

# Detailed Table of Contents

## Chapter 1: Introduction

■ Introduction .....	2
□ Overview .....	2
▪ Australian competition law .....	2
■ Legislative history of Australian competition law .....	2
□ Overview .....	2
▪ <i>Australian Industries Preservation Act 1906</i> (Cth) .....	2
▪ <i>Monopolies Act 1923</i> (NSW) .....	3
▪ <i>Trade Practices Act 1965</i> (Cth) .....	3
▪ <i>Restrictive Trade Practices Act 1971</i> (Cth) .....	5
▪ <i>Trade Practices Act 1974</i> (Cth) .....	5
▪ The Swanson Committee .....	5
▪ The Blunt Committee .....	6
▪ The Green Paper .....	6
▪ The Griffith Committee .....	6
▪ The Cooney Committee .....	6
▪ The Hilmer Committee .....	6
▪ <i>Competition Policy Reform Act 1995</i> (Cth) .....	7
▪ The Dawson Committee .....	7
▪ <i>Trade Practices Legislation Amendment Act (No 1) 2006</i> (Cth) .....	7
▪ <i>Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009</i> (Cth) .....	7
▪ <i>Competition and Consumer Act 2010</i> (Cth) .....	7
▪ The Harper Panel .....	8
▪ The Government response to the Harper Report .....	8
▪ Changes to pecuniary penalties and fines .....	8
■ Section 2 of the CCA .....	8
□ The object of the CCA .....	8
▪ Enhance the welfare of Australians .....	8
■ Prohibitions under the CCA .....	9
□ Types of prohibitions .....	9
▪ <i>Per se</i> prohibition .....	9
▪ Substantial lessening of competition prohibition .....	10
■ Competition Code .....	10
□ Part XIA of the CCA .....	10
▪ Object of Part XIA .....	10
▪ The Competition Code .....	11
■ ACCC .....	12
□ The role of the ACCC .....	12
▪ Administering and enforcing the CCA .....	12
▪ The strategies of the ACCC .....	12
▪ ACCC's enforcement priorities .....	12
▪ ACCC's enduring priorities .....	12
▪ ACCC's compliance 'pyramid' .....	12
■ Section 5 of the CCA .....	13
□ Extended application of the CCA to conduct outside Australia .....	13
▪ Extraterritorial application of the CCA .....	13
▪ Bodies corporate incorporated in Australia .....	14
▪ 'Carrying on business within Australia' .....	14
▪ 'Carries on business within Australia' <i>simpliciter</i> .....	16
▪ 'Carrying on business within Australia' through a subsidiary .....	16
▪ 'Australian citizens' .....	16
▪ 'Persons ordinarily resident within Australia' .....	17

## Chapter 2: Definitions and Key Concepts I

■ Definition of a person.....	21
□ Legal and natural person.....	21
▪ A broad definition .....	21
■ Definition of corporation.....	21
□ Constitutional powers.....	21
▪ Types of corporation .....	21
□ Definition of a foreign corporation .....	21
▪ A corporation incorporated overseas .....	21
□ Definition of a trading corporation.....	22
▪ A corporation that trades or has the purpose to trade .....	22
▪ The former ‘purpose of incorporation’ test.....	22
▪ The ‘substantial current activities’ test.....	22
▪ The two and three-stage tests .....	23
▪ A question of fact and degree.....	23
▪ Meaning of trading.....	23
▪ Incidental trading .....	24
▪ Instances of a trading corporation.....	24
▪ Instances of not a trading corporation .....	25
□ Definition of a financial corporation.....	25
▪ Borrows, lends or otherwise deals in finance .....	25
▪ The ‘substantial current activities’ test.....	25
■ Definitions of subsidiary, holding and related bodies corporate.....	26
□ Section 4A of the CCA .....	26
▪ A deeming provision .....	26
□ Definition of subsidiary .....	27
▪ No definition of subsidiary .....	27
▪ ‘Composition of board’ test .....	27
▪ ‘Voting control’ test .....	28
▪ ‘Allotted share capital’ test .....	28
□ Definition of related bodies corporate .....	29
▪ No definition of related bodies corporate .....	29
▪ Statutory corporations .....	30
■ Purpose, effect and likely effect .....	30
□ Purpose .....	30
▪ Relevance of purpose.....	30
▪ Meaning of purpose .....	31
▪ A substantial purpose .....	31
▪ Multiple and common purposes .....	32
▪ Purpose distinguished from motive.....	32
▪ Purpose distinguished from effect or likely effect.....	33
▪ There may be purpose even though the end sought is impossible to achieve .....	33
□ Proving Purpose .....	34
▪ Inference of purpose.....	34
▪ Inference from the surrounding circumstances .....	34
▪ Purpose can be inferred from effect.....	34
□ Effect .....	35
▪ Relevance of effect.....	35
▪ Meaning of effect.....	35
▪ The effect of a provision or cartel provision .....	36
▪ ‘Give effect to’ as defined in s 4(1) .....	36
▪ Knowledge is not an essential component of ‘give effect to’ .....	37
▪ ‘Has’, or ‘would have’, the effect of substantially lessening competition.....	37
□ Likely effect .....	38
▪ Relevance of likely effect .....	38
▪ Meaning of likely effect.....	38
▪ The date of assessment.....	39

▪ The ongoing debate about the meaning of 'likely' .....	39
■ Provision .....	40
□ Provision of a contract, arrangement or understanding .....	40
▪ Meaning of provision .....	40
■ Contract, arrangement or understanding .....	41
□ A spectrum of consensual dealings .....	41
▪ 'Contracts to the left, understandings to the right and arrangements in middle' .....	41
▪ A wide range of consensual dealings .....	42
□ 'Make' a contract or arrangement or 'arrive at' an understanding .....	42
▪ Two or more parties are necessary for a 'make' or 'arrive at' .....	42
▪ 'Making' arrangements and 'arriving at' understandings are not synonymous .....	42
□ An overarching contract, arrangement or understanding .....	43
▪ A more general form of consensus .....	43
▪ Proving an overarching agreement from individual agreements .....	43
□ 'Hub-and-spoke' arrangement.....	44
▪ Meaning of 'hub-and-spoke' arrangement.....	44
■ Contract .....	44
□ Meaning of a contract.....	44
▪ Something that is enforceable at law .....	44
■ Arrangement.....	44
□ Meaning of an arrangement .....	44
▪ An arrangement is not a term of art .....	44
□ Elements of an arrangement .....	45
▪ The requisite elements .....	45
▪ Meeting of minds .....	45
▪ Arousal of an expectation .....	46
▪ An obligation, assurance or undertaking .....	46
▪ The use of the word 'obligation' .....	47
▪ Mutual commitment or reciprocity .....	47
▪ An unresolved question is now resolved .....	48
■ Understanding .....	49
□ Meaning of an understanding.....	49
▪ Something less formal than an arrangement .....	49
▪ An understanding may be 'tacit' .....	49
□ Elements of an understanding.....	50
▪ The requisite elements .....	50
▪ Meeting of minds .....	50
▪ An obligation, assurance or undertaking .....	51
▪ A moral obligation.....	51
▪ An understanding need not be overt.....	52
▪ Mutual commitment or reciprocity .....	52
■ Proving a contract, arrangement or understanding.....	52
□ Onus of proof.....	52
▪ Standard of proof.....	52
□ Direct evidence .....	53
▪ Proof of fact without inference.....	53
□ Admissions .....	54
▪ Proof of admission .....	54
▪ An admission that is binding on the company.....	54
▪ An admission must satisfy all requisite elements.....	55
▪ A court is not always bound to act on an admission .....	55
□ Circumstantial evidence.....	55
▪ A fact in issue that is inferred .....	55
▪ A more probable inference .....	56
▪ Community of purpose proved by independent facts.....	56
▪ Conflicting inferences of an equal degree of probability .....	57
▪ Distinction between inference and conjecture .....	57

- The importance of circumstantial evidence ..... 57
    - Circumstantial evidence can at times be strong evidence ..... 58
    - The *Jones v Dunkel* inference ..... 58
    - Proving a horizontal arrangement as distinct from a vertical one ..... 61
    - The range of circumstances (and ‘recurrent themes’) ..... 61
  - Conscious parallelism..... 61
    - Meaning of conscious parallelism ..... 61
    - Conscious parallelism is not illegal..... 62
  - Parallel pricing..... 62
    - Meaning of parallel pricing ..... 62
    - Parallel pricing may constitute circumstantial evidence ..... 63
    - Parallel pricing is not sufficient to prove a contract, arrangement or understanding ..... 63
    - Parallel pricing is only the beginning of the inquiry..... 64
- Other key definitions and concepts ..... 64
  - Goods ..... 64
    - ‘Ships, aircraft and other vehicles’ ..... 66
    - ‘Animals (including fish)’ ..... 66
    - ‘Mineral, trees and crops’ ..... 66
    - ‘Gas and electricity’ ..... 67
    - ‘Computer software’ ..... 67
    - ‘Second-hand goods’ ..... 67
    - ‘Any component part of, or accessory to, goods’ ..... 68
  - Services ..... 68
  - A supply of goods or a supply of services? ..... 72
  - Acquire (and acquisitions) ..... 73
  - Supply (and re-supply) ..... 74
  - Engage in conduct..... 75
  - Loss or damage ..... 75
  - In trade or commerce ..... 76
    - Meaning of in trade or commerce ..... 76
    - Conduct must bear a ‘trading or commercial character’ ..... 76
  - Conduct must be ‘in’ trade or commerce..... 77
    - The central conception ..... 77
  - Severability..... 78

**Chapter 3: Definitions and Key Concepts II**

- Market definition..... 82
  - Overview ..... 82
    - Relevance of market definition ..... 82
    - Meaning of market definition ..... 82
    - Market definition is a metaphor ..... 83
    - Market definition requires identification of the correct width ..... 83
    - Market definition is not precise nor comprehensive ..... 84
    - Market definition is not an exact science ..... 84
    - Market definition is an economic tool ..... 85
    - Market definition must have economic and commercial reality..... 85
    - Market definition is a focusing process ..... 85
    - Market can exist even though dealings are dormant or suspended ..... 86
  - Section 4E of the CCA..... 86
    - A statutory definition of market that does not define a market ..... 86
    - The terms ‘substitutable’ and ‘otherwise competitive with’ ..... 86
    - ‘Market in Australia’ ..... 87
  - Substitution ..... 89
    - Substitution is critical to market definition ..... 89
    - Demand and supply side substitution..... 90
    - An ideal market definition must consider substitution ..... 90

▪	The substitution period .....	91
□	Evaluating substitution .....	91
▪	The hypothetical monopolist test (SSNIP test) .....	91
▪	The cellophane fallacy .....	92
▪	The relevance of cross-elasticities .....	93
□	Dimensions of the market .....	93
▪	The four dimensions of the market .....	93
▪	Product dimension .....	94
▪	Geographic dimension .....	98
▪	Functional dimension .....	102
▪	Time dimension .....	108
□	Sub-market .....	110
▪	Meaning of sub-market .....	110
▪	Sub-market is merely a tool of analysis .....	110
▪	Sub-market may throw light on how a market operates .....	110
▪	Sub-market may be useful to assess short-run competition effects .....	111
▪	Sub-market as a tool can have the propensity to confuse .....	111
▪	Sub-market may contain all four dimensions of a market .....	112
□	Other types of markets .....	112
▪	Cluster markets .....	112
▪	Single-branded markets .....	113
▪	Single product markets .....	113
■	Market Power .....	113
□	Overview .....	113
▪	Relevance of market power .....	113
▪	Meaning of market power .....	113
▪	Market power is a recognised economic concept .....	114
▪	Market power is a matter of degree .....	114
▪	Market power does not have to be total .....	115
▪	Market power may manifest itself by anti-competitive conduct .....	115
▪	Meaning of 'substantial' in the context of market power .....	116
▪	Market power must be present and need not be exercised .....	117
▪	Market power is not concerned with a 'one-second' snapshot .....	117
□	Structural factors of market power .....	118
▪	Examination of structural factors .....	118
▪	Market share .....	118
▪	Barriers to entry .....	119
▪	Vertical integration .....	120
□	Financial Power .....	120
▪	Meaning of financial power .....	120
▪	Financial power is not market power .....	121
▪	Profit is not market power .....	121
■	Market System .....	122
□	Overview .....	122
▪	Meaning of free market .....	122
■	Market failure .....	122
□	Overview .....	122
▪	Meaning of market failure .....	122
■	Market structure .....	123
□	Overview .....	123
▪	Meaning of market structure .....	123
▪	The structure-conduct-performance paradigm .....	123
□	Monopoly .....	124
▪	Meaning of monopoly .....	124
▪	Meaning of monopoly power .....	125
□	Natural monopoly .....	125
▪	Meaning of natural monopoly .....	125

▪	Common examples of natural monopolies.....	126
▪	The test of natural monopoly.....	126
▪	A natural monopoly that becomes an essential facility.....	127
▪	Natural monopolies and competition.....	128
□	Oligopoly.....	128
▪	Meaning of oligopoly.....	128
□	Monopolistic competition.....	129
▪	Meaning of monopolistic competition.....	129
□	Workable competition.....	129
▪	Meaning of workable competition.....	129
□	Contestable markets.....	129
▪	Meaning of contestable markets.....	129
□	Perfect competition.....	130
▪	Meaning of perfect competition.....	130
□	Monopsony.....	131
▪	Meaning of monopsony.....	131
▪	Monopsony is not of itself illegal.....	131
□	Oligopsony.....	132
▪	Meaning of oligopsony.....	132
■	Substantial lessening competition.....	132
□	Overview.....	132
▪	Relevance of substantially lessening competition.....	132
▪	Substantially lessening competition is an evaluative phrase.....	132
□	Substantial.....	133
▪	Meaning of substantial.....	133
▪	The word 'substantial' is imprecise and ambiguous.....	134
▪	The word 'substantial' is a relative concept.....	134
▪	'Nipping competition in the bud'.....	135
□	Lessening.....	135
▪	Meaning of lessening.....	135
▪	A qualitative assessment.....	136
▪	Lessening includes 'preventing and hindering'.....	136
▪	The counterfactual test.....	137
▪	Relevance of the counterfactual test.....	138
▪	The standard of proof of the counterfactual test.....	138
▪	The method of assessment of the counterfactual test.....	138
▪	The three-stage counterfactual test.....	139
▪	A counterfactual is no more than 'an element of calculus'.....	139
□	Competition.....	140
▪	Meaning of competition.....	140
▪	Competition is an economic concept.....	140
▪	Competition must be applied in a practical way.....	141
▪	Competition is deliberate and ruthless.....	141
▪	The theatre of competition.....	141
■	Other key definitions and concepts.....	142
□	Efficiencies.....	142
▪	Economic efficiency.....	142
▪	Productive efficiency.....	142
▪	X-inefficiency.....	143
▪	Allocative efficiency.....	143
▪	Dynamic efficiency.....	144
□	Elasticity.....	144
▪	Price elasticity of demand.....	144
▪	Cross-price elasticity of demand.....	144
▪	Price elasticity of supply.....	145
▪	Cross-price elasticity of supply.....	145
□	Production costs.....	145

- Short-run costs ..... 145
- Long-run costs ..... 146
- Opportunity cost ..... 146
- Production output ..... 146
  - The production function ..... 146
  - The law of diminishing marginal returns ..... 146
  - Comparative advantage ..... 147
  - Absolute advantage ..... 147
- Economic fallacies ..... 148
  - Fallacy of composition, division, causation and single causation ..... 148
- The role of the economist ..... 148
  - The purpose of the economist ..... 148
  - 'Dirty' and 'clean' economists ..... 148
  - Economists and the 'hot tub' ..... 149

**Chapter 4: Primary Contravener and Accessorial Liability**

- Introduction ..... 152
  - Overview ..... 152
    - Primary and ancillary liability under the CCA ..... 152
    - Accessorial liability under the CCA ..... 152
    - Accessorial liability without the primary contravener in proceedings ..... 152
    - Proof of the contravention without the primary contravener in proceedings ..... 152
    - Liability of corporate and non-corporate principals ..... 153
    - Civil pecuniary penalties and criminal fines ..... 153
- Section 75B of the CCA ..... 153
  - Accessorial liability ..... 153
    - 'Involved' in a contravention ..... 153
- 'Aided, abetted, counselled or procured' ..... 154
  - Meaning of 'aided, abetted, counselled or procured' ..... 154
    - A long history in criminal law ..... 154
    - 'Aided or abetted' ..... 154
    - 'Counselled or procured' ..... 154
    - Difference between 'aiding or abetting' and 'counselling or procuring' ..... 155
  - Elements of 'aided, abetted, counselled or procured' ..... 155
    - Knowledge of the essential facts ..... 156
    - Intentional assistance or encouragement ..... 156
- 'Induced' ..... 157
  - Meaning of 'Induced' ..... 157
    - Some act of compulsory or persuasion ..... 157
  - Elements of 'induced' ..... 158
    - Affirmative or positive act or course of conduct ..... 158
    - Actual inducement ..... 158
- 'Knowingly concerned in' or 'party to' ..... 159
  - Meaning of 'knowingly concerned in' or 'party to' ..... 159
    - 'Knowingly concerned in' ..... 159
    - 'Party to' ..... 160
    - 'In any way, directly or indirectly' ..... 160
  - Elements of 'knowingly concerned in', or 'party to' ..... 160
    - Knowledge of the essential facts ..... 160
    - Intentional participation in the contravention ..... 162
- 'Conspired with others' ..... 162
  - Meaning of 'conspiracy' ..... 162
    - An agreement to carry out a non-trivial unlawful act ..... 162
  - Elements of 'conspiracy' ..... 163
    - Single physical element ..... 164
    - Default fault element of intention ..... 167

- Attempt to contravene .....167
  - Meaning of ‘attempt to contravene’ ..... 167
    - An attempt to contravene that never succeeded..... 167
  - Elements of ‘attempt to contravene’ ..... 168
    - Mental element..... 168
    - Physical element ..... 170
- ‘Attempt to induce’ .....172
  - Meaning of ‘attempt to induce’ ..... 172
    - An attempt to induce another to contravene that never succeeded..... 172
  - Elements of ‘attempt to induce’ ..... 173
    - Mental element..... 173
    - Physical element ..... 173
- Section 84 of the CCA .....173
  - Conduct by directors, employees or agents ..... 173
    - The state of mind and conduct of the body corporate and non-corporate ..... 173
  - Key concepts ..... 175
    - ‘Director’ ..... 175
    - ‘Employee’..... 175
    - ‘Agent’ ..... 176
    - ‘Actual authority’..... 177
    - Actual express authority ..... 178
    - Actual implied authority ..... 179
    - ‘Apparent authority’..... 179
- Section 84(1) of the CCA .....180
  - Attribution of state of mind ..... 180
    - The ‘intention’ of the body corporate ..... 180
- Section 84(2) of the CCA .....181
  - Attribution of conduct ..... 181
    - Conduct engaged in on behalf of a body corporate ..... 181
    - ‘On behalf of’ ..... 181
    - No vicarious liability ..... 182
    - On a ‘frolic of their own’ ..... 183
- Section 84(3) of the CCA .....183
  - Attribution of state of mind ..... 183
    - The ‘intention’ of a non-corporate ..... 183
- Section 84(4) of the CCA.....183
  - Attribution of conduct ..... 183
    - Conduct engaged in on behalf of a non-corporate..... 183
- Section 84(4A) of the CCA .....183
  - Convicted of an offence ..... 183
    - Where a person is not liable to imprisonment ..... 183
- Section 84(5) of the CCA .....184
  - An interpretative provision ..... 184
    - Reference to state of mind ..... 184

## Chapter 5: Civil Cartels

- Introduction ..... 190
  - Overview ..... 190
    - Cartels are egregious..... 190
    - Cartels are difficult to detect, investigate and prosecute ..... 191
    - Cartels are top priority for the ACCC ..... 191
- Legislative history of civil (and criminal) cartels..... 191
  - The international criminalisation of hard core cartels ..... 191
    - OECD: The anti-cartel program ..... 191

□	The Australian criminalisation of hard core cartels .....	192
▪	<i>Dawson Era</i> : The first major step towards criminalisation of hard core cartels .....	192
▪	A closer step towards criminalising hard core cartels .....	193
▪	A final step towards criminalising hard core cartels .....	194
▪	<i>Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009</i> (Cth) .....	194
▪	<i>Harper Era</i> : A call for simplification of cartel provisions .....	195
▪	A simplification of cartel provisions .....	196
▪	A call for higher civil penalties and criminal fines .....	196
■	Rationale of cartels .....	197
□	Reasons why cartels are illegal .....	197
▪	Destructive of competition .....	197
▪	Commercial crime .....	197
■	Meaning of cartels .....	198
□	Competitors agreeing not to compete .....	198
▪	A simple definition .....	198
▪	Cheating in cartels .....	198
■	Types of cartels .....	198
□	Overview .....	198
▪	Types of cartels .....	198
▪	Price fixing .....	199
▪	Output restriction .....	200
▪	Market allocation .....	200
▪	Bid rigging .....	201
■	Structure of cartel provisions .....	201
□	Overview .....	201
▪	A somewhat complex structure .....	201
■	Section 45AA of the CCA .....	202
□	Simplified outline .....	202
▪	A summary of Pt IV, Div 1 .....	202
■	Section 45AB of the CCA .....	203
□	Definitions .....	203
▪	Specific definitions to Division 1 .....	203
▪	Meaning of 'benefit' .....	204
▪	Meaning of 'bid' .....	204
▪	Meaning of 'evidential burden' .....	204
▪	Meaning of 'likely' .....	205
▪	A question of whether 'likely' in s 45AB applies to the expression 'likely to be in competition' .....	205
▪	Meaning of 'obtaining' .....	205
▪	Meaning of 'production' .....	206
■	Section 45AC of the CCA .....	206
□	A deeming provision .....	206
▪	Extended meaning of party .....	206
■	Section 45AD of the CCA .....	207
□	A definition provision .....	207
▪	Cartel provisions .....	207
□	Key concepts .....	210
▪	'Provision' .....	210
▪	'Contract, arrangement or understanding' .....	210
▪	'Purpose' .....	210
▪	'Effect' .....	210
▪	'Likely effect' .....	210
▪	'Goods' .....	210
▪	'Services' .....	210
▪	'Supplied (and re-supplied)' .....	210
▪	'Acquired (and acquisition)' .....	211
▪	'Competition' .....	211

▪ 'In trade or commerce' .....	211
■ Section 45AD(1) of the CCA .....	211
□ The cartel provisions .....	211
▪ Definition of cartel provision .....	211
■ Section 45AD(2) of the CCA .....	211
□ Purpose/effect condition .....	211
▪ Fixing of prices.....	211
▪ 'Directly or indirectly' .....	212
▪ 'Fixing, controlling or maintaining' .....	212
▪ 'Fixing' .....	212
▪ 'Maintain' .....	213
▪ 'Control' .....	213
▪ 'Providing for' .....	214
▪ 'Price' .....	214
▪ 'Discount, allowance, rebate or credit' .....	215
■ Section 45AD(3)(a) of the CCA.....	216
□ Purpose condition .....	216
▪ Restriction of output .....	216
▪ 'Preventing, restricting or limiting' .....	216
■ Section 45AD(3)(b) of the CCA .....	217
□ Purpose condition .....	217
▪ Allocation of markets .....	217
▪ No need to delineate market definition .....	217
■ Section 45AD(3)(c) of the CCA .....	217
□ Purpose condition .....	217
▪ Rigging of bids .....	217
▪ 'Ensuring that in the event' .....	218
▪ 'Request for bids' .....	218
▪ No need that the request for bids be directed to specific parties .....	219
▪ No need for bidders to be within the scope of the bidding process .....	219
▪ It is not necessary for all parties to bid .....	219
▪ 'Other bidders' .....	220
▪ 'Supply or acquisition of goods or services' .....	220
■ Section 45AD(4) of the CCA .....	220
□ Competition condition .....	220
▪ The 'horizontal' requirement .....	220
▪ 'In competition' .....	221
▪ 'Likely to be in competition' .....	221
▪ 'In, or likely to be in, competition, <i>but for</i> the contract, arrangement or understanding' .....	222
▪ Competitors in the context of agency.....	222
▪ Reference to ' <i>those</i> goods or services' .....	222
▪ Reference to 'trade or commerce' .....	223
▪ No requirement to delineate the market .....	223
■ Section 45AD(5) of the CCA .....	223
□ An interpretative provision.....	223
▪ Immaterial whether identities of persons can be ascertained .....	223
■ Section 45AD(6) of the CCA .....	224
□ A clarification provision .....	224
▪ Recommending prices etc.....	224
■ Section 45AD(7) of the CCA .....	225
□ A clarification provision .....	225
▪ Immaterial whether particular circumstances or particular conditions.....	225
■ Section 45AD(8) of the CCA .....	225
□ A deeming provision .....	225
▪ Considering related provisions - purpose/effect condition.....	225
■ Section 45AD(9) of the CCA .....	225

□ A deeming provision .....	225
▪ Considering related provisions - purpose condition .....	225
■ Section 45AD(10) of the CCA .....	226
□ An interpretative provision .....	226
▪ Purpose/effect of a provision .....	226
■ Section 45AD(11) of the CCA .....	226
□ An interpretative provision .....	226
▪ Purpose of a provision .....	226
■ Section 45AE of the CCA .....	226
□ A clarification provision .....	226
▪ Meaning of expressions in other provisions of the CCA .....	226
■ Section 45AJ of the CCA .....	227
□ Civil penalty provision .....	227
▪ Making a contract etc. containing a cartel provision .....	227
■ Section 45AK of the CCA .....	227
□ Civil penalty provision .....	227
▪ Giving effect to a cartel provision .....	227
■ Cases on price fixing .....	228
□ The first price fixing case .....	228
▪ Price fixing of beer .....	228
□ A classic hard-core cartel .....	231
▪ Price fixing of corrugated fibreboard packaging .....	231
□ Price fixing in the petrol industry .....	236
▪ Attempting to fix the prices of petrol .....	236
▪ Attempting to induce others to fix the price of petrol .....	237
▪ Alleged price fixing of supergrade petrol .....	240
▪ Price fixing to 64.9 cents per litre .....	241
▪ Alleged price fixing by the Service Station Association Ltd .....	243
▪ Price fixing of petrol and liquid petroleum gas .....	247
▪ Alleged price fixing of retail petrol .....	248
▪ Price fixing of unleaded petrol and liquid petroleum gas .....	249
▪ Price fixing of petrol in Ballarat, Victoria .....	251
▪ Appeal of price fixing of petrol in Ballarat, Victoria .....	256
▪ Alleged price fixing of petrol in Geelong, Victoria .....	262
□ Price fixing in the building and construction industry .....	266
▪ Attempting to control the discounts for steel products .....	266
▪ Attempt to induce price fixing of flat steel products .....	268
▪ Price fixing of pre-mixed concrete .....	272
▪ Price fixing of clay bricks .....	274
▪ Price fixing of valves for water pipes .....	275
▪ Price fixing of chemicals to preserve wood .....	276
▪ Price fixing of Dulux paint .....	277
▪ Price fixing of polythene building film .....	279
▪ Price fixing of rates paid to roof tilers .....	280
▪ Price fixing of the cost estimates for the supply of timber services .....	280
□ Price fixing in the electricity industry .....	281
▪ Alleged price fixing of kilowatt hour meters .....	281
□ Price fixing in the food and beverage industry .....	284
▪ Price fixing of liquid glucose .....	284
▪ Price fixing of packaged ice .....	285
▪ Price fixing of frozen foods .....	286
▪ Alleged price fixing of milk .....	287
▪ Attempting to fix the prices of wheaten flour .....	289
▪ Attempting to fix the prices of biscuits .....	290
▪ Price fixing of bread .....	292
▪ Price fixing of takeaway alcoholic beverages .....	293
▪ Price fixing of unshucked abalone .....	295

□ Price fixing of linen goods .....	298
▪ Price fixing of Sheridan manchester products .....	298
□ Price fixing in the motor vehicle industry .....	299
▪ Price fixing of car rentals .....	299
▪ Price fixing of discounts for motor vehicles .....	300
▪ Price fixing of motor vehicle replacement windscreens .....	302
□ Price fixing in the services industry .....	304
▪ Alleged price fixing of radio advertising rate card services .....	304
▪ Attempting to price fix in the travel services industry .....	307
▪ Price fixing of orthodontist services .....	312
▪ Price fixing of medical services .....	314
▪ Price fixing of skin and body treatment services .....	315
▪ Price fixing of education consulting services .....	316
▪ Attempting to fix the price of selling vacant lots .....	318
▪ Attempting to fix the price of internet services .....	319
▪ Attempted price fixing of foreign exchange forward contracts .....	319
▪ Alleged price fixing of refunds to home loan customers .....	321
▪ Maintaining the price of kart circuit hire services .....	324
□ International price fixing .....	326
▪ Price fixing of animal vitamins .....	326
▪ Price fixing of ball and roller bearings .....	328
▪ Price fixing of land and submarine cables .....	331
▪ Price fixing of marine hose .....	337
▪ Price fixing of fine paper .....	338
□ International price fixing ('Air Cargo Litigation') .....	340
▪ Price fixing of fuel surcharges for freight .....	340
▪ Class action against international airlines .....	340
▪ Qantas Airways Ltd .....	341
▪ British Airways PLC .....	347
▪ Société Air France and Koninklijke Luchtvaart Maatschappij NV .....	347
▪ Cargolux Airlines International SA .....	348
▪ Martinair Holland NV .....	348
▪ Japan Airlines International Co Ltd .....	349
▪ Korean Air Lines Co Ltd .....	349
▪ Malaysia Airline System Berhad .....	350
▪ Emirates .....	350
▪ Cathy Pacific Airways Ltd .....	351
▪ Singapore Airlines Cargo Pte Ltd .....	351
▪ Thai Airways International Public Co Ltd .....	352
▪ Air New Zealand Ltd .....	352
▪ Garuda Indonesia Ltd .....	354
■ Cases on output restriction .....	355
□ Reducing oversupply .....	355
▪ Culling of salmon .....	355
▪ Culling of hens .....	356
□ Decreasing competition in the football industry .....	361
▪ Preventing clubs joining the Super League .....	361
▪ Reducing competition to 14 football clubs .....	364
□ Anti-competitive restrictive agreements .....	366
▪ Restricting the supply of take-away liquor .....	366
□ Alleged agreement to maintain or increase volume .....	368
▪ Substantially curtail sales of electrical cable except to wholesalers .....	368
□ Restrictive roster system and rules .....	371
▪ Restricting the supply of taxi services .....	371
▪ Five-day rule to limit taxi services .....	372
▪ Reducing fleet size of carriers of ready mixed concrete .....	373
□ Preventing or limiting the supply of services .....	374

▪ Preventing the supply of cardiothoracic surgical services.....	374
▪ Limiting the services of rodeo riders.....	377
▪ Limiting services of real estate agents.....	379
□ 'Hub-and-spoke' arrangement.....	380
▪ Restricting output in the laundry detergent market .....	380
■ Cases on market allocation .....	384
□ No poaching arrangements .....	384
▪ Customer allocation for forklift gas .....	384
▪ Customer allocation for freight delivery .....	387
□ Allocating geographic areas .....	388
▪ Geographical allocation in the crane servicing market .....	388
▪ Geographical allocation of newspapers.....	391
□ Allocation of suppliers .....	394
▪ Allocation of suppliers of recyclable waste paper .....	394
□ Allocation of customers .....	395
▪ Allocation of customers in the power and distribution transformers industries .....	395
▪ Allocation of customers of air compressors .....	399
▪ Allocation of customers of flexible polyurethane foam .....	401
▪ Allocation of customers of water-proofing services.....	401
▪ Allocation of customers of alluvial garnet .....	402
▪ Allocation of customers of Hino trucks.....	403
▪ Allocation of existing customers of ice .....	403
▪ Attempt to allocate customers of scrap metal recycling .....	403
■ Cases on bid rigging.....	405
□ Bid rigging in the building and construction industry.....	405
▪ Attempt to bid rig in the building management systems industry.....	405
▪ Attempting to induce a bid rig in the architectural industry .....	409
▪ Bid rigging in the slate roof industry .....	410
▪ Bid rotation for the construction of buildings .....	412
▪ Cover pricing in the fire sprinkler industry .....	413
▪ Bid rigging of a tender for demolition and asbestos removal services .....	417
▪ Cover pricing for government construction projects.....	419
▪ Cover pricing in the air conditioning and mechanical services industry .....	422
▪ Bid rigging of a tender in the scrap metal industry .....	424
□ Bid rigging in the freight industry .....	427
▪ Attempting to cover price for freight cartage services.....	427
□ Alleged Bid rigging in the mining industry .....	429
▪ Bid withdrawal of a tender for mining exploration license .....	429
▪ Bid suppression of the sale of a mining consumables company .....	435
▪ Bid rigging of the supply of equipment and services for mining projects .....	439
□ Bid rigging in the milk industry .....	440
▪ Alleged bid suppression at milk auctions.....	440
□ International bid rigging .....	441
▪ Rigging bids in the supply of wire harnesses .....	441

## Chapter 6: Criminal Cartels

■ Introduction .....	450
□ Overview .....	450
▪ Serious cartel conduct.....	450
■ CDPP .....	450
□ The criminal prosecution agency.....	450
▪ The role of the CDPP .....	450
□ Memorandum of Understanding.....	451
▪ Responsibilities.....	451
▪ Referrals to the CDPP .....	451
▪ CDPP decision to prosecute .....	451

▪	Immunity .....	452
□	Prosecution Policy of the Commonwealth .....	452
▪	Criteria that governs the decision to prosecute .....	452
▪	Reasonable prospects of securing a conviction .....	452
▪	Public interest requires a prosecution .....	453
□	Statement on Disclosure .....	453
▪	Duty to disclosure .....	453
■	Criminal practice and procedure .....	454
□	Summary of steps in a prosecution .....	454
▪	From commencing prosecution to sentencing and appeals .....	454
□	The charge .....	455
▪	Definition of a charge .....	455
▪	Charge negotiation .....	455
▪	Definition of a 'rolled-up' charge .....	456
▪	The 'rolled-up' charge and sentencing .....	456
▪	Definition of a 'representative' charge .....	457
▪	The 'representative' charge and sentencing .....	457
□	The indictment .....	457
▪	Definition of an indictable offence .....	457
▪	Definition of indictment .....	458
▪	Meaning of 'reasonable particularity' .....	458
▪	One indictment for each trial .....	460
▪	A single indictment can include multiple counts .....	460
▪	The function of an indictment .....	460
▪	The role of an indictment .....	461
▪	Timing and service of an indictment .....	461
▪	Extension of time to file an indictment .....	461
▪	Consequences of not filing indictment within time .....	462
▪	Amending or replacing indictments .....	462
▪	Amendments before the start of the trial .....	462
▪	Replacements before the start of the trial .....	462
▪	Amendments or replacements after the start of the trial .....	463
▪	Committal papers .....	463
□	The Committal process .....	463
▪	Committal hearing .....	463
▪	Commencement of committal hearing .....	464
▪	Steps of the committal hearing .....	464
▪	Disclosure of evidence .....	465
▪	Charge certificates .....	465
▪	Charge certificates must be filed .....	466
▪	Case conferences .....	466
▪	Case conference certificate .....	467
▪	Failure to complete case conference obligations .....	468
▪	Further offers .....	468
▪	Case conference certificate and other evidence not admissible in other proceedings ...	468
▪	Confidentiality and prohibition on publication of case conference material .....	469
▪	Examination of prosecution witnesses .....	469
▪	Evidence of prosecution witnesses .....	469
▪	No requirement for prosecution to call every witness .....	470
▪	Committal for trial where unfitness to be tried raised .....	470
▪	Committal for trial or sentence .....	471
▪	Guilty pleas and committal for sentence .....	471
▪	Procedure on committal .....	471
▪	Procedures after committal .....	472
▪	Costs .....	472
□	Pre-trial hearings .....	473
▪	The first pre-trial hearing .....	473

▪	Court may make orders during pre-trial hearings .....	473
▪	Objecting to indictments.....	473
▪	Examining witnesses after committal in absence of the jury .....	474
▪	<i>Ex officio</i> indictment.....	474
□	Bail.....	475
▪	Applying for Bail .....	475
▪	Granting Bail .....	475
▪	Bail may be granted subject to conditions.....	475
▪	Bail undertaking .....	476
▪	Notice of proposed forfeiture .....	476
▪	Ordering forfeiture and objections .....	477
□	Pre-trial disclosure .....	477
▪	Pre-trial and ongoing disclosure .....	477
▪	Disclosure of case for the prosecution .....	478
▪	Notice of the accused's response .....	479
▪	Notice of the prosecution's response to the accused's response .....	479
▪	Ongoing disclosure obligations for the accused .....	480
▪	Ongoing disclosure obligations for the prosecution .....	480
▪	Copies of things need not be provided if unlawful, impossible or impracticable .....	481
▪	Personal details need not be provided .....	481
▪	Effect on legal professional privilege and other privileges .....	481
▪	Consequences of disclosure requirements.....	481
▪	Restricting further disclosure of disclosed material .....	482
▪	Restricting disclosed material as evidence in other proceedings.....	482
□	Jury.....	482
▪	Role of the jury.....	482
▪	Empanelling the jury .....	483
▪	Court's power to excuse a person from serving on jury.....	483
▪	Challenges to potential jurors.....	483
▪	Prosecutor may request that potential jurors be stood aside.....	484
▪	Directions to jurors .....	484
▪	Discharge of jurors (and potential jurors).....	484
□	Trial .....	485
▪	Practice and procedure applicable to the trial .....	485
▪	Arraignment .....	485
▪	Pleas .....	486
▪	Pleading to different offences capable of being supported by indictment.....	486
▪	Changing pleas .....	486
▪	The verdict.....	486
▪	Guilty pleas.....	487
▪	No guilty verdicts and guilty verdicts .....	487
▪	Sentencing.....	487
□	Appeals.....	488
▪	Appellate jurisdiction .....	488
■	The <i>Criminal Code</i> .....	488
□	General principles of criminal responsibility .....	488
▪	Application of the <i>Criminal Code</i> to criminal cartel offence provisions .....	488
▪	Establishing guilt in respect of offences .....	488
▪	Legal burden of proof - Prosecution .....	489
▪	Legal burden of proof - Defence .....	489
▪	Elements of an offence .....	489
▪	The 'default fault' element of 'intention' .....	490
▪	'Knowledge' or 'belief' .....	490
■	Section 45AF of the CCA .....	491
□	The operative provision .....	491
▪	Making a contract, arrangement or understanding that contains a cartel provision .....	491
▪	Elements of an offence .....	491

■ Section 45AG of the CCA .....	492
□ The operative provision .....	492
▪ Giving effect to a cartel provision .....	492
▪ Elements of an offence .....	493
■ Section 45AH of the CCA .....	493
□ A clarification provision .....	493
▪ Determining guilt .....	493
■ Section 45AI of the CCA .....	494
□ A clarification provision .....	494
▪ Court may make related civil orders .....	494
■ Section 45AIA of the CCA.....	495
□ A clarification provision .....	495
▪ Section 4AB of the <i>Crimes Act 1914</i> (Cth) does not apply .....	495
■ Criminal cartel cases.....	495
□ The shipping industry.....	495
▪ Nippon Yusen Kabushiki Kaisha .....	495
▪ Kawasaki Kisen Kaisha Ltd.....	499
▪ Wallenius Wilhelmsen Ocean AS .....	503
□ The banking industry.....	507
▪ Citigroup Global Markets Australia Pty Ltd.....	507
□ The money remittance industry .....	509
▪ Vina Money Transfer Pty Ltd.....	509
□ The scaffolding and steelfixing industries.....	512
▪ Construction, Forestry, Maritime, Mining and Energy Union.....	512
□ The assistive technology products industry.....	514
▪ Country Care Group Pty Ltd .....	514
□ The pharmaceutical ingredients industry .....	517
▪ Alkaloids of Australia Pty Ltd.....	517
▪ Christopher Kenneth Joyce .....	520

## Chapter 7: Exceptions to Cartels

■ Introduction .....	523
□ Exceptions to cartel conduct .....	523
■ Legislative history of cartel exceptions .....	524
□ Conduct notified .....	524
□ Cartel provision subject to grant of authorisation .....	524
□ Contracts, arrangements or understandings between related bodies corporate .....	525
□ Joint ventures.....	525
▪ <i>Swanson Era</i> : Joint ventures should be afforded 'special and favourable' treatment.....	525
▪ <i>Hilmer Era</i> : A minor clarification to the joint venture provision .....	526
▪ <i>Dawson Era</i> : Substituting old provisions for new ones .....	527
▪ Introducing joint venture provisions specifically for cartel conduct .....	528
▪ <i>Harper Era</i> : Broadening and narrowing the joint venture provisions .....	529
□ Cartel anti-overlap provisions.....	529
▪ Overview.....	529
▪ Resale price maintenance .....	530
▪ Exclusive dealing.....	530
▪ Dual listed company arrangement.....	531
▪ Acquisition of shares or assets .....	531
▪ Collective acquisition of goods or services .....	532
▪ Covenants affecting competition (repealed) .....	532
■ Rationale of cartel exceptions .....	533
□ Increase in total economic welfare.....	533
▪ Pro-competitive conduct outweighs anti-competitive effect.....	533
▪ Conduct notified, authorisation and related bodies corporate .....	533
▪ Joint venture.....	533

▪ Anti-overlap provisions .....	534
■ Section 45AL of the CCA .....	535
□ Conduct notified .....	535
▪ Collective bargaining notice .....	535
▪ Elements .....	535
▪ 'in so far as' .....	535
■ Section 45AM of the CCA .....	536
□ Cartel provision subject to grant of authorisation .....	536
▪ Authorisation must be in force .....	536
■ Section 45AN of the CCA .....	536
□ Contracts, arrangements or understandings between related bodies corporate .....	536
▪ All parties must be related bodies corporate .....	536
■ Section 45AO of the CCA .....	537
□ Joint ventures - Prosecution .....	537
▪ A legal burden .....	537
■ Section 45AP of the CCA .....	538
□ Joint ventures - Civil penalty proceedings .....	538
▪ Genuine joint ventures exempted .....	538
□ Elements of joint ventures .....	539
▪ Overview of requisite elements .....	539
□ A joint venture must exist or is contemplated to exist .....	539
▪ First requisite element .....	539
□ Common law definition of joint venture .....	540
▪ Origins of joint venture .....	540
▪ No precise definition .....	540
▪ Joint venture is not a term of art .....	541
▪ Nature of joint venture .....	541
▪ Essential elements of joint ventures .....	542
▪ Common characteristics of joint ventures .....	542
▪ Joint ventures can be in the form of contracts, arrangements or understandings .....	544
▪ Substance over form .....	544
▪ Profits and expenses of joint ventures .....	545
▪ Assets of joint ventures .....	546
▪ Types of joint ventures .....	546
▪ Variation, assignment and termination of joint ventures .....	546
▪ Fiduciary duties of joint ventures .....	547
▪ Various indicia of a fiduciary relationship .....	548
▪ Fiduciary duties can arise before joint venture agreement .....	549
▪ Joint ventures and partnerships .....	550
▪ Definition of partnerships .....	551
▪ Common indicia of partnerships .....	551
▪ Overlap between joint ventures and partnerships .....	551
▪ Joint ventures can be separate and distinct to partnerships .....	552
▪ Distinctions between joint ventures and partnerships .....	552
▪ Difficult distinction between joint ventures and partnerships .....	552
▪ Timing of joint ventures and partnerships .....	553
▪ Fiduciary obligations and partnerships .....	553
□ Statutory definition of joint venture .....	555
▪ Section 4J of the CCA .....	555
□ The <i>Cascade</i> decisions .....	557
▪ A 'silent and passive' joint venture .....	557
□ Implications of the <i>Cascade</i> decisions .....	561
▪ Useful guidance on joint venture provisions .....	561
▪ The 'pooling of assets' .....	561
▪ 'Other contributions' .....	562
▪ Final thoughts on the <i>Cascade</i> decisions .....	562
□ Cartel provision contains a contract, arrangement or understanding .....	562

▪	Second requisite element .....	562
□	Cartel provision is for the purpose of a joint venture .....	563
▪	Third requisite element.....	563
▪	Meaning of ‘for the purposes of a joint venture’ .....	563
□	Cartel provision is reasonably necessary for undertaking the joint venture .....	564
▪	Fourth requisite element .....	564
▪	Meaning of ‘reasonably necessary’ .....	564
▪	Applying <i>Cascade</i> to the reasonably necessary requirement.....	566
□	Joint venture is for the production, supply or acquisition of goods or services .....	567
▪	Fifth requisite element .....	567
□	Joint venture is not carried on for the purpose of substantially lessening competition .....	567
▪	Sixth requisite element .....	567
□	Joint venture carried on jointly or carried on by a body corporate .....	567
▪	Seventh requisite element .....	567
■	Section 45AQ of the CCA .....	568
□	Resale price maintenance.....	568
▪	Anti-overlap provision .....	568
■	Section 45AR of the CCA.....	570
□	Exclusive dealing .....	570
▪	Anti-overlap provision .....	570
▪	Section 45AR(1) of the CCA .....	571
▪	A three-step analysis .....	572
▪	Section 45AR(2) of the CCA .....	572
▪	Reference to ‘horizontal’ and ‘vertical’ relationships .....	573
▪	A significant challenge for interpretation .....	574
■	Section 45AS of the CCA .....	576
□	Dual listed company arrangement .....	576
▪	Anti-overlap provision .....	576
■	Section 45AT of the CCA .....	577
□	Acquisition of shares or assets.....	577
▪	Anti-overlap provision .....	577
▪	‘In so far as’ .....	578
▪	‘Directly or indirectly for the acquisition of’ .....	578
▪	A three-step analysis .....	579
■	Section 45AU of the CCA .....	579
□	Collective acquisition of goods or services .....	579
▪	Anti-overlap provision .....	579

## Chapter 8: Anti-Competitive Agreements

■	Introduction .....	584
□	Anti-competitive agreements .....	584
▪	A general prohibition .....	584
■	Legislative history of anti-competitive agreements .....	584
□	Overview .....	584
▪	<i>Australian Industries Preservation Act 1906</i> (Cth) .....	584
▪	<i>Trade Practices Act 1965</i> (Cth).....	584
▪	<i>Restrictive Trade Practices Act 1971</i> (Cth) .....	584
▪	<i>Trade Practices Act 1974</i> (Cth).....	584
▪	<i>Swanson Era</i> : A time for change .....	585
▪	A new prohibition.....	586
▪	<i>Trade Practices Amendment Act 1978</i> (Cth) .....	586
▪	<i>Blunt Era</i> : No recommended changes .....	586
▪	<i>Restrictive Trade Practices Revision Act 1986</i> (Cth).....	586
▪	<i>Trade Practices Legislation Amendment Act 1992</i> (Cth).....	587
▪	<i>Hilmer Era</i> : Proposal for minor amendments.....	587
▪	<i>Competition Policy Reform Act 1995</i> (Cth).....	587

▪ Dawson Era: An examination of <i>per se</i> prohibitions .....	587
▪ Trade Practices Legislation Amendment Act (No 1) 2006 (Cth).....	588
▪ Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth).....	588
▪ Introducing the price signaling regime .....	589
▪ Harper Era: A call to replace the price signalling regime with concerted practices.....	589
▪ Replacing the price signalling regime with concerted practices .....	590
▪ Repeal of exclusionary provisions .....	590
■ Rationale of anti-competitive agreements .....	591
□ Aim to preserve and promote competition .....	591
▪ A general regulatory provision.....	591
■ Meaning of anti-competitive agreements.....	591
□ Anti-competitive agreements and concerted practices .....	591
▪ No specific definition .....	591
■ Types of anti-competitive agreements .....	591
□ Overview .....	591
▪ Non-exhaustive list.....	591
■ Structure of anti-competitive agreement provisions.....	592
□ Overview .....	592
▪ A straightforward structure .....	592
■ Section 45 of the CCA .....	593
□ Contract, arrangements or understandings that restrict dealings or affect competition .....	593
▪ Overview .....	593
□ Key concepts .....	595
▪ ‘Corporation’ .....	595
▪ ‘Related bodies corporate’ .....	595
▪ ‘Make’ .....	595
▪ ‘Give effect’ .....	595
▪ ‘Contract, arrangement or understanding’ .....	595
▪ ‘Provision’ .....	595
▪ ‘Purpose’ .....	595
▪ ‘Effect’ .....	595
▪ ‘Likely effect’ .....	595
▪ ‘Substantial lessening competition’ .....	596
▪ ‘Acquire’ .....	596
▪ ‘Supply’ .....	596
▪ ‘Goods’ .....	596
▪ ‘Services’ .....	596
■ Section 45(1)(a) of the CCA .....	596
□ An operative provision .....	596
▪ Makes, or arrives at, anti-competitive agreements.....	596
■ Section 45(1)(b) of the CCA .....	596
□ An operative provision .....	596
▪ Giving effect to anti-competitive agreements.....	596
■ Section 45(1)(c) of the CCA .....	596
□ An operative provision .....	596
▪ Engaging in a concerted practice .....	596
▪ Elements of s 45(1)(c) .....	598
□ Concerted Practices .....	598
▪ Meaning of ‘concerted practice’ .....	598
▪ ‘Concerted practice’ distinguished from ‘acting in concert’ .....	600
□ Concerted Practices: Overseas jurisdictions.....	600
▪ Utility of overseas jurisprudence .....	600
■ Section 45(2) of the CCA .....	600
□ A clarification provision .....	600
▪ Application of the ‘give effect’ prohibition.....	600
■ Section 45(3) of the CCA .....	601
□ Specific definition of competition.....	601

▪ ‘Competition in <i>any</i> market’ .....	601
■ Section 45(4) of the CCA .....	601
□ A deeming provision .....	601
▪ Aggregation of multiple agreements .....	601
■ Section 45(5) of the CCA .....	602
□ Resale price maintenance.....	602
▪ Anti-overlap provision.....	602
■ Section 45(5A) of the CCA .....	603
□ Exclusive dealing (in relation to ‘make’) .....	603
▪ Anti-overlap provision.....	603
▪ A three-step analysis .....	603
■ Section 45(6) of the CCA .....	603
□ Exclusive dealing (in relation to ‘give effect’ and ‘concerted practice’).....	603
▪ Anti-overlap provision.....	603
■ Section 45(6A) of the CCA .....	604
□ Dual listed company arrangement .....	604
▪ Anti-overlap provision.....	604
■ Section 45(7) of the CCA .....	604
□ Mergers and acquisitions.....	604
▪ Anti-overlap provision.....	604
▪ ‘To the extent’ .....	604
▪ ‘Directly or indirectly for the acquisition of’ .....	605
▪ A three-step analysis.....	605
■ Section 45(8) of the CCA .....	605
□ Related bodies corporate exemption .....	605
▪ All parties must be related bodies corporate .....	605
■ Section 45(8AA) of the CCA .....	606
□ Crown exemption.....	606
▪ In relation to concerted practices .....	606
■ Section 45(8A) of the CCA .....	606
□ Conduct notified .....	606
▪ Collective bargaining notice .....	606
■ Section 45(9) of the CCA .....	606
□ Anti-competitive contracts subject to grant of authorisation.....	606
▪ Authorisation must be in force .....	606
■ Cases on anti-competitive agreements.....	606
□ Forcing a business to shut down.....	606
▪ Mega-Litigation in the sports pay television market .....	606
□ Acquiring excessive amounts of input .....	613
▪ Complex litigation .....	613
□ Refusal of application .....	615
▪ Membership of local livestock auction sales association .....	615
□ Disciplinary action.....	617
▪ Precluded from playing cricket .....	617
□ Restriction on acquisition of services .....	621
▪ Exclusion of rugby league players.....	621
▪ Restricted from playing Australian Rules football .....	623
□ Restriction of entry .....	626
▪ Preventing registration of thoroughbred horses .....	626
□ Tender process of exclusive licence.....	627
▪ Preventing competition of towage services .....	627
□ Refusal to supply .....	628
▪ Retailers refused supply for engaging in parallel importing.....	628
□ Refrain from supplying.....	629
▪ Anti-competitive supply of polycarb roof sheeting .....	629
□ Removing incentives to compete .....	630
▪ Reducing competition in the terminal services markets .....	630

□	Foreclosing participation .....	633
▪	Course materials for accountants .....	633
□	Refusal to deal .....	635
▪	Not negotiating with a freight broker .....	635
□	Hard commercial agreements .....	637
▪	Restricting competition in the information stock exchange market .....	637
□	Restrictions on acquiring stock .....	640
▪	Preventing or hindering purchase of stationary .....	640
□	Not dealing with a new entrant .....	641
▪	Blacklist a tour booking agency .....	641
□	Opposing approvals for development .....	642
▪	Preventing operation of outlet centres .....	642
□	Preventing or hindering development .....	644
▪	Compensation to ports .....	644

### Chapter 9: Secondary Boycotts

■	Introduction .....	653
□	Overview .....	653
▪	Controversial provisions .....	653
■	Legislative history of secondary boycotts .....	654
□	Overview .....	654
▪	<i>Swanson Era</i> : A call for secondary boycott provisions .....	654
▪	<i>Trade Practices Amendment Act 1977</i> (Cth) .....	654
▪	<i>Trade Practices Amendment Act 1978</i> (Cth) .....	655
▪	<i>Blunt Era</i> : No changes recommended .....	655
▪	<i>Trade Practices (Boycotts) Amendment Act 1980</i> (Cth) .....	655
▪	<i>Green Paper</i> : A call for repeal of secondary boycott provisions .....	655
▪	<i>Hilmer Era</i> : No changes recommended .....	656
▪	<i>Industrial Relations Reform Act 1993</i> (Cth) .....	656
▪	<i>Workplace Relations and Other Legislation Amendment Act 1996</i> (Cth) .....	656
▪	Royal Commission into Trade Union Governance and Corruption .....	657
▪	<i>Harper Era</i> : Recommend to 'pursue secondary boycott cases with increased vigour' ....	658
▪	<i>Competition and Consumer Amendment (Competition Policy Review) Act 2017</i> (Cth) ....	658
■	Rationale of secondary boycotts .....	659
□	Political motivation .....	659
▪	'Union Bashing' .....	659
■	Meaning of secondary boycotts .....	659
□	Two or more parties preventing a third party from dealing with the target .....	659
▪	No specific definition .....	659
▪	Difference between primary boycotts and secondary boycotts .....	660
□	Key concepts .....	660
▪	Key concepts in secondary boycott provisions bear similarities with other provisions ...	660
▪	'Corporation' .....	661
▪	'Person' .....	661
▪	'Engage in conduct' .....	661
▪	'Supply' .....	661
▪	'Acquire' .....	661
▪	'Goods' .....	661
▪	'Services' .....	661
▪	'Purpose' .....	661
▪	'Effect' .....	661
▪	'Likely effect' .....	661
▪	'Preventing' .....	661
▪	'Hindering' .....	661
▪	'Provision' .....	662
▪	'Contract' .....	662

▪	‘Arrangement’ .....	662
▪	‘Understanding’ .....	662
▪	‘Substantial loss or damage’ .....	662
▪	‘In concert’ .....	663
■	Section 45D of the CCA .....	665
□	Secondary boycotts for the purpose of causing substantial loss or damage .....	665
▪	Overview .....	665
□	Section 45D(1) .....	666
▪	The operative provision .....	666
▪	Requisite elements of s 45D .....	667
□	Section 45D(2) .....	667
▪	Purpose .....	667
□	Section 45D(3) and 45D(4) .....	667
▪	Constitutional nexus .....	668
■	Section 45DA of the CCA .....	669
□	Secondary boycotts for the purpose of causing substantial lessening of competition .....	669
▪	Substantial loss or damage to the target .....	669
▪	Requisite elements .....	670
■	Section 45DB of the CCA .....	670
□	Boycotts affecting trade or commerce .....	670
▪	Involving the movement of goods between Australia and overseas .....	670
▪	Requisite elements .....	671
▪	Involving the movement of goods between Australia and places outside Australia .....	671
■	Section 45DC of the CCA .....	672
□	Involvement and liability of employee organisations .....	672
▪	Certain organisations (unions) taken to be acting in concert .....	672
■	Section 45DD of the CCA .....	674
□	Situations in which boycotts are permitted .....	674
▪	Exceptions to ss 45D(1), 45DA(1) or 45DB(1) .....	674
▪	Dominant purpose of conduct relates to employment matters (conduct by a person) ..	676
▪	Dominant purpose .....	677
▪	Dominant purpose of conduct relates to employment matters (conduct by unions and employees) .....	677
▪	Dominant purpose of conduct relates to environmental protection or consumer protection .....	677
▪	Meaning of ‘environmental protection’ .....	678
▪	Meaning of ‘consumer protection’ .....	679
▪	Meaning of industrial action (basic definition) .....	680
▪	Meaning of industrial action (further clarification) .....	681
▪	Sub-sections 45DD(1), 45DD(2) and 45DD(3) do not protect people not covered by them .....	681
▪	Defences to contravention of s 45DB(1) .....	681
▪	Each person to prove defence .....	681
■	Section 45E of the CCA .....	681
□	Overview .....	681
▪	A complimentary provision to ss 45D and 45DA .....	681
▪	Requisite elements .....	683
▪	The proscribed purpose .....	684
▪	The proscribed purpose must be an operative purpose .....	684
▪	There can be a variety of purposes .....	684
▪	Primary and accessorial liability .....	685
□	Section 45E(1) .....	685
▪	Two situations to which s 45E applies .....	685
□	Section 45E(2) .....	686
▪	Operative provision in supply situations .....	686
□	Section 45E(3) .....	686
▪	Operative provision in acquisition situations .....	686

▪ No need to specifically identify ‘second person’ .....	687
□ Section 45E(4) .....	687
▪ No contravention if second person gives written consent to written agreement .....	687
□ Section 45E(5) .....	687
▪ Meaning of accustomed to supply .....	687
□ Section 45E(6) .....	688
▪ Exception to s 45E(5) .....	688
□ Section 45E(7) .....	688
▪ Meaning of accustomed to acquire .....	688
□ Section 45E(8) .....	688
▪ Exception to 45E(7) .....	688
■ Section 45EA of the CCA .....	688
□ Operative provision .....	688
▪ Giving effect to a provision that contravenes s 45E .....	688
▪ Liability of a union under ss 45E and 45EA .....	689
■ Section 45EB of the CCA .....	690
□ Explanatory provision .....	690
▪ Avoids affecting other competition provisions .....	690
■ Cases in relation to s 45D .....	690
□ Secondary boycotts aimed to cause substantial loss or damage .....	690
▪ Secondary boycott in the milk industry .....	690
▪ Secondary boycott in the concrete industry .....	694
▪ Secondary boycott in the housing development industry .....	695
▪ Secondary boycott in the construction industry .....	696
▪ Secondary boycott in the abattoirs industry .....	697
▪ Secondary boycott in the slaughter of cattle industry .....	699
▪ Secondary boycott in the sheep industry .....	700
▪ Secondary boycott in the meat process works industry .....	701
▪ Secondary boycott in the delivery of construction materials industry .....	704
▪ Secondary boycott in the sewerage industry .....	705
▪ Secondary boycott in the airline industry .....	705
▪ Secondary boycott in the trucking industry .....	706
▪ Secondary boycott in the excavation industry .....	706
▪ Secondary boycott in the televised football industry .....	707
▪ Secondary boycott in the supply of concrete industry .....	708
▪ Secondary boycott in the construction of substantial buildings industry .....	708
▪ Secondary boycott in the butcher industry .....	709
□ Interlocutory hearings .....	710
▪ Secondary boycott in the slaughter of buffalo and cattle industry .....	710
▪ Secondary boycott in the shipping of grain industry .....	711
▪ Secondary boycott in the re-development industry .....	712
▪ Secondary boycott in the supply of metal components industry .....	712
▪ Secondary boycott in the construction of an aluminum smelter .....	712
▪ Secondary boycott in the exporting of uranium .....	713
▪ Secondary boycott in the transportation of coal .....	713
▪ Secondary boycott in the exporting of wool .....	714
▪ Secondary boycott in the transportation of ready mixed concrete .....	714
▪ Secondary boycott in the shipping industry .....	715
▪ Secondary boycott in the water and irrigation equipment industry .....	715
▪ Secondary boycott in the funeral service industry .....	715
▪ Secondary boycott in the supermarkets industry .....	716
▪ Secondary boycott in the plumbing industry .....	716
▪ Secondary boycott in the importation of cement industry .....	717
▪ Secondary boycott in the installation of air conditioners industry .....	717
▪ Secondary boycott in the building of private homes industry .....	718
▪ Secondary boycott in the transport of fuel industry .....	718
▪ Secondary boycott in the delivery of sand and gravel industry .....	719

▪ Secondary boycott in the distribution of clothing industry .....	719
▪ Secondary boycott in the information storage industry .....	720
▪ Secondary boycott in the recycling of bottles industry .....	721
▪ Secondary boycott in the construction industry .....	721
▪ Secondary boycott in the hiring of equipment .....	722
▪ Secondary boycott in the shipping of oil .....	722
▪ Secondary boycott in the delivery of beer .....	722
▪ Secondary boycott in the supply of oil services .....	723
▪ Secondary boycott in the theater and film industry .....	724
▪ Secondary boycott in the refuelling of aircraft industry .....	724
▪ Secondary boycott in the collection and delivery of goods .....	725
▪ Secondary boycott in the retail grocery industry .....	725
▪ Secondary boycott in the building workers industry .....	725
▪ Secondary boycott in the motor vehicle repairs industry .....	726
■ Cases in relation to s 45DB .....	726
□ Boycotts affecting trade or commerce .....	726
▪ Secondary boycott in the export of live sheep industry .....	726
■ Cases in relation to s 45DC .....	729
□ The involvement and liability of employee organisations .....	729
▪ Secondary boycott in the demolition and excavation industry .....	729
■ Cases in relation to s 45DE .....	731
□ Prohibition of agreements affecting the supply or acquisition of goods or services .....	731
▪ Secondary boycott in the construction project industry .....	731
▪ Secondary boycott in electrical contractor industry .....	732

## Chapter 10: Misuse of Market Power

■ Introduction .....	739
□ Overview .....	739
▪ A controversial provision .....	739
■ Legislative history of misuse of market power .....	740
□ Overview .....	740
▪ <i>Australian Industries Preservation Act 1906</i> (Cth) .....	740
▪ <i>Trade Practices Act 1965</i> (Cth) .....	740
▪ <i>Restrictive Trade Practices Act 1971</i> (Cth) .....	740
▪ <i>Trade Practices Act 1974</i> (Cth) .....	740
▪ <i>Swanson Era</i> : A suitable system to deal with monopolies .....	740
▪ A clearer provision for monopolisation .....	742
▪ <i>Blunt Era</i> : A call for lowering the threshold .....	742
▪ <i>Restrictive Trade Practices Revision Act 1986</i> (Cth) .....	742
▪ <i>Griffiths Era</i> : 'Advance to Go!' .....	743
▪ A new s 46A and s 46B .....	743
▪ <i>Cooney Era</i> : Rejection of an effects test .....	743
▪ Some minor amendments .....	744
▪ <i>Hilmer Era</i> : More proposals for reform .....	744
▪ <i>Reid Era</i> : A call to strengthen the law .....	745
▪ <i>Baird Era</i> : A call for reverse of onus .....	745
▪ <i>Hawker Era</i> : Another rejection of an effects test .....	745
▪ <i>Dawson Era</i> : A further rejection of an effects test .....	746
▪ <i>Stephens Era</i> : More issues examined .....	746
▪ The Birdsville Amendment .....	747
▪ Other significant amendments .....	748
▪ Proof of recoupment unnecessary and clarification of 'take advantage' .....	748
▪ <i>Harper Era</i> : A call for the substantial lessening of competition test .....	749
▪ A call for repeal of ss 46A and 46B .....	749
▪ The current s 46(1) .....	749
▪ No s 46(2) .....	750

▪	The current ss 46(3) to 46(8).....	750
■	Rationale of misuse of market power .....	750
□	The object of s 46 .....	750
▪	To protect consumers by fostering competition .....	750
■	Meaning of misuse of market power .....	751
□	Unilateral anti-competitive conduct.....	751
▪	No specific definition .....	751
■	Types of misuse of market power .....	751
□	Overview .....	751
▪	No reference to types of conduct .....	751
□	Predatory pricing.....	752
▪	Meaning of predatory pricing .....	752
▪	Different forms of predatory pricing.....	753
▪	Elements of predatory pricing .....	754
▪	The three stages of predatory pricing.....	754
▪	Stage one.....	755
▪	Stage two.....	755
▪	Stage three .....	755
▪	The frequency and likely success of predatory pricing.....	756
▪	Distinguishing predatory pricing from vigorous competition.....	757
▪	Tests to determine predatory pricing .....	757
▪	Cost-based tests .....	758
▪	Marginal costs .....	758
▪	Strengths of marginal costs.....	758
▪	Weaknesses of marginal costs .....	759
▪	Average variable costs .....	759
▪	Strengths of average variable costs .....	759
▪	Weaknesses of available variable costs .....	760
▪	Average avoidable cost .....	760
▪	Strengths of average avoidable costs .....	761
▪	Weaknesses of average avoidable costs.....	761
▪	Average total cost .....	761
▪	Strengths of average total costs .....	762
▪	Weaknesses of average total costs.....	762
▪	Average incremental cost .....	762
▪	Strengths of average incremental cost .....	762
▪	Weaknesses of average incremental cost.....	763
▪	Recoupment test.....	763
▪	The quantitative assessment of recoupment .....	764
▪	The qualitative assessment of recoupment.....	764
▪	Possible defences.....	765
▪	Legitimate Business Defence .....	765
▪	Efficiency Defence.....	765
▪	No defence if ceasing predatory pricing increase prices .....	765
▪	Advantages of recoupment.....	766
▪	Disadvantages of recoupment .....	766
▪	Recoupment is not essential .....	767
▪	Cross-subsidisation.....	768
▪	Loyalty rebates .....	768
▪	Predatory pricing under s 46.....	768
□	Price discrimination .....	769
▪	Meaning of price discrimination .....	769
▪	Types of price discrimination .....	769
▪	Elements of price discrimination .....	770
▪	Is price discrimination pro-competitive or anti-competitive?.....	771
▪	Pro-competitive effects of price discrimination .....	771
▪	Anti-competitive effects of price discrimination .....	772

▪	History of price discrimination under s 49 .....	772
▪	The reasons for repeal of s 49.....	773
▪	Price discrimination under former s 49 .....	773
▪	The former s 49(1).....	774
▪	The former s 49(2).....	776
▪	The former s 49(3).....	777
▪	The former s 49(4).....	777
▪	The former s 49(5).....	777
▪	Price discrimination under the current s 46 .....	777
■	Structure of misuse of market power provisions .....	778
□	Overview .....	778
▪	A straightforward structure .....	778
■	Section 46 of the CCA .....	778
□	Misuse of market power .....	778
▪	Overview .....	778
□	Key concepts .....	779
▪	'Corporation' .....	779
▪	'Person'.....	779
▪	'Related bodies corporate'.....	779
▪	'Market' .....	779
▪	'Market power'.....	779
▪	'Purpose' .....	780
▪	'Effect' .....	780
▪	'Likely effect' .....	780
▪	'Substantial' .....	780
▪	'Lessening'.....	780
▪	'Competition' .....	780
▪	'Supply' .....	780
▪	'Acquire' .....	780
▪	'Goods' .....	780
▪	'Services'.....	780
■	Section 46(1) of the CCA.....	780
□	The operative provision .....	780
▪	Prohibition of anti-competitive conduct.....	780
▪	Elements of s 46 .....	780
■	Section 46(3) of the CCA.....	781
□	A deeming provision .....	781
▪	Aggregation of market power.....	781
■	Section 46(4) of the CCA.....	781
□	An interpretative provision.....	781
▪	Market power determined by constraint of competitors .....	781
▪	Market power determined by contracts, arrangements or understandings .....	782
■	Section 46(5) of the CCA.....	783
□	An interpretative provision.....	783
▪	Market power does not require substantial control .....	783
▪	Market power does not require absolute freedom from constraint.....	783
■	Sections 46(6) and 46(7) of the CCA.....	783
□	Interpretative provisions .....	783
▪	No need to be a monopolist to have market power .....	783
■	Section 46(8) of the CCA.....	784
□	An interpretative provision.....	784
▪	'Market' and 'power' .....	784
■	Section 46A of the CCA.....	784
□	Misuse of market power in the trans-Tasman Market.....	784
▪	A market in Australia, New Zealand or Australia and New Zealand.....	784
■	Section 46B of the CCA.....	787
□	New Zealand Trans-Tasman prohibition.....	787

▪ No immunity from certain New Zealand laws .....	787
■ Cases on misuse of market power .....	787
□ Refusal to supply .....	787
▪ Constructive refusal to supply Y-bar .....	787
▪ Refusal to supply recorded music .....	789
▪ Alleged refusal to supply street directories .....	790
▪ Refusal to supply in the milk industry .....	792
▪ Alleged refusal to supply strapping equipment .....	793
▪ Refusal to supply ski boots .....	794
□ Refusal to acquire .....	795
▪ Refusal to acquire bread .....	795
□ Refusal to negotiate .....	796
▪ Alleged refusal to negotiate in the sports channel industry .....	796
□ Refusal of access to essential infrastructure and facilities .....	799
▪ Refusal of access to electricity .....	799
▪ Alleged refusal access to access to a container terminal .....	802
▪ Refusal access to ticket system .....	804
□ Excessive charging for access to essential infrastructure and facilities .....	805
▪ Excessive charging for access to port .....	805
□ Acquiring excessive amounts of inputs .....	806
▪ Acquiring excessive amounts of flyash .....	806
□ Imposing anti-competitive conditions .....	809
▪ Conditions imposed on the acquisition of stock exchange information .....	809
▪ Alleged anti-competitive conditions imposed on the acquisition of liquor .....	810
▪ Alleged anti-competitive conditions imposed in airline travel .....	811
▪ Alleged anti-competitive conditions imposed on football clubs .....	812
□ Land banking .....	814
▪ Alleged land banking of business premises .....	814
□ Bundling of goods or services .....	815
▪ Bundling of hospital fluids .....	815
▪ Alleged bundling of pharmaceutical drugs .....	817
□ Termination or failure to grant or renew a contract .....	819
▪ Alleged termination of supply agreement of vehicles .....	819
▪ Alleged failure to renew supply agreement of vehicles .....	820
▪ Alleged termination of supply agreement of vehicles and spare parts .....	820
▪ Alleged termination of dealership to supply vehicles .....	820
▪ Alleged termination of agreement to distribute bathroom products .....	821
▪ Alleged termination of supply agreement of radio service equipment .....	821
▪ Alleged termination of music licence .....	822
□ Statutory power to terminate or failure to grant or renew a contract .....	823
▪ Alleged misuse of statutory power to grant exclusive towage services .....	823
▪ Alleged misuse of statutory power to grant exclusive licence to operate bus services .....	824
□ Anti-competitive threats .....	825
▪ Alleged anti-competitive threats to withdraw circulation of newspapers .....	825
▪ Alleged anti-competitive threats to surgeons .....	826
□ Anti-competitive litigation .....	828
▪ Alleged anti-competitive litigation in relation to slurry pumps .....	828
▪ Alleged anti-competitive litigation with improper motive .....	829
□ Predatory pricing .....	829
▪ Alleged predatory pricing in concrete masonry products market .....	829
▪ Predatory pricing in the eggs market .....	831
▪ Predatory pricing in the taxi metre market .....	832
▪ Alleged predatory pricing in newspaper advertising of real estate .....	834
▪ Predatory pricing in the barge transportation services .....	836
▪ Alleged predatory pricing in the supply of fertilizer .....	836
■ Annexure A .....	836
□ Elements under the former s 46 (repealed) .....	836

▪ A structured order.....	836
□ Taking advantage of (repealed) .....	837
▪ A notoriously complex and difficult element.....	837
▪ A casual connection .....	837
▪ The ‘arsonist analogy’ .....	838
▪ Use of market power .....	838
▪ A morally neutral concept.....	839
▪ Materially facilitated .....	839
▪ The ‘could have’/’would have’ debate .....	840
▪ Legitimate business rationale .....	840
▪ Efficiency rationale.....	841
▪ Taking advantage in one market for a proscribed purpose in another .....	841
▪ Principles of ‘take advantage of’ .....	841
□ Proscribed purpose (repealed) .....	842
▪ Three proscribed purposes .....	842
▪ A subjective purpose.....	843
▪ Inference of purpose.....	843
▪ An intention to achieve a result.....	844
▪ Purpose distinguished from motive.....	844
▪ Purpose distinguished from effect or likely effect.....	844
▪ A substantial purpose .....	845
▪ Short-term purposes vs long-term purposes.....	845
▪ Purpose distinct from legitimate commercial interest .....	846
■ Annexure B .....	846
□ Table of cases under the former s 46(1).....	846
▪ More ‘losses’ than ‘wins’.....	846

## Chapter 11: Exclusive Dealing

■ Introduction .....	855
□ Overview .....	855
▪ Vertical non-price restraints .....	855
■ Legislative history of exclusive dealing .....	855
□ Overview .....	855
▪ <i>Australian Industries Preservation Act 1906</i> (Cth).....	855
▪ <i>Trade Practices Act 1965</i> (Cth).....	855
▪ <i>Trade Practices Act 1974</i> (Cth).....	855
▪ <i>Swanson Era</i> : Some calls for repeal .....	856
▪ <i>Hilmer Era</i> : Calls for uniformity for vertical restraints.....	856
▪ <i>Dawson Era</i> : No support for <i>per se</i> prohibition on third line forcing .....	857
▪ <i>Harper Era</i> : Further calls for repeal .....	858
▪ Third line forcing no longer a <i>per se</i> prohibition .....	858
■ Rationale of exclusive dealing .....	858
□ Overview .....	858
▪ A case-by-case analysis .....	858
▪ Intra-brand and inter-brand competition .....	858
□ Exclusive dealing as pro-competitive.....	859
▪ Greater efficiency.....	859
▪ ‘Free rider’ issues .....	859
▪ Effect on intra-brand competition .....	860
▪ Promoting product image .....	860
□ Exclusive dealing as anti-competitive .....	860
▪ Preventing, restricting or limiting competition .....	860
▪ Create barriers to entry.....	861
▪ Impact on horizontal conduct .....	861
▪ Effect on other markets .....	861
■ Meaning of exclusive dealing .....	861

□	The practice of exclusive dealing .....	861
▪	No specific definition .....	861
■	Types of exclusive dealing .....	861
□	Overview .....	861
▪	Common examples.....	861
□	Solus agreements.....	862
▪	Meaning of solus agreements.....	862
□	Tying agreements.....	862
▪	Meaning of tying agreements .....	862
□	Full line forcing.....	863
▪	Meaning of full line forcing .....	863
□	Minimum quantities condition .....	863
▪	Meaning of minimum quantities condition .....	863
□	Requirement agreements.....	864
▪	Meaning of requirement agreements .....	864
□	Customer restrictions .....	865
▪	Meaning of customer restrictions.....	865
□	Territorial restrictions .....	865
▪	Meaning of territorial restrictions .....	865
□	Third line forcing .....	866
▪	Meaning of third line forcing .....	866
▪	Third line forcing and bundling.....	867
■	Structure of exclusive dealing provisions.....	867
□	A somewhat complex structure.....	867
▪	Overview .....	867
■	A non-exhaustive list of exclusive dealing provision .....	868
□	Legislative 'gaps' .....	868
▪	Reverse 'solus agreement' .....	868
▪	Inverse 'solus agreement' .....	869
▪	Reverse 'requirements agreement' .....	869
▪	Reverse 'third line forcing' .....	869
▪	Restrictive 'licence or lease' agreement .....	869
■	Section 47 of the CCA .....	869
□	Exclusive dealing .....	869
▪	Overview .....	869
□	Key concepts .....	873
▪	'Practice of exclusive dealing' .....	873
▪	'Corporation' .....	873
▪	'Person'.....	873
▪	'Another person' .....	873
▪	'Related bodies corporate' .....	873
▪	'In trade or commerce' .....	873
▪	'Acquire' .....	874
▪	'Supply' .....	874
▪	'Re-supply' .....	874
▪	'Goods' .....	874
▪	'Services' .....	874
▪	'Price' .....	874
▪	'Discount, allowance, rebate or credit' .....	874
▪	'Condition' .....	874
▪	'On the condition' .....	874
▪	'Refuses' .....	875
▪	'For the reason' .....	875
▪	'Will' or 'will not' .....	875
▪	'Except to a limited extent' .....	876
▪	'Directly or indirectly' .....	877
▪	'Another party to the lease or licence' .....	879

▪ 'Grant' .....	879
▪ 'Renew' .....	879
▪ 'Lease' .....	879
▪ 'Licence' .....	880
▪ 'Land' .....	880
▪ 'Building' .....	880
■ Section 47(1) of the CCA .....	880
□ The operative provision .....	880
▪ A provision of wide application .....	880
▪ Onus of proof .....	881
■ Section 47(2) of the CCA .....	881
□ The practice of exclusive dealing .....	881
▪ Supplies or offers to supply .....	881
▪ The operation of s 47(2) .....	881
▪ Further analysis of s 47(2) .....	882
■ Section 47(3) of the CCA .....	882
□ The practice of exclusive dealing .....	882
▪ Refuses to supply .....	882
▪ The operation of s 47(3) .....	883
▪ Further analysis s 47(3) .....	883
■ Section 47(4) of the CCA .....	884
□ The practice of exclusive dealing .....	884
▪ Acquires or offers to acquire .....	884
▪ The operation of s 47(4) .....	884
▪ Further analysis of s 47(4) .....	885
■ Section 47(5) of the CCA .....	885
□ The practice of exclusive dealing .....	885
▪ Refuses to acquire .....	885
▪ The operation of s 47(5) .....	886
▪ Further analysis of s 47(5) .....	886
■ Section 47(6) of the CCA .....	886
□ The practice of exclusive dealing .....	886
▪ Supplies or offers to supply (third line forcing) .....	886
▪ The operation of s 47(6) .....	887
▪ Further analysis of s 47(6) .....	887
■ Section 47(7) of the CCA .....	888
□ The practice of exclusive dealing .....	888
▪ Refuses to acquire (third line forcing) .....	888
▪ The operation of s 47(7) .....	888
▪ Further analysis of s 47(7) .....	888
■ Section 47(8) of the CCA .....	889
□ The practice of exclusive dealing .....	889
▪ Grant, renewal or non-termination of a lease or licence .....	889
▪ The operation of s 47(8) .....	890
■ Section 47(9) of the CCA .....	890
□ The practice of exclusive dealing .....	890
▪ Refuse to grant, renewal or terminate a lease or licence .....	890
▪ The operation of s 47(9) .....	891
■ Section 47(10) of the CCA .....	892
□ Substantial lessening of competition .....	892
▪ Conduct in isolation and aggregation .....	892
■ Section 47(11) of the CCA .....	893
□ Exemption .....	893
▪ Registered charities .....	893
■ Section 47(12) of the CCA .....	893
□ Exemption .....	893
▪ Related bodies corporate .....	893

■ Section 47(13) of the CCA.....	893
□ Expanded meaning of on the ‘condition’ .....	893
▪ Ordinary meaning of ‘condition’ .....	893
▪ Expanded meaning of ‘condition’ .....	894
▪ Any direct or indirect condition .....	894
▪ Legal or equitable force .....	894
▪ Ascertainable by inference only.....	894
□ Expanded meanings of ‘competition’ .....	894
▪ Expanded meaning of ‘competition’ in relation to goods or services .....	894
▪ Expanded meaning of ‘competition’ in relation to land and buildings .....	895
■ Cases on exclusive dealing.....	895
□ Cases in relation to s 47(2).....	895
▪ Alleged solus agreement in the training of accountants .....	895
▪ Solus agreement in the sound recordings industry .....	896
▪ Alleged solus agreement in the broadcasting of sports channels industry.....	897
▪ Solus agreement in apparel industry .....	897
▪ Alleged solus agreement in the outboard motors industry.....	897
▪ Solus agreement in the self-propelled barge services industry.....	898
▪ Solus agreement in the credit card industry.....	898
▪ Alleged solus agreement in the eggs industry .....	898
▪ Tying agreement in the medical fluids industry.....	898
▪ Alleged tying agreement in the pharmaceutical drug industry .....	899
▪ Minimum quantity condition in the vehicle windscreens industry .....	900
□ Cases in relation to s 47(3).....	901
▪ Territorial restrictions in warehouses and town halls .....	901
▪ Alleged solus agreement in the outboard motor industry .....	901
▪ Solus agreement in the outboard motors and spare parts industry .....	902
□ Cases in relation to s 47(4).....	902
▪ Alleged refusal to acquire bread products.....	902
▪ Alleged solus agreement in the computer software industry .....	902
▪ Solus agreement in the polycarbonate industry.....	902
▪ Alleged solus agreement in the towage services industry .....	903
▪ Solus agreement in the ice cream industry .....	903
□ Cases in relation to s 47(5).....	904
▪ Alleged solus agreement in the bread products market .....	904
▪ Alleged refusal to acquire in the transport industry.....	905
□ Cases in relation to s 47(6).....	905
▪ Alleged third line forcing in the delivery of beer industry .....	905
▪ Third line forcing in the mortgages industry.....	907
▪ Alleged third line forcing in the equipment financing industry .....	908
▪ Alleged third line forcing in the tourism industry .....	909
▪ Alleged third line forcing in the digital satellite industry.....	910
▪ Alleged third line forcing in the insurance industry.....	910
▪ Alleged third line forcing in the motor vehicle trade-in industry .....	911
▪ Third line forcing in the quarry industry .....	911
▪ Third line forcing in the pet product industry.....	911
▪ Third line forcing in the telecommunications industry.....	911
▪ Third line forcing in the taxi industry .....	912
▪ Third line forcing in the newsagent industry .....	912
▪ Alleged third line forcing in the health services industry .....	912
▪ Alleged third line forcing in the rental of equipment industry.....	912
▪ Third line forcing in the money lending industry .....	912
□ Cases in relation to s 47(7).....	913
▪ Alleged third line forcing in the health industry .....	913
▪ Alleged third line forcing in the tertiary education industry .....	913
▪ Alleged third line forcing in the rugby industry .....	913
▪ Alleged third line forcing in the newsagent industry.....	913

- Third line forcing in the vehicle finance industry..... 914
- Cases in relation to s 47(8)..... 914
  - Alleged third line forcing in the sports ticketing industry ..... 914
- Cases in relation to s 47(9) of the CCA..... 915
  - Alleged exclusive dealing in the rubbish dump industry ..... 915
  - Alleged exclusive dealing in the auction of cattle industry ..... 915

**Chapter 12: Resale Price Maintenance**

- Introduction ..... 919
  - Overview ..... 919
    - Vertical price fixing..... 919
- Legislative history of resale price maintenance ..... 920
  - Overview ..... 920
    - *Australian Industries Preservation Act 1906* (Cth) ..... 920
    - *Restrictive Trade Practices Act 1971* (Cth) ..... 920
    - *Trade Practices Act 1974* (Cth)..... 920
    - *Hilmer Era*: Authorisation available ..... 920
    - *Harper Era*: Notification available ..... 921
- Rationale of resale price maintenance ..... 921
  - Overview ..... 921
    - An ongoing debate ..... 921
  - Resale price maintenance as pro-competitive ..... 922
    - Promoting product image ..... 922
    - Encourage supply for low profit goods ..... 923
    - ‘Free rider’ issue..... 923
    - Gain preferential treatment..... 924
    - Prevent ‘loss leader’ selling..... 924
    - Increase competition and efficiency ..... 924
  - Resale price maintenance as anti-competitive..... 924
    - Facilitating collusion between suppliers ..... 924
    - Facilitating collusion between retailers ..... 925
    - Supplier exclusion ..... 925
    - Retailer exclusion ..... 925
- Meaning of resale price maintenance..... 926
  - The practice of resale price maintenance ..... 926
    - No specific definition ..... 926
- Types of resale price maintenance..... 926
  - Overview ..... 926
    - Minimum (not maximum) resale price maintenance ..... 926
- Structure of resale price maintenance provisions ..... 926
  - A straightforward structure ..... 926
    - Overview ..... 926
- Section 48 of the CCA ..... 927
  - The operative provision ..... 927
    - *Pe se* contravention..... 927
- Section 96 of the CCA ..... 928
  - Overview ..... 928
    - The practice of resale price maintenance..... 928
  - Key concepts ..... 929
    - ‘Practice of resale price maintenance’ ..... 929
    - ‘Corporation’ ..... 929
    - ‘Person’..... 929
    - ‘Supplier’ ..... 929
    - ‘Goods’ ..... 929
    - ‘Supplied’ ..... 929
    - ‘Directly or indirectly’ ..... 929

▪ 'Price' .....	930
▪ 'Price specified' .....	930
■ Sections 96(1) and 96(2) of the CCA.....	932
□ Overview .....	932
▪ Corporates and non-corporates.....	932
■ Section 96(3)(a) of the CCA .....	932
□ The practice of resale price maintenance .....	932
▪ 'Making it known' .....	932
▪ Conditional threat not to supply goods .....	933
▪ 'Agrees' .....	934
■ Section 96(3)(b) of the CCA .....	935
□ The practice of resale price maintenance .....	935
▪ Defined in two situations .....	935
▪ 'Inducing' .....	935
▪ 'Attempting to induce' .....	936
■ Section 96(3)(c) of the CCA.....	937
□ The practice of resale price maintenance .....	937
▪ Entering, or offering to enter, into an agreement.....	937
▪ Agreement.....	938
▪ Offer to agree .....	938
▪ Parties to the agreement .....	938
▪ Not to sell 'the goods' .....	939
■ Section 96(3)(d) of the CCA .....	939
□ The practice of resale price maintenance .....	939
▪ Withholding supply for reasons that relate to the second person.....	939
▪ 'Withholding the supply' .....	939
▪ 'For the reason' .....	939
■ Section 96(3)(e) of the CCA .....	940
□ The practice of resale price maintenance .....	940
▪ Withholding supply for reasons that relate to the third person .....	940
■ Section 96(3)(f) of the CCA .....	940
□ The practice of resale price maintenance .....	940
▪ Using a statement of price .....	940
▪ A provision of wide operation.....	940
▪ 'Using' .....	941
▪ 'Statement of a price' .....	941
▪ 'Likely to be understood' .....	941
▪ 'Are not to be sold' .....	941
■ Section 96(4) of the CCA.....	942
□ Specified by the supplier.....	942
▪ A deeming provision for s 96(3) .....	942
■ Section 96(5) of the CCA.....	942
□ Expansive meaning of 'formula' .....	942
▪ An interpretive provision for s 96(4) .....	942
■ Section 96(6) of the CCA.....	943
□ Acting on behalf of, or by arrangement with .....	943
▪ A deeming provision for s 96(3) .....	943
▪ 'on behalf of' .....	943
▪ 'by arrangement with' .....	943
■ Section 96(7) of the CCA.....	944
□ Advertising, displaying or offering goods .....	944
▪ An expansive provision for s 96(3) .....	944
■ Section 96(8) of the CCA.....	944
□ Exemption .....	944
▪ Related bodies corporate.....	944
■ Section 96A of the CCA.....	945
□ Resale price maintenance in relation to services .....	945

▪ Services should be treated similarly to goods .....	945
■ Section 97 of the CCA .....	945
□ Recommended prices .....	945
▪ No obligation to state recommended price .....	945
▪ 'By reason only' .....	946
▪ A 'recommended' price may be a 'specific' price .....	947
■ Section 98 of the CCA .....	947
□ Overview .....	947
▪ A deeming provision for ss 96(3)(d) and 96(3)(e) .....	947
▪ Refuses or fails to supply to, or as requested (s 98(1)(a)) .....	948
▪ Refuses to supply except on disadvantageous terms (s 98(1)(b)) .....	949
▪ Supply with less favourable treatment (s 98(1)(c)) .....	950
▪ Supplier causes or procures another to withhold supply (s 98(1)(d)) .....	951
▪ The loss leader defence (s 98(2)) .....	952
▪ The scope of the loss leader defence.....	952
▪ Elements of the loss leader defence .....	952
▪ Less than 'cost' .....	953
▪ For the 'purpose' .....	953
▪ Exceptions to the loss leader defence (s 98(3)) .....	954
▪ 'Genuine seasonal or clearance sale' .....	954
■ Section 99 of the CCA .....	954
□ Statements as to the minimum price of goods .....	954
▪ A deeming provision for s 96(3)(f) .....	954
■ Section 100 of the CCA .....	955
□ Evidentiary provisions.....	955
▪ Reversal of onus of proof.....	955
▪ Requisite elements.....	956
▪ The defendant 'had been supplying goods of the kind' .....	956
▪ Carrying on a 'business similar to that of the plaintiff' .....	956
▪ A substantial 'reason' .....	956
▪ The defendant 'became aware' .....	957
■ Cases on resale price maintenance .....	958
□ Cases in relation to s 96(3)(a) .....	958
▪ Resale price maintenance in the paraglider industry .....	958
▪ Resale price maintenance in the home appliance industry.....	959
▪ Resale price maintenance in the electronic goods industry.....	959
▪ Resale price maintenance in the baby products industry .....	960
▪ Resale price maintenance in the bread industry .....	960
▪ Resale price maintenance in the computer industry.....	960
▪ Resale price maintenance in the kitchen products industry .....	960
▪ Resale price maintenance in the heater industry .....	961
▪ Resale price maintenance in the sunglasses industry .....	961
□ Cases in relation to s 96(3)(b) .....	961
▪ Resale price maintenance in the cosmetic beauty products industry.....	961
▪ Resale price maintenance in the bicycle industry.....	963
▪ Resale price maintenance in the kitchen appliances industry.....	963
▪ Resale price maintenance in the sports garments industry .....	963
▪ Resale price maintenance in the skin care products .....	964
▪ Resale price maintenance in the sunglasses industry .....	964
▪ Resale price maintenance in the boat industry .....	964
▪ Resale price maintenance in the navigational equipment industry .....	964
▪ Resale price maintenance in the motor vehicle industry .....	965
▪ Resale price maintenance in the electrical appliance industry .....	965
▪ Resale price maintenance in the mattress industry .....	965
▪ Resale price maintenance in the power tools industry .....	965
□ Cases in relation to s 96(3)(c).....	966
▪ Resale price maintenance in the bicycle industry.....	966

- Resale price maintenance in the men’s suits industry ..... 967
- Resale price maintenance in the children’s clothing and toys industries ..... 967
- Resale price maintenance in the beauty products industry ..... 967
- Resale price maintenance in the paraglider industry ..... 968
- Resale price maintenance in the jeans and jackets industries ..... 968
- Cases in relation to s 96(3)(d) ..... 968
  - Resale price maintenance in motor vehicle industry ..... 968
  - Resale price maintenance in the cosmetic industry ..... 969
  - Resale price maintenance in the white goods industry ..... 970
  - Resale price maintenance in the music industry ..... 970
  - Alleged resale price maintenance in the motor vehicle industry ..... 970
- Cases in relation to s 96(3)(e) ..... 970
  - Resale price maintenance in toothpaste industry ..... 970
- Cases in relation to s 96(3)(f) ..... 971
  - Resale price maintenance in the petrol industry ..... 971
  - Resale price maintenance in the shoe industry ..... 973
  - Resale price maintenance in the motor vehicle industry ..... 973
  - Resale price maintenance in the petrol industry ..... 973
  - Resale price maintenance in the garments industry ..... 973
  - Alleged resale price maintenance in the wine industry ..... 974