

Sharing Experiences - Competition Law In Singapore, Region, International

**RAJAH
TANN**

Lawyers who know Asia

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By Kala Anandarajah

Partner

Head, Competition & Antitrust Practice & Trade

65 6232 0111



COMPETITION Law Firm of the Year

ACQ Financial Magazine, Country Law Awards 2008, 2009, 2010

‘Highly regarded practice’

Practical Law Company (PLC) Which Lawyer?

Best of the Best Women Business Lawyers – For Corporate Governance & Competition and Antitrust – Kala Anandarajah

Euromoney Guide to the World’s Leading Competition And Antitrust Lawyers;

‘Kala Anandarajah ... a leading authority in corporate governance, compliance and competition issues ...’

AsiaPacific Legal 500

Kala Anandarajah is ... is head of the competition and trade law practice group, one of the first of its kind in Singapore and is regarded as ‘very knowledgeable’ ...

Who’s Who of Leading Practitioners Singapore

Leading Competition and Antitrust Lawyer – Kala Anandarajah

International Financial Law Review 1000; Euromoney Guide to the World’s Leading Competition And Antitrust Lawyers; The International Who’s Who of Leading Competition lawyers

The ‘outstanding’ Dominique Lombardi brings over 10 years of experience relating to European competition laws to the table, having worked in-house and as a private lawyer in Paris.

Who’s Who of Leading Practitioners Singapore

‘...establishing a forte in competition and trade law, adding another capability to a multi-faceted team

Asia-Pacific Legal 500

Ian McEwin has been recognised as one of the world’s LEADING COMPETITION ECONOMISTS for the years 1998, 1999, 2000 and 2010.

Global Competition Review

Rajah & Tann LLP is one of the largest full-service law firms in Singapore and the Asia Pacific. We are at the leading edge of Asian law, having worked on many of the biggest and highest profile cases in the region. As a result, we've developed a near-instinctive understanding of the issues, opportunities and challenges facing those doing business here. We also have the reach and the resources to deliver excellent service to clients all over the region, with offices in Shanghai, Kuala Lumpur and Laos, as well as specialist practice groups focusing on Japan, South Asia and Indonesia.

A Tier 1 Practice with top-quality regional competition law work, boasting an international team including the ex-Chief Economist of the Singapore Competition Commission. An all-rounded Practice focusing on merger notifications/ challenges to compliance/ advisory to investigations/ handling raids/ appeals to the Competition Appeals Board to regulatory work, including drafting the Airport Competition Code. The only Practice voted Competition Law Firm of the Year - Singapore for 3 consecutive years from 2008 to 2010.

Kala Anandarajah is cited as amongst the Best of the Best - Women in Business Law 2010 for her work in Antitrust and Competition Law and Corporate Governance by Euromoney Guide to the World's Leading Lawyers.

Also cited on numerous occasions by international peer-reviewed legal ranking journals such as The International Who's Who of Lawyers and the Euromoney Guide to the World's Leading Lawyers.

The AsiaPacific Legal 500 states '*Kala Anandarajah has emerged as a leading authority in corporate governance, compliance and competition issues..*', whilst The Who's Who of Leading Practitioners Singapore describes her as '*highly active and very good*' and an '*acknowledged authority in this field*' plus '*very knowledgeable*' in competition law matters.

She is a prolific writer who has written very widely, including the first book on Competition Laws, on Corporate Governance and on Trade.

Apart from her legal practice, Kala is a:

- Member of the Ministry Of Manpower Workplace Safety And Health Council, and chair of the Engagement & Outreach Committee of that Council.
- Member of the Transplant Ethics Committee (Lay-Persons) appointed by the Ministry of Health.
- A director of the Singapore Institute of Legal Education, where she co-chairs the Working Party on Compulsory Professional Development.
- A Governing Council Member and a Director of the Singapore Institute of Directors.
- In 2004-2005, she was a member of the Review Committee established by the Council of Corporate Disclosure and Governance that reviewed and issued a revised Singapore's Code of Corporate Governance.

Sample Of Notable Cases

Mergers

- Obtained clearance for acquisition by Fresenius Medical Care Beteiligungsgesellschaft mbH / Fresenius Medical Care AG & Co. KGaA of 100% of the shares of Asia Renal Care, Limited, a company incorporated in the Cayman Islands and involved in the Renal Dialysis Business from Bumrungrad International Holdings (Hong Kong) Ltd.
- Acted for Fortis Global Healthcare Mauritius Limited on all Competition law related issues in its proposed (but failed) offer for all of the shares of Parkway Holdings Limited, a company listed on the Main Board of the Singapore Exchange Securities Trading Limited.
- Advised as Singapore counsel for Oracle Inc on all Competition law related issues pertaining to the acquisition of Sun Microsystems, and for the Lonza Group in Singapore in relation to the share purchase with Genentech Inc.
- Obtained clearance for acquisition of bonding wire business of Kulicke and Soffa Industries, Inc. by W.C. Heraeus GmbH; and for acquisition by Chartered Semiconductor Manufacturing Ltd. of Hitachi Semiconductor Pte Ltd.
- Advised various bidders (including the successful bidder, Lion Power Consortium, which included Marubeni and GDF, for the sale of the Senoko Pte Ltd), one of the larger Generation Companies in Singapore, which were sold by Temasek Holdings, on all aspects of merger and anti-competition concerns which fell under the purview of the Energy Market Authority jurisdiction, including engaging the Energy Market Authority and writing in for various exemptions.
- Acting in several potential merger involving cross border mergers and implications in several countries across Asia.

Notifications

- Acting for two major international music corporations in clearing the licensing arrangement entered into between them.
- Successfully obtained ruling in a confidential Notification for Guidance in respect of an agreement between the largest local financial institutions and a major payment scheme operator in the financial industry in Singapore.
- Successfully acted for Qantas Airways Ltd and British Airways Pte Ltd in obtaining a for their cooperation, as well as for Qantas Airways Ltd and Orangestar Holdings Pte Ltd for their cooperation.

Investigations

- Acted in the first two appeals before the Competition Appeal Board in Singapore in relation to the price fixing cartel involving the express bus operations between Singapore and Malaysia and Thailand, and reduced fines by up to 45%.
- Successfully acted for some parties in reducing fines in the first price fixing cartel in Singapore.
- Acted for the APRIL Group and various individual respondents in relation to a paper cartel in Korea and Australia, and managed the settlement process as instructing counsel to effectively reach a satisfactory settlement in Australia, where inter alia the case against a number of the companies and all the individual respondents were dismissed.
- Acting as Singapore counsel for one of the largest cargo carriers in the global cartel investigation involving fuel surcharges, as well as for passenger carriers in the global cartel investigation involving fuel surcharges.
- Acting for a major party in the first dominance case in Singapore, and clearing them of any potential abuse.
- Acting in several on-going cartel investigations across the region.

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Overview



- Infringement of Competition Laws:
 - Result in drastic penalties for companies
 - Permanent restrictions could be imposed on companies' business practices which would limit future commercial activities and represent a competitive disadvantage.
- Opportunity cost to companies = time and money
- Reputational risk
- Individuals can be affected as well:
 - Penalties / Imprisonment
 - Risks for directors / officers

Competition Laws In The Region (Not Exhaustive)

	Australia	Bangladesh	Brunei	Cambodia	China	Hong Kong	India	Indonesia	Japan	Korea	Lao PDR	Malaysia	Mongolia	Pakistan	Philippines	Singapore	Taiwan	Thailand	Vietnam
Generic Competition Law	Y	N	N	N	Y	N	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	Y
Anti-Competitive Agreements	Y	-	-	-	Y	-	Y	Y	Y	Y	Y	-	Y	Y	Y	Y	Y	Y	Y
Dominance / Abuse of Dominance	Y	-	-	-	Y	-	Y	Y	Y	Y	Y	-	Y	Y	Y	Y	Y	Y	Y
Exceptions	Y	-	-	-	Y	-	Y	Y	Y	Y	Y	-	Y	Y	-	Y	Y	Y	Y
Mergers	Y	-	-	-	Y	-	Y (not in force)	Y	Y	Y	Y	-	Y	Y	-	Y	Y	Y	Y
Corporate / Personal Liability	Y/Y	-	-	-	Y/Y	-	Y/Y	Y/N	Y/Y	Y/Y	Y/N	-	Y/Y	Y/Y	Y/Y	Y/Y	Y/N	Y/Y	Y/Y
Penalties	Y	-	-	-	Y	-	Y	Y	Y	Y	Y	-	N/Y	Y	-	Y	Y	Y	Y
Sectoral Regulation	Y	Y	Y	Y	Y	Y	Y	y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

In A Nutshell – What Should One Be Aware Of?

SINGAPORE

- Competition Act prohibits:
 - **Cartels** – Anti-competitive agreements (Section 34)
 - **Abuses** of a dominant position (Section 47)
 - **Mergers** that substantially lessen competition (Section 54)
- Commercial and economic activities
- Statutory bodies / Government exempt

MALAYSIA

- TWO separate legislation:
 - Competition Act
 - Competition Commission Act
- Competition Act prohibits:
 - **Cartels** – Anti-competitive agreements (Section 4)
 - **Abuses of Dominance** (Section 10)
- Commercial activities
- Directly or indirectly in exercise of governmental authority

- A ‘market’ is a simple idea – it involves both buyers and sellers
- Provides framework for competition analysis
- Key step in identifying competitive constraints on a supplier of a given product / service
- Market must first be defined before market shares can be calculated
- Exercise is costly, complex and controversial – many decisions in competition law turn on market definition

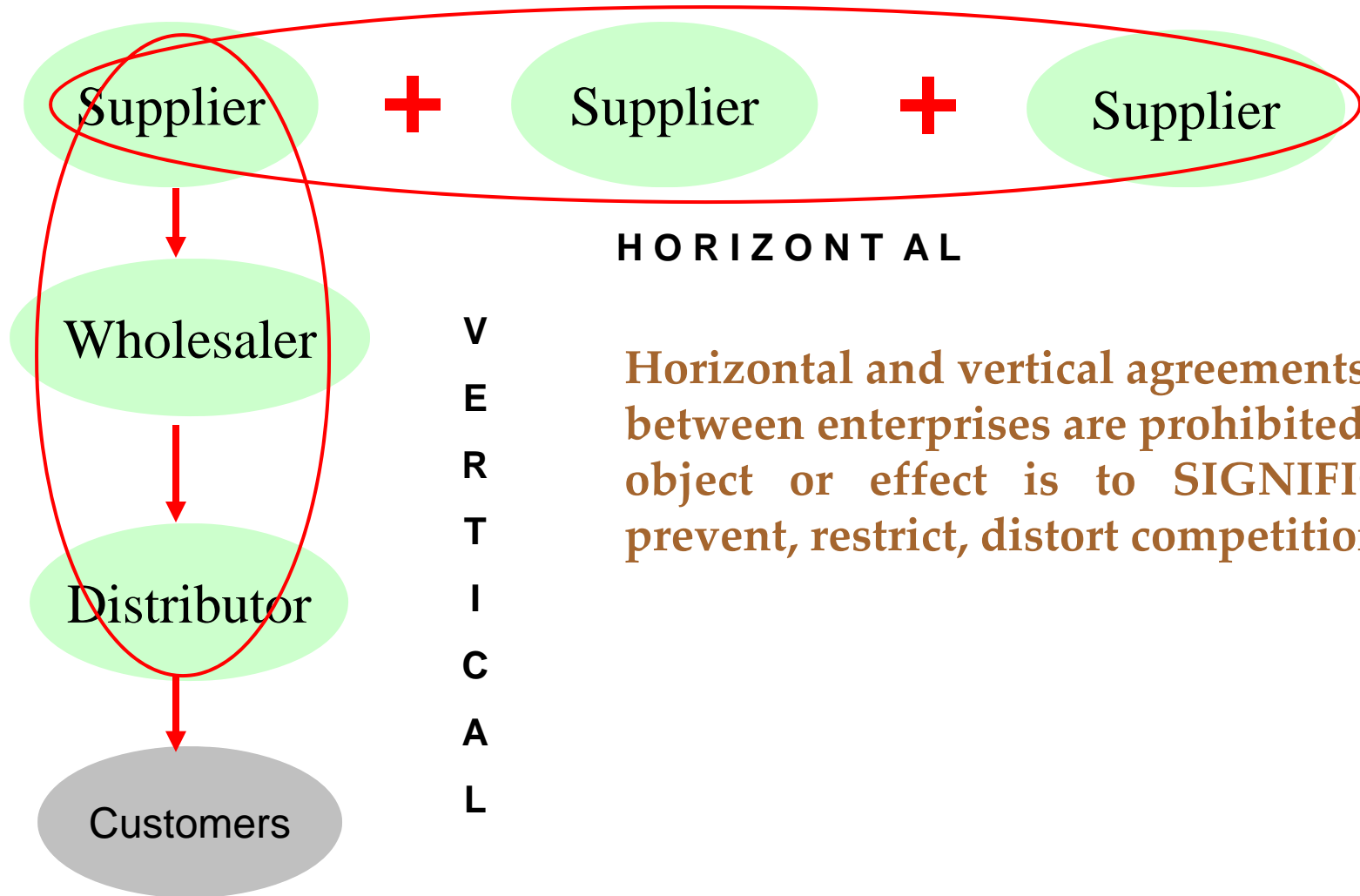
- Note - regulators define markets for competition law purposes is different from the way businessmen think about markets.
- However, evidence from businessmen about the likely constraints on the exercise of market power (the ability to raise or control prices or to dictate the terms of competition in a market) provides the main evidence to determine the relevant competition law market

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Anti-competitive Agreements





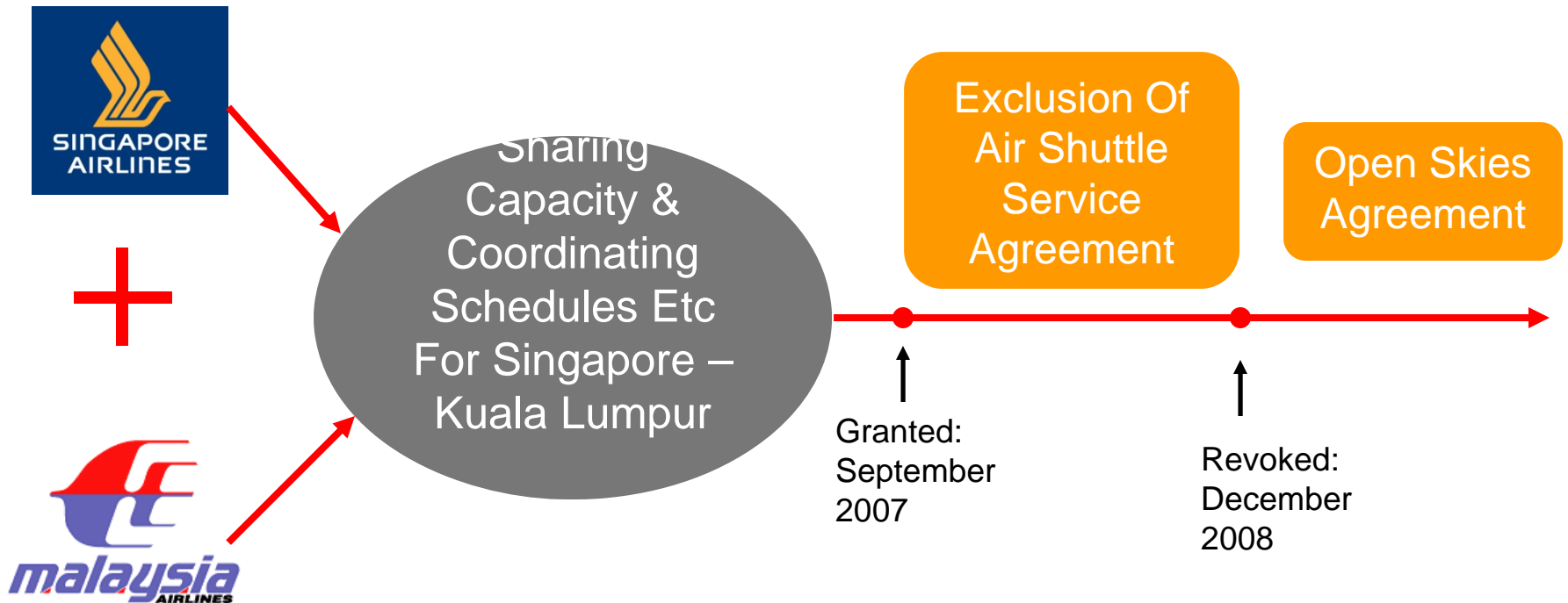
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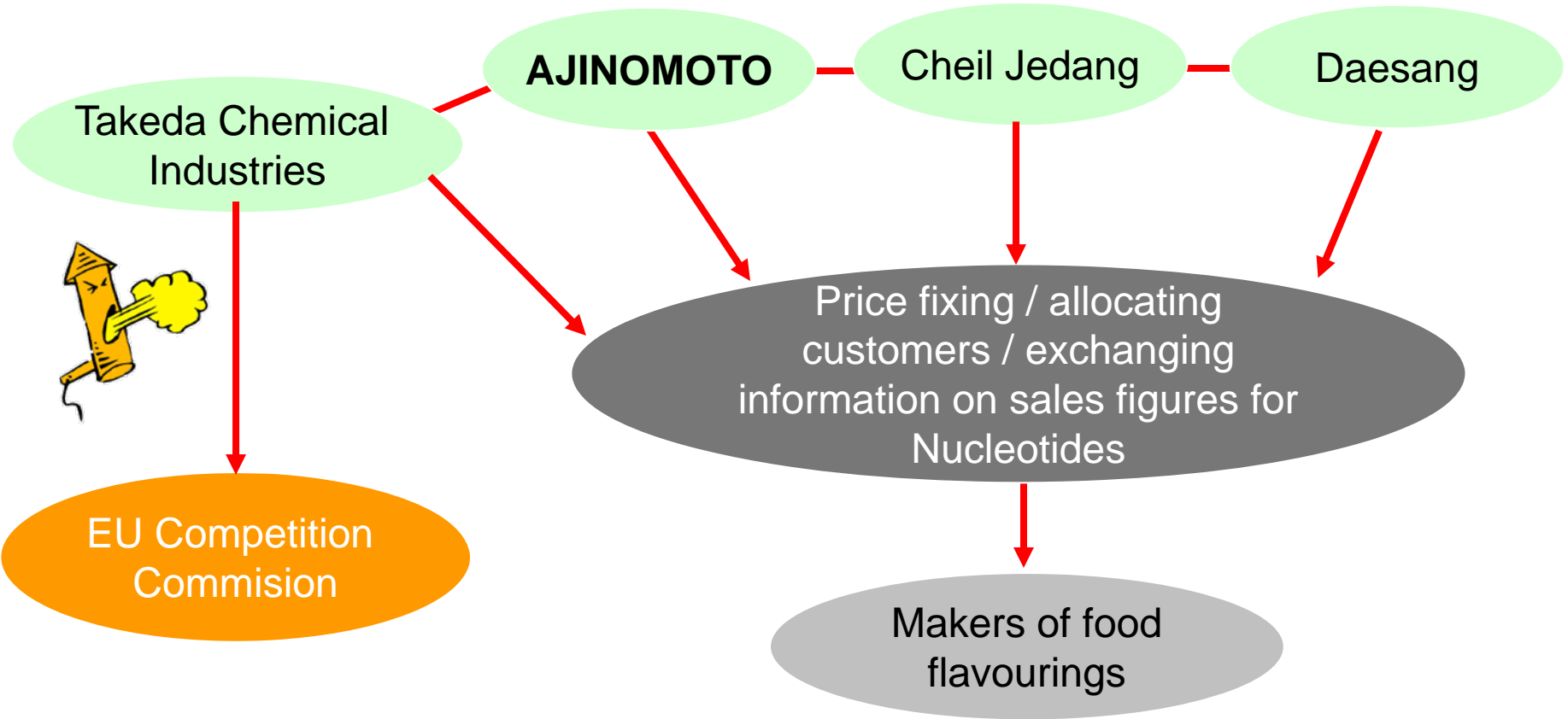
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Horizontal and vertical agreements between enterprises are prohibited if their object or effect is to **SIGNIFICANTLY** prevent, restrict, distort competition.

- Key ingredients of a prohibited horizontal agreement:
 - Agreement
 - Object / Effect
 - Prevent, Restrict or Distort
 - Significantly
- Horizontal Agreements between enterprises which have the object to:
 - Fix Prices
 - Fix Trading Conditions
 - Limit or control:
 - Production
 - Market Outlets / Market Access
 - Technical or Technological Developments
 - Investment
 - Rig Bids

Market





Ajinomoto (S\$24.5 million); Cheil (S\$4.8 million); Daesang (S\$4 million)
Ajinomoto fined highest for its size and deterrence.

- **Key Ingredients of a prohibited vertical agreement:**
 - Agreement
 - Different levels of the supply chain
 - Object / Effect
 - Prevent, restrict or distort
 - **Significantly**
- **Examples:**
 - Resale Price Maintenance: Fixed price / Minimum Price / Recommended price?
 - Exclusive territory
 - Exclusive purchase / Supply
 - Non-Compete



Note: Business must be free to sell their products at price below seller's recommended retail price... customers should be allowed to shop around!



Total Fine: AUD\$1.36 million (MYR 3.7 million)

Personal liability On Director and Sales Manager: AUD\$110,000

(MYR 300,000)



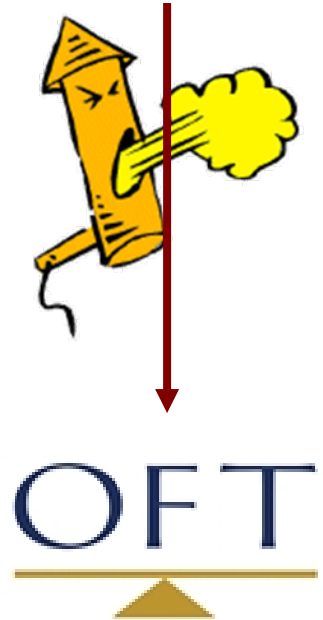
The Royal Bank of Scotland



BARCLAYS

RBS' Professional Practices Coverage Team unilaterally disclosed only to Barclays, generic and specific confidential future pricing information on loan products sold to accountants, lawyers and real estate firms. Barclays took information into account in determining its own pricing.

Disclosures - in the course of a number of contacts on the fringes of social, client or industry events or through telephone conversations.



S\$60 million in total fines.

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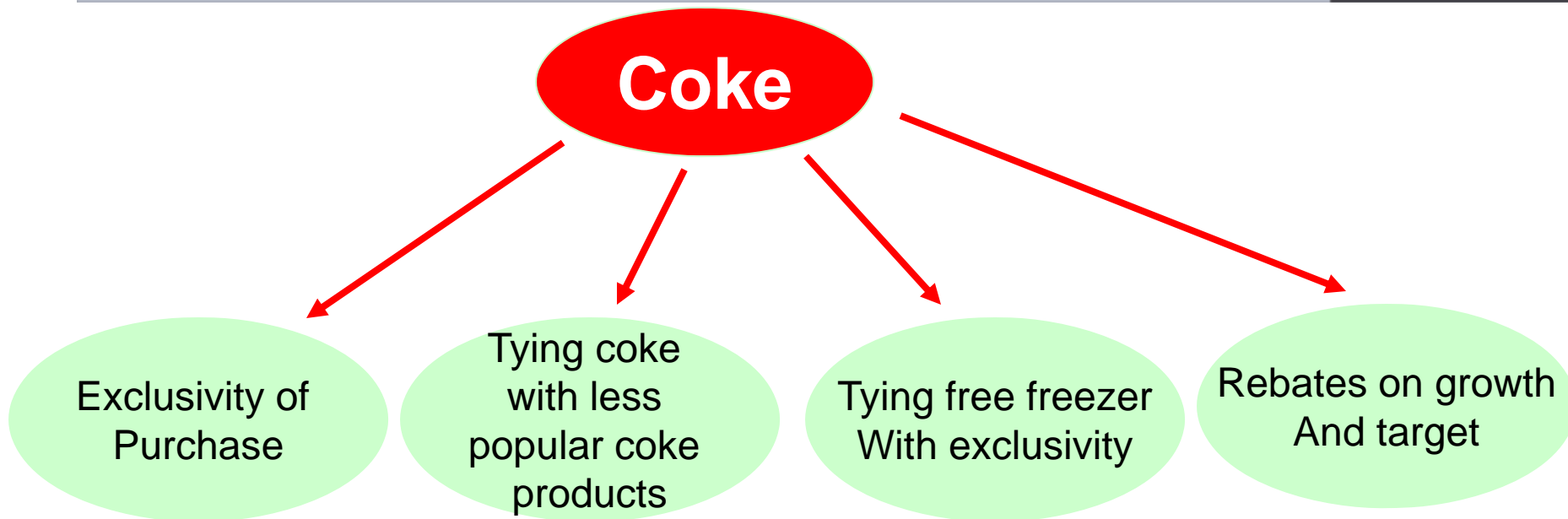
Abuse Of A Dominant Position



- It is okay to be in a dominant position in a market
- But it is not okay to abuse the dominance

What is Dominance?

- **Imposing unfair purchase or selling prices or other unfair trading conditions;**
- **Limiting or controlling**
 - production
 - market outlets or market access
 - technical or technological development
 - investment
- **To the prejudice of consumers**
- **Refusing to supply**
- **Discrimination**
- **Tying**
- **Predatory behaviour**
- **Buying up scarce intermediate goods or resources required by competitors without reasonable commercial justifications**



5 Year Commitments

- No more exclusivity; but if through competitive tender, then ok
- No use of Coke's strongest brands to sell less popular products
- 20% of free space in Coke coolers provided for free
- No target / growth rebates which reward for purchasing purely the same amount or more of coke products than in the past

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Powers Of The Commission & Enforcement



- Conduct market review
- Conduct an investigation when:
 - Whistle-blowing cannot be reprimanded!
 - **Note: Tipping-off any person about an ongoing investigation is an offence!**
 - In extreme cases, may search **WITHOUT A WARRANT & WITHOUT NOTICE**
- **Imposition of Penalties**
- **Leniency**
- **Legal privilege**
- **Third party actions / Private Action**

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Practical Steps



- Creates awareness
- Helps avoid infringements
- Considered to be a mitigating factor when determining final penalties amounts (Australia, Singapore and UK)
- How:
 - Review contracts
 - Conduct audits
 - Restructure practices
 - Compliance Manuals – 50 pages? Or practical guidance?

- Does **NOT** Require
 - Offer
 - Acceptance
 - Consideration
- Does **NOT** follow standard requirements for regular contracts
 - Parties
 - Property
 - Price
 - Writing
- Activities are analysed as being possible anti-competitive agreements and abuse of dominance.

- Agreement In Competition Law
 - Wider
 - If prohibited, attracts:
 - Fines
 - Permanent/Partial restrictions
 - Opportunity Costs
 - Reputation
 - Private Action
- Agreement In Contract Law
 - 3 Ps + Certainty
 - If breached, attracts
 - Damages
 - Permanent/Partial restrictions
 - Opportunity Costs
 - Reputation

- Handwritten message: ““Eric Lee - You can quote \$2.1k and I will support \$2.35k...””
- Handwritten messages on side of quotation: “Godfather this is my price pls let me and Ah Poa know how much to put in.”
- “Hi William Can u put this price tks. From victor & pls change the item no 1”
- Email 14 December 2006: “This is your price – no need to change already.”

- Daesang's report of meeting: "everyone was thanked for their co-operation during 1995 which resulted in the effective implementation of Nucleotide price increases and everyone was asked to continue their co-operation in 1996 so as to further increase the Nucleotide prices. [] all participants showed their agreement by nodding or saying words to that effect".
- Business trip report: "Takeda said they were making P-meeting for nucleotides to avert severe competition which would be occurred by Miwon's [Daesang] entry and asked us to support and join into the P-meeting"
- Ajinomoto internal memorandum: "we [Ajinomoto] as leading manufacturer as well as Takeda, have to take the lead in the price increase race, and therefore it is most likely to run against a head wind. However, it is inevitable that we have to take risks".

Make compliance part of the company's business culture

- **From the top**
- **Communicating down and to all**

- Steps To Take
 - Call or e-mail Legal
 - Before Act in force
 - Amend your activities!
 - After Act in force
 - Cease the infringing conduct immediately
 - Ensure no document destruction
 - Conduct an internal investigation
 - Approach the Competition Commission for leniency

Many Thanks!

For more information, please contact:

Competition & Antitrust Practice

DID: +65 6232 0111 / +65 6232 0104

Fax: +65 6225 7725

Email: kala.anandarajah@rajahtann.com

competitionlaw.com@rajahtann.com

Website: www.rajahtann.com