The ‘root and branch’ review delivers on a key election commitment and will help identify ways to build the economy and promote investment, growth and job creation.


**Focus of Course:**
- *Competition and Consumer Act 2010 (Cth)*
  - How to interpret it?
    - Part IV – competition provisions
      - ‘Competition Code’
      - ‘Application scheme’
    - Why?
    - Australian Consumer Law
    - ‘Application scheme’
    - Why?

**Competition and Consumer Act:**
Two goals:

- Promote competition through restriction of anti-competitive practices
- Protect the consumer by prohibition of unfair practices

Purpose: s2
“enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”

**TPC Annual Report 1975:**
“(i) to strengthen the competitiveness of private enterprise at the various levels of production and distribution of industrial and consumer goods and services to the benefit of the public as ultimate consumers and to the benefit of business in general;
(ii) to strengthen the position of consumers relative to producers and distributors to the benefit of consumers (and ethical traders); to the benefit also of the competitive process, because producers and distributors will be activated to compete more on the fundamentals of price and quality.”

**To think about......**
Are these purposes:
- Complementary?
Is what is good for the consumer also good for the competitive process?
- Conflicting?
Are the indeed conflicting, how do we approach things if they are.
- Does it matter?
Why do we care?

**Recall: Statutory Interpretation**
"corporation" means a body corporate that:
   (a) is a foreign corporation;
   (b) is a **trading corporation** formed within the limits of Australia or is a financial corporation so formed;
   (c) is incorporated in a Territory; or
   (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

**Trading corporation**

➢ **Hughes v Western Australian Cricket Association (Inc) (1986) 69 ALR 660**

Facts:
- Hughes was a professional cricketer who led a tour of South Africa at a time where this was prohibited because of their apartheid policy.
- The Cricket Council an unincorporated body so did not have a corporate body it was made up of representatives of various cricket clubs.
- The associations corporations act prohibited trading for a profit so Hughes comes back and he is bared and he says that’s a breach of s45.
- The cricket council says we are not caught because it only applies to corporations and even if some of our members are corporations by definition we are not trading because we are prohibited from trading to make a profit.

Held:
- Similarly because a corporation trades does not make it a trading corporation the correct test is:

**Current activities test:**
- You look at the current activities of the corporation and just because the corporation has not begun to trade it still could be a trading corporation.
- Trading activity must be a substantial corporate activity it can be involved in a range of other activities.
- What does trading mean: Providing for reward, good and services.
- You don’t have to be profitable you just have to provide goods and services for reward.
- They provide tickets for reward therefore they are a trading corporation and therefore all the others were caught and were corporations.

**Financial Corporation:**


“Like the expression “trading corporation”, the words “financial corporation” are not a term of art; nor do they have a special or settled legal meaning. They do no more than describe a corporation which engages in financial activities or perhaps is intended to do so.... However, just as a corporation may be a trading corporation, notwithstanding that its trading activities are entered into in the course of carrying on some primary or dominant undertaking, so also with a corporation which engages in financial activities in the course of carrying on its primary or dominant undertaking. Thus a corporation which is formed by an employer to provide superannuation benefits for its employees and those of associated employers may nevertheless be a
financial corporation if it engages in financial activities in order to provide or augment the superannuation benefits."

2: Conduct of corporation
Two issues:
• How does a corporation commit an offence? E.g. how does it engage in ‘conduct”? S84/s139B
• If the prohibition/liability attaches to a corporation is it only the corporation which is liable?
-Ancillary liability (the idea that helps us with individual liability) s75B

COMPETITION AND CONSUMER ACT 2010 - SECT 84
Conduct by directors, employees or agents,
(2) Any conduct engaged in on behalf of a body corporate:
(a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent; shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

Ancillary liability:
• First you have to prove that you have a corporation that is liable then you can move onto individuals.
• ss79, 82 provide for individual liability
• ‘ancillary’ – prove corporate liability first
• s75B – defines required connection with contravention
• Discussed in Yorke v Lucas (1985) 158 CLR 661
• ACCC v Rural Press Ltd [2003] HCA 75, at[48]
  • “necessary to find… actual knowledge of the essential matters constituting the contraventions”

s 75B - Interpretation
(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU, 75AYA or 95AZN, shall be read as a reference to a person who:
(a) has aided, abetted, counselled or procured the contravention;
(b) has induced, whether by threats or promises or otherwise, the contravention;
(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
(d) has conspired with others to effect the contravention.
Yorke v Lucas (1985) 158 CLR 661

• In relation to the sale of a business
• Breach of s52TPA (now s18) – misrepresentation about turnover of business.
• His business was Ross Lucas and he was selling Treasureway, Mr Lucas had sought figures of the business, turns out they were false. Mr Yorke brought the business based on these untrue figures.
• Damages sought against selling company (Treasureway Pty Ltd) and director (Mr Mahony) and agency company (Ross Lucas Pty Ltd) and agent (Ross Lucas.)
• Agency company and agent unaware that figures false.
• Agency company liable for breach of s52 – no damages against Mr Lucas.
• Appeal re damages against Mr Lucas.
• Was Mr Lucas personally liable?
• The problem for Mr Yorke was that Mr Lucas thought the figures were accurate he had been lied to, he had everything he possibly could do to check.
• s 75B

Held:
They confirmed what the trail judge said:

• There is no doubt that Mr Lucas was acting exactly in accordance with the instructions and information given to him as Managing Director of Ross Lucas Pty Ltd by Mr Mahoney. He was sufficiently careful to obtain Mahoney’s written confirmation on at least three occasions of the turnover figure and he heard Mahoney orally confirm it to Mr Yorke. When he returned from an overseas trip he asked Mahoney for an up to date profit figure and he sought and obtained confirmation that the weekly turnover was $3500 before he resumed his efforts to sell the business. My ultimate finding was that ‘Mr Lucas conscientiously and carefully passed on to Mr Yorke the instructions and informations he received from Mr Mahoney and this finding is not disturbed by the evidence given by Mr Mahoney.’
• The position then is and I find that Mr Lucas was not aware and had no reason to suspect, that the information concerning turnover which he relayed to Mr Yorke was incorrect. He made all appropriate inquiries from Mr Mahoney and was entitled to be satisfied by the answers he was given, particularly as the turnover figure which he was supplied received some support from the accounts of Treasureway. He did not know of or suspect, and had no reason to suspect, the inaccuracy of the turnover figures and in no way could it be said that he acted recklessly or deliberately abstained from asking questions or pursuing enquiries.

High Court – s75B

(a) has aided, abetted, counselled or procured the contravention;
• ‘where they are used to designate participation in a crime as a principal in the second degree or as an accessory before the fact...a person will be guilty of the offences of aiding and abetting or counselling and procuring the commission of an offence only if he intentionally participates in it. To form the
requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime.

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention;

• There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention.

3: Catching non-corporate conduct

• Recall constitutional limitations

Extended operation – s6

Act applies to natural persons:

• Engaged in trade or commerce:
  (i) between Australia and places outside Australia;
  (ii) among the States;
  (iii) within a Territory, between a State and a Territory or between two Territories; or
  (iv) by way of the supply to the Commonwealth or one of its instrumentalities.

• Engaging in conduct involving the use of postal, telegraphic or telephonic services
• or taking place in a radio or television broadcast.

Extra-territorial application

• Extraterritorial application
  • Section 5(1) conduct outside Australia is caught if…by…
    • Bodies corporate incorporated or carrying on business within Australia
    • Australian citizens
    • Persons ordinarily resident within Australia
  • Also some other provisions
    • Section 5(1A) – TransTasman market – only for s 46A
    • Section 5(2) – extended operation of s 47 and 48

ACCC v Chen [2003] ATPR 41-984

Facts:

• Mr Chen set up a website which was operating out of America which was operating in Australia and other places and on this website you could get tickets to a lot of opera house events used by tourists.
• He was a scam artist
• S 18- misleading
• The court was prepared to see that there was a specific connection with Australia luckily Mr. Chen conceded

Scope of CCA:

• Corporations – trading, financial or foreign (s4)
• Persons directly connected with corporations (s75B)
• Persons engaged in inter-state trade/post/telephone/radio or TV broadcast (s6)
• Actions overseas by corporations (or persons directly connected with them) with a necessary connection with Australia (s5)
• BUT........THERE IS STILL A LOT LET OUT.

2 pathways:
• Consumer provisions
• Competition provisions
• Currently – both application schemes

Extension of scope:
• Competition reform - Hilmer Report
• The Council of Australian Governments seek to introduce a national competition policy.
• Key principle – more competitive markets will generally best serve the interests of consumers and the wider community.
• Complementary purposes?

Hilmer recommendations:
• All commercial activity in Australia should be subject to the Trade Practices Act (not just corporate activity everything!)
• New regulatory regime to prevent “essential facility” monopolies from abusing their market power.
• ‘Competitive neutrality principles’
• Extension of prices surveillance to state and territory businesses
• Reform of the organisational arrangements governing competition policy in Australia

To think about......
• Hilmer: catch ALL commercial activity?
• S51 – How? (constitutional provision).

Extension of scope
• Hilmer
  • Referral of power by States – s51(***vii)
  • States: NO
• Also
  • Referendum to extend Federal power
  • NO - 1913, 1919, 1929 and 1944
• Application scheme
  • Competition Code (Schedule One)
  • Existing law, adopted by States.

-The application scheme is a bit like building a raft, the commonwealth do not have the power to make laws for all trading activity but States do.
Process of reform:

- Every state has said yes it is so important to have national law
- COAG – consultative “code” solution.
- COAG 11 April 1995: signed a number of agreements (legislation underpinned by these administration agreements).

- Competition Principles Agreement;
- Conduct Code Agreement;
- Agreement to Implement the National Competition Policy and Related Reforms.
  - *Competition Policy Reform Act 1995 (Cth)*
  - PART XIA
  - Schedule One (where the law as applies is)
  - cf Australian Consumer Law

State process:

- Application scheme
  - One common source of the law agreed to by all the jurisdictions, you will find a law that applies that, you have the states using there power and the commonwealth using there power in the same scheme.
  - NSW hands over their power to the ACCC for enforcement for competition not consumer.
  - e.g. *Competition Policy Reform (NSW) Act 1995*
  - s5 applies Competition Code as a law of NSW
  - S25 – offence is regarded as an offence against Commonwealth laws
  - S19 – ACCC may enforce
  - The scheme is to have one law, one enforcement system to provide unity in this area.

Example of the effect:

Resale Price maintenance

**COMPETITION AND CONSUMER ACT 2010 - s 48**

* A corporation or other person shall not engage in the practice of resale price maintenance.

**COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 1 –s48** (application provisions).

* A person shall not engage in the practice of resale price maintenance

=The commonwealth is still only catching corporation what they have the power to do but the states are now catching everything else. They are giving power to the same legislator, treating all as if it is a commonwealth offence. Its not a bad way of achieving national regulation in this area.
Federal Court jurisdiction?
- Part XIA – centralise enforcement of State and Territory codes
- The states vested the federal court with jurisdiction to hear these matters.
- Federal Court jurisdiction
  - BUT – recall *Re Wakim: ex parte McNally*
    - State jurisdiction may not be conferred on Federal Courts
    - Constitutionally federal power can be conferred on state courts but state courts cannot confer power onto federal courts.
- Corporations law – there was great cooperation and they all agreed to refer of powers
- Competition law? No this did not happen here.
- Federal Court’s accrued jurisdiction?

- There is an argument various matters can be dealt with in the accrued jurisdiction of federal courts but there is an argument that they must be dealt with in state courts.
- Even though there is this neat scheme in fact we have this cross vesting issue. Not so much in competition law but expect in consumer law there will be problems in this area.

To think about....
- Strengths of an application scheme
  - Great way to create unity and national policy where the power to do so does not exist.
  - There is only the one text of the law, it just says this applies.
- Uniformity
  - Challenges of an application scheme
  - It relies on continued national cooperation.

Hilmer – Competitive neutrality
- Recall Hilmer recommendations:
  - **All commercial activity** in Australia should be subject to the Trade Practices Act
  - Non-corporates and government businesses
  - Competitive neutrality - Government owned businesses should face the same disciplines as their private sector competitors
  - So, should be caught by competition legislation
  - BUT, shield of the crown

COMPETITION AND CONSUMER ACT 2010 - SECT 24
Application of Act to Commonwealth and Commonwealth authorities
(1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.
(2) Subject to the succeeding provisions of this section, this Act applies as if:
(a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
(b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business; were a corporation.

- This is only the commonwealth crown and only in so far as carrying on business by authority of the commonwealth (it is deeming those government entities to be corporations and caught by the act).
- State government businesses are not caught by what is in what was the trade practices act.

**State crown?**

- ss2B-D
- s2B(1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:
  - (a) Part IV;
  - (b) Part XIB;
  - (c) the other provisions of this Act so far as they relate to the above provisions.

  (2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.

**National coverage:**

- After Hilmer – competition provisions apply universally
- Subject to continuing State agreement
- ‘Competition Code’
- BUT... Consumer provisions? There is no national coverage.

**National consumer protection?**

- Constitutional limitations
- State approaches
  - Fair Trading legislation
  - Divergence in state legislation – e.g. Victoria’s unilateral introduction of unfair contract terms

**Issue: Path to National law?**

- Productivity Commission
  - Referral of power by States – s51(xxxvii)
  - States: NO
Application scheme
  • *Australian Consumer Law* (ACL) – Schedule Two, *Competition and Consumer Act 2010* (Cth)
    • New law, agreed by COAG
    • cf Competition Code (Schedule One)
    • Existing law, adopted by States.

Application Scheme?
  • Commonwealth lead legislator
  • National Partnership Agreement to Deliver a Seamless National Economy (2008)
  • Intergovernmental Agreement for the Australian Consumer Law (July 2009)
  • *Trade Practices Amendment (Australian Consumer Law) Act (No 1) (2010)* (Cth)
  • *Trade Practices Amendment (Australian Consumer Law) Act (No 2) (2010)* (Cth)

*Competition and Consumer Act 2010* (Cth) Part XI
s 131 Application of the Australian Consumer Law in relation to corporations etc.

(1) Schedule 2 applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations.

• s 131 tells us to read things down so if you see person and your dealing with the commonwealth it has to be a corporation because they don’t get extra power.

State process
  • *Fair Trading Amendment (Australian Consumer Law) Act 2010* No 107
  • ‘applied ACL’ – Part XIAA CCA

*Fair Trading Act 1987* (NSW) Part 3
28 Application of Australian Consumer Law
(1) The Australian Consumer Law text, as in force from time to time:
  (a) applies as a law of this jurisdiction, and
  (b) as so applying may be referred to as the *Australian Consumer Law (NSW)*,
  and
  (c) as so applying is a part of this Act.
(2) This section has effect subject to sections 29, 30 and 31.

Uniform text?
  • Corporation or person? (not uniform because you have to read it down to corporations).
    • S131 CCA
• Recall discussion of foreign, trading, financial corporation
• Other differences – enforcement

**ACL and CCA:**

CCA: s84(2) Any conduct engaged in on behalf of a body corporate:
(a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

shall be deemed, *for the purposes of this Act*, to have been engaged in also by the body corporate.

And s139B(2)
(2) Any conduct engaged in on behalf of a body corporate:
(a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent; or
(b) by any other person:
   (i) at the direction of a director, employee or agent of the body corporate; or
   (ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;

   if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

   is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

**Crown?**

• s2A: ACL applies to Commonwealth Crown

**FAIR TRADING ACT 1987 - SECT 3**

Extent to which Act binds the Crown
(1) This Act (other than the ACL) binds the Crown in right of the State in so far as the Crown in right of the State carries on a business, whether directly or by an authority of the State.
(2) Nothing in this Act renders the State liable to prosecution for an offence.

**FAIR TRADING ACT 1987 - SECT 36**

Application law of this jurisdiction
The application law of this jurisdiction binds (so far as the legislative power of Parliament permits) the Crown in right of this jurisdiction and of each other jurisdiction, so far as the Crown carries on a business, either directly or by an authority of the jurisdiction concerned.
Actions for damages

(1) If:
   (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
   (b) the conduct contravened a provision of Chapter 2 or 3;
the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

**S2 ACL = s75B**

"*involved*" : a person is involved, in a contravention of a provision of this Schedule or in conduct that constitutes such a contravention, if the person:
   (a) has aided, abetted, counselled or procured the contravention; or
   (b) has induced, whether by threats or promises or otherwise, the contravention; or
   (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
   (d) has conspired with others to effect the contravention.

**Recap:**
   • CCA – promote competition and protect consumers
   • Competing or complementary aims?
   • Constitutionally only corporations may be regulated
- The Commonwealth can only regulate corporations
   • All entities subject to competition principles
     • Part IV CCA
     • Competition Code
   • All entities subject to consumer principles
     • Australian Consumer Law
     • Application scheme
   • Ancillary liability for individuals (s75B)
   • Crown businesses caught (amendments to fair trading).

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**Lecture Two: Fundamental Competition Concepts**

**Part IV Restrictive Trade Practices**

*‘Every modern economy has a set of rules designed to ensure that the competitive process is not undermined by the anti-competitive behaviour of firms, whether acting collusively or individually’*


*Queensland Wire Case:*
   • Very important case about part IV.
• S48: (and Part VIII) resale price maintenance;
• S50: mergers and take-overs.

(Part VI: Remedies)

**Regulation of competition:**

• Common law addresses rights of competitors (allowing them to receive damages if there are restraints on their trade), whereas legislation addresses the process of competition (very much what part IV is about).
• Unsuccessful early attempts
  • *Australian Industries Preservation Act 1906*
    - Major constitutional problems, unconstitutional because it infringed the rights of the states.
  • *Trade Practices Act 1965*
    - Also constitutional problems.
  • *Trade Practices Act 1974*
    - First effective legislation.
  • *Competition and Consumer Act 2010*

- Australia was a highly protected economy. We used to run the 2 airlines policy, they would fly to the same places, they would charge the same amount of money. They operated as a Cartel the whole market was controlled by these two airlines. There was no competition.
- This was very much the Australian economy.
- The mood was protectionist not free trade. This still exists in to some extend in Australia.

**Why regulate?**

• For competition’s sake?
- Are we trying to promote competition because it’s a good in itself?
  • Or because competition brings benefit to the community?
  • Object of CCA (s2)
    • *The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair-trading and provision for consumer protection.*

  (Suggests it is an effective agency by which the well fair of Australians will be advanced).

**Hilmer Report:**

• *Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interests of economic efficiency while accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives.*

**Draft terms of reference – Root and branch review:**
• Effective reforms achieve long-term competitiveness, promote investment, increase productivity, support higher real wage growth and increase Australian living standards.
• ...the Government is looking to further engage the engine of competition to broaden durable benefits for Australians, foster economic prosperity and enterprise that enables efficient business – including small businesses – to grow and prosper, promote Australian businesses, attract investment, and establish a footing for exports

Queensland Wire Case
• “Competition by its very nature is deliberate and ruthless, competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to ‘injure’ each other in this way. This competition has never been a tort...and these injuries are an inevitable consequence of the competition that s46 is designed to foster” (at 585)

=It is not about protecting the small business against the big business. But are there social good about having a number of small businesses? So how does the ACCC and legislature balance this?

Why do we want competition?

Competition = efficiency
• Competition policy is based on the view that in general, competitive markets lead to more efficient allocation of resources than do markets in which either buyers or sellers have significant market power. Such markets also promote technical efficiency (the effectiveness with which resources within a firm are utilized) and dynamic efficiency (the speed at which firms respond to changing problems and opportunities) ...When firms are unable to increase their profits through exercising market power, their pursuit of profit is channelled into finding ways to increase their efficiency and into searching for better ways to serve their customers

EPAC No 38 1989

-If this is what the perfect market place looks like how does the market we have compare (the act is trying to achieve effective competition)
-Perfect competition is a bench mark.
-But the act is based on workable competition.

‘Workable’ competition
• The aim of restrictive practices legislation is to maintain what has been labelled ‘workable’ or ‘effective’ competition, that is ‘that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more’. Workable or effective competition is that which is not perfect competition but which is feasible in the real-world market conditions.

**Competition**

Part IV is designed to deal with:
- Structure/Conduct/Performance Paradigm
- E.g. Cartel provisions
- Focus on market structure

**KEY CONCEPTS:**

1. **MARKET**
   - There is no clear definition in the legislation.

‘Market’: definition

- *Re Queensland Co-op Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40-01 (Trade Practices Tribunal):
  - They were deciding whether a merger would be allowed to proceed and in order to decide they needed to look at the effect on competition. So what does market mean?
  - **Substitution:**
    - A market is defined by this idea of substitution ability the test is offend called the hypothetical monopolist test:
      - What would you swap for what? How price sensitive are you?

The test: The price of tea goes up from $2 to $2.20 your paying 20c more, do you switch to coffee? If you still buy tea that is the limit of the market because you don’t substitute anything out. If you change to coffee then you go again the hypothetical monopolist owns all the tea and coffee and they all go up by 10% do you stay drinking tea and coffee then that’s the market do you substitute for hot chocolate then the market is tea, coffee, hot chocolate.

- What would you substitute for what?

*Re Queensland Co-op Milling Association Ltd and Defiance Holdings Ltd (QCMA)*

- “…A market is the area of close competition between firms or…the field of rivalry between them….Within the bounds of a market there is substitution…So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution…It is the possibilities of such substitution which set the limits upon a firm’s ability to ‘give less and charge more’”

Essence of the market: being able to charge less and charge more

Essence of constrains on the market: is the ability to restrain people from doing that.

**Market = substitutability**

- *s4E: For the purposes of this Act, unless the contrary intention appears, market means a market in Australia and, when used in relation to any goods*