



CORE MODULE 6

DO'S AND DON'T'S OF COMPETITOR INTERACTIONS

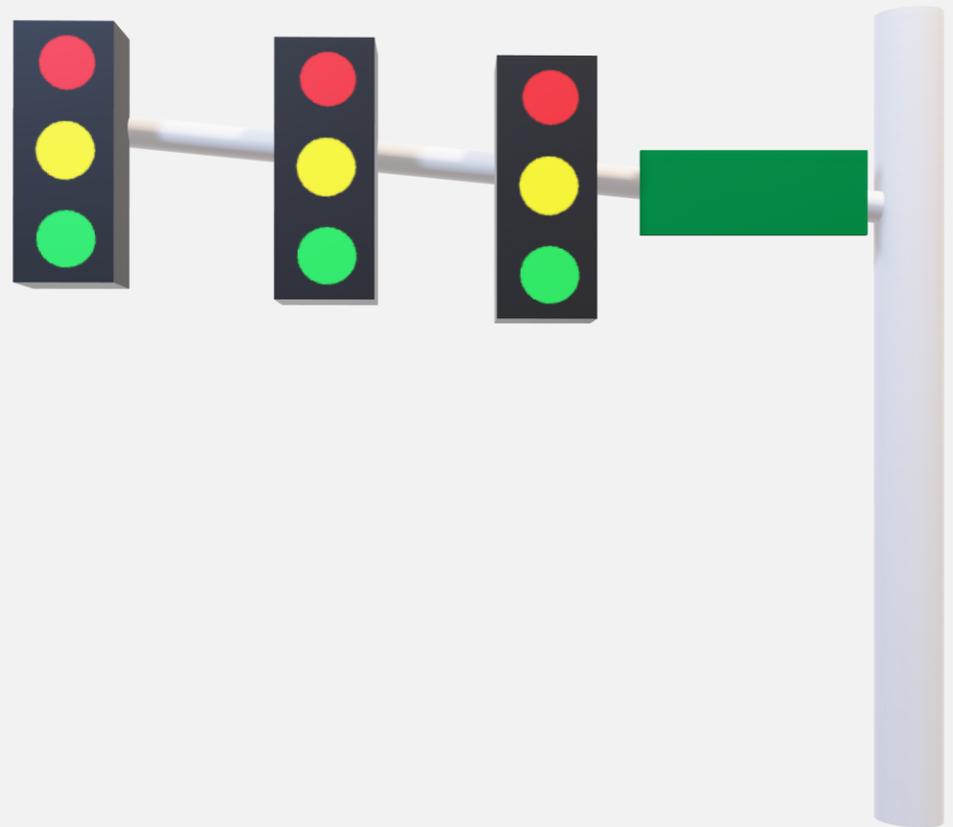
WHAT IS THIS MODULE ABOUT?

- Collusion does **NOT** always occur in smoke-filled rooms with company executives **intentionally** agreeing to conduct business in a way that is prohibited under the Competition Act 2007.



- There are different circumstances in which company representatives may find themselves interacting with their competitors:
 - During trade association or industry activities;
 - Strategic alliances and joint ventures;
 - In a dual distribution system (where a company operates at more than one level of the supply chain e.g. as a wholesale distributor and retailer);
 - Even, in informal settings (such as in a restaurant, at an airport, or on a golf course).
- It is important that legitimate competitor dealings do **NOT** stray into illegality through careless or improper conduct.
- Competitor contacts carry unique competition law risks and allegations of illegal collusive activity!

THIS MODULE WILL COVER PRACTICAL TIPS / “**DOS** AND **DON'TS**” THAT BUSINESSES GENERALLY, TRADE ASSOCIATIONS AND THEIR MEMBERS CAN USE TO MINIMIZE THE RISK OF ISSUES ARISING UNDER THE COMPETITION ACT 2007.



IN MY BUSINESS DEALINGS WITH COMPETITORS

- It is important to first understand who are my competitors to ensure that all my business dealings are compliant
 - In addition to direct competitors, competitive relationships may also exist with –
 - Suppliers or licensors (sometimes as customers or licensees)
 - Distribution, manufacturing, or marketing partners
 - Joint venture partners
- A key antitrust principle is that enterprises should make (current and future) decisions for their products or business **independently**, e.g. -
 - At what price to sell/ how much discount to give in present market conditions?
 - How much to produce and under what terms and conditions?
 - Future intentions about prices, price increases or reductions?
 - Who to buy from/sell to?
 - Whether or not to participate in a bid/tender exercise?
- Any conduct, contact or exchange among competitors which is or is likely to affect the independence of my or my competitor's commercial decision-making runs the risk of infringing the prohibitions contained in the Act!

COMMON MISPERCEPTIONS

“You haven’t fixed prices if you don’t actually agree on the price.”

- **WRONG** – The definition of price-fixing agreement is very broad and also includes the exchange of certain information (commercially sensitive) among competitors capable of influencing their market conduct

“We didn’t fix prices, we only discussed terms and conditions.”

- **WRONG** – Agreeing on terms and conditions that affect prices is also unlawful



Common
Mistakes



INFORMATION EXCHANGE



Reference has been made to "**commercially sensitive information**" and the need to avoid sharing or discussing such information with competitors, either in business dealings, at a trade association, or any time with actual or potential competitors.

Some examples of "commercially sensitive information" are:

- prices, price changes, future prices, price lists or offers
- terms of sale, credit terms, terms of purchase, discounts, allowances or rebates
- profit margins, costs or other information related to costing or pricing
- allocation or restriction of territory, clients, products or markets
- sales, production, inventory levels or capacity (current or projected)
- channels or methods of distribution
- quantity or quality of production
- content of bids, and intent to bid or not to bid
- selection or termination of customers
- marketing, sales or strategic plans
- entering or exiting geographical or product markets
- commercial decisions or activities in the marketplace.



IN MY BUSINESS DEALINGS WITH COMPETITORS

- There can be a wide range of legitimate topics to be discussed with a competitor but you must:
 - ensure that discussions do not stray into illegality because of their anticompetitive nature/purpose, and
 - minimize risk that someone will later accuse you or your competitor(s) of misconduct.

IN MY BUSINESS DEALINGS WITH COMPETITORS (CONTD.)



It is best to avoid contact with competitors, except in specific monitored settings, because even meeting can give rise to suspicion.



It is a good practice to obtain legal advice prior to participating in any meetings or discussions with competitor(s).



Ensure that there is a legitimate business purpose for all such communications and document the legitimate business objective and rationale.



Establish written protocols governing dealings with competitors as part of a comprehensive competition law compliance policy.



Ensure that any permitted discussions and meetings follow a pre-set agenda and that the conversations/conduct do not go beyond the scope of the agenda.



Exercise common sense and careful judgment in all written and oral communications including (but not limited to) internal memoranda, personal notes, email and text messages.



Always object to and terminate any discussion that you think is or may be questionable or inappropriate.

IN MY BUSINESS DEALINGS WITH COMPETITORS (CONTD.)



Don't discuss competitively sensitive matters particularly relating (but not limited) to current or future pricing, input/production costs, production/output levels, marketing/business plans, customer/market allocation matters, or specific bids or tenders.



Don't participate in private meetings, "off the record" discussions or social encounters with competitors concerning competitively sensitive matters.



Don't take any action or make any statements which could be construed as suggesting or expressing an agreement or understanding.



Don't relax competition law compliance rules in the context of pre-merger discussions with a competitor.



Don't hesitate to seek legal advice regarding concerns you have about the appropriateness of any communications with a competitor, even if you are not directly involved.

SCENARIO I

- The local access and alarms industry has been in financial difficulty following the establishment of stricter/more costly manufacturing standards and the recent entry of DIY monitoring systems, which is gaining popularity on the market.
- The Sales and marketing executives of the two largest suppliers of access and alarms systems': Wiki and Nikki, met at the '*Salon des Gadgets*' while marketing their products and started discussing with one.
- During their discussions, they noted that demand for their products has significantly decreased because electronic accessories' shops – their main customers – are now purchasing DIY monitoring systems.
- To counter the recent increase in their production costs and survive on the market, the representatives of Wiki and Nikki verbally agree to respectively apply an 8% price increase for their next production batch until further notice. To support one another, Wiki's sales force will concentrate efforts in the South only while Nikki will focus on the North. Also, they will stop discounting to and even threaten to withhold their after-sales warranty services from retailers that stock DIY monitoring systems or like products. If the latter do not heed after a first warning, they will be boycotted.

ASK YOURSELF:

Do Wiki and Nikki
qualify as competitors
or potential
competitors?

What is the topic/nature
of their discussion?

Did the discussion
involve commercially
sensitive variables?

What is the aim/result of their
discussion?

Did they agree on a
common plan /
objective?

Is any of their discussion
likely to fall foul of the
Competition Act?

WHAT SHOULD I DO IF...?

- **... a competitor seeks to discuss commercially sensitive topics or seeks or provides commercially sensitive information?**
 - ✓ Say you cannot discuss that and break off the discussion and leave if possible.
 - ✓ Advise legal counsel as soon as possible.
- **... you receive commercially sensitive information, including e-mails, from competitors containing commercially sensitive information or topics?**
 - ✓ Indicate your disapproval immediately. Even silence can be construed as approval
 - ✓ Immediately bring it to the attention of legal counsel for appropriate response.
- **... you obtain competitor information from a public source and retain it?**
 - Make a note on it as to its source.
 - Do not accept information from competitors, even if it is otherwise publicly available. The fact that it came from a competitor might indicate or infer ongoing discussions or agreement. Therefore, only publicly available information should be used, but only when not obtained from a competitor, and its source must be documented.



IN MY TRADE ASSOCIATION DEALINGS

- **Trade associations** are common and are legitimate forms of cooperation among competitors.
- Because industry associations, by their very nature, encourage contact and interaction between actual or potential competitors, their activities are inherently of interest to competition law enforcement and carry an inherent risk of actual or potential breach of the prohibition against certain forms of competitor activities.
- Associations should ensure that their rules, interactions, decisions are not designed for the purpose of creating artificial barriers to entry into the market, giving some members a competitive advantage over others, or excluding competitors from the market.

IN MY TRADE ASSOCIATION DEALINGS (CONTD.)



Ensure that association meetings have agendas and that minutes accurately reflect attendance and discussions



Ensure that measures are in place to prevent the disclosure of competitively sensitive information to or between individual association members



Exercise care when collecting and sharing competitively sensitive information within the association. Use a third party to collect the information and have it disseminated in aggregated form so that it cannot be attributed to any competitor



Ensure that attendees use caution during association meetings. If improper discussions arise, attendees should leave the meeting and have their departure noted in the minutes.



Allow all members to attend annual and other general meetings so as not to exclude a specific firm or category of the association's membership



Find alternatives to recommended fee guidelines to provide information to the public or association members on prices



Ensure that rules, codes of conduct or standards (rules) include a clear statement of objectives, expectations and responsibilities, as well as a transparent dispute resolution mechanism

IN MY TRADE ASSOCIATION DEALINGS (CONTD.)



Don't engage in communications at association meetings or social events about competitively sensitive information. Private meetings between competitors under the pretext of association meetings should be discouraged



Don't use unreasonable disciplinary measures to coerce members to provide information or data for information sharing purposes



Don't establish arbitrary criteria for membership that will exclude a competitor or category of competitors from membership in the association



Don't impose sanctions or discriminate against members that do not adhere to rules with respect to competitively important considerations



Don't use rules to establish prices, mandate levels or types of services, restrict advertising, or exclude viable competitors from the market



Don't create a false impression that lower prices or fees are indicators of lower quality services



Don't use standard-setting to artificially provide some competitors with a competitive advantage over others, including firms with the potential to enter the market

SCENARIO II:
LET US HAVE A LOOK AT THE
FOLLOWING ASSOCIATION OF
TOUR OPERATORS' MEETING
AGENDA...

MEETING AGENDA

February 29, 2016

15hrs00

Seat of the Association, PL

| | | | |
|---------------------------|--|-------------------------|--|
| Meeting called by: | <u>Mr. A, President of the Association</u> | Type of meeting: | <u>Monthly Meeting</u> |
| Facilitator: | <u>Mr. Y, Vice-President of the Association</u> | Note taker: | <u>Mr. X, Secretary to Trade Association</u> |
| Attendees: | <u>Members of 'Association of Coach & Tour Buses'</u> | | |
| Please read: | <u>Regulations No. 16/2016 made under the Carbon Emission Tax Act 2014</u> | | |
| Please bring: | <u>Completed 'Information sheets' for March 2016</u> | | |

AGENDA ITEMS

- ✓ Discussion of the method of implementation and cost implications of introducing a 'Carbon Tax' of 15% applicable to all diesel-driven tourism coach buses under the new Regulations.
- ✓ Establishing a common front for lobbying against the new tax system by means of an Impact assessment Report for submission to relevant authorities (MTPA, MTA, NTA, MRA, PMO, Consumer Association Groups, etc).
- ✓ Exchange and analysis of the following information collected by the Association:
 1. Number of overseas coach tourists on a yearly basis for period 2010 - 2014;
 2. Revenue generated & expenses incurred as per Annual Reports of members for period 2010 - 2014;
 3. Aggregate figures for fuel and coach maintenance costs of the three largest vs. three smallest coach companies;
 4. Aggregate figures for the total number of new coaches/ tour buses purchased by private operators over the period 2010 – 2014;
 5. Number of bookings made with each coach company for summer and winter seasons of years 2014 & 2015
 6. List of all promotional offers run by coach companies (website information) & destinations covered by coach companies.
- ✓ Mr. A, X and Y will present their individualized 'Information Sheet' today and followed by posting of individual Information Sheets by Members, via Trade Association 'Member only Web Portal'.
- ✓ Discussion of common pricing for ad-hoc routes and implementation of minimum fares for special routes; implementation of quota system during peak season (Feb. – May 2016 and Oct. 2016 – Jan 2017) as a means of generating revenue across all destination routes to enable members to recoup expected losses from new tax system.
- ✓ Resolutions on strategies voted to be passed on 15th March 2016.

Consider the following agenda of a trade association meeting called by the Association of Coach & tour Buses to discuss potential avenues open to the Association/its members in the context of an impending tax to be implemented by way of environmental regulations.

Also note that members have been required to bring in their filled 'Information sheet' for the coming month of March 2016

DO YOU FIND POTENTIAL INFRINGING CONDUCTS ON THE PART OF THE ASSOCIATION?

1

Introduction of a 15% carbon tax:

- Any decision/ resolution/recommendation by members which relates to the may amount to collective fixing of a cost component (carbon tax) of their business to be included in the end-price charged to tourists (consumers), is likely to amount to a prohibited decision of the association to fix prices for supplying coach/buses transportation services to tourists.

2

Common front for Government lobbying:

- Any such decision of the association members, which serves to legitimately protect the interests of the industry members against the imposition of a tax system that is adversely affecting the competitiveness of their business/the industry, is unlikely to be caught under the Act's prohibition.
- So long as it does not relate to the actual/future commercial conduct of the existing operators on the market or to increasing barriers to potential entrants

3

Information exchange:

- On the nature of information exchanged, items 1 - 4, & 6 are unlikely to amount to sharing of confidential/commercially sensitive information since they relate to publicly available data and/or historic/aggregated business information
- The sharing of individualised, seasonal bookings by competitors (item 5) and the requirement for members A, X,Y to compile and share (sensitive actual/predicted commercial) data may facilitate reaching an agreement/understanding on coordinated commercial policy.

4

Discussion of common pricing for routes & quota system:

- Any decision/ resolution/recommendation by members which relates to the may amount to collective fixing of a cost component (carbon tax) of their business to be included in the end-price charged to tourists (consumers), is likely to amount to a prohibited decision of the association to fix prices for supplying coach/buses transportation services to tourists.

REAL – LIFE EXAMPLES OF INFRINGEMENTS THROUGH COMPETITOR INTERACTIONS

- **Local estate agents’ advertising of fees, UK**
- In 2015, a trade association, 3 estate agents and a newspaper publisher were collectively fined over £735,000 for agreeing to prevent agents from advertising their fees or discounts in the local newspaper.
- The trade association introduced a rule that prevented its members from advertising their fees or discounts in the local paper, and the paper agreed to extend this agreement to prevent any agents from advertising their fees (whether they were members or not).
- This limited agents’ ability to compete with each other on their fees, making it harder for consumers to compare prices and get value for money and may also have made it harder for new or smaller businesses to attract new customers.

REAL – LIFE EXAMPLES OF INFRINGEMENTS THROUGH COMPETITOR INTERACTIONS (CONTD.)

Eye surgeons, UK

- In 2015, a membership organisation of private ophthalmologists (eye surgeons) was fined £382,500 for sharing commercially sensitive information amongst competing consultants and recommending what prices they should charge to insurers. The eye surgeons were working together as part of different, competing groups across the UK.
- The membership organisation broke competition law by facilitating the exchange of sensitive information between these competing groups on subjects such as their pricing and commercial intentions. These actions were taken in the interests of increasing revenue and profitability for the consultants by removing competition between them.
- Actions such as these can mean higher prices, which will ultimately have a knock-on effect for patients who may end up paying more through premiums or self-pay fees.

**REAL – LIFE
EXAMPLES OF
INFRINGEMENTS
THROUGH
COMPETITOR
INTERACTIONS
(CONTD.)**

Queensland pre-mixed concrete cartel, Australia

- Three companies - Pioneer, Boral and CSR were sanctioned for bid rigging, price fixing and market sharing in the pre-mixed concrete market in south-east Queensland from 1989 until 1994.
- The participants had more than 50 regular meetings and phone conversations. In addition to fixing prices, they agreed on market shares and not to compete on specified major projects.
- Market shares were maintained by the companies recognising certain customers (referred to as “pets”) as belonging to certain suppliers and agreeing not to compete for their business. The participants even engaged an accountant to monitor market shares so they could enforce compliance with the agreement.
- The arrangement led to considerable overcharging on major construction jobs, including federal, state and local government projects.

**REAL – LIFE
EXAMPLES OF
INFRINGEMENTS
THROUGH
COMPETITOR
INTERACTIONS
(CONTD.)**

Visy and Amcor packaging cartel, Australia

- Between them, Visy and Amcor controlled around 90% of the corrugated fibre packaging market (the cardboard carton), which was worth some \$1.8 billion to \$2 billion per year.
- From 2000 to 2004, the two companies conspired to raise the prices of their products while maintaining their respective market shares.
- Both companies nominated executives to consult on and coordinate price rises and collude when negotiating quotes for customers. These executives met regularly and secretly in public places such as hotels and parks, and also communicated using public phones and special prepaid mobiles. When larger customers wished to renegotiate contracts, the two companies swapped information to ensure that the competitor's quote was higher than the existing price structure. (Contd.)

VISY AND AMCOR PACKAGING CARTEL, AUSTRALIA (CONTD.)

- Thousands of firms (and ultimately millions of consumers) were significantly overcharged by the cartel. The Federal Court ordered Visy and Amcor to pay \$95 million in damages to a customer class action involving more than 4500 businesses.
- This is what one of the Federal Court judges, Mr Justice Heerey said in November 2007, when he issued his judgement on this well-known Visy cartel case:

The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.

Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect.

The whole point of price fixing and market sharing is to obtain the benefit of prices greater than those which would be obtained in a competitive market.

The cartel here went on for almost five years. Had it not been accidentally exposed, it would probably still be flourishing. It was run from the highest level in Visy, a very substantial company. It was carefully and deliberately concealed. It was operated by men who were fully aware of its seriously unlawful nature.

REMEMBER

- It is not an excuse to have discussions, but then say there is no agreement.
- It is not sufficient to merely avoid actual breach of the Act, as even the **appearance** of wrongdoing can have serious negative consequences -
 - Business disruption, forcing your firm to incur significant cost of investigation, even attracting unwarranted litigation from aggrieved person(s)
- If there is frequent contact between competitors at social events or other meetings and/or exchanges of information (verbal or written), followed by similar price changes or terms of sale, it may be inferred that there was an agreement or understanding.
- If there are contacts or exchanges of customer information, and subsequently competitors do not compete for certain customers or in certain geographic areas, it may be inferred that there had been an agreement to allocate customers or territorial markets.
- The sphere of legitimate trade association activity is generally limited to lobbying policy makers, public education, joint promotion/marketing of the industry, and development and promotion of legitimate industry standards.
- A trade association must not become involved in business or commercial decisions, nor should these be discussed at the Association's events.
- Association members should never discuss market or commercial activity or decisions, or intended commercial activity or decisions, nor should there be any discussion or sharing of commercially sensitive information.
- If you are in doubt, seek legal advice before.

THANK YOU



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