Instructor’s Manual for Module 2
Cartels - Illegal agreements between competitors

Dear Educator,

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The online module is a free resource and includes the first five quiz questions contained in this Instructor’s Manual.

You are invited to request your students to complete this module and the multiple choice quiz online or you may choose to teach this content in a classroom. The ACCC has developed this Instructor’s Manual to provide you with additional quiz questions and answers and a discussion question and answer that are not available on the online program. You can also receive the content of this module in a PowerPoint presentation if you subscribe to the free ACCC Tertiary Information Network, available under the ‘For Educators’ section at www.accc.gov.au/ccaeducation

We wish you success in teaching this module. The ACCC Small Business and Consumer Strategies Branch.

Learning objectives

At the end of this module, you should be able to:

- Explain the concept of “a cartel” and why cartels are illegal
- List the types of cartel behaviour and how they affect consumers
- Explain the penalties and remedies that guilty parties may face if caught
- Explain how businesses can seek an exemption from the cartel provisions of the Competition and Consumer Act 2010 (CCA) under certain circumstances.
Introduction

A competitive marketplace benefits consumers by providing them with greater variety of choice, and allowing them to buy the goods and services they want at the best possible price. It does this by fostering enterprise, innovation and efficiency. Businesses with higher operating costs may be forced out of the market by their more efficient rivals. Fair competition also encourages businesses to produce the types of goods or services that consumers want.

A healthy competitive marketplace thrives when businesses compete fairly. Most Australian businesses increase their customer base and their profits honestly through:

- continual innovation to improve products or services
- sales and marketing showing the genuine benefits of their products or services
- keeping costs down so they can offer competitive prices.

However, sometimes businesses struggling to compete and maintain profits may be tempted to deliberately and secretly set up or join a cartel with their competitors.

This module explains what a cartel is, why businesses might be tempted to form or join one, and why cartels are so damaging to the Australian economy. It explains the four types of cartel behaviour that businesses may engage in, along with the penalties and remedies that guilty parties may face if proven guilty in a court of law. This module also explains how businesses can seek an exemption from the cartel provisions of the CCA under certain circumstances.

What is a cartel?

Put simply, a cartel exists when businesses agree to act together instead of competing with each other. A quick example of cartel behaviour is price fixing, when two or more businesses agree to sell particular products or services for the same price.

Cartel agreements are designed to drive up the profits of cartel members while maintaining the illusion of competition.

Cartel agreements can take on various forms, and these will be outlined in detail in this module. Cartels have been discovered operating in a wide range of industries. Cartel participants range from large, well-known corporations to small local businesses.

Cartels are illegal under Australian law because they are anti-competitive. That is, cartels inflate prices, minimise choice for consumers and stifle innovation. Cartels can put honest and well-run companies out of business while protecting their own inefficient members. Ultimately cartels undermine the efficient functioning of Australian markets.
Cartels can be local, national or international. Worldwide, cartels steal billions of dollars every year.

The legislation that makes cartels illegal in Australia is the CCA.

The government agency that investigates possible cartel behaviour and takes legal action where necessary is the Australian Competition and Consumer Commission (the ACCC).

Why do you need to know about cartels?

When you are working in the business world, you will need to understand how the cartel laws affect your dealings with your competitors. Businesses that get involved in cartel behaviour risk being caught and facing hefty financial penalties. Businesses that suffer loss because the law has been broken can seek compensation from the businesses that engaged in illegal cartel conduct.

If you were personally involved in the cartel agreement, you may also be personally liable to pay a penalty and/or compensation. You can also be sentenced to a maximum of 10 years in jail.

‘The Marker’ – A Short Film About Cartels

The ACCC has made a fictional short film called The Marker to demonstrate the devastating impact cartels can have on the people involved. The film was inspired, in part, by Melbourne University research showing gaps in business awareness of the illegality of cartel conduct.

The film shows how cartel activity can ruin relationships, careers and long-term financial security, and may ultimately land guilty parties in jail.

The film can be viewed at www.accc.gov.au/themarker.
Please view the film before moving on to the next section of this module, Types of Cartels.

Types of cartels

As the film ‘The Marker’ demonstrates, cartel behaviour, also known as ‘cartel conduct’ can take on a variety of forms.

There are four types of cartel conduct. These include:

- price fixing, when competitors agree on a pricing structure rather than competing against each other
- allocating markets, when competitors agree to divide a market and only service their designated portion, so participants are sheltered from competition
- rigging bids, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price
- controlling the output or limiting the amount of goods and services available to buyers.

It is common for cartels to engage in more than one of the above strategies at a time.

Cartel agreements do not have to be formal or written agreements. For example, they can be oral agreements made over a drink at the pub or at an industry association meeting.

When two or more businesses make a commitment to each other to act in a way that restricts competition, this is illegal.

The only exception to this is when the conduct or behaviour has been specifically authorised by the ACCC. This scenario will be discussed in further detail later in this module under the heading ‘Applying For Exemption’.

Price fixing

Competing businesses must not agree to fix, control or maintain the price (or any component of the price, e.g. discounts) they will charge for goods or services.
Example

The local hardware store and the local paint store are the only two stores in a town that sell paint products. Their respective owners, Bob and Susie, meet for a coffee and secretly agree not to sell their paint products below a certain price per litre. The price they agree to is much higher than the paint prices per litre in other nearby towns and the nearest metropolitan city.

As a result of their agreement, paint prices in this town are artificially inflated. People looking to buy paint in this town would have no choice in terms of price, and unless they wished to travel to another town, they would have to pay a high price for paint.

Industry Associations - Recommended Prices

In your future roles working in business, you may have some involvement with industry associations. These organisations bring together individual businesses within an industry to form a body that represents and acts in the collective interests of its members.

Industry associations need to be extremely careful when dealing with pricing issues, including recommended price lists or fee schedules. When an industry association recommends prices for its members, this could have the effect of price fixing by creating a minimum price that all the competing businesses sell their goods or services at. While industry associations may wish to help their members, particularly new and inexperienced operators, on the issue of pricing, it needs to be clear that businesses are free to set their own prices.

The definition of price fixing under Australian law includes a range of behaviour that extends beyond clear agreements to charge at or above a particular price for goods or services. It also includes agreements between competitors that fix, maintain or control discounts, allowances, rebates or credits in relation to goods or services acquired or supplied.

The price fixing law also catches businesses that make agreements containing provisions that have the purpose, effect or likely effect of controlling a component of the end price that will be charged by cartel members.
Example

Four major construction companies agree that the company that wins a particular tender will pay each unsuccessful tenderer an ‘unsuccessful tenderer fee’ of $500 000.

Even though each tenderer retains considerable discretion as to the terms on which they would tender, this agreement amounts to price fixing because each tenderer would factor the ‘unsuccessful tenderer fee’ into their tender price.


Market allocating: allocating customers, suppliers or territories
Dividing a market up with competitors and agreeing to only do business in specific market segments is known as ‘market sharing’. It is illegal for competing businesses to reach an agreement that:

- allocates customers or suppliers in certain areas to particular businesses
- allocates particular customers or suppliers to particular businesses
- obliges parties to the agreement not to poach each other’s established customers.

Example

The three competing major suppliers of roller doors within a state get together and divide their market. Between them, one agrees to only service the northern region, the second will only service the eastern and western regions, and the third will only service the southern region. As a result of this agreement, potential customers only have one supplier of roller doors available to them – this is effectively a monopoly.

Bid rigging
In the interests of seeking the best product or service at the best price, businesses and government bodies may sometimes invite several other businesses to submit a proposal or
offer, outlining what they can provide, within what timeframe and for what price. This is known as a tender process.

Businesses that attempt to interfere with competitive tender processes may be breaking the law. When competitors make agreements about the terms on which they will tender for the right to supply goods or services, they threaten the competitive outcomes that such tenders are designed to create. For this reason, bid rigging, also referred to as collusive tendering, is prohibited. Competing businesses cannot reach an agreement to:

- not tender for a particular project, whilst agreeing for one or more particular parties to tender
- tender on the basis that one bid is more likely to be successful than the others
- initially bid but later withdraw their bids
- tender, but a material component of at least one of the tenders is worked out in accordance with the contract, arrangement or understanding between the parties
- take turns winning business.

**Example**

For about 10 years until 1997 most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings at which they agreed to allow certain tenders to be won by particular competitors. To ensure that the tenders were won by the agreed participants, the companies agreed on the prices at which they would tender for particular projects. It has been estimated that this conduct affected contracts worth more than $500 million. The Federal Court imposed more than $14 million in penalties on the companies and some of their executives.

See: *ACCC v FFE Building Services* [2003] FCA 1542.

**Controlling/restricting output**

When a product or service becomes scarce, people are likely to pay more for it.

A business must not reach an agreement with one or more of its competitors that is likely to reduce the quantity of goods or services supplied to the market. This is known as ‘restricting output’ or ‘restricting supply’.

These types of agreements are illegal as they can have the effect of raising prices and limiting consumer access to the goods and services they want.

In particular, competing businesses must not agree to prevent, restrict or limit:

- the production or likely production of goods
- the capacity or likely capacity to supply services
- the supply or likely supply of goods or services to particular persons or classes of persons.
Example
The salmon growers’ industry association, comprising of five major players in the salmon industry, devised a plan to lift falling salmon prices as part of a broader plan to ease the financial difficulties plaguing the industry. The association asked members to sign an agreement under which they committed to cull at least 10 per cent of their salmon stocks. This amounted to an agreement to restrict or limit the production of goods. It therefore amounted to an illegal agreement to restrict output.


Penalties and other remedies

Penalties and imprisonment
A business that breaches the civil cartel prohibitions or commits a criminal cartel offence may be ordered to pay a pecuniary penalty. The maximum amount of the penalty is the greater of:

- $10 million
- three times the total value of the benefit gained by the business as a result of the breach, or
- 10 per cent of the business’s annual turnover (including related bodies corporate) during the 12-month period ending at the end of the month in which the business committed, or began committing, the offence.

Individuals personally involved in a cartel could also face criminal or civil penalties, including:

- up to 10 years in jail and/or penalties of up to $340 000 per criminal cartel offence
- a pecuniary penalty of up to $500 000 per civil contravention.

It is illegal for a corporation to indemnify its officers against legal costs and any financial penalty.

**Damages (compensation order)**

In addition to the imposition of penalties, businesses that breach competition laws may be required to pay compensation to the victims of the anti-competitive conduct. For example, a customer who has been overcharged as a result of a price fixing cartel agreement is able to sue to recover the amount of the overpayment. Compensation can also be recovered from individuals running the company if they were involved in the contravention. The court also has the power to make other orders to overcome losses, such as an order that varies the terms of supply contracts.

**Other penalties and remedies**

A person or business that contravenes competition laws may be subject to a range of other court orders.

- **Injunctions**: a court order that requires a business or individual to do or refrain from doing particular acts.

- **Other orders**: businesses that breach, and employees involved in those breaches, can also be ordered to:
  - establish a compliance program
  - establish an education and training program
  - revise internal operations
  - disclose specified information to specified persons
  - publish a corrective advertisement

- **Disqualification orders**: on the application of the ACCC, the court may order that a person involved in a breach of the CCA be disqualified from managing a corporation for such a period as it considers appropriate.
Immunity for cartel participants

The ACCC has established an immunity policy for both businesses and individuals who have been involved in a cartel. The policy provides immunity from litigation and penalty to the business or individual who is the first to report the cartel activity to the ACCC.

Immunity is subject to a number of conditions.

Applying for exemption

Overview
The CCA recognises that there may be circumstances where greater public benefit would result from allowing certain business behaviour that may restrict competition.

Australia’s competition regulator, the ACCC, can allow businesses to engage in conduct that may otherwise breach the competition provisions of the CCA, through its authorisation or notification process. These exemptions apply to the cartel provisions. The ACCC will assess whether the proposed behaviour is likely to result in a public benefit that outweighs any resulting public detriment (i.e. harm), including from a lessening of competition.

If the ACCC allows an exemption, the applicant is protected from legal action under the CCA.

For example, the CCA makes it illegal for businesses to get together and collectively negotiate prices with a supplier or a customer, as this could involve agreements between competitors and amount to price fixing. However when the outcome of collective negotiations is likely to result in a public benefit—such as lower costs for business and lower prices for consumers, or an increased variety of products—the ACCC may allow it.

The ACCC has allowed small business bargaining groups to form in diverse areas ranging from dairy farming and vegetable growing to concrete carting and hotels.

There are two administrative pathways that a business seeking an exemption from the cartel provisions of the CCA can choose to follow: authorisation or notification.
The authorisation and notification processes are both public. The applications for authorisations and notifications and all relevant submissions by the notifying party and interested parties are placed on the ACCC’s public register on the ACCC website (excluding confidential information).

**Authorisation**

Businesses can apply for exemption from the cartel provisions through the ACCC’s authorisation process. However businesses seeking to have proposed cartel conduct authorised must apply to the ACCC before engaging in the conduct. Authorisation cannot be granted after the fact.

The ACCC will generally conduct a public consultation process inviting interested parties for their views on the proposed conduct and its likely effects.

An authorisation will only be granted when the ACCC is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

A lodgement fee of $7,500 is payable by the businesses making the application to the ACCC, although this can be waived in certain circumstances.

**Example**

A group of importers of refrigerant gas wanted to impose a levy of $1.50 per kilogram of gas imported into Australia. This levy would contribute towards the costs associated with disposing of ozone-depleting refrigerant gases in an environmentally friendly manner. An agreement to impose such a levy would be caught by the price-fixing prohibition.

The ACCC granted authorisation. Although this arrangement may increase prices for consumers purchasing products containing refrigerant gases, the increase is likely to be minimal. On the other hand, the environmental benefits brought about by this conduct are significant.

**Notification**

Another option businesses have available to them to seek protection from legal action in relation to cartel conduct is the ACCC’s notification process.

The lodgement fee for a notification is $1,000. Businesses do not need to wait for the ACCC to grant them an exemption. Rather, businesses may engage in the notified conduct 14 days after they have lodged their notification, unless the ACCC objects to the notification within the 14 day period.

The notification provides an exemption for three years or until such time as the ACCC revokes the notification by sending an objection notice on the basis that the conduct does not result in an overall public benefit.
To lodge a valid collective bargaining notification each party to the collective arrangement must reasonably expect that the total value of the transaction it will conduct with the supplier/customer over a 12-month period under the arrangement will not be greater than $3 million (or higher amounts as set by regulations).

Any party to a collective bargaining arrangement can lodge a notification on behalf of:
- their business, or
- the other business(es) that will be a party to the arrangement.

Collective bargaining notifications may also be lodged by a nominated representative who is not a member of the collective bargaining group. For example, an industry association may lodge a notification on behalf of its members.

When a notification is lodged on behalf of other businesses who are party to the collective bargaining arrangement, the notification must clearly identify all of the businesses involved and show that they all consent to the lodging of the notification on their behalf.

Example

The Tasmanian Chicken Growers’ Association, on behalf of its six grower members, notified the ACCC of its intention to negotiate terms and conditions of grower contracts with Inghams, a chicken processor. The arrangement would be caught by the prohibitions against price fixing and output restrictions.

The ACCC did not object to the notified conduct. The size of the bargaining group suggested that the anti-competitive detriment would be minimal. Further, the conduct would bring about benefits in the form of lower transaction costs and allowing the growers to have more effective input into grower contract terms and conditions.


Authorisation or notification – which process should businesses use?
The notification process is likely to be more suitable than lodging an application for authorisation for a proposed collective bargaining arrangement when:

- all members of the bargaining group are identified and are unlikely to change over time
- there is a single supplier or customer (target) with whom the group wishes to negotiate
• the annual value of the transactions each member of the bargaining group will have with the target under the collective arrangement is not greater than $3 million (the transaction threshold differs for some industries)

• the exemption under the CCA is required for less than three years.

Summary

Competition between businesses in the marketplace benefits consumers by giving them price alternatives and a wider range of goods and services. It benefits businesses by encouraging them to innovate and improve efficiency. This results in advantages for consumers, businesses and society as a whole. When businesses agree to act together instead of competing against one another, they are engaging in cartel conduct. The whole point of this conduct is to sell goods or services at higher prices than those which may be available to consumers in a competitive market.

Restrictive practices and cartel behaviour cause harm to consumers and have serious consequences for the businesses involved. Consumers have a restricted choice in price, quality and service; they pay higher prices and innovation and efficiency are suppressed. Businesses involved risk significant penalties and legal costs and loss of business reputation and market share. In addition a cartel may have the effect of putting honest and well-run firms out of business.

The ACCC can grant an exemption from the cartel prohibitions if the public benefits are greater than any public detriment flowing from the anti-competitive conduct.

Further reading & information

• Bruce, A (2010), Restrictive Trade Practices Law in Australia, Butterworths, Canberra.
• Corones, SG (2010), Competition Law in Australia, 5th edn, Lawbook Co, Sydney.
• Website: www.accc.gov.au/publications:
  • ACCC, Authorising and notifying cartel conduct
  • ACCC, Cartels: What you need to know – a guide for business
  • ACCC, Cartel conduct: How it affects you and your business
  • ACCC, Guide to collective bargaining notifications
Quiz questions

Question 2.1:
Businesses can avoid reaching an agreement for the purposes of the cartel provisions of the CCA by:

A. Ensuring that any agreement reached is not reduced to writing.
B. Not making commitments to each other about how they will act.
C. Ensuring that they never act in the same way as their competitors.
D. All of the above.

The correct answer is B: Cartel agreements can be (and often are) quite informal. If parties commit to act in a particular way they have reached an agreement whether or not a written document has been produced. Acting in the same way as your competitors does not necessarily show that there has been a meeting of minds or that an agreement has been reached. The correct answer is to avoid making commitments to each other about how they will act.

Question 2.2:
Individuals involved in cartel conduct may:

A. Face significant financial penalties.
B. Face jail time.
C. Be required to compensate those who have been harmed by cartel conduct (such as customers who have paid an inflated price).
D. All of the above.

The correct answer is D: The correct answer is ‘all of the above’. Significant penalties apply where individuals have been found to have engaged in cartel conduct.

Question 2.3:
The law in relation to price fixing:

A. Prevents a business from lowering its prices to match or better the prices offered by its competitors.
B. Will be breached when competitors make commitments to each other about how they will price goods and services.
C. Can be avoided by ensuring that agreements are informal and not reduced to writing.
D. Will be breached whenever businesses charge the same price for competitive products.

_The correct answer is B_: Whenever competitors make a commitment to each other about the price they will charge for goods or services, they have reached an agreement even if the agreement is informal and not reduced to writing. However, the law does not prevent businesses from reacting competitively to offers put out by their competitors, even when this response involves matching the competitor’s price. In competitive markets, it is not uncommon for businesses to charge the same price for equivalent goods. So long as each business makes a genuine independent decision when it comes to pricing, the price fixing law will not have been breached.

**Question 2.4:**
Matt and Steven run competing travel agencies in Adelaide. At a recent industry function, they discussed how difficult it was to operate on the low margins that exist in the travel industry. Matt and Steven agreed to stop offering free travel insurance to customers who spent more than $3,000 on flights and accommodation.

Matt and Steven:
A. Have not breached the price-fixing prohibition because they have not agreed on a price to be charged for the service they offer.
B. Have not breached the price-fixing prohibition because their discussions were informal.
C. Have not breached the price-fixing prohibition because they were not charging customers for the travel insurance anyway.
D. None of the above.

_The correct answer is D_: Matt and Steven have breached the price fixing law. Although their agreement does not relate to the price they charge for goods or services, they have agreed to discontinue a particular discount. The law against price fixing agreements is broad and captures a range of conduct that extends beyond agreements to charge a particular price. The CCA refers to the ‘fixing, controlling or maintaining’ of prices which includes an agreed formula for discounting or agreed bonus offers. The fact that they have not reduced the agreement to writing does not save them – all that is required is that they make a commitment to each other, which they have done.
**Question 2.5:**
The law against output restrictions:

A. Will be breached whenever two competitors decide to stop supplying goods to a particular person even if each competitor made its decision independently.
B. Prevents a business from lowering the amount it supplies to the market during times of low-demand.
C. **Will be breached when competitors agree not to supply a particular customer even if their reasons for reaching such an agreement differ.**
D. Requires businesses not to reduce their capacity to produce goods or services.

The correct answer is C: Businesses that make decisions about pricing or production independently will not contravene the output restriction law simply because they decide to reduce production or lower prices. The CCA does not force businesses to make particular decisions – the only requirement is that such decisions be made independently. The correct answer is that the law will be breached when competitors agree not to supply a particular customer. This applies even if their reasons for reaching such an agreement differ; the key element is the agreement between competitors.

**Question 2.6:**
Imagine that the owners of two competing restaurants, each of which can seat 50 customers, decide to close down their restaurants and, in partnership, open a new restaurant they believe will be more profitable. The proposed restaurant will only be able to accommodate 75 customers. Have the restaurateurs breached the law against output restrictions?

A. Yes, because the effect of the agreement is that fewer diners will be accommodated.
B. No, the restaurateurs are not competitors for the purposes of the cartel provisions because they agreed to close down their businesses.
C. **No, because the restaurateurs cannot be said to be acting for the purpose of reducing the number of diners that can be accommodated.**
D. None of the above.

The correct answer is C: The focus of the output restriction prohibition is on the purpose of the agreement, not its effect. Although the restaurateurs will cease to be competitors when the new restaurant is opened, the cartel law applies to agreements between businesses that compete or would compete if it wasn’t for the agreement in question. They therefore do not escape liability on this basis. However, the restaurateurs have not breached the law because they cannot be said to be acting for an anti-competitive purpose.
Question 2.7:
An agreement between two competitors to divide or allocate customers, suppliers or territories will not amount to a market sharing agreement if:

A. The agreement provides for nothing more than maintenance of the status quo.
B. One competitor agrees to supply only to corporate customers and the other agrees to supply only to the non-corporate sector.
C. The parties simply agree to not to take positive steps to win over each other’s current customers.
D. None of the above.

The correct answer is D: All of the agreements listed above divide the market in some way and would therefore breach the market sharing prohibition.

When competing businesses make a commitment to each other to divide their customers, they breach the law in relation to market sharing.

The basis on which customers are divided is irrelevant. All of the agreements listed above divide the market in some way and would therefore breach the law.

Question 2.8:
At an industry association meeting some members are angry that the other members have been undercutting them in price. The association arranges to send out a pricing formula to all members and a minimum price schedule requesting that all members comply with the schedule.

A. The industry association has not breached the law because it has not suggested a price that its members should charge.
B. The industry association has not breached the law because it is assisting its members in a tough economic environment.
C. The industry association’s behaviour is likely to be regarded as price fixing.
D. The agreement is not reached by or made between competitors and will not breach the law.

The correct answer is C: Irrespective of the aims or motives of the industry association, there is a risk that the organisation could be facilitating arrangements that may be in breach of the price fixing law.

Where there is an understanding between competitors to use a recommended price list as an industry-wide price floor, then a price fixing arrangement has been made.

An association may be at risk if a communication relating to price has the purpose, effect or likely effect, directly or indirectly, of fixing, controlling and / or maintaining prices between
competitors. The association should make it clear that it does not require its members to abide by any suggestions or guidelines it provides in relation to pricing.

**Question 2.9:**
Two firms are rivals in the air conditioning industry. They are both tendering for the same government contract. Firm A approaches Firm B and asks if Firm B would be prepared to subcontract work on the job if Firm A wins the contract. Firm B agrees to subcontract if Firm A wins the contract.

A. Firm A has engaged in cartel conduct by advising a competitor that it is tendering for the contract.
B. Firm B has engaged in cartel conduct by accepting the opportunity to subcontract if Firm A wins the contract.
C. Both Firm A and Firm B have breached the cartel provisions of the CCA.
D. Neither Firm A or Firm B has breached the cartel provisions of the CCA.

The correct answer is D: There is no problem with a competitor advising that it will be tendering for a contract. Nor is there a problem with a competitor agreeing to subcontract on the job.

However, if Firm A had requested Firm B not to tender for the contract and Firm B agreed on the condition that it got the subcontracting work, both firms would be engaging in cartel conduct in breach of the law.

**Question 2.10:**
Which of the following statements is true?

A. The ACCC has the discretion to authorise cartel conduct where the parties had a legitimate reason for engaging in the conduct.
B. The only circumstances in which cooperation between competitors does not breach the law is if the conduct has been authorised by the ACCC before it commenced.
C. The courts will find that the cartel prohibitions have not been breached where the benefits brought about by the conduct are outweighed by the detriments caused by the conduct.
D. The price fixing law will not capture agreements between competitors to collectively acquire goods and services at a particular price.

The correct answer is D: The ACCC, not the courts, has the power to authorise potential breaches of the cartel provisions on public benefit grounds. However conduct must be authorised before it is engaged in.
Although authorisation will exempt some conduct not yet engaged in from the cartel prohibitions, there are other circumstances in which co-operation between competitors is not illegal.

The correct answer is that the pricing-fixing prohibition will not capture agreements between competitors to collectively acquire goods and services at a particular price.

**Question 2.11:**
Which of the following statements is true?

A. Exemption will only be granted under the authorisation and notification processes if the public benefit test is satisfied – that is, that the public detriment caused by the anti-competitive conduct is outweighed by the public benefit.

B. Under the authorisation process, conduct becomes exempt once the authorisation application has been lodged with the ACCC.

C. Under the notification process, conduct becomes exempt when the ACCC issues a determination granting the exemption.

D. None of the above.

*The correct answer is A:* A business that lodges an authorisation application or notifies conduct to the ACCC will only receive an exemption if it is able to satisfy the public benefit test. Under the authorisation process the business lodges an application for exemption.

The ACCC will consider this application and then decide whether to grant the applicant’s request for exemption. The conduct does not become exempt until the ACCC issues its determination. Under the notification process the business notifies the ACCC of the conduct it proposes to engage in. The conduct is exempt from 14 days after lodgement, up until the ACCC revokes the notification.

**Question 2.12:**

The ACCC can grant an exemption from the cartel prohibitions if the public benefit test is satisfied. This requires the ACCC to be satisfied that:

A. The cartel conduct will not harm competition at all

B. The cartel conduct will not substantially harm competition

C. The cartel conduct will generate significant public benefits

D. The public benefits brought about by the cartel conduct outweigh any public detriments it will cause.
The correct answer is D: The public benefit test will be satisfied if the public benefits likely to be brought about by the conduct will outweigh any detriments it will cause. It is not necessary to show that competition is not harmed. Some lessening of competition can occur so long as the conduct generates benefits sufficient to outweigh the harm caused.

Discussion questions

Case study 1:

Natasha runs Nat’s Cats Pty Ltd, a cattery in Perth. The bulk of Natasha’s business comes from boarding cats, although she also sells a small selection of cat toys and premium cat food. Natasha has become good friends with Nick who owns and operates Indulged Pooches Pty Ltd, a pet shop in Perth that sells live animals, animal toys and animal food.

Natasha and Nick are both animal lovers. Although ordinarily Natasha and Nick operate their businesses seven days a week, both of them shut their business on Sunday 26 May 2013 so they could attend an animal rights rally. Nick and Natasha marched in the rally together during which they had the following discussion:

Natasha: I thought the rally leader’s suggestion that owners of pet businesses impose a levy on pet products and donate the money to a pet charity is excellent. I am going to raise the price I charge for cat food by at least $1 and donate the proceeds to the Pet Rescue organisation.

Nick: I’m happy to put my price up by $1 if you do. I too was thinking about doing this in any event.

Natasha: Ok then, let’s start tomorrow. We will both raise our price by at least $1 and donate the proceeds to Pet Rescue.

Nick: Great. Just so you know, I’ve also decided not to purchase food from Pets’ Chum the company that claims it supports pet charities. Earlier, another rally participant told me that Pets’ Chum donates less than 1 per cent of its profits to pet charities.

Natasha: Thanks for the information. I’ll keep it in mind next time I am ordering cat food.
There are several competing specialist businesses that sell cat food within a five kilometre radius of Nat’s Cats and Indulged Pooches. Further, a relatively wide selection of cat food is available at most supermarkets.

On the Monday following the rally Natasha and Nick both raised the price they charged for cat food by $1. Both Natasha and Nick donated the additional funds to Pet Rescue.

Two weeks after the rally, Natasha spoke with the owner of Pets’ Chum. Upon confirming that the information Nick provided her was correct, Natasha terminated her account and has not placed an order with Pets’ Chum since. Previously both Nick and Natasha had ordered substantial quantities of food from this supplier.

**Question:**

(a) Have Nat’s Cats and Indulged Pooches breached any of the cartel prohibitions by increasing the price they charge for cat food following the rally?

(b) Has Nat’s Cats breached any of the cartel prohibitions by discontinuing its relationship with Pets’ Chum?

(c) Is there a way that Nick and Natasha could have avoided breaching the law?

**Answer (a):**

There are three issues that need to be considered:

1. Are Natasha and Nick competitors?
2. Did Natasha and Nick reach an agreement?
3. If an agreement has been reached, does the agreement:
   (a) fix prices
   (b) restrict the production and/or supply of goods
   (c) allocate customers or share markets
   (d) boycott suppliers or customers
   (e) rig bids
   (f) have the purpose, effect or likely effect of substantially lessening competition.

**Competitors:**

- Not all agreements relating to price are illegal. For example, a supplier may engage in negotiations with a business customer and ultimately decide on a price at which the goods are to be sold. Price-fixing agreements are only illegal if they are reached between competitors.
- Nick and Natasha could argue that they are not competitors. The bulk of Natasha’s business comes from boarding cats. Nat’s Cats only sells a small selection of premium cat food. Nick’s business is a retail business selling, not only cat food but a range of live animals, toys and animal food.
Agreement:

- Businesses will be held to have made commitments to each other when they reach an agreement to act in a particular way.
- In response to Natasha’s statement that she intends to increase the price of pet food by at least $1, Nick indicated that he was happy to do the same. Natasha and Nick then agreed to put their prices up by at least $1 the following day.
- An agreement has been reached.

Type of agreement:

- The agreement between Nick and Natasha relates to price; specifically, the price each business charges for cat food.
- Although there is a possibility that Nick and Natasha may increase their prices by different amounts (remember that they only agreed to increase the price by at least $1) they have still made a price fixing agreement. It is not necessary that prices be set at the same level by all parties. The price-fixing prohibition also catches agreements that contain a provision that has the purpose, effect or likely effect of controlling a component of the end price that will be charged by parties to the agreement.

Answer (b):

- Nick and Natasha have both discontinued their relationship with Pets’ Chum.
- However establishing that two competitors are acting in the same way does not prove that they have reached a cartel agreement.
- Nick provided information to Natasha about the donation policy of Pet’s Chum. After verifying this information herself, Natasha made an independent decision not to deal with Pets’ Chum.
- The cartel prohibition has not been breached as Nick and Natasha have not reached an agreement to terminate their supply arrangement with Pets’ Chum. Rather, they made independent decisions to stop dealing with a supplier.

Answer (c):

- The ACCC has the power to authorise conduct that would otherwise breach the cartel prohibitions. An exemption will only be granted when the likely benefits to the public outweigh any likely detriments (the public benefit test). If authorisation is granted, the conduct is exempt from the cartel prohibitions. This means that the ACCC will not take legal action against the businesses for breaching the cartel laws.
- Authorisation cannot be granted retrospectively. As Natasha and Nick have already engaged in the relevant conduct, it is too late to apply for authorisation.
• However, had Natasha and Nick applied for authorisation before they engaged in the conduct they would have had to identify the public benefits and public detriments likely to flow from the conduct.
• Natasha and Nick would point to the increased support they are able to offer pet charities as a public benefit.
• This public benefit would need to outweigh any detriments, eg. increased prices to consumers. Nick and Natasha could argue that these detriments are minimal because pet food is widely available in Perth.
**Case Study 2:**

Dr de Cruze and Dr Stotch operate competing medical practices at the Chadstone Shopping Centre. Both practices currently open from 9:00am – 5:00pm from Monday to Saturday. Currently, neither practice opens on Sundays. Over the past year there have been several serious accidents at the Chadstone Shopping Centre on Sundays. In April 2013, a shopper suffered a heart attack and died at the centre. It is believed that if a doctor had been available, this death may have been avoided. Rita, who works for centre management at the Chadstone Shopping Centre, recently had the following discussion with Dr Stotch:

**Rita:** In light of the unfortunate events in April, the centre would like either you or Dr Stotch to open your practice on Sundays.

**DR STOTCH:** Neither myself nor Dr de Cruze wish to open our practices on Sunday. We both like to spend this day with our families.

**RITA:** Perhaps you could come up with some sort of roster which ensures that one practice is open on Saturdays and the other opens on Sundays. That way you would both still get to spend one day each weekend with your families.

**DR STOTCH:** Rita, we can’t do that. We suggest that you ask your in-house counsel about a little thing called the cartel prohibitions in the *Competition and Consumer Act*.

**RITA:** I will do that Dr Stotch. However if I find out that it is possible for such a roster to be implemented without contravening the law, implementation of such a roster will be made a condition of your next lease renewal.
Question:

Rita would like to know whether the proposed rostering arrangement would breach the cartel prohibitions

Answer

There are three issues that need to be considered:

1. Are Dr Stotch and Dr de Cruze competitors?

2. Would Dr Stotch and Dr de Cruze be required to reach an agreement?

3. If an agreement has been reached, does the agreement:
   (a) fix prices
   (b) restrict the production and/or supply of goods or services
   (c) allocate customers or share markets
   (d) boycott suppliers or customers
   (e) rig bids
   (f) have the purpose, effect or likely effect of substantially lessening competition.

Competitors:

Dr Stotch and Dr de Cruze both provide medical services within the same shopping complex and operate competing medical practices. It would appear that they are clearly competitors. However, if each doctor was a specialist practising in a different field of medicine, and did not operate a generalist practice, it could be argued that they are operating in different markets and are therefore not competitors.

Agreement:

- The defining characteristic of an agreement is commitment and a meeting of minds.
- It is clear that the roster system contemplated by Rita would require both of the doctors to make a commitment to each other.
- An agreement would be reached.

Type of agreement:

- Rita wants the doctors to make a commitment about the times at which they will provide medical services.
- It is therefore necessary to consider whether the output restriction or market sharing cartel offences have been breached.
- Rita requires only that one doctor commit to providing services on Saturday and the other to commit to providing services on Sunday. Importantly, there is nothing to
stop the doctor who has agreed to work on Saturdays also working on Sundays (and vice versa), which may in fact increase competition in the market.

- Both doctors only wish to work one day on the weekend and the effect of the agreement will be that only one doctor works on each day. However, this is the effect, not the purpose, of the agreement. The purpose of the agreement is to provide medical services on Saturdays and Sundays at the shopping centre.
- If a roster arrangement is intended to genuinely ensure the supply and availability of medical services after hours and/or weekends, it is unlikely that it would breach the cartel provisions of the CCA.

Authorisation:

- The ACCC has the power to authorise conduct that would otherwise breach the cartel prohibitions. An exemption will only be granted when the likely benefits to the public outweigh any likely detriments (the public benefit test). If authorisation is granted, the conduct is exempt from the cartel prohibitions.
- Since the two doctors have not yet engaged in the problematic conduct, they could apply to the ACCC for an authorisation.
- There are genuine public benefits in ensuring the supply of medical services to major shopping centres. The critical issue is to demonstrate the link between those public benefits and the conduct for which authorisation is sought. If the public benefit outweighs the anti-competitive effect, authorisation (in effect immunity from the Act) can be granted.
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