



Miles and Dowler, *A Guide to Business Law 21st edition*

## Study Aid – Chapter summaries

### Chapter summary – ch 19 – competition and consumer law

#### A. The Competition and Consumer Act 2010

1. The objects of the Act are to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.
2. The Commonwealth has no power to make laws about consumer protection. The Commonwealth does have power to make laws about corporations, interstate and overseas trade and the use of the postal and telephone services.

Accordingly, the Act generally prohibits certain conduct by corporations and by individuals engaged in overseas or interstate trade or using the postal or telephone services.

3. The Australian Competition and Consumer Commission is a statutory body whose functions include:
  - (a) administration and enforcement of the Act;
  - (b) research and information; and
  - (c) attending to consumer inquiries.
4. The Australian Competition Tribunal is a quasi-judicial body. It hears appeals from decisions of the Commission.
5. The Commission and the Tribunal are Commonwealth statutory bodies.
6. Litigation involving breaches of the *Competition and Consumer Act 2010* is generally heard in the Federal Court.
7. Although the *Competition and Consumer Act 2010* is a complex statute, in this text emphasis is placed upon Pt IV (Restrictive trade practices) and Schedule 2 – the Australian Consumer Law. We will first examine Part IV, Restrictive trade practices.

#### B. Concepts of market and competition

1. It is essential for any understanding of the Act to know what is a **market** and what is **competition**. These terms are difficult to define.
2. It has been said that “**a market** is the area of close competition between firms” or, putting it a little differently, the field of rivalry between them (if there is no close competition, there is of course a monopolistic market).
3. **Competition** has been defined as requiring both flexibility of prices and an



“independent rivalry” in all aspects of the price-product-service package offered to customers.

#### C. Cartel Conduct and Contracts, arrangements or understandings affecting competition

Division 1, ss 44ZZ RA to 44ZZRV explain, prohibit and relate to cartel conduct which is covered in [19.110]. Cartel conduct may be a civil or criminal matter. If criminal it can be prosecuted by the Commonwealth Director of Public Prosecutions on the recommendation of the ACCC.

1. **Section 45** is a general section that prohibits any contract, arrangement or understanding that has the purpose or effect of substantially lessening competition in a market.

Contracts that breach s 45 are not enforceable.

2. **Section 45B** prohibits covenants that are likely to have the effect of reducing competition in the market. In this context, *covenant* probably means any promise. This section does not affect covenants on residential land. It would, however, affect a restrictive covenant on a commercial lease.

3. **Section 45C** prohibits covenants that have a price-fixing effect.

#### D. Boycotts

**Section 45(2)** prohibits secondary boycotts, ie contracts or arrangements intended to restrict the supply of or acquisition of goods or services to specific persons or groups, often called “exclusionary arrangements”.

#### E. Secondary boycotts

The Act also prohibits secondary boycotts – where persons, in industrial situations, act in co-operation to prevent or hinder the supply of goods or services to, or the acquisition of goods and services by a corporation that is not really a party involved in that industrial situation.

#### F. Misuse of market power

1. **Section 46** prohibits a corporation with a substantial degree of market power from using its market power to:
  - eliminate or substantially damage competitors; and
  - prevent persons entering the market or competing in the market.
2. The section targets corporations with substantial market power or the ability to considerably influence a market.

Section 46(1A) prohibits predatory pricing which may force competitors out of a



market.

#### G. Exclusive dealing

1. A corporation cannot, under s 47, refuse to supply or restrict the supply of goods or services where to do so would limit the freedom of the market. The refusal to buy, or imposing restrictions on buying, is also prohibited.
2. The purpose of this section is to prohibit exclusive dealing.
3. The section also prohibits *third-line forcing* – supplying goods or services on condition that the buyer buy goods from another supplier.

#### H. Resale price maintenance

1. **Section 48** outlaws resale price maintenance – supplying goods or services on condition that they only be resold at a minimum price.
2. Recommended retail prices are permissible where there is a genuine recommendation.
3. There is nothing to prevent a supplier setting a maximum resale price.

Note that “loss leader selling” is an exception to resale price maintenance. If a trader sells goods below invoiced cost as a sales “leader” to sell less desirable goods, a trader may be justified in cutting off supply.

#### I. Acquisitions

1. **Section 50** prevents mergers or takeovers where the result would be market dominance.
2. The ACCC has issued guidelines for companies who wish to merge or take over another company as detailed in the text.

#### J. Authorisations and notifications

These are specific procedures available to corporations who are engaging in conduct which may otherwise breach the *Competition and Consumer Act 2010* but the conduct of the trader may have significant public benefit which outweighs any anti-competitive effect. In these circumstances, the corporation may apply for the immunity from prosecution provided by these alternatives.

#### K. The Australian Consumer Law

On 24 May, 2008 the Ministerial Council on Consumer Affairs (MCCA) agreed to commence work on a new national consumer law for Australia.

This was largely a reflection of the diversion of the law in the States and Territories, which varied greatly in their application and scope.

The *Australian Consumer Law* was implemented in two stages, by the *Trade*



*Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth)* and *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth)*.

The Australian Consumer Law is Schedule 2 to the *Competition and Consumer Act 2010*. This Act replaced the *Trade Practices Act 1974* (Cth) (TPA) from 1 January 2011.

The ACL has been drafted in plain language to make its usage clearer and to reflect changes in drafting conventions made since the original Trade Practices Act in 1974.

It is regarded as an “Applications Law” which means that each State and Territory jurisdiction will apply it as its own law.

The ACL commenced fully on 1 January 2011.

#### **L. How is the ACL structured?**

The ACL is divided into “chapters” as follows

- Chapter 1 - Definitions and interpretation of key consumer law concepts
- Chapter 2 - General protections - Standards of Business conduct
- Chapter 3 - Specific protection for consumers under certain unfair practices provisions
- Chapter 4 - Offences
- Chapter 5 - Enforcements and remedies.

There are various “unfair practices” prohibited by the ACL including:

- section 18 :Misleading or deceptive conduct
- sections 20-22 :Unconscionable conduct
- section 29 :false /misleading statements about goods and services
- section 32: offering gifts or prizes and not supplying them
- section 35: bait advertising
- section 36: receiving payment for goods/services that cannot be supplied.

#### **M. Unfair contracts (unfair terms in contracts)**

The first part of the ACL was passed in March 2010 to take effect on 1 July 2010 in relation to the unfair contracts terms portion. (As we have seen, the remaining ACL provisions became law on 1 January 2011.) This means that from this date, any unfair terms in standard form consumer contracts will be void.



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Notwithstanding, the standard form contract containing the unfair term may operate without inclusion of that unfair term, to the extent that it is able to do so.