Chapter 1

The Development of Competition Law

Introduction

1.1 In January 2011, the Competition and Consumer Act 2010 (Cth) (CCA) (the Act) replaced the former Trade Practices Act 1974 (Cth) (TPA) as the principal legislative mechanism to address restrictive trading practices. The Act is the latest measure in a long line of attempts by governments of various societies throughout history to combat certain anti-competitive trading practices by which traders attempt to interfere in markets to the detriment of consumers.

In fact, attempts by traders to manipulate markets in order to increase their profits are as old as markets themselves. Egyptian papyri have been found indicating that, in 3000 BC, there was an attempt by traders in grain to fix the prices against those prevailing in the market.[1] Price-fixing is just one of the many methods, of equally ancient heritage, in which traders attempt to manipulate markets for their own profit. As one commentator observed:

> They represent no more than the attempts of intelligent men to interfere to their own advantage, or that of the industry in which they are engaged, with the free working of supply and demand and with the results of competition.[2]

In this chapter, we will explore a little of the cultural history of competition law. It will help to put the Act into a larger historical context; locating it within the wider and more ancient context of monopolies and restrictive trading practices on the one hand, and attempts by various kings, queens, rulers and legislatures at outlawing those practices on the other. It turns out that history is full of monopolies and illegal trading practices.

1.2 Why is that? Adam Smith believed that:

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends up in a conspiracy against the public or in some contrivance to raise prices … It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest.[3]

1. R Piotrowski, *Cartels and Trusts: Their Origin and Historical Development*, George Allen & Unwin Ltd, United Kingdom, 1933, p 88.
2. Lord Wilberforce, A Campbell and N Ellis, *Restrictive Trade Practices and Monopolies*, 2nd ed, Sweet & Maxwell, London, 1966, p 2.
3. A Smith, *The Wealth of Nations*, Book I, Ch II, 1776.

However, he also did not think these meetings could be regulated:

> It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice.[4]

'Liberty' and 'justice' are interesting concepts in the context of trade practices or antitrust law, where the power of the corporation to manipulate the market appears to triumph over the individual consumer. Even the ill-fated St Thomas Moore cautioned us not to:

> … [s]uffer these rich men to buy up all, to ingrosse and forestalle and with their monopoly, to keep the market alone as please them.[5]

1.3 According to Justice Dyson Heydon, St Thomas Moore was the first person to employ the term 'monopoly' in the sense of meaning dominant control over resources. However, this is not strictly correct. According to Dr Barbara Lesco of the Department of Egyptology at Brown University, in 2000 BC, Egyptian royal families enjoyed the economic benefits of their monopolies in minerals that were used in the production of make-up (the malachite and black shades favoured by the Egyptians seemed to also possess antibiotic qualities and helped to reflect light away from the eyes). These monopolies were important in also controlling the distribution of make-up used in religious events and feasts. Feasts and food were particularly important to peoples of ancient civilisations and were frequently the subject of monopolies. In the 7th century BC, cooks in ancient Greece were granted annual monopolies to exploit their recipes.

The world's first antitrust trial?

1.4 Unfortunately, that was not all ancient civilisations attempted to exploit. Possibly the world's first antitrust trial comes down to us from 388 BC in ancient Greece. It concerned a 'contract, arrangement or understanding' by grain dealers to buy up grain in order to create a scarcity, thereby allowing them to charge supra-competitive retail prices for the grain at markets.[6] In other words, it involved a cartel.

Normally, grain shipments were unhindered through the Hellespont Passage which was controlled by the Athenians. However, in 388 BC, the Spartans began to raid the grain ships coming into the Greek harbour of Piraeus. The limited amount of grain available meant that wholesalers were bidding ferociously against each other for whatever grain made it past the Spartan pirates. Because the wholesalers were paying more for the grain from the merchants, they recouped their expenses by raising the retail price of grain and bread products at market. The Greek population feared that inflation would put grain out of their reach.

One of the Athenian grain commissioners innocently suggested that several grain wholesalers should collusively bid for the grain, thereby ensuring they would pay less for the grain. The commissioner's innocent idea was that, since the cost to the wholesalers was

4. Ibid.
5. St Thomas More, *Utopia*, Book 1 (1516) in H Craik, *English Prose*, Vol I, The MacMillan Company, New York, 1916.
6. L Kotsiris, 'An Antitrust Case in Ancient Greek Law' (1988) 22(2) *Int Lawyer* 451.

less, the cost savings would be passed on to the Greek citizens in the form of lower retail prices for grain.[7]

It did not work out that way. Predictably, the grain wholesalers bought huge quantities of grain and, instead of making it available to consumers at lower prices, they hoarded the grain in their own warehouses. In order to create panic, these same wholesalers then spread rumours of war, loss of grain ships and blockades of ports. The rumours had the effect of causing 'panic buying' of grain. The price shot up to six times the legal limit and the wholesalers made a fortune.

When the cartel was discovered, some senators wanted the cartel members handed over for execution without trial. However, once tempers cooled, a trial was arranged and although the cartel members attempted to shift the blame on to the grain commissioner ('we were only following orders!'), the defence was quickly defeated.[8]

We do not know the outcome of this trial, but it seems reasonable to assume that the cartel members were found guilty. While nothing is known of their fate, it seems clear that the ancient Greeks' interest in monopolies had not diminished.[9]

Aristotle's solution to university funding

1.5 Like most academies of higher learning, Aristotle's Lyceum was struggling to cover its costs through public funding. Writing in *The Politics*, Aristotle devised an interesting solution.

Eager to prove the commercial usefulness of philosophy and astrology (and thereby to attract government funding), Aristotle related the story of Thales, who came from the Asia Minor city of Miletus. Thales had ascertained from the position of the planets and stars that the next season's crop of olives would be especially bountiful.

Some months ahead of the harvest, Thales bought up all of the olive presses in the surrounding area, thereby ensuring that he was the sole owner of the facilities needed to process olives into olive oil.

As predicted, the next season's olive crop was plentiful. Because he owned all of the olive presses, Thales was able to insulate himself from his competitors; through predatory pricing, he was able to force his rivals out of the market and to reap supra-competitive prices for the hire of the olive presses. Aristotle, therefore, proudly invited government funding for his school because the subjects taught had commercial application!

Incidentally, Thales was the first to prove the geometrical theorems that Euclid codified centuries later. Thales also considered that all natural phenomena were composed of certain material substances, water being the most predominant. It is, therefore, ironic that Thales died of dehydration-induced heat exhaustion while watching wrestling matches.

The Romans

1.6 Laws from Roman times indicate a concern to protect the trade in corn and grain against unnatural rises in prices. One of the first of these laws was the *Lex Julia de Annona*,

7. W Dunham, 'Cold Case Files: The Athenian Grain Merchants, 386 BC' (2008) 28(3) *Cato J* 495.
8. R Seager, 'Lysias against the Corndealers' (1966) *Historia: Zeitschrift fur Alte Geschichte* Bd, 15, H 172.
9. See J Hasebroek, *Trade and Politics in Ancient Greece*, G Bell and Sons Ltd, United Kingdom, 1933.

which was said to date back to the time of Julius Caesar. It imposed fines against individual traders and groups of traders who engaged in profiteering and creating artificial shortages of supply.[10]

More significant was the *Constitution of Zeno* issued in 483 AD. It went further than the *Lex Julia* by rescinding all exclusive licences and private monopolies that had been granted. Penalties included fines and banishment for life. Emperor Zeno issued an edict to the Roman Prefect of Constantinople in the following terms:

> We command that no one may presume to exercise a monopoly of any kind of clothing, fish, or of any other thing serving for food or any other use … nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a price less than they were agreed upon amongst themselves.[11]

When competition legislation had real penalties

1.7 The Competition and Consumer Act 2010 (Cth) permits the Federal Court to send executives to jail if they engage in cartel behaviour. The court can also levy pecuniary penalties against both individuals and corporations found to be in breach of prohibitions on restrictive trading practices. In 2007, Richard Pratt's Visy Board corporation was fined $36 million for price-fixing: *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617; (2007) ATPR ¶42-185.

1.8 Traders didn't always have it that easy. In the Middle Ages, most trade in domestic goods and services was conducted at markets, held weekly. The owners of the markets or fairs charged the merchants who were selling goods at their market a fee, called a 'stallage', for the space.

Unscrupulous traders would often attempt to prevent other traders from entering the market. This had the effect of preventing price competition for various goods as well as preventing the market owner from collecting the stallage fee. This practice was known as 'forestalling'. When it was practiced during times of poor harvests or famine, it enabled some traders to manipulate the market. The absence of outside competition allowed the traders to extract supra-competitive prices for their goods.[12]

At a time when most people lived in poverty and at the mercy of agricultural inconsistency, the practice of forestalling had disastrous consequences; hundreds of thousands of people died of starvation. One writer described life in 15th-century England, devastated by the Black Death:

> The undrained neglected soil; the shallow stagnant waters which lay upon the surface of the ground, the narrow unhealthy homes of all classes of the people; the filthy neglected streets of the town, the insufficient and un-wholesome food; the abundance of stale fish which was eaten, the scanty variety of the vegetables which were consumed predisposed the agricultural and town population alike to typhoidal diseases and left them little chance of recovery when stricken down with pestilence.[13]

10. D Cowan, 'Ancient Origins of Competition Law' (2007) *Advocate* 38 (Forum).
11. Lord Wilberforce, A Campbell and N Ellis, *Restrictive Trade Practices and Monopolies*, 2nd ed, Sweet & Maxwell, London, 1966, p 20.
12. R Lopez and I Raymond, *Medieval Trade in the Mediterranean World*, W W Norton & Company Inc, United States, 1967.

In these dismal circumstances, the public resentment of forestallers was strikingly described:

> … it was ordained that no forestaller should be suffered to dwell in any town; for he is a manifest oppressor of the poor and a decayer of the rich, a public enemy of the country, a canker, a moth and a gnawing worm that daily wasteth the Commonwealth; and the act and name of a forestaller was so odious … that it was moved in parliament to have had it established by law, that a forestaller should be baited out of town where he dwelt by dogs and whipped forth with whips.[14]

1.9 Accordingly, Henry VIII issued a proclamation in 1529 against those:

> … who do combine and confeder together in fairs and markets to set unreasonable process upon the said corn and grain to the great damage of his loving subjects.[15]

King Henry VIII was concerned that:

> Prices of such victuals be many times enhanced and raised by the greedy covetousness and appetites of the owners of such victuals, by occasion of ingrossing and regrating the same, more than upon any reasonable or just ground or cause, to the great damage and impoverishing of the King's subjects.[16]

Penalties included forfeit of property, time in the 'stocks', and even amputation of an ear or hand.

In the 16th century, King Edward VI passed an Act prohibiting anti-competitive market practices that provided for penalties of 20 days' imprisonment on bread and water rations for a first offence, 'punishment of the pillory' for a second offence, and pillory plus amputation of an ear for a third offence.

Monopolies and the downfall of empires

1.10 Despite publicly condemning monopolies, the kings and queens of England were not above granting them when it was convenient to do so.

For example, at the beginning of the 13th century, King John had lost territories in Normandy, France. In order to fund a war to retake those lands, King John granted monopolistic trading rights to the 'Cinque Ports' (the five English ports nearest to France). In exchange, those ports pledged to provide ships and men for King John's war of re-conquest. This monopoly was granted despite King John also signing the Magna Carta which was considered to prohibit all monopolies. Likewise, after the rise of the merchant guilds, Queen Elizabeth I granted the Newcastle coal monopoly permission to incorporate as a guild in exchange for a significant share in the profits calculated per unit of coal exported from the Newcastle mines.

13. F D Jones, 'Historical Development of the Law of Business Competition' (1926) 35 *Yale Law J* 905 at 911.
14. Ibid at 908–9.
15. Lord Wilberforce, A Campbell and N Ellis, *Restrictive Trade Practices and Monopolies*, 2nd ed, p 24.
16. Ibid, p 25.

Even after the famous Statute of Monopolies in 1623 purporting to make monopolies void, the Crown continued to grant them as a means of revenue raising without the need for Parliamentary approval. One of the most important monopolies Queen Elizabeth I granted was a 'Charter' to the East India Company which gave it a monopoly over trade with India and other eastern countries. One of the most important products acquired and sent back to England by the East India Company was saltpetre. Saltpetre was the main ingredient used at the time in the production of gunpowder and explosives because of its high levels of nitrate and potassium. The East India Company was particularly efficient in developing its monopoly — an inquiry by the House of Lords in 1693 found that the company had spent the astronomical amount of 90,000 pounds for the corruption of public servants in securing its trade.

1.11 Why were the monopolies of the East India companies tolerated? Dutch East India lawyer, Pieter Van Damm, suggested:

> The State ought to rejoice at the existence of an association which pays it so much money every year that the country derives three times as much profit from trade and navigation in the Indies as the shareholders.[17]

Centuries later, the British Empire was to colonise India and exert a monopoly over the production of salt. Only British firms could produce salt and there was an enormous tax on domestic Indian labour that did make salt. In a hot and dehydrating climate, the need for salt was crucial. In March 1930, an Indian ex-lawyer by the name of Mohandas Gandhi set off on a 241-mile march to Dandi on the Indian Coast, where he proceeded to make salt in objection to the British monopoly. Some historians regard this major act of non-violent public objection to a manufacturing monopoly to be the beginning of the downfall of Britain's domination of India.

The United States of America

1.12 Predictably, the early settlers of Jamestown and Virginia faced problems with forestalling as ships' captains sold their cargo to traders before the goods were unloaded and sold in the town's markets. Laws were passed preventing such sales, giving the colonists time to journey to the capital at Jamestown to make their purchases. In 1641, the Coppie of the Liberties of the Massachusetts Colonie in New England provided:

> No monopolies shall be granted or allowed amongst us but of such new Inventions that are profitable to the Countrie, and that for a short time.[18]

As the American colonies were attempting to build an agricultural and mercantile base, they were gradually being squeezed by English trade policy. England imposed various monopolistic and exclusive dealing restraints on the American colonies, effectively designed to deny them access to international markets and to make them rely on imports from England to the detriment of their own fledgling industries.

17. F Braudel, *Civilization and Capitalism, 15th–18th Century* (3 vols), Harper and Row, New York, 1981–84 (original editions in French, 1979), p 445.
18. F D Jones, 'Historical Development of the Law of Business Competition Part II' (1926–1927) 36 *Yale Law J* at 46.

By the mid-1700s, these policies and the taxation levied to enforce them spawned widespread boycotts of English goods. These boycotts were met with violence and retribution. These events contributed to the American Revolution.

1.13 However, modern United States 'Antitrust law' stems from the late 19th century. Following the American Civil War (1861–65), changing economic circumstances saw the rise of trade restraints. While state courts employed the common law to strike down restraints of trade and more obvious price-fixing arrangements, more subtle forms of market manipulation arose.

These forms of control involved common ownership and control of business entities. At that time, corporations could not purchase shares and stocks in another corporation. To get around this, stock in corporations was placed into trusts for the benefit of stockholders. The trustees controlled the management of multiple corporations, enabling them to engage in coordinated anti-competitive behaviour.

The late 1800s saw the rise of the Standard Oil Trust and similar trusts in other vital industries, including the railroads, all of which were directed toward market manipulation and price-fixing. Producers of primary products, including farmers as well as consumers, demanded an end to such practices amidst growing public fear of price exploitation.

One contemporary writer observed:

> Indeed the public mind has begun to assume a state of apprehension, almost amounting to alarm, regarding the evil economic and social tendencies of these organisations. The social atmosphere seems to be surcharged with an indefinite but almost inexpressible fear of trusts.[19]

1.14 By 1888, both major American political parties advocated anti-monopoly platforms. In 1889, Senator Sherman introduced:

> A bill to declare unlawful, trusts and combinations in restraint of trade and production.[20]

After much deliberation, the Republican 51st Congress in 1890 enacted the Sherman Act, prohibiting monopolisation.

The Australian context

1.15 It was to the Sherman Act that Australia looked in its first attempt at addressing anti-competitive trading practices shortly after Federation. The history of trade practices regulation in Australia can generally be divided into six periods:

1. 1906–65;
2. 1965–74;
3. 1974–95;
4. 1995–2003;
5. 2003–10; and
6. post-2010.

19. G W Stocking and M W Watkins, *Monopoly and Free Enterprise*, Twentieth Century Fund, New York, 1951, p 80.
20. F D Jones, 'Historical Development of the Law of Business Competition Part III' (1926–27) 36 *Yale Law J* at 218.

and substitutable sources of new supply (supply side) which would constrain an attempt by the firm to exercise market power (engage in discretionary behaviour) have been exhausted.

9. An assessment is then made of the relationship between the firm's alleged anti-competitive conduct and the identified substitutes. If those substitutes in fact act as constraints on the exercise of market power, then it is unlikely that the conduct will substantially lessen competition in breach of the Act. However, if the answer is no, then it may be that the firm has market power and its conduct may substantially lessen competition in breach of the Act.

Further reading

D Brewster, 'Market Definition and Substitutability — Australian Courts Continue to Struggle with Part IV of the Trade Practices Act 1974 (Cth)' (1996) 12 *QUTLJ* 246

G Edwards, 'From Super-League to the Super-market? The Appropriate Emphasis in Market Definition' (1997) 4 *CCLJ* 220

G Edwards, 'Sub-markets as Competition Law Markets: The Appropriate Approach to the Sub-market Concept in Market Definition' (1998) 6 *CCLJ* 156

D Hay, 'A Lesson from the US Hypothetical Monopolist about Market Definition: Timeframes and Thresholds and the QCMA Test' (1998) 6 *CCLJ* 73

M Landrigan, 'The Delineation of Sub-markets under TPA Part IV' (1997) 5 *CCLJ* 58

G Owbridge, 'Globalisation, the Information Age and Market Definition under the Trade Practices Act 1974' (2010) 18 *CCLJ* 28

Chapter 4

Market Power and Substantial Lessening of Competition

Overview

This chapter is intended to:

- explain the relationship between market definition, market power and the substantial lessening of competition threshold;
- introduce you to the concepts of competition, market power and substantial lessening of competition;
- examine the way market power is identified in the form of price and non-price discretionary behaviour;
- identify the factors that indicate whether a market is competitive or likely to facilitate the exercise of market power;
- explain the approach of the courts to the term 'substantial lessening of competition';
- illustrate the working of the 'future with and the future without' test as the process by which conduct may or may not substantially lessen competition; and
- demonstrate the interrelationship between market definition, competition, market power and substantial lessening of competition.

Introduction

4.1 In **Chapter 3**, we saw that the process of defining a market is not an end in itself, but merely a means by which a firm's market power is evaluated. If a firm has market power, it may be in a position to lessen competition; if it can substantially lessen competition, then the firm may be in breach of a provision of Pt IV of the Competition and Consumer Act 2010 (Cth) (CCA) (the Act).

We saw that there is an inverse relationship between the level of competition in a market and the existence of market power. The more competitive a market is, the less likely that any one firm has market power. This is because a competitive market is characterised by cross-elasticity of supply and demand, so that if a firm attempted to raise the price of their goods or services above the competitive level then customers could swap to other goods or services that are (to use the words of s 4E of the Act) 'substitutable for or otherwise competitive with' that firm's goods or services.

For this reason, we saw that market definition is always just the first aspect of the overall inquiry into the central question of whether the conduct in question is an expression of market power and whether that conduct might substantially lessen competition in a relevant market. This is why the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177; 83 ALR 577 stated (ALR at 582):

> In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining a market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated.

Likewise, the court in *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826; (2006) ATPR ¶42-123 stated (at 45,244):

> Market definition is not an exact physical exercise … it is the recognition and use of an economic tool or instrumental concept related to market power, constraints on power and the competitive process which is best adapted to analyse the asserted anti-competitive conduct.

4.2 But how does the process of market definition reveal the existence of market power? What does market power 'look like'? What indicators or factors do the courts look for in evaluating a firm's market power? What does the court mean when it talks about 'constraints on power'? And what is the relationship between market power and the 'substantial lessening of competition' (SLC) threshold in Pt IV of the Act?

These are the questions to be explored in this chapter. After reading and understanding the principles in this chapter and **Chapter 3**, you will have an idea of the basic economic principles that underpin the Act. These economic principles can then be 'picked up and dropped into' any problem involving conduct alleged to breach the Act.

For example, whether you are considering the effect of a market-sharing arrangement or understanding between competitors under s 45(2), an exclusive dealing arrangement under s 47 or a potentially anti-competitive merger or acquisition under s 50 of the Act, the same economic principles will be relevant to your analysis.

In each case, you will have to define a market that best enables an evaluation of the conduct at issue, consider the existence of structures and patterns of behaviour that might facilitate the exercise of market power by a firm and then evaluate whether that firm's conduct might substantially lessen competition in breach of a provision of Pt IV of the Act.

For this reason, **Chapters 3** and **4** form the 'hermeneutical key' to the Act; that is, the principles of market definition, market power, competition and SLC are the fundamental interpretative concepts enabling you to understand and apply the provisions of the Act to any given situation involving potentially anti-competitive corporate conduct.

Market power

4.3 A corporation that has an effective and efficient competitive strategy will tend to acquire more customers, more market share and generally exert a more influential position in the market. The acquisition of power and influence in the market is a natural consequence

of the forces of competition that the Act encourages. Therefore, the Act does not punish the acquisition of market power.

However, it does punish the use of that market power for anti-competitive purposes. In **Chapter 8**, we will examine s 46 of the Act that specifically prohibits a corporation which has a substantial degree of power in a market from taking advantage of that power to injure or eliminate a competitor.

We noted that market power is the antithesis or opposite of competition. But what is market power?

Identifying market power

4.4 No definition of the term 'market power' is found in the Act; s 46(4)(a) provides that a reference to power in s 46 is a reference to market power. This redundant-sounding definition does have considerable significance in distinguishing the use of market power by a corporation from the use of some other form of economic power, such as a contractual or regulatory right. This issue will be considered in more detail in **Chapter 8**.

4.5 For the moment, we can note that it has been left to the courts to determine the meaning of the phrase 'market power'. A good starting point is the observation of the Tribunal in *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR ¶40-012 which stated (at 17,246):

> As is often said in United States antitrust cases, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. That power may or may not be exercised. Rather, where there is significant market power the firm (or group of firms) acting in concert is sufficiently free from market pressures to 'administer' its own production and selling policies at its discretion.

There are several key concepts contained in this statement that have been agreed with and applied by all subsequent decisions concerning issues of market power.

These concepts indicate the following as being characteristic of market power:

- the power to raise price and exclude entry;
- freedom from competitive pressures;
- freedom to engage in discretionary production and selling policies; and
- the ability to do the above without rivals taking away customers 'in due time'.

Let's consider what the courts have had to say about these indicators of market power.

Market power identified by price and non-price strategies

4.6 On the first occasion it considered s 46 of the Act, the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177; 83 ALR 577 (*QWI*) where Mason CJ and Wilson J defined market power to mean (ALR at 583):

> … 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 product.

While Mason CJ and Wilson J focused on the unconstrained ability to raise prices, Dawson J focused on other discretionary behaviour (ALR at 591):

> The term 'market power' is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner … But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal … The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices …

Dawson J's emphasis on non-price behaviour as an indicator of market power resulted from his Honour adopting an observation by an influential American text, *Antitrust Policy* by Kaysen and Turner, where the authors stated:

> A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing similar cost and demand conditions.[1]

4.7 In their text, Kaysen and Turner identify five factors that enable the evaluation of a market which influences the development of competition or market power:

1. the breadth of the market and the character of demand;
2. the number and size distribution of sellers and buyers;
3. the conditions of entry for new sellers and of expansion for existing sellers;
4. the character and importance of product differentiation; and
5. the degree of independence of action among buyers and sellers.

4.8 These five factors that enable an evaluation of market power are remarkably similar to the factors identified by the court in *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 494. Lockhart J summarised a number of factors that were relevant in identifying the existence of market power (at 138):

- 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 conduct of the firm under scrutiny in the market is constrained by the conduct of competitors or potential competitors;
- although not determinative, the market share of the firm under scrutiny;
- the presence of vertical integration; and
- the extent of barriers to entry.

From this list, which his Honour derived from the *QWI* decision above, you can see that market power in the form of discretionary behaviour can be identified by both price and non-price strategies. This list was also adopted by the court in *RP Data Ltd (ACN 087 759 171) v State of Queensland* [2007] FCA 1639; (2007) ATPR ¶42-197 (at 48,267).

4.9 Identifying the presence of market power by looking at the ability of a firm to engage in both discretionary price and non-price behaviour was approved of by the High Court in its subsequent decision in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* [2003]

1. C Kaysen and D Turner, *Antitrust Policy*, Harvard University Press, Cambridge, 1959, p 75.

HCA 5; (2003) 215 CLR 374; ATPR ¶41-915. Gleeson CJ and Callinan J referred to the *QWI* case and stated (at 49,471):

> Pricing may not be the only aspect of market behaviour that manifests power. Other aspects may be the capacity to withhold supply; or to decide the terms and conditions, apart from price, upon which supply will take place. But pricing is ordinarily regarded as a critical test … Power, that is, the capacity to act without constraint, may result from a variety of circumstances. A large market share may, or may not, give power.
>
> The presence or absence of barriers to entry into a market will ordinarily be vital. Vertical integration may be a factor … Power in a supplier ordinarily means the ability to put prices up, not down.

These comments were specifically adopted by the Full Court in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd (No 2)* [2008] FCAFC 141; (2008) 170 FCR 16; ATPR ¶42-247 at 49,470.

How do these factors indicate the existence of market power?

4.10 What is the relationship between the various factors listed above and the existence (or otherwise) of market power? Let's consider how each of these factors work.

Barriers to entry

4.11 Barriers to entry are the obstacles that a firm must overcome in order to enter the market. In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* above, Dawson J stated (ALR at 592):

> The existence of barriers to entry may be conclusive in determining the relevant market and the degree of market power in it. In the context of s 46, the existence of significant barriers to entry into a market carries with it market power on the part of those operating within the market. Market power follows as a natural consequence of barriers to entry which are also a prerequisite to the establishment and maintenance of a monopoly.

A firm attempting to initiate a small but significant and non-transitory increase in the price (SSNIP) of its goods or services will be constrained if barriers to entry to the market are low. In response to the price rise, potential new firms could enter the market and constrain the attempt by the firm to exercise market power.

4.12 The relatively low barriers to entry into the market was significant for the court in *Australian Gas Light Co v ACCC (No 3)* [2003] FCA 1525; (2003) 137 FCR 317; ATPR ¶41-966. The court examined whether the Australian Gas Light Company's acquisition of shares in the consortium that owned the Loy Yang Power Station would enable it to substantially lessen competition in the relevant market.

The court considered the possibility that Loy Yang could occasionally generate 'price spikes' by withholding supply. The issue was whether this ability was the result of Loy Yang enjoying a substantial degree of market power.

Because of evidence that entry barriers to the market were low, the fact that gas turbines could be commissioned in less than two years and the presence of new entrants already trading in the market in response to the price spikes by Loy Yang, the court concluded that the acquisition would not result in a substantial lessening of competition.

The constraining influence of competitors

4.13 In a competitive market, firms will find it difficult to initiate a significant and sustainable increase in the prices of its goods or services. In the event of a price rise, consumers can swap over to the goods or services produced by rivals. The presence of substitutable goods and services functions as a constraint on the acquisition or exercise of market power by a firm.

In *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* [2003] HCA 5; (2003) 215 CLR 374; ATPR ¶41-915, the ACCC alleged that Boral had taken advantage of its substantial degree of market power in selling concrete masonry products below cost in order to drive competitors out of the market.

The High Court noted the remarks of Heerey J in finding (at 46,680):

> The low barriers to entry and the existence of strong competitors, in particular Pioneer and, as time passed, C&M meant that BBM did not have power to behave independently of competition and competitive forces.

The constraining influence of customers — countervailing power

4.14 Powerful customers may constrain the ability of a firm to exercise market power through rises in prices or exclusionary conduct. In *Boral Besser Masonry Ltd v ACCC*, above, the High Court found that the over-capacity of concrete block manufacturers meant that builders and bricklayers could exert considerable influence over the prices charged by Boral and other manufacturers.

Gleeson CJ and Callinan J stated (at 46,670):

> The unchallenged finding that customers were 'able to force' the price of masonry products 'down and down' is of major importance in considering whether BBM, or any other supplier, had, and took advantage of, a substantial degree of market power …

Market share

4.15 Although a firm may possess a large share of the market, this, by itself, does not indicate that it enjoys market power. In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177; 83 ALR 577 Mason CJ and Wilson J stated (ALR at 583):

> A large market share may well be evidence of market power … but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power.

The existence of barriers to entry will be crucial in assessing whether a firm that enjoys a significant share of the market possesses market power. A firm that enjoys a market share of 80% in a market with low or no barriers to entry is unlikely to possess market power. This is because new entrants can enter the market in response to a rise in the price of the firm's goods or services.

This is the reasoning behind the comment made by Gleeson CJ and Callinan J in *Boral Besser Masonry Ltd v ACCC*, above, where they stated (at 49,471):

> A large market share may, or may not give power. The presence or absence of barriers to entry into a market will ordinarily be vital.

Market power not established by conduct alone

4.16 It is true that non-price conduct, but especially exclusionary conduct (such as refusal to supply or the implementation of certain adverse trading terms), may indicate the presence of market power. Justice Finkelstein in the Full Court appeal in *Australian Competition and Consumer Commission v Boral Ltd* [2001] FCA 30; (2001) 106 FCR 328; ATPR ¶41-803 expressly drew this connection (at 42,643):

> Generally, an analysis of abuse of market power involves a two-stage process: first, it is necessary to determine whether a firm has market power, second it is necessary to examine whether that power has been abused. However, when the existence of market power is defined by reference to a firm's ability to exclude competition, the two step investigation is not appropriate. The evaluation of market power and the abuse of that power is part of one analysis. The existence of market power based on this approach cannot be examined independent of the alleged exclusionary conduct. It is the exclusionary conduct that establishes market power, not the reverse.

However, on further appeal, the High Court disapproved of this approach, stating that it is not acceptable to conclude that a firm possesses market power solely on the basis of the conduct it has engaged in.

4.17 In *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* [2003] HCA 5; (2003) 215 CLR 374; ATPR ¶41-915, Gleeson CJ and Callinan J stated (at 46,685):

> The questions whether BBM had a substantial degree of power in a market … and whether its behaviour and in particular it pricing behaviour … involved taking advantage of, that is, using that power, are closely related. But as the decision in *Melway* shows, they are two questions, not one.

Justices Gaudron, Gummow and Hayne also disagreed with this approach to identifying the existence of market power. Their Honours stated (at 46,693):

> In any event, as s 46 is framed and has been interpreted in this court, what is required first is an assessment of whether the firm in question possessed a substantial degree of market power, having regard to considerations such as those referred to by Heerey J (the trial judge) and, if so, then asking whether the firm has taken advantage of that power for a proscribed purpose and in that way abused the power.

Essentially, the High Court is warning that it is not permissible to regard evidence about exclusionary conduct, as well as the purpose of that conduct, as also being evidence of market power.

4.18 A good illustration of this approach is found in the decision of the Full Court in *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193; (2003) 131 FCR 529; ATPR ¶41-947. In 1998 and 1999, Universal Music Australia Pty Ltd (Universal) and Warner Music Australia Pty Ltd (Warner) were large distributors of recorded music in Australia.

Universal was the creation of a merger between Polygram Pty Ltd and Universal Music Australia Pty Ltd. Warner and Universal, together with three other Australian recording companies, accounted for about 90% of the wholesale market for recorded music. However, Universal and Warner accounted for about 17% and 16% of that market respectively.

R Wright and M Painter, 'Recent Developments in the Application of s 46: *Melway* and *Boral* Considered' (2001) 21 *ABR* 105

Market power

A Merrett, 'The Court Speaks for Itself: What Australian Decisions Say about Assessing Market Power for the Purposes of s 46 of the TPA' (2004) 11 *CCLJ* 1

(Many of the articles discussing *Melway* and *Boral* also discuss approaches to measuring market power.)

Take advantage

M Brock, 'Section 46 of the Trade Practices Act — Has the High Court Made a "U-turn" on "Taking Advantage?"' (2005) 33 *ABLR* 327

A Duke, 'The Need to Close the "Take Advantage" Gap in the Regulation of Unilateral Anti-competitive Conduct' (2008) 15 *CCLJ* 284

H Ergas and M Landrigan, 'Not Another Article about Section 46 of the Trade Practices Act!' (2004) 32 *ABLR* 415

I Stewart, 'Taking Advantage of Market Power in Section 46 of the *Trade Practices Act 1974* (Cth)' (2005) 33 *ABLR* 343

Purpose

S Quo, 'Interpretation and Application of the Purpose Test in s 46 of the *Competition and Consumer Act 2010*' Pt 1 (2011) 19 *CCLJ* 90; Pt 2 (2012) 19 *CCLJ* 215

Legitimate business decision

B Marshall, 'The Relevance of a Legitimate Business Rationale Under Section 46 of the *Trade Practices Act*' (2003) *Deakin LR* 3

Predatory pricing

G Campbell, 'Quo Vadis? Towards an Effective Predatory Pricing Provision' (2009) 17 *TPLJ* 82

J Clarke, 'Australia's Radical Predatory Pricing Reforms: What Business Must Know' (2008) 1 *Deakin LR* 6

S Corones, 'Sections 46(1) and 46(1AA) of the TPA: The Struggle of the Small Against the Large' (2009) 37 *ABLR* 110

Bundling

J Gans and S King, 'Potential Anti-competitive Effects of Bundling' (2005) 33 *ABLR* 30

I Wylie, 'When is Bundling Illegal in Australia under s 46 or s 47 of the *Trade Practices Act 1974* (Cth)?' (2005) 33 *ABLR* 190

Chapter 9

Exclusive Dealing

Overview

This chapter is intended to:

- introduce the concepts of vertical price and vertical non-price restraints;
- identify the basic forms that vertical non-price restraints can take;
- explain why exclusive dealing is considered 'bad' for competition;
- explore the basic structure of s 47 of the Competition and Consumer Act 2010 (Cth) (CCA) (the Act);
- illustrate that structure in detail by reference to the most common forms of product, customer and territorial restraints;
- understand the basic and common concepts that underpin s 47 of the Act;
- examine the courts' approach to analysing whether exclusive dealing conduct has the purpose or effect of substantially lessening competition;
- provide a detailed and worked 'road map' of every subsection of s 47 of the Act; and
- provide references to academic articles for further reading.

Introduction

9.1 Vertical restraints on competitive behaviour operate across different functional levels of the production and distribution of goods or services in a market. They usually involve the behaviour between suppliers and wholesalers or between wholesalers and retailers. In this form, they are unlike horizontal restraints, such as price-fixing or market sharing, because the restraints are not made between potential competitors at the same functional level of the market.

9.2 Vertical restraints generally take one of two forms. The first form can involve pricing behaviour. In that case, a supplier might try to ensure that their retailers maintain a minimum resale price. These vertical price restraints are referred to as the 'practice of resale price maintenance' (RPM) and are discussed in **Chapter 10**.

9.3 The second form of vertical restraint may not be concerned with price. These vertical non-price restraints often take the form of exclusive dealing arrangements. They usually occur when a supplier of goods or services will only supply to a retailer if that retailer accepts some form of condition that restricts their ability to resell those goods or services.

These conditions generally restrict the retailer in one of three ways:

1. The supplier can restrict the retailer from buying goods or services from a competitor of the supplier. These restraints often involve product ties.
2. The supplier can restrict the retailer from selling the supplier's goods to particular persons or classes of persons.
3. The supplier can restrict the retailer from selling the suppliers' goods in certain places or classes of places. These restraints often involve territorial restrictions.

9.4 Section 47 of the Act prohibits vertical non-price restraints in two ways:

1. The majority of vertical non-price restraints, whether involving goods, customers or territory, where the restraint substantially lessens competition in the relevantly defined market, will be prohibited by the Act.
2. Some forms of restraint are prohibited per se without involving any analysis of whether the restraint actually harms competition in the relevant market.

Why is exclusive dealing 'bad' for competition?

9.5 Vertical restraints on competitive conduct between producers and distributors influence both intra-brand competition and inter-brand competition. This influence is not always detrimental to the competitiveness of the market and, in some circumstances, the restraint may have a pro-competitive effect on the market. For example, in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13; (2001) 205 CLR 1; ATPR ¶41-805, the High Court recognised that although Melway's segmented and restrictive distribution system restricted competition for Melway Street Directories (intra-brand competition), it may have encouraged rival producers of street retailers to become more efficient, thus enhancing inter-brand competition.

As the influence of vertical restraints on the market continues to be analysed, economists are less likely to argue that such restraints are either always anti-competitive or always pro-competitive. See 'Further reading' at the end of this chapter.

9.6 *Inter-brand* competition exists when retailers sell *different brands* of the same product, such as computers or shoes. The consumer benefits from inter-brand competition because they are able to 'shop around' for the best price for the kind of product they are after. Generally speaking, where there is healthy inter-brand competition, it prevents individual retailers and suppliers charging a price that is greater than the competitive level.

However, vertical non-price agreements that involve product restrictions have the potential to lessen inter-brand competition. For example, assume that retailer A is selling several brands of shoes and wishes to stock the next season's range of shoes from manufacturer X. Assume then that manufacturer X agrees to supply those shoes to A on condition that A also buys 90% of its shoes from X. In that situation, A no longer sells other brands of shoes. Competition for different brands of shoes is thus reduced.

9.7 *Intra-brand* competition exists where different retailers sell *the same brand* of product that is made by the manufacturer. The consumer benefits from intra-brand competition because they are also able to 'shop around' for the best price for the particular brand of

product they are after. Generally speaking, where there is healthy intra-brand competition, the consumer benefits.

9.8 Non-vertical price agreements involving territorial or customer restrictions have the potential to lessen intra-brand competition. For example, assume that in the Sydney CBD there are seven retailers that offer producer X's brand of running shoe. Customers can shop around among these retailers to find the best-priced brand of X's shoe. However, assume that X then offers to supply next season's shoes on condition that each of the retailers agrees not to supply to certain 'segments' of the market. Competition for that brand of shoe may be lessened since not everyone may then be able to shop around for that brand of shoe.

9.9 These concerns are reflected in the way the courts approach the analysis of vertical non-price restraints: a market is defined, its competitive dynamics identified and the likely effect of the restraint upon those dynamics is assessed. Where the effect of the restraint (except for the per se provisions) is to substantially lessen competition in the market, then it is prohibited by the Act.

We will return to the anti-competitive nature of s 47 when we examine how different forms of vertical non-price restrictions affect competition in a market.

The structure of s 47

9.10 Section 47 is a very complex section. It contains fourteen subsections and spans at least four pages in most versions of the Act. It involves two different thresholds for assessing the very diverse forms of vertical non-price restraints that it is intended to deal with.

There are three important steps in establishing exclusive dealing conduct:

1. Section 47(1) simply states that '[s]ubject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing'. Section 47(1) therefore prohibits the conduct but does not then define what the 'practice of exclusive dealing' actually means.
2. The 'practice of exclusive dealing' is defined in s 4(1) of the Act to mean 'the practice of exclusive dealing referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9)'.
3. The practice of exclusive dealing defined in s 47(2), (3), (4), (5), 8(a), 8(b) or 9(a), (b) or (c) is only prohibited if the conduct has the purpose, effect or likely effect of substantially lessening competition. This 'separating out' of s 47(6), (7), 8(c) and 9(d) exclusive dealing conduct is deliberately made by s 47(10).

9.11 Section 47(6) and (7) are special forms of exclusive dealing conduct commonly referred to as 'third line forcing'. The difference between third line forcing conduct and other forms of exclusive dealing conduct will be explained below. For the moment, it is important to note that, except for third line forcing conduct, exclusive dealing conduct will only breach s 47(1) if the conduct substantially lessens competition.

9.12 Therefore, the elements of a cause of action under s 47 of the Act are:

1. the conduct must fit the definition of 'the practice of exclusive dealing';
2. for all forms of exclusive dealing conduct other than third line forcing, the conduct must have the purpose, effect or likely effect of substantially lessening competition; and
3. the exclusive dealing conduct must have occurred 'in trade or commerce'.

The practice of exclusive dealing

9.13 Section 47(2)–(9) then sets out the various forms of behaviour that constitute 'the practice of exclusive dealing'. In overview, these forms of behaviour are as follows:

- Section 47(2): A corporation engages in the practice of exclusive dealing if the corporation supplies or offers to supply goods or services *on condition* that:
  - the purchaser will agree not to acquire goods or services from a competitor of the supplier (s 47(2)(d));
  - the purchaser accepts some restriction on the right to re-supply goods or services acquired from a competitor (s 47(2)(e));
  - the purchaser accepts some restriction on the re-supply of goods or services to persons or particular classes of persons or to 'places or particular classes of places': s 47(2)(f).
- Section 47(3): A corporation engages in the practice of exclusive dealing if the corporation refuses to supply goods or services *for the reason that*:
  - the person (the acquirer) has acquired, or has not agreed not to acquire, goods or services from a competitor of the supplier (in other words, the negative or reverse of s 47(2)(d)) (s 47(3)(d));
  - the person has re-supplied, or has not agreed not to re-supply, goods or services acquired from a competitor of the supplier (s 47(3)(e));
  - the person has re-supplied, or has not agreed not to re-supply, goods or services to particular persons or classes of persons or to places or particular classes of places: s 47(3)(f).
- Section 47(4): A corporation 'engages in the practice of exclusive dealing if the corporation acquires, or offers to acquire, goods or services' *on condition* that the supplier will not, or will not to a limited extent, supply goods or services to 'particular persons or classes of persons' or to places or particular classes of places.
- Section 47(5): A corporation engages in the practice of exclusive dealing if the corporation *refuses to acquire* goods or services from a person *for the reason that* the supplier will not or will not to a limited extent supply goods or services to particular persons or classes of persons or to places or particular classes of places.
- Section 47(6): A corporation also engages in the practice of exclusive dealing if it supplies or offers to supply goods or services *on condition* that the acquirer will acquire goods or services 'from another person'.
- Section 47(7) is the negative form of s 47(6) above (refusing to supply).
- Section 47(8): A corporation also engages in the practice of exclusive dealing if it grants or renews an interest in land on certain restrictive conditions.
- Section 47(9) is the negative form of s 47(8) (refusing to grant a lease, licence or interest in land because of a refusal to accept a restrictive condition).

9.14 There are a number of ways to think about the structure of s 47 of the Act and the restrictions that it targets. One way is to think about the *object* of the restriction; that is, whether the supply upon restriction involves a product, customer or a certain distribution territory. Another way is to think about the *nature* of the supply upon condition; that is, whether it involves a 'negative' or refusal to supply or acquire unless a restrictive condition is

accepted, or a 'positive' agreement to supply or acquire but only after a restrictive condition is accepted.

Both of these ways of approaching the structure of s 47 are outlined below.

Products, customers and territories

9.15 All of the 'practices of exclusive dealing' that are described in s 47 concern restrictions on goods or services, customers and areas of supply (territories).

Product restrictions

9.16 The practices involving product restrictions are:

- where corporation A supplies or offers to supply goods or services to B on condition that B will not acquire goods or services (products) from a competitor of A (s 47(2)(d));
- where corporation A supplies or offers to supply goods or services to B on condition that B will acquire goods or services from a third party (s 47(6));
- where corporation A acquires or offers to acquire goods or services from B on condition that B will not supply goods or services of any description to any person (s 47(4)(b));
- where corporation A refuses to supply goods or services to B for the reason that B has not agreed to accept a restraint on its ability to deal with those goods or services (s 47 (3)(d));
- where corporation A refuses to acquire goods or services from B for the reason that B has supplied or has not agreed not to supply goods or services (47(5)(b)); or
- where corporation A refuses to supply goods or services to B for the reason that B has not acquired goods or services from a third party: s 47(7).

Customer restrictions

9.17 The practices involving customer restrictions are:

- where corporation A supplies or offers to supply goods or services to B on condition that B will not re-supply goods or services that B acquired from a competitor of A (s 47(2)(e));
- where corporation A supplies or offers to supply goods or services to B on condition that B will not re-supply the goods or services to particular persons or classes of persons (s 47(2)(f)(i));
- where corporation A refuses to supply goods or services to B for the reason that B has re-supplied goods or services acquired from a competitor of A (s 47(3)(e));
- where corporation A refuses to supply goods or services to B for the reason that B has re-supplied goods or services acquired from A to any person or to particular persons or classes of persons (s 47(3)(f)(i)); or
- where corporation A refuses to acquire goods or services from B for the reason that B has supplied goods or services to particular persons or classes of persons: s 47(5)(c).

Territorial restrictions

9.18 The practices involving territorial restrictions are:

- where corporation A supplies or offers to supply goods or services to B on condition that B will not re-supply the goods or services in particular places or classes of places (s 47(2)(f)(ii));
- where corporation A refuses to supply goods or services to B for the reason that B has re-supplied goods or services acquired from A in particular places or classes of places (s 47(3)(f)(ii));
- where corporation A acquires or offers to acquire goods or services from B on condition that B will not supply the goods or services in particular places or classes of places (s 47(4)(d)); or
- where corporation A refuses to acquire goods or services from B for the reason that B has supplied goods or services in particular places or classes of places: s 47(5)(d).

Positive and negative conduct

9.19 These practices can also be thought of as involving 'positive' and 'negative' forms of conduct.

Positive conduct involves a supply or acquisition upon a restrictive condition, and is found in s 47(2), (4), (6) and (8). Negative conduct involves a refusal to supply or acquire because of failure to do so or to accept a restrictive condition and is found in s 47(3), (5), (7) and (9).

Generally speaking, the 'positive' forms of exclusive dealing are found in the even-numbered subsections, while the 'negative' forms of exclusive dealing are found in the odd-numbered subsections. It's all a bit odd.

Product 'forcing' and 'tying'

9.20 Sometimes, certain forms of exclusive dealing conduct are referred to as 'full line forcing', 'third line forcing' and 'product tying'. For example, in *KAM Nominees Pty Ltd v Australian Guarantee Corporation Ltd* (1994) 51 FCR 338; ATPR ¶41-325, the court considered an earlier decision involving s 47(6) conduct and stated (ATPR at 42,292):

> Smithers and Northrop JJ held that, for s 47(6) to apply, the requirement that the acquirer from the third line forcing supplier 'will' acquire goods or services …

Likewise, the headnote to *Australian Automotive Repairers' Association (Political Action Committee) Inc (in liq) v Insurance Australia Ltd* [2006] FCAFC 33; (2006) ATPR ¶42-111 states: 'Trade Practices — Exclusive dealing — First line forcing'. The High Court in *SST Consulting Services Pty Ltd v Rieson* [2006] HCA 31; (2006) 225 CLR 516; ATPR ¶42-118 employed the heading 'Third line forcing' before commencing its discussion of s 47(6) of the Act.

None of these terms are contained in the text of s 47 but they are useful descriptors of the mechanics of exclusive dealing conduct. Here is how they work.

9.21 To begin with, it is important to recall the basic wrong that exclusive dealing prohibits. In its most basic form, this wrong is the 'forcing' or 'tying' of product A, that one party wants, to another product, B, that the party does not want.

Assume company A wants to buy pens from company B. Company B is happy to sell pens, but it also wants to increase its flagging sales of ink. No one wants to buy B's ink because of its poor quality. Therefore, B decides to create a market for the ink by 'tying' the sale of the ink to the pens. In this way, B agrees to supply pens to A *on the condition* that A will also buy the ink from B. The ink product is therefore 'forced' onto A. The pen is the 'tying product' and the ink is the 'tied product'.

If we change these facts slightly, we can see how the mechanics of 'third line forcing' works. Assume that company B agrees to sell pens to company A, but only on condition that it also buys its ink from company C. In this case, C is the third party whose goods (ink) are 'forced' by company A onto company B as a condition of the sale of pens. Hence, this is third line forcing.

Forms of exclusivity

9.22 Using the above scheme, we can see that s 47(2)–(9) (outlined at **9.13**) describes five basic forms of exclusive dealing conduct, each one of them having the potential to lessen competition in a market:

1. product exclusivity;
2. customer exclusivity;
3. territorial exclusivity;
4. third line forcing; and
5. conduct involving interests in leases and licences of land.

Set out below are common examples of these forms of conduct as they are found in the case law. At this stage, we won't be concerned with how the court concluded whether or not the conduct in each case actually substantially lessened competition. The method, process and tests involved in assessing whether exclusive dealing conduct 'substantially lessens competition' will be discussed in more detail later.

At this stage, try to see how the conduct at issue 'fitted' the statutory description of the practice of exclusive dealing in s 47. Also, try to see how the conduct might have affected inter-brand or intra-brand competition for the products in question.

Product exclusivity

9.23 Why would suppliers want to impose restrictions in relation to the supply of their products? There are a number of common reasons:

- to prevent customers from buying a competitor's goods or services, thus reducing or even eliminating inter-brand competition;
- to require customers to buy all or most of their stock from the supplier (requirements contracts);
- to require customers to buy more than one product in the same transaction (bundling); or

- to require customers to buy products from a third party with whom the supplier has a commercial relationship (third line forcing).

The following cases demonstrate how these practices work.

Reducing or eliminating inter-brand competition

9.24 In *Australian Competition and Consumer Commission v Eurong Beach Resort Ltd* [2005] FCA 1900; (2006) ATPR ¶42-098, the respondents owned and operated a barge transporting passengers to Fraser Island, off the coast of Queensland. For some time, the respondents operated the only barge service to Fraser Island. However, a rival company began operating barge transportation services to Fraser Island in competition with the respondents.

The respondents then (inter alia) entered into contracts with customers to offer discounts on barge services if those customers did not use the competing service. The court found that the respondents had breached ss 45, 46 and 47 of the Act. However, this was not a case of product tying because the respondents were not supplying barge transport services to customers on condition that they also acquire other services (such as accommodation) from them. Nor were the respondents offering to supply barge transport services on condition that the customers acquire other goods or services from a third party.

This doesn't seem like a case of product tying or forcing in the way we have described it above. So how did the respondent's conduct amount to 'the practice of exclusive dealing' as defined in s 47(2)(d)? The easiest way to work this out is to substitute the names of the parties and the supplied goods or services into the relevant legislative scheme.

Therefore, in this case, we can submit that Eurong Beach Resort Pty Ltd (Eurong) engaged in the practice of exclusive dealing because it gave a discount in relation to the supply of transportation services (s 47(2)(c)) on the condition that customers did not acquire barge transportation services from a competitor of Eurong: s 47(2)(d).

How might this conduct affect competition? The presence of the rival barge operator meant that there was competition for the provision of barge transportation services to Fraser Island — this being inter-brand competition. However, Eurong was clearly attempting to damage the competitive position of the rival barge operator by offering discounts to customers who did not use the rival service. Eurong was thus attempting to diminish inter-brand competition.

9.25 Likewise in *Australian Competition and Consumer Commission v FILA Sport Oceania Pty Ltd* [2004] FCA 376; (2004) ATPR ¶41-983, FILA wholesaled sports clothes that were licensed by five teams within the Australian Football League (AFL) competition. These clothes were of two types: 'on field' clothes, worn by players and officials, and 'team spirit' clothes, offered for sale to the general public. Some clothing retailers also sold 'on field' clothes to the public. FILA competed with other wholesalers of both 'on field' and 'team spirit' clothing.

After a licensing re-structure by the AFL, only wholesalers of 'on field' clothing would be licensed to provide both 'on field' and 'team spirit' clothing. FILA then implemented what it called a 'selective distribution policy' whereby it would only wholesale 'on field' clothing worn by members of the licensed five teams to retailers on condition that those retailers did not stock 'team spirit' clothing provided by other wholesalers.

The court found that this policy was in breach of s 47(2)(d) of the Act. Again, we can insert the names and products into the legislative scheme to see how this conclusion was reached.

In this case, we can submit that FILA engaged in the practice of exclusive dealing because it supplied or offered to supply licensed 'on field' clothing to retailers on condition that those retailers did not also acquire 'team spirit' clothing from competitors of FILA.

Effectively, FILA wanted to reduce inter-brand competition for the retail sale of 'team spirit' clothing by maximising the purchases of its own 'team spirit' clothing. The retailers needed to stock 'on field' clothing of teams for which FILA was licensed. However, the retailers also needed to stock 'team spirit' clothing for teams beyond the five that FILA was licensed for in order to sell to supporters of teams other than FILA.

FILA did this by making the supply to retailers of the 'on field' clothing, for the five teams that it was licensed for, conditional upon the retailers not stocking the 'team spirit' clothing for other teams for which FILA was not licensed. Since it was imperative for retailers to have FILA's 'on field' clothing, they had little choice but to comply by stocking only the 'team spirit' clothing for FILA's licensed teams.

Requirements contracts

9.26 In *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) ATPR ¶40-376; 48 ALR 625, O'Brien both manufactured and wholesaled windscreens. As a matter of evidence, O'Brien had the largest share of the wholesale market for the supply of windscreens in New South Wales. In the Wagga district, O'Brien also retailed and fitted windscreens. Cool & Sons was one of many retailers and fitters of windscreens in the Wagga district. Most of the retailers in the area were service stations and smash repairers.

O'Brien administered a wholesale discount program, offering retailers different discounts on the wholesale price of different windscreens. The court found that O'Brien had breached s 47(1) because it (ALR at 627):

> ... had a general practice of giving and offering to give to retailers discounts of 45 percent or 50 percent in relation to the supply of windscreens on the condition that each such retailer would purchase all of the substantial majority of its purchases of windscreens from the respondent [O'Brien].

Bundling

9.27 Suppliers sometimes attempt to 'bundle' two separate products which are packaged together and sold as a unit. Usually, bundling is not a form of exclusive dealing in breach of s 47 because the sale of one product is not made conditional on the purchase of another. The two products are sold as one unit and the purchaser is entitled to buy goods or services from other suppliers. There is no 'supply on condition'.

9.28 For example, in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; (2002) 122 FCR 110; ATPR ¶41-879, the Institute of Chartered Accountants in Australia (the ICAA) provided training and materials, other support materials, examinations and certification, for persons wishing to describe themselves as 'Chartered Accountants'. Monroe Topple & Associates (MTA) and several

other entities competed with the ICAA in providing support materials such as 'User Guides' and 'Examination Guides'.

Until 2000, the ICAA charged an enrolment fee for the training material and a separate fee for the other support materials. In 2000, ICAA decided to supply the training material together with the other support materials when a candidate paid their enrolment fee.

MTA alleged that the ICAA had engaged in the practice of exclusive dealing by providing candidates with enrolment in the Chartered Accountant's program on condition that those candidates also accepted the training and other support materials. MTA alleged that this had the effect of foreclosing competition for the provision of other support materials.

The Full Court disagreed, stating (at [105]):

> This approach confuses the issues of purpose and effect with that of condition. It really alleges no more than … hope or expectation on the part of the Institute that Candidates will not purchase support material from other suppliers including MTA … For a trader to offer products A and B for a single price which might make the consumer more inclined to purchase the package and not buy a competing trader's product B, is not to impose any sort of condition within the meaning of s 47(2).

9.29 However, bundling can become the practice of exclusive dealing when the supplier provides the bundle *on condition* that the purchaser does not acquire goods or services from a competitor.

For example, in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd (No 2)* [2008] FCAFC 141; (2008) 170 FCR 16; ATPR ¶42-247, the basis upon which Baxter was prepared to supply sterile fluids separately from PD fluids was so expensive that the various state purchasing authorities had no real option but to accept a bundled product. In fact, although Baxter provided what appeared to be a bundled product, the practice was unlike that in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* because the purchase of sterile fluids at the economically realistic price was made conditional upon the purchase of PD fluids. In *Monroe Topple* above, enrolment in the Chartered Accountants program was not made conditional upon the purchase of support materials. Those support materials were bundled products in the true sense.

The trial judge found, and the Full Court agreed, that (at [193]):

> There was no dispute that Baxter's impugned conduct amounted to conduct that fell within s 47(2). That is quite clear: its alternative offer strategy included offering to supply sterile fluids and PD fluids on condition that the relevant SPAs would not acquire, or would acquire only to a limited extent, PD fluids from any competitor of Baxter in the PD fluids market.

9.30 The decisions in *Monroe Topple* and *Baxter Healthcare* appear similar because in both cases, the second party received two products. However, the crucial difference lies in *how* the second party came to acquire the second product. In *Monroe Topple*, the second party (students) simply received both products: training and support materials when they paid their enrolment fee. However, in *Baxter Healthcare*, Baxter effectively *forced* the second party (hospitals) to acquire the second product (PD fluids) by making it too expensive for them to acquire sterile fluids if they did not also acquire PD fluids. That was the whole point of Baxter's 'alternative offer strategy.

Customer exclusivity

9.31 Customer exclusivity involves a supply, or refusal to supply, goods or services on condition that one party accepts restrictions on the persons, or classes of persons, to whom they can re-supply the goods or services.

Territorial exclusivity

9.32 Territorial exclusivity involves the supply, or refusal to supply, goods or services on condition that the retailer accepts restrictions on the places or classes of places where it can re-supply the goods or services.

For example, in *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) ATPR ¶40-809; 75 ALR 581, Mark Lyons sold ski equipment both in retail stores and in warehouses and town halls. Bursill was the exclusive Australian distributor of the 'Salomon' brand of ski equipment. Salomon's alpine ski boots were the most popular ski boot in the market and, to remain competitive, all ski equipment retailers stocked these boots.

Mark Lyons' practice of retailing discounted ski equipment through warehouses and town halls caused other retailers of ski equipment to complain to Bursill, which then sent a letter to Mark Lyons stating (ALR at 586):

> The style of your operation, selling upmarket ski boots through town halls and warehouses is not conducive to the image that we are attempting to project for these boots.

Following that letter, Bursill refused to supply Mark Lyons with the next season's Salomon ski boots. Mark Lyons instituted proceedings against Bursill, alleging that it had breached ss 46, 47 and 49 (the latter a now-repealed section of the Trade Practices Act 1974 (Cth) which concerned price discrimination) of the Act.

The court found that Bursill had breached ss 46 and 47 of the Act in refusing to supply Salomon ski boots to Mark Lyons. The court found that Bursill had engaged in the practice of exclusive dealing described in s 47(3)(f)(ii) of the Act. This was because Bursill had refused to supply Salomon ski boots to Mark Lyons for the reason that Mark Lyons had re-supplied ski boots 'in particular places' (the town halls and warehouses).

Third line forcing conduct

9.33 Third line forcing conduct, found in s 47(6) and (7), takes a particular form involving two products and three parties. An example of this is where A agrees to supply goods or services on condition that B also agrees to acquire other goods or services from C.

9.34 In *Trade Practices Commission v Tepeda Pty Ltd* (1994) ATPR ¶41-319, a customer wanted to buy an ex-lease car from Tepeda and to trade in his old car. Tepeda (which traded under the name 'Metro Motor Market') offered the customer a trade-in price of $2000 or, alternatively, of $2640 if the customer acquired financing for the purchase of his new car from Ford Credit.

The court concluded (ATPR at 42,247):

> In my opinion, the trade-in allowance on Mr Jones' Honda was an allowance or credit for the purposes of s 47(6)(c). The allowance or credit was offered and was given in relation to the

Chapter 14

Public Enforcement: Policies and Procedures of the Australian Competition and Consumer Commission

Overview

This chapter is intended to:

- introduce you to the role of the Australian Competition and Consumer Commission (the ACCC) (the Commission) in enforcing Australian competition law as well as its objectives and priorities;
- consider the ACCC's *Compliance and Enforcement Policy*;
- identify the elements of the ACCC's 'compliance pyramid';
- explore how the ACCC's *Immunity Policy for Cartel Conduct* and its related *Policy Interpretation Guidelines*, and the ACCC's *Cooperation Policy for Enforcement Matters* integrate with the ACCC's enforcement strategies;
- explain the principal information-gathering powers of the ACCC — the 'search and seizure' mechanism in Pt XID of the Competition and Consumer Act 2010 (Cth) (CCA) (the Act) and the power under s 155 of the Act enabling the ACCC to seek information, documents and oral evidence;
- consider the burden of proof that the ACCC must satisfy in taking legal action under the Act; and
- discuss the ACCC's obligations under the Commonwealth's 'model litigant' direction in pursuing its enforcement objectives.

Role of the ACCC in enforcing Australian competition law

14.1 Competition and consumer protection law, embodied in the CCA and the Australian Consumer Law (ACL), is regulated and enforced by the ACCC. The ACCC was established by the Competition Policy Reform Act 1995 (Cth) as the successor to the former Trade Practices Commission (TPC). In 2004, the Trade Practices Amendment (Australian Energy Market) Act 2004 (Cth) inserted a new Pt IIIAA into the CCA creating the Australian Energy Regulator (AER). The creation of the AER was motivated by the establishment of

the national energy market that includes the regulation of electricity and gas transmission and distribution throughout Australia. Although the AER and the ACCC are different Commonwealth regulators, they are both governed by the Act and pursue similar regulatory goals. Both the ACCC and the AER are therefore concerned with ensuring fair, competitive and informed markets in their respective spheres of regulation. Because the Act vests the ACCC with principal responsibility for regulating anti-competitive activity, this chapter will confine its discussion to the enforcement policies and procedures of the ACCC.

Purpose and function of the ACCC

14.2 Part II of the Act establishes the ACCC generally and outlines its functions and powers. Specifically, s 6A(2) of the Act establishes the ACCC as a body corporate with all the characteristics of a body corporate, including perpetual succession and the right to sue or be sued in its corporate name.

14.3 An interesting feature of Pt II of the Act is the absence of express power given to the ACCC to investigate and collect information concerning alleged contraventions of the Act. As we will see later in the chapter, other Parts of the Act confer power on the ACCC to undertake information-gathering processes.

14.4 The basic purpose and function of the ACCC is explained in its 2012–13 *ACCC & AER Corporate Plan*.[1] The *Corporate Plan* explains that the ACCC carries out its statutory objectives through the pursuit of five interrelated goals:

1. to maintain and promote competition and remedy market failure;
2. to protect the interests and safety of consumers and support fair trading in markets;
3. to promote the economically efficient investment in monopoly infrastructure;
4. to increase engagement with the broad range of groups affected by the administration of the Act; and
5. to increase effectiveness as an organisation.

For each of these goals, the *Corporate Plan* then sets out a number of 'Strategies & Actions' by which they are to be implemented.

Role of the ACCC

14.5 According to the ACCC's *2011–2012 Annual Report*, the ACCC's role in making markets function more effectively for consumers is achieved by:[2]

- Maintaining and promoting competition and remedying market failure — by preventing anti-competitive mergers, stopping cartels and intervening when we identify misuse of market power;
- Protecting the interests and safety of consumers and supporting a fair marketplace — addressing misleading behaviour, removing unsafe goods and tackling unconscionable conduct;
- Driving efficient infrastructure — through industry specific regulation and access regimes.

1. ACCC, *ACCC & AER Corporate Plan 2012–2013*, Canberra, 2012.
2. ACCC, *2011–2012 Annual Report*, Commonwealth of Australia, Canberra, 2012, p 19.

14.6 In its *2011–2012 Annual Report* the ACCC explains the strategies it employs in achieving these goals:[3]

Goal 1: Promote vigorous, lawful competition and informed markets
Strategies
1.1 Deter, detect, pursue and stop anti-competitive conduct
1.2 Assess mergers efficiently and take action where a merger presents competition concerns
1.3 Deliver consistent, informed and efficient authorisation and notification decisions to ensure competition laws do not prevent arrangements that are in the public interest

Goal 2: Encourage fair trading, protection of consumers and product safety
Strategies
2.1 Promote fair trading and minimise harm to businesses from unfair trading practices
2.2 Tackle unfair trading practices and deliver increased consumer welfare through the Australian Consumer Law
2.3 Minimise harm to consumers from unsafe consumer products and services

Goal 3: Regulate national infrastructure and other markets where there is limited competition
Strategies
3.1 Provide robust and independent regulation of natural monopoly markets
3.2 Monitor and advise on industries where market structures are changing
3.3 Monitor prices and quality of specified goods and services to assess and advise on effect of market conditions

Goal 4: Deliver results through the ACCC's investment in its people and systems
Strategies
4.1 Increase the efficiency and effectiveness of our operations

The ACCC's approach to enforcement

14.7 In February 2012, the ACCC published its *Compliance and Enforcement Policy* which 'sets out the principles adopted by the Australian Competition and Consumer Commission to achieve compliance with the law and to outline the ACCC's enforcement powers, functions, priorities, strategies and regime'.[4]

As a national regulator of competition and consumer protection law and policy, the ACCC will involve itself with matters of national and international significance. Accordingly, the ACCC will not involve itself with private commercial disputes, it will not settle employment disputes or give legal advice as to whether certain conduct is legal or not, and it will not pursue issues that are more appropriately dealt with at a state or local level.[5]

Generally speaking, when it is faced with an apparent breach of the Act, the ACCC's principal objectives are to:

3. Ibid, p 29.
4. ACCC, *Compliance and Enforcement Policy*, Commonwealth of Australia, Canberra, 2012, p 2.
5. ACCC, *2007–08 Annual Report: ACCC Incorporating the AER*, Commonwealth of Australia, Canberra, 2008, p 17.

- stop the conduct in breach of the Act;
- deter potential future breaches of the Act;
- reverse the harm caused by the conduct;
- encourage the implementation of compliance programs; and
- where warranted, punish the wrongdoer through penalties or fines.

The ACCC's 'compliance pyramid'

14.8 When it is faced with conduct in breach of the Act, the ACCC does not automatically institute proceedings in the Federal Court to seek the imposition of pecuniary penalties. There are a range of enforcement and compliance strategies available to the ACCC. In its 2012 *Compliance and Enforcement Policy*, the ACCC explains the six broad enforcement and compliance strategies which are available to it:[6]

In ascending order, those strategies are outlined below:

1. *Education, advice and persuasion:* It is better to avoid potential breaches of the Act through education and other information campaigns than it is to take legal action after a breach has occurred.
2. *Voluntary industry self-regulation, codes and schemes:* Individual traders and industry groups are able to implement self-regulatory schemes in the form of codes of conduct. Part IVB of the Act provides for the regulation of industries through codes of conduct.
3. *Administrative resolution:* Where there has been conduct in breach of the Act and if the risk or harm flowing from the conduct is low, the ACCC may resolve the matter administratively. 'Administrative resolutions generally involve the trader agreeing to stop the conduct and compensate those who have suffered a detriment because of it, and to take other measures necessary to ensure that the conduct does not recur.'[7]
4. *Infringement notices:* The ACL permits the ACCC to issue 'infringement notices' in relation to alleged contraventions of the ACL that are relatively minor. These notices are used for conduct that 'requires a more formal sanction than an administrative resolution but where the ACCC considers that the matter may be resolved without legal proceedings'.[8]
5. *Section 87B enforceable undertakings:* Section 87B provides that the ACCC can accept enforceable undertakings from a party in breach of the Act. As the name suggests, an enforceable undertaking is a formal agreement whereby the party in breach agrees to undertake certain action to address the breach. The undertaking is court enforceable.
6. *Litigation:* In the event of a particularly serious breach, the ACCC may institute legal proceedings.

The *Compliance and Enforcement Policy* indicates that the ACCC also has two additional enforcement strategies: the cooperation policy and the immunity policy for cartels. Let us

6. ACCC, *Compliance and Enforcement Policy*, Commonwealth of Australia, Canberra, 2012, pp 4–5.
7. Ibid, p 4.
8. Ibid.

explore these two policies to see how they 'fit in' with the ACCC's broader enforcement strategies above.

ACCC cooperation policy

14.9 In July 2002, the ACCC published its *Cooperation Policy for Enforcement Matters* (the cooperation policy) which set out the ACCC's position in relation to immunity or leniency in circumstances where a potential respondent (individual or corporate) has cooperated with the ACCC in responding to allegations of a contravention of Pt IV of the Act.

The cooperation applies only to civil contraventions of Pt IV of the Act. It does not apply to the cartel regime in Pt IV Div 1 since that Division establishes a criminal regime. Discretion in relation to criminal contraventions of the Act rests with the Commonwealth Director of Public Prosecutions (CDPP).

Where a director or corporation is able to take advantage of the cooperation policy, the recognition of that cooperation may take the form of either complete or partial immunity from action by the ACCC, administrative settlement of the contravention or a submission to the court for a reduction in the penalty to be imposed in respect of the contravention.

Clearly, there are advantages for a corporation and its directors in seeking to invoke the cooperation policy. Rather than contest a long and expensive court case, the ACCC encourages compliance through 'rewarding' self-directed admissions of contraventions of the Act.

The ACCC decides whether and to what extent the cooperation policy will be activated to the benefit of a director or corporation.

Leniency for individuals

14.10 The cooperation policy:

> … applies to directors, managers, officers or employees of a corporation who come to the Commission as individuals and not on behalf of a corporate entity with evidence of conduct contravening the Trade Practices Act (or other legislation administered by the Commission). Leniency, including immunity, is most likely to be considered appropriate for individuals who:
>
> - come forward with valuable and important evidence of a contravention of which the Commission is either otherwise unaware or has insufficient evidence to initiate proceedings
> - provide the Commission with full and frank disclosure of the activity and relevant documentary and other evidence available to them
> - undertake to cooperate throughout the Commission's investigation and comply with that undertaking
> - agree not to use the same legal representation as the firm by which they are employed
> - have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity.

Immunity would not be granted where the person seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.[9]

Leniency for corporations

14.11 Under the policy:

Leniency is most likely to be considered for a corporation which:

- comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings
- upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity
- provides the Commission with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the Commission's investigation and any ensuing litigation
- has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader or originator of the activity
- is prepared to make restitution where appropriate
- is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking
- does not have a prior record of Trade Practices Act, or related, offences.

Immunity would not be granted where the corporation seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.[10]

Immunity policy for cartel conduct

14.12 Cartel conduct is notoriously difficult to detect and to establish to the satisfaction of the court. For this reason, the discovery of cartel conduct is usually more difficult than other forms of anti-competitive conduct, such as resale price maintenance (RPM). Recall from **Chapter 10** that in many RPM cases, there was an actual e-mail or letter from the supplier to the retailer specifying the price that was to be maintained.

This sort of documentation is rarely found in cartel conduct and the ACCC must rely on inferential evidence. For example, in 2006, the chair of the ACCC explained that:

> Investigations into cartels are some of the most complex and difficult investigations that the Commission undertakes. In a typical investigation, the ACCC will usually gather information about communication between competitors (eg by analysing telephone records and e-mails). An example from one recent case … the ACCC analysed more than 20 archive boxes of telephone call records. This revealed more than 1600 calls between competitors.[11]

9. ACCC, *Cooperation Policy for Enforcement Matters*, Commonwealth of Australia, Canberra, 2002, p 2.
10. Ibid.
11. G Samuel, 'The Enforcement Priorities of the ACCC' (2006) 14 *TPLJ* 71 at 83.

An effective immunity policy can be effective in providing clear incentives for corporations and individuals to disclose cartel conduct to the ACCC. An immunity policy also acts to deter the creation of new cartels because of the greater risk of detection.

14.13 Accordingly, in July 2009, the ACCC published its revised *ACCC Immunity Policy for Cartel Conduct* (the cartel immunity policy). It applies only to ACCC-initiated civil proceedings in relation to cartel conduct. This is because criminal proceedings under Pt IV Div 1 of the Act are undertaken by the CDPP and not the ACCC. The CDPP has its own policy regarding immunity in criminal matters.

Therefore, the cartel immunity policy will apply to:

- civil action taken under ss 44ZZRJ and 44ZZRK within Pt IV Div 1; or
- civil action taken under s 45(2)(a)(ii) and (b)(ii) within Pt IV Div 2.

The cartel immunity policy is a very brief document, comprising only 21 paragraphs at the time of writing. However, it is to be read in conjunction with the much more extensive July 2009 *Immunity Policy Interpretation Guidelines* (the cartel immunity guidelines). Both the policy itself and the guidelines were further updated in 2011 to reflect the change from the Trade Practices Act 1974 (Cth) (TPA) to the CCA.

The conditions that must be met in order for a corporation to invoke the cartel immunity policy are set out in para 8 of that policy:

> 8. A corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where:
>
> (a) it applies for immunity under this policy and satisfies the following conditions:
> (i) the corporation is or was a party to a cartel
> (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the Competition and Consumer Act
> (iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy
> (iv) the corporation has not coerced others to participate in the cartel and was not the clear leader in the cartel
> (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel
> (vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)
> (vii) the corporation undertakes to provide full disclosure and cooperation to the ACCC, and
>
> (b) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Competition and Consumer Act arising from the conduct in respect of the cartel.[12]

Similar considerations apply to applications by individuals for immunity in respect of their participation in cartel conduct.

12. ACCC, *Immunity Policy for Cartel Conduct*, Commonwealth of Australia, Canberra, 2009, pp 1–2.

Information-gathering powers

14.14 The Act provides the ACCC with two very powerful mechanisms for gathering information during the investigation of alleged contraventions of the Act. Information is employed by the ACCC from as early as a preliminary consideration of the conduct complained of, through to its eventual use in an agreed statement of facts in support of penalty submissions to the court.

First, s 154X (contained in Pt XID of the Act) enables ACCC officers to obtain a search warrant authorising them to enter premises to search for, copy and remove 'evidential material'; that is, documents or other things that may afford evidence relating (inter alia) to a breach of the Act. Part XID is a 'search and seizure' regime.

Second, s 155 (contained in Pt XII of the Act) permits the ACCC to issue a notice to a person to provide answers to questions, to provide documents, to attend and give evidence on oath, or a combination of these three, if the Commission has 'reason to believe' that the person is capable of producing information in relation to a matter that either constitutes, or may constitute, a breach of the Act.

The 'search and seizure' regime — Pt XID

14.15 Part XID was inserted into the Act by the Trade Practices Legislation Amendment Act (No 1) 2006 (Cth), following the 2003 report of the Dawson Review into the competition provisions of the Act.

14.16 Prior to the amendment, s 155(2) of the TPA enabled officers of the ACCC to enter premises, inspect any documents and to make copies of those documents or make extracts of them. The subsection did not empower the ACCC to use force to gain entry to premises, or to seize documents or objects and take them away.

While the power was exercised sparingly, the ACCC was sometimes accused of a lack of impartiality in the issuing of an authority to enter premises, and of unreasonableness in the execution of the authority.

Accordingly, the Dawson Committee recommended that s 155(2) be amended to enable the ACCC to search for and seize documents and to require that the ACCC seek a warrant from a Federal Court judge or magistrate to exercise that power.[13]

14.17 Part XID became operative from 1 January 2007 and provides that an 'inspector' appointed by the chairperson of the ACCC may apply for a search warrant from a magistrate, authorising entry into premises for the purpose of searching for and seizing 'evidential material'. Despite the width of the power in Pt XID, no search warrants were issued or signed by magistrates during 2007 and 2008.[14]

There are two possibilities anticipated by Pt XID for the use of the search and seizure powers.

13. Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p 197.
14. ACCC, *2007–08 Annual Report: ACCC Incorporating the AER*, Commonwealth of Australia, Canberra, 2008, p 186.

Entry to premises with consent

14.18 The first possibility involves the inspector entering premises with the consent of the occupier. No search warrant is required.

Pursuant to s 154D(1), an inspector may enter premises if the Commission, the chairperson or the deputy chairperson of the ACCC 'has reasonable grounds for suspecting that there may be evidential material on the premises' and 'the inspector obtains the consent of the occupier of the premises to enter'. However, before entering the premises, s 154D(3) requires the inspector to first inform the occupier that he or she may refuse consent to enter.

14.19 One uncertainty that has been noted in relation to the issue of consent[15] involves the situation where the occupier withdraws consent after the inspector has already entered the premises and begun collecting evidential material. The answer is that the inspector must leave the premises. Since no search warrant was obtained, the initial entry to the premises was gained by licence of the occupier. Once that licence to enter and remain is withdrawn, the inspector must leave or potentially be exposed to liability for trespass.

Entry to premises without consent

14.20 Where an occupier does not consent to an inspector entering premises, or withdraws consent after initially permitting entry to the premises, then s 154X of the Act permits the ACCC inspector to apply to a magistrate for a warrant to enter and search the premises.

Pursuant to s 154X(2), the magistrate may issue the warrant if he or she 'is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that (a) there is evidential material on the premises or (b) there may be evidential material on the premises within the next 72 hours'. If the matter is very urgent, s 154Y permits an inspector to apply for a warrant by telephone, fax or other electronic means.

Legal professional privilege

14.21 Curiously, Pt XID does not expressly preserve legal professional privilege. Can the ACCC inspector search and seize documents that contain communications that are the subject of legal professional privilege? The issue is important because s 154R provides for penalties if a person at the premises fails to comply with a request to answer questions or to produce evidential material to which the warrant relates.

As we will see below, until recently s 155 of the Act was also silent as to legal professional privilege. However, the High Court in *Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49; (2002) 213 CLR 543; 192 ALR 561 determined that s 155 did not abrogate legal professional privilege. Despite this decision, Pt XID contains a different legislative scheme to s 155. I suspect that if the issue ever arose, the court would find a 'necessary implication' to the effect that Pt XID did not intend to abrogate legal professional privilege.

15. F Zumbo, 'The New Search and Seizure Regime: A Review' (2007) 15 *TPLJ* 176 at 178.

The s 155 regime — Pt XII

14.22 By far the most common formal mechanism by which the ACCC gathers information involves the mechanism in s 155 of the Act which allows the Commission to gather information for use in civil and criminal litigation involving breaches of the Act. In its *2011–2012 Annual Report*, the ACCC notes that it issued 175 notices under s 155 in the previous year.[16]

Overview of legislation

14.23 Section 155(1) of the Act provides (inter alia) that where the Commission, the 'chairperson or the deputy chairperson [of the ACCC] has *reason to believe* that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute a contravention of [the] Act' (emphasis added), a member of the Commission may issue a notice requiring the person:

- to furnish information by writing within the time and in the manner specified (s 155(1)(a));
- to produce documents specified in the notice to the Commission or to a person specified in the notice (s 155(1)(b));
- to appear before the Commission, or before a member of the staff assisting the Commission who is a Senior Executive Service (SES) employee or acting SES employee who is specified in the notice at a time and place specified in the notice to give evidence, either orally or in writing, and produce documents (s 155(1)(c)).

Section 155(5) provides that a person shall not 'refuse or fail to comply' with a s 155 notice, or 'knowingly furnish information or give evidence that is false or misleading'.

Section 155(7) expressly provides that a person is not excused from furnishing information, producing documents or permitting the inspection of a document on the ground that the information or document may tend to incriminate the person.

However, s 155(7B) provides that a person is excused from producing a document that would disclose information that is the subject of legal professional privilege.

ACCC's common law power to question

14.24 Officers of the ACCC have power at common law, like all citizens, to ask questions about particular matters. The High Court in *Clough v Leahy* (1904) 2 CLR 139 stated (at 156–7):

> The power of inquiry, of asking questions, is a power which every individual citizen possesses, and, provided that in asking these questions he does not violate any law, what Court can prohibit him from asking them?

However, the obvious limitation of this general power in the context of an investigatory authority was pointed out by the High Court in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330, which said '[it] is of little value unless it has behind it

16. ACCC, *2011–2012 Annual Report*, Commonwealth of Australia, Canberra, p 281.

the authority to enforce answers and to compel the discovery and production of documents': at 377.

Role and importance of s 155 of the Act

14.25 The role and utility of the s 155 power was put forcefully by Pagone, who stated:

> Section 155 of the Trade Practices Act gives the Commission very broad powers of investigation. The section has rightly been described as the 'lynchpin' of the Commission's enforcement role: 'without it the Commission would be sterile'. The role of the courts in this context is to maintain the delicate balance between conflicting social objectives. Without effective powers of investigation the Commission will not be able to discharge its public duty of implementing and maintaining the standards of market practices laid down in the Act, and the courts must strive to ensure that the Commission's task is not made too difficult.[17]

14.26 These comments have been mirrored by both the Federal and High Courts in many decisions. In *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) ATPR ¶40-107, the Federal Court stated (at 18,084):

> Part XII is obviously designed by Parliament to confer upon the Commission the authority to seek and obtain information from corporations and others for the purpose of facilitating the enforcement of the Act by legal process. So important did Parliament consider this function that it authorised the Commission to seek and obtain such information even from those suspected of contraventions of the Act and even where, in supplying it, the persons concerned may make incriminating admissions.

In *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460, the High Court stated (at 472):

> Its purpose, and this will have a bearing on its construction, is to aid the Commission in the discharge of its functions under the Act. These functions include the investigation of alleged breaches, the acquisition of information and the obtaining of evidence for submission to the Court in proceedings in respect of contravention.

Remember that when competitors create cartels and other anti-competitive arrangements, they do not usually publicise the fact. Hence, the then TPC's 1981–82 annual report notes that s 155 has been effective in investigations into price-fixing arrangements between competitors which are 'typically arrived at in conditions of utmost secrecy'.[18]

The High Court reflected these comments a year later in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; ATPR ¶40-341 at 44,106:

> Without obtaining information, documents and evidence from those who participate in contraventions of the provisions of Pt IV of the Act, the Commission would find it virtually impossible to establish the existence of those contraventions. The consequence would be that the provisions of Pt IV could not be enforced by successful proceedings for a civil penalty under s 76(1).

17. G Pagone, 'Access to Information: Guerilla Warfare under the Trade Practices Act' (1983) 11 *ABLR* 79 at 106.
18. Trade Practices Commission, *Annual Report: 1981–1982*, AGPS, Canberra, para 4.4.3.