



# Market Definition - Wide Variations

- National retail market for home loans
- Retail market for food and groceries provided by supermarkets within 3 km of Sylvania, Sydney





# Misuse of market power (s 46 TPA)

- It is illegal for a company with a substantial degree of power in any market to take advantage of that power for a prohibited anti-competitive purpose
- Three elements to prohibition:
  - Substantial degree of power in a market. What is this?
    - 46(3) – have regard to the extent to which conduct is constrained by conduct of competitors or countervailing power
    - What does this mean? “The ability of a firm to raise prices above the supply costs without rivals taking away customers in due time” – Queensland Wire
    - Critically related to definition of market



# Misuse of market power (s 46 TPA)

- Look to a variety of indicia
  - whether there are barriers to entry into the relevant market
  - the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time
  - the extent to which the firm's conduct is constrained by competitors or potential competitors
  - the market share of the firm and how significant it is in the relevant market setting
  - the presence of vertical integration
  - financial strength
  - the size of the firm.



# Misuse of market power (s 46 TPA)

- Taking advantage:
  - no moral overtone - means “use”
  - take advantage when a company acts in a way that it would not act absent that market power
  - Often very difficult to prove. Problematic for predatory pricing.
- Prohibited anti-competitive purposes:
  - Can be inferred from conduct. Often relied on more than self serving statements
  - Often inferred from “swagger” comments
  - to eliminate or substantially damage a competitor in any market;
  - to prevent someone entering any market; or
  - to deter or prevent competitive conduct in any market



# Misuse of market power (s 46 TPA)

- Common forms of section 46 conduct
  - Predatory pricing
    - there is no specific definition or formulation of this conduct. It is an economic term not a legal term
    - Colloquially it occurs where a firm with substantial market power prices its products in a manner to drive a competitor out of the market or prevent someone from entering a market
    - Difficulty for courts is distinguishing between vigorous competition and predatory conduct.
    - General rule is that pricing below avoidable cost will be problematic
    - Recent Boral decision involved predatory pricing allegations – While the Court found that there was no contravention, it did not find that predatory pricing did not contravene section 46



# Misuse of market power (s 46 TPA)

- Refusal to deal
  - More relevant in vertically integrated businesses – Typically occurs where company with market power in upstream market refuses to supply important input services to its competitors in the downstream market.
  - Many legislative regimes have been created to provide for the compulsory supply of services. Eg Telecommunications
- Price Squeeze
  - Occurs in vertically integrated markets
  - Upstream supplier charges its competitors in the downstream an amount for an input good or service that is so high that having regard to the price for the goods or services in the downstream market the competitor cannot make a margin.
  - Many legislative regimes have been created to determine terms and conditions of supply. Eg Telecommunications



## Exclusive dealing (s 47 TPA)

- There are two broad types of exclusive dealing:
  - 47(2): where a company supplies or offers to supply goods or services on condition that the purchaser will not acquire good or services from the supplier's competitors (exclusive supply)
  - 47(4): where a company acquires or offers to acquire goods or services from a supplier on condition that the supplier will not supply particular goods or services to particular persons or classes of persons (exclusive acquisition)
- Only applies where the dealing has the purpose, effect or likely effect of substantially lessening competition in a market
- Prohibition does not apply to dealings between related companies
- Applies to vertical relationships

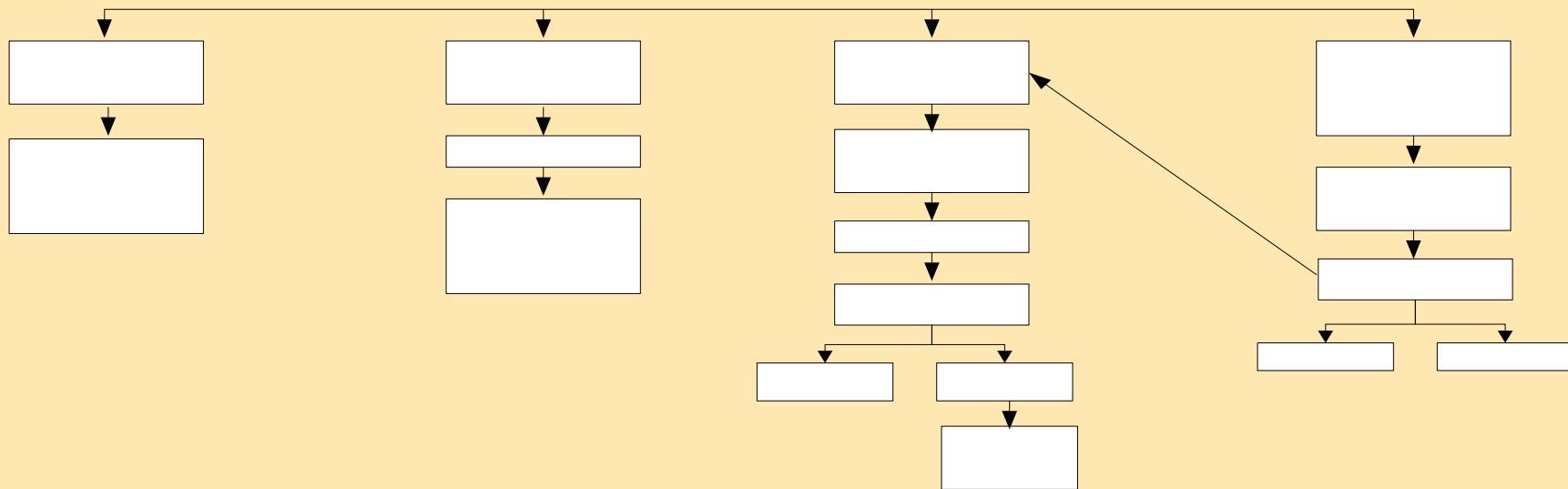


## Other prohibitions

- General prohibitions against anti-competitive agreements (s45 TPA)- any contract, arrangement or understanding with the purpose, effect or likely effect of the contract, arrangement or understanding is to substantially lessen competition.
- Mergers and acquisitions (s 50 TPA) – prohibits the acquisition of shares or assets where such acquisition has the purpose, effect or likely effect of substantially lessening competition in a market
  - No formal process for “clearing” mergers under the TPA, instead ACCC provides informal clearance
  - Critics argue that this gives the ACCC too much power and that ACCC has been rejecting mergers that should have been allowed in the national interest
  - Significant changes proposed by Dawson review



# Mergers and Acquisitions (s 50 TPA) - Dawson





# Per Se Prohibitions



# Per se Contraventions

## Price Fixing (s 45 TPA)

- Competitors are prohibited from entering into any contract, arrangement or understanding for fixing, controlling or maintaining prices, discounts, rebates or credits for goods or services
- There are four important features to this prohibition
  - Competitors
    - Need to be competitive with the each other in relation to the price, discount or rebate the subject of the agreement.
  - Contract, arrangement or understanding
    - an understanding requires only a “meeting of minds”
    - A wink and a nod will suffice
    - However, does not include “conscious parallelism”



# Per se Contraventions Price Fixing (s 45 TPA)

- Fix, control or maintain
  - Broader than simply agreeing on a price
  - Any agreement relating to price of goods or services acquired or supplied in competition are dangerous
- Prices, discounts or rebates
  - Not just price
- Viewed as a particularly heinous offence. Recent Penalties:
  - Freight Case (early 90s, total fines \$5 million approx)
  - Vitamin Case (\$26 million in fines)
  - Power Transformer Case (\$7 million so far for just one respondent)
- Recent recommendations for criminal sanctions.



# Per se Contraventions

## Collective boycotts (ss 45 and 4D TPA)

- Competitors prohibited from entering into a contract, arrangement or understanding with a provision the purpose of which is to prevent, restrict or limit the supply, or acquisition, of goods or services to, or by, certain persons or classes of persons
- Three important features:
  - Competitors –
    - includes people who would be competitive but for the restriction
    - Must be competitive with each other in relation to the good or service the subject of the restriction



# Per se Contraventions

## Collective boycotts (ss 45 and 4D TPA)

- Purpose of preventing, restricting or limiting
  - Would include an agreement to limit supply of particular services or in particular circumstances
- Person or class of person
  - The people the subject of the restriction need to be readily identifiable
- Most common form of conduct are market sharing arrangements between competitors
- Important to keep in mind whenever entering into restrictive agreements with competitors even where that agreement is a vertical agreement – that is supplier/acquirer relationship



# The Key Exceptions to s 45

- s 45 carve outs
  - s 45(6): provision of an agreement to which s 47 (exclusive dealing) applies
  - s 45(7): agreement insofar as it provides for acquisition of shares or assets
  - s 45(8), 2 4A: agreement between related corporations
  - s 45A(2): price fixing prohibition does not apply to joint ventures
  - s 51(2)(e): provision of agreement solely for protecting goodwill when selling a business or shares
  - s 51(3): transfer and exercise of rights in relation to intellectual property



# S 45 Carve Out: Exclusive Dealing Conduct

- s 45(6): agreement does not constitute a contravention of s 45 by reason that the agreement contains a provision to which s 47 (exclusive dealing) applies
- s 47 prohibits exclusive dealing only where it has the purpose, effect or likely effect of SLC
- Exclusivity provisions in agreements with competitors – be very careful that the proposed exclusivity restriction amounts to an exclusive dealing rather than collective boycott
- Danger with s 45(6) carve-out:
  - Must be very careful when relying on s 45(6) that conduct does not go beyond the terms of s 47
  - s 45(6) will not assist if there is SLC



## Third line forcing (s 47(6) and (7) TPA)

- Third line forcing occurs where a company supplies its products to a customer (or supplies them at a particular price) on condition that the customer will acquire goods or services from a third person.
- Does apply to related corporations.
- Can be avoided by careful restructuring of deal offered or by notification to ACCC
- Often little or no competitive detriment in TLF - common practice (eg car parks in shopping centres)
- Dawson – not prohibited if no purpose/effect of substantially lessening competition



## Resale price maintenance (s 48 TPA)

- Prohibition in s 48 - RPM is defined in section 96
- Unlawful for a supplier to attempt to dictate the minimum price at which resupplier/reseller sells their products
- Can have a recommended price
- May set a maximum price
- Regarded as serious contravention by ACCC
- Check all distribution and licensing agreements to ensure that supplier/licensor is not trying to control retail price unlawfully



# Part VI

## Enforcement and Remedies



# Consequences of non-compliance

- Damages
- Injunctions
- Undertakings
- Civil Penalties (Part IV)
- Criminal Fines (Part V)
- Adverse publicity
- Compliance program
- Diversion of management
- Legal and other costs
- Dawson Review of the TPA - ACCC seeking jail terms for contraventions of Part IV - “hard core” cartel participants



# Damages and Injunctions

- Damages - section 82
  - available for any contravention of Parts IV or V
  - need to establish:
    - contravention of Act
    - loss or damage suffered by reason of the contravention
  - measure of damages more akin to tort than contract, ie aim is to put the plaintiff in the position plaintiff would have been had the contravention not occurred
- Injunctions - section 80
  - available for almost all contraventions of Parts IV or V (only ACCC can obtain an injunction under s 50)



# Part VII

## Authorisations and Notifications



# Authorisation and Notification

- Authorisation
  - Applies to most prohibitions in Part IV
  - Does not apply to s 46
  - Public benefit of allowing conduct to occur outweighs the detriment suffered as a result of anti-competitive effect of the conduct.
- Notification
  - Exclusive dealing only
  - Conduct not prohibited while notice is effective
  - ACCC may on 31 days notice remove notice where it is not satisfied that benefit outweighs detriment
  - Common for third line forcing



# The New Commission's approach to Enforcement



# Statements of ACCC

- Samuels has publicly restated many of the existing policies of the ACCC eg
  - Not publicly discussing cases prior to judgment
  - Priority action for matters involving widespread consumer detriment, deliberate breach, emerging trends or recidivist behaviour
  - Enforcement hierarchy to stop the behaviour, restitution, prevention
  - Litigation is a second best approach – time consuming and costly and not always delivering the outcomes. Will consider alternatives to litigation in appropriate cases
  - Cartel identification and prosecution a priority for 2004



## Negotiated Penalties

- While its policies indicate that the ACCC will be keen to negotiate penalties, the recent FFE decision may throw a spanner in the works.
- In that case, the Court did not accept the penalties agreed, and imposed a substantially higher penalty for both the corporate and individual respondents.
- Similar issue to North West Frozen Foods case – which was overturned on appeal.