

**SVENSON**  
BARRISTERS



# Identifying competition law issues

(or “Competition Law for Non-Competition Lawyers”)

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# Outline

- Really just focusing on Pt IV (but don't forget ACL)
- Why consider this topic
- Approach / mindset
- Orange and red flags
- Types of matters
  - Accidental cartels (including “concerted practices”)
  - M&A and JVs
  - Contractors v employees
  - Commercial property (and business sales)
  - Distribution agreements
  - Joint or co-operative tenders

# Why should I care?

- ACCC's shifting agenda
- Recent experience of a Partner at national mid-tier firm
- Contract negotiations
- Increased offering to clients
  - Risk or reward?
- Potential issues can be used for leverage in negotiations (particularly with larger companies)

# May require a slight shift in approach to advising

Competition issues are rarely categorical

- Can't usually just look at the legislation
- “Substantial Lessening of Competition” (SLC)
- Purpose and likely effect
- ACCC and the “sniff test”
- Risk
  - Legal v regulatory risk
  - Being investigated / prosecuted can be as bad as any penalty

# Flags

- **ANY** communication with competitors
  - Esp industry associations!
- Dominance in the suburb, town, region, state, country
- Non-compete provisions
- “Exclusivity” provisions
- MFN provisions
- Refusal to deal

# Accidental Cartels

- Cartelists are rarely crooks!
- Concerted Practices (what now?)
  - Information sharing
- Focusing on the deal, not the law – *Colgate/Woolworths*
- Naivety about law – *Colgate/Woolworths, Eggs*
  - A belief that you're OK so long as there's no agreement
- Naivety about the ACCC – *foreign businesses especially*
- Industry Associations - “for the good of the industry” -
- Just being “a little bit” inappropriate

# M&A and JVs

Litmus tests - :

(Not “will it SLC?” but “will the ACCC want to look at it?”)

1. Does the combined entity have >20% market share?
2. How concentrated is the market?
  - >5 to 4 – less likely
  - 4 to 3 – quite possible
  - 3 to 2 – very likely
3. Is the target a vigorous and effective competitor? (mavericks, innovators)

# Contractors v employees

- Employment arrangements are generally exempt from Pt IV but independent contractors are not (especially when corporatised)
- Shift in employment arrangements

e.g. – workforce company switches from seconding employees to more of an agency model for independent contractors with their own companies

- pricing arrangements for all contractors
- restraints of trade



# Commercial property (sales and leases)

- Restrictive covenants on title
- Shopping centres, business parks etc
  - Permitted (and unpermitted) uses/activities on leases
  - Landlord warrants no competing businesses

# Distribution agreements

- Dual distribution models (ANZ / Flight Centre)
  - Medical products case a joint venture
- Exclusive arrangements
  - Territories or customers
  - Sole supplier, take-or-pay, or best endeavours
- Resale price maintenance
- Bundling (full line forcing)

# Joint / group tenders

- Agreements not to compete
- Co-ordinated pricing
- A joint venture?

**QUESTIONS?**

**THANK YOU**

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