Major Energy Users Inc.

A Review of Gas Pipeline Competition

Issues where there is:

- **A lack of open access**

and

- **Limited or no competition**

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The views expressed in this document do not necessarily reflect the views of the Consumer Advocacy Panel or the Australian Energy Market Commission.

The content and conclusions reached are the work of the MEU and its consultants.

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1. Introduction

The use of natural gas to provide feedstock for further processing or heating for industrial or residential use is now so prevalent in Australia, that for many, the supply of natural gas is considered an essential service. In the past, in Victoria and SA gas transport was provided by vertically integrated government owned providers and in NSW by a regulated private company.

In the late 1990s it was recognised that gas transportation was effectively a monopoly business and greater regulatory involvement was required to ensure that gas transport assets (transmission and distribution) should be subject to regulation coupled to open access so that inefficient investment in gas transportation could be avoided. As a result, a formal open access gas transport regime was implemented.

Initially, most gas transportation pipelines were "declared" to be subject to the open access regulatory regime, so a feature of the regime was the ability for revocation of coverage under the regime and for the future use of light handed regulation. It was also recognised that certain gas pipelines could be "recovered" by the regime if circumstances changed and pipelines were seen to become effective monopolies again.

In the years since the regime was established a number of gas transmission pipelines have had their coverage revoked but the ability to implement recoverage has not been as practical as was imagined.

Gas transport arrangements are different to those that apply in the electricity industry where electricity transport allows unrestricted access up to the capacity of the electricity transport system. Generally, increases in capacity of an electricity network are spread over all users in proportion to their use. Payment options for transport services vary with paying for peak demand being moderated by some fixed charges and payment for volume delivered. Electricity transport is usually referred to as market carriage open access.

In contrast, gas transportation is less regulated and operates on a contract basis where shippers pay for an agreed capacity of transport with payment a mix of fixed costs and demand based costs with penalties for over-runs. Gas transport under this model is usually referred to as contract carriage open access.

A key point of difference with gas transportation relates to the treatment of investment for additional load which varies with whether the pipeline is regulated or unregulated. The cost to increase capacity in regulated pipelines is spread over all users so that all shippers are charged the same cost regardless of who caused the need for the augmentation. In contrast, allocation of costs for upgrades in capacity for unregulated pipelines varies with the pipeline owner and can range from being spread over all users (as in regulated pipelines) to being allocated entirely to the new shipper.

Under a contract based cost for service, there is no limit as to how much capacity of a pipeline can be contracted to a single shipper, up to the firm capacity of the pipeline. This difference to the electricity market based system can lead to a loss of open access to all potential users.

In recent years, MEU member firms have been confronted by various forms of restrictions on their gas transport arrangements. This has resulted in the firms having to pay unnecessarily high costs for their gas transport.

Almost all gas transport users access their gas transport arrangements through retailers which then contract as shippers with gas pipeline owners, although a few large gas users do contract directly with pipeline owners as shippers in their own right.

The MEU has identified that there three different conditions where owners and/or retailers can structure arrangements for pipeline access needed to deliver gas to consumers where the owner or a retailer can have an effective monopoly on the transport of gas and thereby acquire monopoly rents or prevent/minimise open access to gas transport infrastructure. These conditions are:

Condition 1 - overt monopoly power

> This is where the pipeline provides a monopoly service but is unregulated. This allows the owner to set prices for the service at any level providing that the prices are not at a level where competition is provided in the form of another pipeline (allowing Ramsey pricing). In theory, obtaining recoverage of the pipeline should overcome this problem but there is a complex assessment process for gaining recoverage which is different to the process for gaining revocation.

Condition 2 - covert monopoly power (hoarding)

> This is where a retailer/shipper acquires all of the firm capacity of a pipeline and uses this to prevent competition from other retailers. This is of particular concern when there is unused capacity which could be accessed by contracting for interruptible supply. Under this condition, to prevent competition the retailer/shipper reaches an "understanding" with the pipeline owner which either precludes the owner from selling interruptible supplies or applying unrealistic prices for the provision of interruptible supply.

Condition 3 - biased monopoly power

> This is where there is insufficient capacity on the pipeline and the new entrant is effectively prevented from gaining access through having to pay for the entire upgrade because existing users get priority on available

capacity. The owner of the pipeline determines the priority of access to the available capacity preventing open competition for a scarce resource. If the pipeline was regulated, this would allow the capacity upgrade to be carried out and the setting of a reference tariff would spread the cost of the upgrade required over all users of the asset.

The MEU considers that under any of these conditions, there are monopoly issues that effectively prevent open access to gas transport infrastructure and/or provide a set of circumstances where there is a lack of competition in gas pipeline services; these issues need to be resolved to enable the principles that are intended by the National Gas Law (NGL) and the associated National Gas Objective (NEO).

The MEU has requested Dwyer Lawyers (Dwyer) to make an assessment of whether the Competition and Consumer Act (CCA) provides any remedies for the issues identified. The attached letter from Dwyer comments:

> "There is nothing in the CCA which of itself prevents a pipeline owner from exercising monopoly power in pricing or which requires him to supply many shippers or to expand his capacity. He is perfectly free to contract out his capacity to as many or as few shippers as he pleases to choose whether or not to expand his capacity, provided there is no agreement having a proscribed purpose or effect."

Dwyer's conclusion reflects the MEU view on these issues:

> "Unless there is some regime specifically directed to natural monopoly such as the access regime there seems no legal hope of ending what appear to be monopoly abuses."

2. Condition 1 - overt monopoly power

The concept behind the Third Party Open Access Regime in gas pipelines was developed in the late 1990s to achieve a number of goals.

The first was to ensure that there would not be inefficient investment in unnecessary gas pipeline infrastructure. It was recognised that if there was spare capacity in an element of infrastructure, it was in the national interest that this spare capacity be made available to other users in preference to investing in new infrastructure assets.

From the first goal, came the second goal - that prices for access had to be reasonable and reflective of the costs to provide the service. This led to the regulatory rules on access pricing. But the regulatory rules only apply to pipelines that are "covered" by the rules.

The third goal was to identify those pipelines where coverage would result in a more efficient outcome. Initially all pipelines that exhibited a monopoly position were deemed to be covered. Since then a number of pipelines have been either "uncovered" or had their coverage reduced to "light regulation" as it was seen that continued regulation was not leading to more efficient outcomes. The reasons for the "uncovering" have ranged from "there is competition" to "regulation does not serve a purpose".

An example of the first reason - there is competition - was the decision to "uncover" portions of the Moomba to Sydney pipeline (MSP). With the completion of the pipeline from Longford to Sydney (Eastern Gas Pipeline - EGP) it was considered that there was competition for gas supplies to the Sydney region as there was considered to be options for shippers. This first decision was based on the concept that two pipelines each delivering from different gas fields exhibited competitive tension and therefore regulation was unnecessary.

An example of the other extreme - regulation does not serve a purpose - was the decision to uncover the South Eastern Pipeline System - SEPS. In this example, all of the capacity was contracted to one retailer/shipper which also provided the only source of gas injection to the pipeline. The contract for all the capacity had a life of ten years and regulation would have no bearing on the cost of gas transport for that period. Continuing with regulation would have incurred costs which delivered no value to end users. It was considered that at the end of the ten year contract, if the pipeline was still in use, then coverage could be reapplied as the pipeline was seen as a monopoly provider.

Where the problem arises, is that the rules leading to the initial decision to cover a monopoly pipeline are different to the rules to impose coverage again. Further, the rules apply to regaining coverage are not the mirror of the rules that allow revocation of coverage. These inconsistencies result in outcomes that are not in the long term interests of consumers which is what the NEO requires.

2.1 The SEPS experience

SEPS is the gas pipeline serving the lower south east of South Australia and was built to deliver gas from the Katnook gas field to users in Millicent and Mount Gambier. SEPS was not connected to any other gas pipeline system until 2005 when it was connected to the SEAGas pipeline through the SESA gas pipeline built by Origin Energy - the then owner of the Katnook gas field - to provide a back up to the failing reserves at Katnook.

Initially, SEPS was a pipeline covered under the National Third Party Gas Access Code (the Code). In 2000, the owner of SEPS applied successfully for the revocation of coverage of SEPS as the costs for regulation were considered significant and would not achieve any purpose because the capacity of the pipeline was fully contracted. Revocation was achieved but there was an expectation of users that regaining coverage would impose a constraint on the pipeline owner (Epic Energy) using its monopoly position.

In 2010, the contract covering the transport of gas on SEPS expired. As the pipeline owner was no longer constrained in its pricing for SEPS, it increased its prices. One user of the services applied for recoverage of the pipeline but was ultimately unsuccessful.

When the pipeline was initially covered it was done so by edict of the SA government when the Code was implemented in the late 1990s. The reason for the decision was that the SEPS clearly provided a monopoly service. When the application for recoverage was made, it was realised that the rules for regaining coverage were not that the pipeline was a monopoly (the reason for covering it in the first place) but that the rules required meeting all four of specific criteria.

These criteria are[1]:

(a) that access (or increased access) to services provided by means of the pipeline would promote competition in at least one market (whether or not in Australia), other than the market for the services provided by means of the pipeline;
(b) that it would be uneconomic for anyone to develop another pipeline to provide the services provided by means of the pipeline;
(c) that access (or increased access) to the services provided by means of the pipeline can be provided without undue risk to human health or safety; and
(d) that access (or increased access) to the services provided by means of the pipeline would not be contrary to the public interest.

[1] NGL Section 15

There was no doubt that criteria 2, 3 and 4 were met so the decision to recover SEPS was based entirely on satisfying criterion (a). Criterion (a) has nothing to do with whether the pipeline is a monopoly or not - it is only about whether coverage will result in greater upstream or downstream competition.

Industrial users of the gas from SEPS are essentially price takers in their markets so none were able to prove that coverage of SEPS would result in promoting downstream competition. Although there was some exploration for gas in the area, it could not be proven that in the short to medium timeframe there would be upstream competition. Effectively even though the users of the gas were being required to pay monopoly rents for access to SEPS, this was not sufficient to regain coverage of SEPS.

One salient issue was pointed out by the applicant - that what the criteria totally over looked that residential consumers using the pipeline could not in anyway show that downstream competition would be promoted by the pipeline being covered as residential users are not in competition at all. This means that any pipeline serving just residential gas consumers cannot in anyway prove that the monopoly gas pipeline serving them should be regulated if the source of gas comes from just one other retailer as it does in the case of SEPS.

The attached example of what is occurring in relation to pricing of SEPS services is in the attached confidential example #1.

2.2 KCA negotiations with Epic for use of SEPS

Up to 2010, Epic had a contract with Origin for the use of the SEPS. This contract was that established in 1990 when the foundation contract was established between KCA, Sagasco (now Origin) and PASA (now Epic) and the contract terms had a 15 year price (reflecting the expected minimum life of Katnook gas field) with a halving of the price for the following 5 years.

Epic advised that with the expiry of the contract between it and Origin in 2010, Epic would allow others to seek access to SEPS but on a different basis to that applying under the foundation contract. This new basis included that Epic will not contract the entire capacity to Origin, allowing others to use capacity not used by other shippers. In principle KCA did not object to this.

What KCA then found unconscionable was that in allowing this increased access to SEPS, Epic used its monopoly position to set shipping rates for use of the capacity of SEPS at levels which clearly included a significant monopoly rent. [redacted]

[redacted] Subsequent to the failure of the application for coverage, prices rose significantly higher.

KCA commenced implementation of its own gas fired generation facility at the Millicent mill in late 2011. Historically, KCA required gas delivery at 850 kPa and gas was provided at the Epic metering point at a pressure significantly higher than this (probably in excess of 4000 kPa). Epic "lets down" the pressure for delivery to KCA at its metering point into gas piping owned by Envestra for delivery into the KCA mill.

As a result of the need for gas at higher pressure to serve the generation plant KCA requested of EPIC two changed aspects for gas delivery:

- A higher delivery pressure (notionally at about 3500 kPa); and
- A new high pressure metered connection to SEPS

In the negotiations with Epic, KCA was advised that there would be a premium charge for delivery at the higher pressure[3], [redacted] KCA concluded that it was more commercially viable to receive gas using the existing low pressure delivery arrangements and to purchase and operate gas compressors to recompress the low pressure gas to the levels required by the generation plant.

[redacted]

[redacted]

[redacted]

This was possible because there was no credible alternative to using the SEPS for gas haulage to the Millicent Mill.

2.3 Conclusion

Clearly, Epic has used its monopoly position to extract considerable monopoly rents, and caused considerable harm to users of the SEPS pipeline. It is understood that Epic has also increased prices to users of the SEPS other than KCA.

The criteria (especially criterion a) for regaining coverage do not reflect the arguments used initially to declare that SEPS should be a covered pipeline - that SEPS is clearly a monopoly and should not be permitted to gain monopoly rents.

Further, the arguments for revoking coverage - that the costs for regulation at the time of the revocation application were greater than the benefits from maintaining coverage - are not reflective of the arguments needed to regain coverage. There is no doubt that the costs of regulation for SEPS would be significantly less now than the benefits consumers would get from the pipeline being covered.

The clear asymmetry in the processes for revoking and regaining coverage is biased against the interests of consumers.

The MEU is not aware of another example of where there is overt but unconstrained exercise of market power, but considers that the very existence of this asymmetry between revocation and regaining coverage could very readily be applicable to more than just this one example of monopoly power.

3. Condition 2 - covert monopoly power (hoarding)

Under the gas access arrangements, gas pipelines operate under a contract carriage model, where shippers seek access to capacity and formally contract with a pipeline owner for the pipeline capacity they intend to use. Pipeline owners sell the capacity of the pipeline generally under one of two forms - firm capacity where the shipper has access at all times for the capacity contracted and interruptible capacity where at certain times the shipper cannot transport gas as all the available capacity is being used by shippers with "firm" access rights.

It is expected that as firm capacity provides a right at all time to the capacity contracted, contracts for interruptible capacity should be priced at a lower level than for firm capacity as the service is of a lesser standard.

Shippers will contract for firm capacity of all or a part of the capacity available in the pipeline, with an expectation that this capacity will be provided as and when the shipper requires it. The fact that a single shipper can control all firm capacity on a pipeline provides the shipper with a monopoly on all gas supplies downstream of the pipeline. By buying all of the firm capacity on the pipeline, the shipper prevents others gaining any firm access and so this prevents other shippers from accessing the firm capacity. This approach (hoarding of capacity) prevents competition in markets downstream of the pipeline because no other shipper can offer a firm supply contract.

Further, a shipper can contract all of the available firm capacity with a pipeline even when there is no expectation that the entire firm capacity will ever be used. This might occur if the downstream market is less than the physical capacity of the pipeline.

Effectively, because of the contractual arrangements possible for gas transport, a shipper can become an effective monopoly by preventing access to downstream markets by hoarding the firm capacity.

Where the issue can become even more of a problem for gas users is when the pipeline owner, after selling all of the firm capacity, does not offer interruptible capacity to other shippers or does so with the cost of interruptible supply being set higher than the cost for firm supply. Whether this is the result of collusion with the shipper buying all of the firm capacity or whether the pipeline owner considers that offering interruptible capacity might impact its relationship with the main shipper, the outcome is the same for downstream users which are denied competition for their gas supplies

3.1 Examples of the concept of hoarding

Please refer to the attached confidential examples #2 and #3 detailing how the issue of hoarding can eliminate competition.

3.2 Conclusion

The acquisition of all firm capacity on a pipeline by one shipper effectively prevents access to capacity on the pipeline by another shipper and this results in downstream gas users being subjected to monopoly pricing.

Restricting the access to interruptible capacity, especially when the downstream market is less than the capacity of the pipeline, perpetuates this ability of the shipper to maintain its monopoly position.

4. Condition 3 - biased monopoly power

When a pipeline is operating at or near capacity, and either a new shipper seeks access to the asset or an existing shipper seeks increased capacity, there is a need to augment the capacity to accommodate the increased gas demand. Increasing the capacity of a pipeline is not an incremental process where small amounts of capacity can be added as demand increases; generally, augmentation delivers a significant step increase in capacity with the augmentation probably delivering much more capacity than the increased demand might warrant.

There are two approaches that could increase demand on a pipeline at or near capacity.

1. The augmentation is carried out and all shippers share in the costs for the upgrade in proportion to their usage. This is the common approach used in regulated networks, although the new shipper might be required to fund some of the augmentation as part of a connection contribution with this connection cost being shared with more new shippers as they seek access.

2. The cost of the augmentation is carried entirely by the shipper seeking access or an increase in capacity, even where the additional capacity is much greater than the capacity sought.

Under option 2, the high cost of augmentation presents a barrier to entry.

In a contract carriage arrangement, the owner of the pipeline determines the way shippers will be treated and how the costs of augmentation are to be shared. For regulated pipelines, this approach is reviewed and incorporated into the approved Access Arrangement.

At one end of the spectrum, the owner can determine that existing users should only be required to pay for the existing capacity used and not carry any of the augmentation cost. At the other end of the spectrum, the costs of the existing pipeline and the augmentation are spread across all users of the asset.

The benefit of spreading the cost is that the increase in usage reduces the cost of the existing assets to all existing users but to offset this, the existing users share in the cost of the augmentation. The approach might (but not always) increase the prices for the existing shippers, and there is a question as to whether this approach is more efficient than not augmenting and accommodating the increase in demand

However, what does result is that it is the decision of the owner as to how it decides to approach the allocation of costs subsequent to the increase in capacity. This allows the owner to use its market power to decide on whether to

prevent the increase in demand (due to the high entry costs) or to spread the cost over all users.

4.1 An example of the biased monopoly power

Please refer to the attached confidential example #4 detailing how the issue of biased monopoly power can prevent new entrants.

4.2 Conclusion

The decision by a pipeline owner on how it will address the costs of requested augmentation is vexed. It can be asserted that the pipeline owner would seek to get more usage of the assets through augmentation as there is an implicit incentive to increase usage as this increases revenue. At the same time, the pipeline owner may consider that retention of the existing pricing regime is sufficient for its needs and it is unwilling to disturb the relationship with the existing shippers.

The issue for the shipper seeking the increased capacity is that the costs to install another pipeline will be greater than the cost to augment an existing pipeline and so it has little ability to seek an equitable outcome

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CONFIDENTIAL ATTACHMENTS

providing actual examples #1, #2, #3 and #4 relevant to the three conditions examined

Confidential attachment #1

[redacted]

[redacted]

[redacted]

[redacted]

[1] KCA is not privy to the actual tariffs as it was not party to the contract between the developer of the Katnook gas field and the pipeline developer. KCA is privy to the tariffs post 2010 as these are a cost pass through from its retailer.

Confidential attachment #2

[redacted]

[redacted]

[redacted]

Confidential attachment #3

[redacted]

Confidential attachment #4

[redacted]

Dwyer Lawyers

Principal

Terence M. Dwyer FTIA
B.A. (Hons), B.Ec. (Hons) (Sydney)
M.A., Ph.D. (Harvard), Dip. Law (Sydney)

Senior Associate

Deborah R. Dwyer FTIA
B.A. (cum laude), M.A. (Smith)
LL.B. (ANU), LLMCL (NTU)

Your Ref: Major Energy Users
Our Ref: 2015/107/

11 May 2015

Mr David Headberry
2 Parkhaven Circuit
HEALESVILLE VIC 3777

Dear David

MONOPOLY GAS PIPELINES AND CAPACITY HOARDING

You asked whether the *Competition and Consumer Act 2010* could provide legal remedies to address 3 problems.

Overt monopoly power

1. The first problem ("overt monopoly power") is that of an unregulated gas pipeline acting as a simple monopoly and charging prices which include large monopoly rents.

Covert monopoly power (hoarding)

2. The 2nd problem ("capacity hoarding" or covert or shared monopoly power) is where a contract carriage shipper or a few of them contract for the whole capacity of a gas pipeline so that others cannot get access to ship gas, even if there is unused capacity.

Biased monopoly power (insufficient capacity)

3. The 3rd problem (insufficient capacity) arises because a pipeline has inadequate capacity a new user must pay for the whole upgrade even if it will benefit other users, whether existing users or future users as well.

A Common Law Remedy?

Before outlining any possible remedies under the *Competition and Consumer Act ("CCA")*, it is worth noting that the common law has for centuries been hostile both to monopoly and contracts in restraint of trade.

Suite 4, Level 2, 161 London Circuit
GPO Box 2529,CANBERRA CITY ACT 2601, Australia

Phone: *+ 61(0)2 6247 8184* ***Fax:*** *+ 61(0)2 6169 3032* ***Email:*** *office@dwyerlawyers.com.au*

In the *Case of Monopolies – Darcy v Allein* (1602) 77 ER 1260, the Court struck down Crown grants of patents of monopoly given in exchange for royalties paid to the ground.

But a gas pipeline monopoly is a natural monopoly, not simply an artificial one created by Crown grant. Although the easements granted by statute to a gas pipeline owner may represent a legislated monopoly, the Courts could not tear up a monopoly granted by legislation and, in any case, even if they could, they would naturally see the exercise as futile.

To declare void the grant of easements in favour of a monopoly gas pipeline owner is not the same thing as declaring void a patent of monopoly for the production of a good which could be produced competitively. The public would be deprived of any benefit from the gas pipeline if its construction and operation was simply declared illegal as a monopoly. To put it more precisely, the common law hostility to Crown grants of monopoly does not mean that every monopoly is void. Nor does it mean that an owner of a natural monopoly is subject to any common law rule preventing him charging what the market will bear in order to extract monopoly rents.

As the case law developed, the courts did not strike down all contracts in restraint of trade. The restraint had to be "unreasonable". The common law doctrine had regard to reasonableness and legitimate interests.

Thus, under common law, all agreements in restraint of trade are void unless:

- they are reasonable in the interest of the parties (the onus is on the party relying on restraint); and

- they are reasonable in the interest of the public (the onus shifts to person seeking to strike down restraint to demonstrate they are not reasonable in the interest of the public)

When assessing reasonableness the courts will first consider whether there is a "legitimate interest" or interests that require protection and, if so, will assess whether or not the restraint does no more than is necessary to protect that interest; if the restraint goes beyond what is necessary then it will not be considered reasonable.

A wide range of interests may be considered legitimate, including protecting trade secrets and protection of business goodwill, and even the creation or maintenance of an even sporting competition (see, for example, *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242).

Thus industry associations were sometimes successful in having price-fixing agreements upheld by the court on various arguments, such as a cartel agreement being necessary to avoid the members carrying on business at a loss or having to reduce employees' wages to an unacceptable minimum, see *Attorney-General v the Adelaide Steamship Co Ltd* (1913) 18 CLR 30.

Turning to the 3 questions you have raised, one sees immediately that the common law doctrine of restraint of trade is of no assistance.

In the first problem of overt monopoly power, there is no contract restraining anyone from doing anything. All that is happening is that an unregulated gas pipeline monopolist is charging whatever he thinks the market will bear. There is no *contract* binding another person not to build a pipeline (the fact that at that option might be completely uneconomic is irrelevant) nor is there any contract restraining any person from plying a downstream or upstream trade.

In the 2nd problem of capacity hoarding, the contract or contracts allocating all the available capacity to one or a few shippers are not in themselves in restraint of trade. Nor are they obviously unreasonable. A gas pipeline earner can well argue that he wants the whole capacity contracted for, whether used or not, because he wants a reliable cash flow on say a take or pay basis, to service construction loans. The shipper or shippers can also say that they need the firm capacity to ensure continuity of supply to downstream users or distributors and that they have contracted for excess capacity to accommodate future demand. Nothing in the shipping contract affects the liberty of any other person to conduct any business or trade.

As for the 3rd problem of insufficient capacity, again there is no *contract* to be attacked as being in restraint of trade. There is no law which requires anyone owning a pipeline to expand it for the convenience or benefit of others. (This, of course, is why infrastructure such as the Sydney Harbour Bridge was built by governments: no private owner could ever solve the free rider problem once a bridge was built. Everyone wanted it but no one wanted to pay for it and the motorists who did could never pay enough to make it worthwhile in advance at any monopoly price.)

Accordingly, it appears that the common law doctrines against the creation of monopolies or contracts in restraint of trade are of no assistance in dealing with either problem.

The Statutory Scheme

Before answering the 3 questions it is necessary to set out the structure of the Act. The *Competition and Consumer Act* is basically a rewrite of the 1974 *Trade Practices Act*.

The core competition law provisions are contained in Part IV of the Act. They embrace –

1. Cartel conduct (Division 1, s 44ZZRD, formerly s 45A),
2. Anti-competitive agreements (s 45)
3. exclusionary provisions (boycotts) (s 45, s 4D)
4. misuse of market power (s 46(1))
5. exclusive dealing (s 47)
6. resale price maintenance (s 48)
7. Mergers (s 50)

Access is covered separately in Part IIIA.

Turning the Part IV provisions of the CCA above, we see that exclusive dealing, resale price maintenance and mergers are irrelevant in considering the 3 questions you have posed. We now examine the other provisions in turn.

At the outset, none of them appear relevant in any way to the third problem of biased monopoly power arising from insufficient capacity and we will look at the first 2 problems.

Cartel conduct?

Division 1 of Part IV of the CCA, containing provisions 44ZZRA - 44ZZRV, now contains the primary prohibition on cartel conduct.

A cartel exists when businesses agree to act together instead of competing with each other. This agreement is designed to drive up the profits of cartel members while maintaining the illusion of competition.

Cartel conduct is defined in s 44ZZRD as including four forms of activity: price fixing, market division, restricting outputs and bid rigging. This conduct is prohibited where made or given effect to in a "contract, arrangement or understanding" and two or more of the parties involved are competitors (or would be but for the conduct).

The section appears irrelevant to both problems.

In the first case, overt monopoly power, there is no agreement made between 2 competitors in the same market and in any case there is no *purpose* directed to any of the proscribed activities.

In the 2nd case, capacity hoarding, if there is only one shipper, there cannot be a cartel agreement. If there are 2 or more shippers, one has to find an agreement *between them* directed to a proscribed purpose. But normally the shippers are contracting independently with the pipeline owner and there is no such agreement between the shippers.

Without a "contract, arrangement or understanding" (all of which must be proved in evidence) you do not even start to look at cartel conduct. The simple fact is that in all 3 problems, there is no need for any such contract: monopoly exists and that is that.

Anti-competitive agreements?

In addition to cartel conduct as defined in s 44ZZRD, section 45 of the CCA prohibits contracts, arrangements or understandings containing a provision which has the *purpose, effect or likely effect* of substantially lessening competition. These arrangements will generally be horizontal in nature, but this is not a requirement of s 45.

A number of factors are considered by the Courts to reach a decision on whether s 45 can apply:

- Is there an "'agreement" caught by the Act?

- What is the market?
- Does the conduct substantially lessen competition in that market?
- Relevant sections of the Competition and Consumer Act
- Other types of anti-competitive behaviour
- More information

Is there an "agreement" caught by the Act?

Under the Act, agreements, contracts, arrangements and understandings possess similar meanings. Essentially they involve the development of a plan of action between two or more people that may not be enforceable at law but they have every intention of following.

In relation to the "arrangement", the Court has said:

"... when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An arrangement as so defined is therefore something whereby the parties to it accept mutual rights and obligations." *TPC v Nicholas Enterprises Pty Ltd (No 2)* (1979) FLR 83

As to "understanding":

"An understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding ..." *Top Performance Motors Ltd v Ira Berk (Qld) Pty Ltd (1975)* 24 FLR 286

To arrive at an understanding or to make an arrangement it is not necessary for anything to be written down. In fact, such agreements are often not put into writing. Nothing need even be expressed—a "nod and wink" is sufficient.

If necessary, the Court will infer the requisite "meeting of minds" from circumstantial evidence such as evidence of joint action, similar pricing structures, or even from evidence of opportunities the parties had to reach an understanding.

What is the market?

To determine whether conduct has any effect in a market, you need to determine what the market is. One widely-accepted judicial definition is the following:

"A market is the area of close competition between firms or ... the field of rivalry between them. ... Within the bounds of a market there is substitution—substitution between one product and another, and between one source of supply and another, in response to changing prices. ... In determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction." *Queensland Cooperative Milling Association Ltd/Defiance Holdings Ltd, re proposed merger with Barnes Milling Ltd (1976)* ATPR 40-012

A market has four important elements:

- product
- geography
- level of function
- time.

Product

The means the range of goods or services (including substitutes for them) that will satisfy customer requirements. Customer response to price changes is an important clue to whether products are in the same market.

Geography

The geographic area within which a product is traded—for example, the Sydney metropolitan newspaper market, the south-east Queensland gas market.

Level of function

The particular market level at which a company operates—for example, manufacturing, wholesale, retail.

Time

The period of time over which substitution possibilities are considered. Generally, substitution possibilities are considered for the period of the foreseeable future such that substitutes will constrain the exercise of significant market power by the merged entities.

Each of these items must be examined in coming to a conclusion regarding the relevant market.

Does the conduct substantially lessen competition in that market?

"Substantial" is an important concept in competition and consumer law and it arises in a number of provisions.

"Substantial" has been defined in case law as large, weighty, big, real or of substance or not insubstantial. However it is not straightforward; the meaning of substantial depends on the context and in a relative sense.

An effect is considered to be substantial if it is important or weighty in relation to the size of the particular market.

In *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38; (2000) ATPR 41-752, Justice French said that to work out whether competition is being substantially lessened...

"...there [must] be a purpose, effect or likely effect of the impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process."

Section 45(2)(a)(ii) may, at first blush, look promising. It outlaws "a provision of the proposed contract, arrangement or understanding has the purpose, or would have or *be likely to have the effect, of substantially lessening competition*". It might be thought that capacity hoarding via contract be attacked because section 45(3) does not require the parties to the agreement to be competitors: an agreement between non-competitors can still have the likely effect of lessening competition in another market where only one of them operates.

However, the section is quite irrelevant to the first problem of overt monopoly power. A pipeline monopolist charging what the market will bear may be reducing the number of downstream users and in that sense shrinking the downstream market, but he is not substantially lessening competition as such if anyone who can afford his prices is free to enter the market. In the case where he has only one customer, there is no effect on competition anyway: the 2 parties are in a situation of bilateral monopoly and monopsony and arguing about the appropriation of profits from the value chain.

Turning to the 2nd problem of capacity hoarding by one or more major shippers, where is the relevant contract or understanding? A shipper and the pipeline owner are not in competition with each other in the same market.

Each of the shippers is contracting with the pipeline owner separately. Each of those contracts is allowing the shipper to enter the downstream market. There is no tripartite agreement between the pipeline owner and the shippers. There is no agreement between the shippers if more than one (and no agreement at all if there is only one).

It is therefore hard to see how the section cannot operate. While the *effect* of the shippers' individual contracts which collectively use up all the capacity of the pipeline may be to exclude others from entering and competing at the downstream market, unless there is a coordinated agreement between them to lock up all the capacity, a result which merely falls out from their separate individual shipping contracts would not seem to be produced by a relevant agreement. A problem a Court would face is which "agreement" produced the impugned "effect", bearing in mind all this has to be proved in evidence.

Once again, one falls over at the first hurdle. It would be extremely rare where one could find an over to agreement between 2 or 3 shippers with all the capacity of a pipeline openly agreeing to anti-competitive conduct. Essentially they do not need to. In fact, the shippers may be in completely different markets. For example, one shipper may be a retail gas distribution business servicing residential customers and the other shipper may be a large industrial user selling products in a completely different market.

The only case where one might find anti-competitive agreement would be if one had two or three shippers were foolish enough to have some explicit understanding. But this would be rare indeed.

Exclusionary provisions

Exclusionary provisions (boycotts) between competitors are prohibited per se by section 45 of the Act, and are defined in section 4D.

Section 4D defines exclusionary provisions as occurring when parties (*two or more of whom are in competition*) make a contract, arrangement or understanding in which the relevant provision has *the purpose* of "preventing, restricting or limiting"

"(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions"

by all or any of the parties to the agreement.

Turning to the first two problems, the prohibition of exclusionary provisions seems quite irrelevant.

In the first case, overt monopoly power, the monopoly pipeline owner is making a contract with a downstream user who is not in competition with him in the same market. Nor in any case does their shipping agreement have any *purpose* of preventing either of them supplying a third party. As regards the 2nd problem of capacity hoarding, there cannot exist any relevant agreement if there is only one shipper and in any case there would rarely be any relevant agreement made for that explicit proscribed *purpose* between *competing* shippers if there were more than one shipper.

Misuse of Market Power?

Section 46(1) prohibits a corporation with substantial market power taking advantage of that market power for a prohibited *purpose*. The prohibited purposes include

(a) Eliminating or substantially damaging a competitor ... in that or any other market

(b) Preventing entry of a person into that or any other market

(c) Deterring or preventing a person from engaging in competitive conduct in that or any other market

Taking advantage

Section 46(1) requires that a corporation "take advantage" of their market power *for a prohibited purpose*. The majority of s 46 cases that have failed have done so as a result of failing to prove this element. The Courts have treated it as a separate and distinct requirement and, where a corporation with market power would (or perhaps could) have engaged in the same conduct absent its market power, they have refused to find the element satisfied (e.g., *Melway*) even where purpose has been clearly established (egg, *Rural Press*). In response to some of these decisions the Trade Practices Legislation Amendment Act 2008 provided some guidance on the "taking advantage" requirement designed to make it easier to prove; however,

it is generally considered that the (relatively) new subsection (6A) merely re-states existing case law and is unlikely to make proof of this element any easier.

Sub-section 46(7) allows the court to infer purpose from surrounding circumstances. Pursuant to s 4F the purpose need not be the sole or dominant purpose but must be a substantial purpose.

Turning to the first 2 problems, the section appears to be of no assistance.

In the first case, overt monopoly power, the monopoly pipeline owner is indeed taking advantage of his market power to maximise his monopoly rents but that is not a prohibited purpose. Price gouging is not a prohibited purpose.

In the 2nd case, capacity hoarding, it is conceivable that one may be able to prove one or more shippers bought up the capacity of the pipeline for the purpose of preventing others competing against them in downstream markets, but that would require explicit proof in each case. In the absence of any explicit agreement directed towards a prohibited purpose, the section would appear to be of no assistance. It is easy to see that one or 2 large shippers could well argue that they bought up capacity the purpose of serving the market themselves and future demand, not for the purpose of preventing anyone else from doing so.

They would simply invite the court look at the relevant contract which merely ensures their future supply of as much gas as they want and note that no provision of the contract is directed in any way at prejudicing or restricting any third party. They would say that anyone else had been free at the time the contract for secure future capacity on similar terms and if they chose not to they can hardly complain now and point to the general policy of the law that bargains should be kept. Nothing in the history of trade practices legislation has ever said that a man is wrong if he has the foresight to make a good long-term bargain to ensure the future growth of his business by securing necessary inputs.

Access

Because natural monopoly does not fit easily or at all in Part IV, it was thought that the problem of natural monopoly could be solved by introducing an access regime separately in IIIA. The basic idea was that wherever there was monopoly or bottleneck infrastructure, it should be thrown open to all users bidding on equal terms so that the owner of the monopoly infrastructure got a fair return on his investment but was not able to extort monopoly rents as quasi-taxes on upstream producers or downstream business or consumer users.

However a natural monopoly has to be declared before it comes under the access regime. Under s 44G(2), the National Competition Council *"cannot recommend that a service be declared unless it is satisfied of **all** of the following matters:*

(a) that access (or increased access) to the service *would promote a material increase in competition in at least one market* (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(e) that access to the service:

(i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;

(f) that access (or increased access) to the service would not be contrary to the public interest.

...."

Because of an inability to satisfy criterion (a), it is not always the case that a monopoly pipeline which has ceased to be a declared pipeline can be re-declared and re-covered under the access regime.

But unless an access regime is declared over a pipeline it is impossible to see how all 3 problems could ever come close to a resolution. As we have seen, the *Competition and Consumer Act* is focused on preserving a process (competition in markets), not on the presumably desired outcome (least cost provision and charging for essential infrastructure and goods and services). The Act takes it for granted that competition is the natural state of affairs and will produce the desired outcome. However the whole problem of natural monopoly is that here, monopoly, not competition, is the natural state of affairs.

The grant of an easement to lay pipelines is a form of legislative monopoly granted by the Parliament on behalf of the public for the benefit of the public. It is a necessary monopoly to avoid wasteful duplication in most cases. It would therefore be more rational for the Act to start with a presumption that wherever network infrastructure exists over legislated easements, that infrastructure should be subject to an access regime for the benefit of the public whose private rights have been abridged by the grant of the easement.

Conclusion

Faced with the 3 simple problems presented of either a single monopoly pipeline owner extracting monopoly rents or a pipeline with capacity hoarded by one or 2 shippers or insufficient capacity blocking entry, it is very hard to see that the CCA will ever be practically relevant or available to protect downstream users, or upstream shippers for that matter.

There is nothing in the CCA which of itself prevents a pipeline owner from exercising monopoly power in pricing or which requires him to supply many shippers or to expand his capacity. He is perfectly free to contract out his capacity to as many or as few shippers as he pleases to choose whether or not to expand his capacity, provided there is no agreement having a proscribed purpose or effect.
Unless there is some regime specifically directed to natural monopoly such as the access regime there seems no legal hope of ending what appear to be monopoly abuses. One might also add that the access regime is also inadequate because it cannot mandate optimal capacity being constructed in the first place. It is fairly clear that no access regime based on "user pays" from motor vehicles could ever have been sufficient to bring about the construction of the Sydney Harbour Bridge. As some toll roads have shown, designing proper capacity is a major issue since necessary capacity depends on usage and usage depends on price – all of which are unknown *ex ante*. That is why infrastructure in so many cases was financed by rates on the lands benefited by its provision.

Yours sincerely

Terence Dwyer

Encl.

COMPETITION AND CONSUMER ACT 2010

Extracts

COMPETITION AND CONSUMER ACT 2010 - SECT 4D

Exclusionary provisions

(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons ***any 2 or more of whom are competitive with each other***; and

(b) the provision has ***the purpose of*** preventing, restricting or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) ***if, and only if,*** the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

COMPETITION AND CONSUMER ACT 2010 - SECT 4G

Lessening of competition to include preventing or hindering competition

For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

COMPETITION AND CONSUMER ACT 2010 - SECT 4M

Saving of law relating to restraint of trade and breaches of confidence

This Act does not affect the operation of:

(a) ***the law relating to restraint of trade*** in so far as that law is capable of operating concurrently with this Act; or

(b) the law relating to breaches of confidence;

but nothing in the law referred to in paragraph (a) or (b) affects the interpretation of this Act.

COMPETITION AND CONSUMER ACT 2010 - SECT 44ZZCA

Pricing principles for access disputes and access undertakings or codes

The pricing principles relating to the price of access to a service are:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

(i) ***allow multi-part pricing and price discrimination when it aids efficiency***; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.

COMPETITION AND CONSUMER ACT 2010 - SECT 44ZZRD

Cartel provisions

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a ***cartel provision*** if:

(a) ***either of the following conditions is satisfied*** in relation to the provision:

(i) ***the purpose/effect condition*** set out in subsection (2);

(ii) the purpose condition set out in subsection (3); ***and***

(b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

Purpose/effect condition

(2) The purpose/effect condition is satisfied if the provision has the purpose, or has or ***is likely to have the effect, of directly or indirectly***:

(a) fixing, controlling or ***maintaining***; or

(b) providing for the fixing, controlling or maintaining of;

the price for, or a discount, allowance, rebate or credit in relation to:

(c) ***goods or services supplied, or likely to be supplied, by any or all of the parties to the contract***, arrangement or understanding; or

(d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(e) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or

(f) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions--see subsection (8).

Note 2: ***Party*** has an extended meaning--see section 44ZZRC.

Purpose condition

(3) ***The purpose condition is satisfied*** if the provision has the purpose of ***directly or indirectly***:

(a) preventing, restricting or limiting:

(i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or

(ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or

(iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or

(b) allocating between any or all of the parties to the contract, arrangement or understanding:

(i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or

(ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or

(iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

(i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or

(ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or

(iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or

(iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

(v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered with related provisions--see subsection (9).

Note 3: ***Party*** has an extended meaning--see section 44ZZRC.

Competition condition

(4) The competition condition is ***satisfied if at least 2 of the parties to the contract, arrangement or understanding***:

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

(c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services--the supply of those goods or services; or

(d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services--the acquisition of those goods or services; or

(e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or likely re-supply, of goods or services--the supply of those goods or services to that re-supplier; or

(f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods--the production of those goods; or

(g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services--the supply of those services; or

(h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services--the supply of those goods or services; or

(i) if paragraph (3)(c) applies in relation to a supply of goods or services--the supply of those goods or services; or

(j) if paragraph (3)(c) applies in relation to an acquisition of goods or services--the acquisition of those goods or services.

Note: ***Party*** has an extended meaning--see section 44ZZRC.

Immaterial whether identities of persons can be ascertained

(5) It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (f) or subparagraph (3)(a)(iii), (b)(i) or (ii) can be ascertained.

Recommending prices etc.

(6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:

(a) to have the purpose mentioned in subsection (2); or

(b) to have, or be likely to have, the effect mentioned in subsection (2);

by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

Immaterial whether particular circumstances or particular conditions

(7) It is immaterial whether:

(a) for the purposes of subsection (2), subparagraph (3)(a)(iii) and paragraphs (3)(b) and (c)--a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and

(b) for the purposes of subparagraph (3)(a)(i)--the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and

(c) for the purposes of subparagraph (3)(a)(ii)--the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

Considering related provisions--purpose/effect condition

(8) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:

(a) the other provisions of the contract, arrangement or understanding;

(b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose, or has or is likely to have that effect.

Considering related provisions--purpose condition

(9) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:

(a) the other provisions of the contract, arrangement or understanding;

(b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose.

Purpose/effect of a provision

(10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

(a) the form of the provision; or

(b) the form of the contract, arrangement or understanding; or

(c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

Purpose of a provision

(11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:

(a) the form of the provision; or

(b) the form of the contract, arrangement or understanding; or

(c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

COMPETITION AND CONSUMER ACT 2010 - SECT 44ZZRF

Making a contract etc. containing a cartel provision

Offence

(1) A corporation commits an offence if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) The fault element for paragraph (1)(b) is knowledge or belief.

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) $10,000,000;

(b) if the court can determine the total value of the benefits that:

(i) have been obtained by one or more persons; and

(ii) are reasonably attributable to the commission of the offence;

3 times that total value;

(c) if the court cannot determine the total value of those benefits--10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

Indictable offence

(4) An offence against subsection (1) is an indictable offence.

COMPETITION AND CONSUMER ACT 2010 - SECT 45

Contracts, arrangements or understandings that restrict dealings or affect competition

(1) If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977* :

(a) is an exclusionary provision; or

(b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.

(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii) ***a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition;*** or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section, ***competition*** , in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, ***means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies*** or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

(5) This section does not apply to or in relation to:

(a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;

(b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or

(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:

(i) conduct that contravenes section 48; or

(ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or

(iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6A) The following conduct:

(a) the making of a dual listed company arrangement;

(b) the giving effect to a provision of a dual listed company arrangement;

does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.

(7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed

contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.

(8A) Subsection (2) does not apply to a corporation engaging in conduct described in that subsection if:

(a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and

(b) the notice is in force under section 93AD.

(9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:

(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and

(b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

COMPETITION AND CONSUMER ACT 2010 - SECT 45B

Covenants affecting competition

(1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.

(2) A corporation or a person associated with a corporation shall not:

(a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:

(i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or

(ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the corporation;

(b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or

(c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(3) Where a person:

(a) issues an invitation to another person to enter into a contract containing a covenant;

(b) makes an offer to another person to enter into a contract containing a covenant; or

(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms;

the first-mentioned person shall, by issuing that invitation, making that offer or making that fact known, be deemed to require the giving of the covenant.

(4) For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which:

(a) a corporation that, or person who, is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or

(b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragraph;

is or would be, or but for subsection (1) would be, entitled.

(5) The requiring of the giving of, or the giving of, a covenant does not constitute a contravention of this section by reason that giving effect to the covenant would, or would but for the operation of subsection 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to engaging in conduct in relation to a covenant by way of:

(a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.

(7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:

(a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the corporation in relation to the covenant or proposed covenant; or

(b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A(1)(a)(ii).

(8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:

(a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and

(b) the person applies for the grant of such an authorization within 14 days after the covenant is given;

but nothing in this subsection affects the application of paragraph (2)(b) or (c) in relation to the covenant.

(9) This section does not apply to or in relation to a covenant or proposed covenant if:

(a) the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes; or

(b) both of the following subparagraphs apply:

(i) the person who required or requires the covenant to be given was or is, at that time, a registered charity;

(ii) the covenant was or is required to be given for or in accordance with the purposes or objects of that registered charity; or

(c) both of the following subparagraphs apply:

(i) the covenant was or is required to be given in pursuance of a legally enforceable requirement made by a registered charity;

(ii) that legally enforceable requirement was or is made for or in accordance with the purposes or objects of that registered charity.

COMPETITION AND CONSUMER ACT 2010 - SECT 46

Misuse of market power

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market ***for the purpose of***:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) ***preventing the entry of a person into that or any other market***; or

(c) ***deterring or preventing a person from engaging in competitive conduct in that or any other market.***

(1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.

(1AA) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1AB) For the purposes of subsection (1AA), without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has a substantial share of a market, the Court may have regard to the number and size of the competitors of the corporation in the market.

(1A) For the purposes of subsections (1) and (1AA):

(a) the reference in paragraphs (1)(a) and (1AA)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

(b) the reference in paragraphs (1)(b) and (c) and (1AA)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(2) If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;

the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.

(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(3A) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate or bodies corporate has or have in that market that results from:

(a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties; and

(b) any covenants, or proposed covenants, that the body corporate or bodies corporate is or are, or would be, bound by or entitled to the benefit of.

(3B) Subsections (3) and (3A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(3C) For the purposes of this section, without limiting the matters to which the court may have regard for the purpose of determining whether a body corporate has a substantial degree of power in a market, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control the market; or

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(3D) To avoid doubt, for the purposes of this section, more than 1 corporation may have a substantial degree of power in a market.

(4) In this section:

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

(4A) Without limiting the matters to which the court may have regard for the purpose of determining whether a corporation has contravened subsection (1), the court may have regard to:

(a) any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services; and

(b) the reasons for that conduct.

(5) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that it acquires plant or equipment.

(6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 49 and 50, by reason that an authorization or clearance is in force or by reason of the operation of subsection 45(8A) or section 93.

(6A) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:

(a) whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;

(b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;

(c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;

(d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

This subsection does not limit the matters to which the court may have regard.

(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, ***the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.***

COMPETITION AND CONSUMER ACT 2010 - SECT 47

Exclusive dealing

(1) Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.

(2) A corporation engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;

on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:

(d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) will not, or will not except to a limited extent, re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) in the case where the corporation supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services to a person at a particular price; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a person;

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate:

(d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(4) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) acquires, or offers to acquire, goods or services; or

(b) acquires, or offers to acquire, goods or services at a particular price;

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(5) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to acquire goods or services from a person; or

(b) to acquire goods or services at a particular price from a person;

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has supplied, or has not agreed not to supply, goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(6) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;

on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(7) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services at a particular price to a person; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a person;

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(8) A corporation also engages in the practice of exclusive dealing if the corporation grants or renews, or makes it known that it will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

(a) will not, or will not except to a limited extent:

(i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(9) A corporation also engages in the practice of exclusive dealing if the corporation refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

(a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(c) has supplied goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a corporation engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:

(a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

(10A) Subsection (1) does not apply to a corporation engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:

(a) the corporation has given the Commission a notice under subsection 93(1) describing the conduct; and

(b) the notice is in force under section 93.

(11) Subsections (8) and (9) do not apply with respect to:

(a) conduct engaged in:

(i) by a registered charity; and

(ii) for or in accordance with the purposes or objects of that registered charity; or

(b) conduct engaged in in pursuance of a legally enforceable requirement made by a registered charity, being a requirement made for or in accordance with the purposes or objects of that registered charity.

(12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.

(13) In this section:

(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;

(b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and

(c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.