

# 'NEW' RULES OF THE GAME

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# What's the game?

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- Market competition is:
  - a “perennial gale of ‘creative destruction’ in which new markets are created and old ones destroyed” (Josef Schumpeter, *The Process of Creative Destruction*, 1942)
  - a process that carries the seeds of
    - short-run monopolisation; and
    - continuous rivalry over the long-run
  - the means to achieving the desired end

# How's the game played?

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- The decisions and actions taken by both existing and potential “players” range from:
  - fierce rivalry (“I set my prices unilaterally”); to ...
  - harmonious business plans (“To avoid losing market share, I’d only increase my price if my rivals also increase their prices”); to ...
  - tacit collusion (“Let’s have kopi together every month to have a chat about the prices we’d all set for our products in the following month”)

# Why the need for formal rules?

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- To protect the competitive process from being undermined by firms that abuse or will abuse their market power
- To sustain and enhance the competitive process for the benefit of all consumers
- Bear in mind: such rules are not directly aimed at stopping “supernormal” profits
  - In the short run, a firm can dominate the market (and earn supernormal profits) by being more efficient and innovative than its rivals

# Enforcement and compliance

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- According to Richard Whish  
(Professor of Law, King's College)
  - ▣ “Competition law is about economics and economic behaviour”
    - *cf* R. Whish, *Competition Law*, 6<sup>th</sup> edition, Oxford University Press, 2008

# Dominance and market power

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- What does “dominant position” mean and how could it be surmised?
  - A firm will not be dominant (in the market) unless it has substantial market power
- A firm has substantial market power when it has the ability to:
  - raise prices consistently and profitably above competitive levels (power over price); and
  - engage in anti-competitive conduct and exclude or deter competitors from the market (power to exclude)

# Dominant position in which market?

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- Definitely not an exercise in identifying “real world” characteristics or features of a market by drawing upon write-ups in business magazines, marketing materials or even industry reports
- The “relevant” dimensions are the product and geographic space within which rivalry and competition occurs
  - Functionality (of the product) is incorporated into the analysis of demand (and supply-side) substitution
  - Time dimension is incorporated into the analysis of competitive effects that can arise over a period of time (typically, 1 to 2 years)
- Market definition draws upon economic concepts, tools and analysis
  - Own-price and cross-price elasticities
  - Market shares and indices of market concentration
  - Barriers to market entry and expansion

# Should there be a “leniency program” to deal with cartels?

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- A leniency program potentially welfare improving
  - Shortens a cartel’s operational life and removes the “deadweight” loss burden on consumers
  - Shortens the time (and lower the costs) of gathering evidence in an investigation
- Incentive design
  - Should the immunity be complete or partial?
  - Should it be granted before and/or after a formal investigation has started?
  - Should it only be granted to the first whistle-blower, or to subsequent whistle-blowers as well?
  - Should applications for leniency be kept confidential or made public?

# Recent empirical findings

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- S. Brenner, “An Empirical Study of the European Corporate Leniency Program”, *International Journal of Industrial Organization*, 27:6, November 2009, pp. 639-645
  - A 75 - 100% reduction of fines for the first company that cooperate fully before an investigation has been initiated
  - A 50 - 75% fine reduction for the first firm that cooperates fully after an investigation has started
  - Subsequent whistle blowers are eligible for fine reductions of 10 – 50%
- Main findings
  - According to the available data (from 1996 EU Leniency Program), the Program has strong incentives for businesses to reveal information about collusive activities
  - But its deterrence effect is ambiguous – it neither stabilized nor destabilized cartels

# Any differences between competition law, economic regulation and trade (or industrial) policy?

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- Competition law deals with economic matters “after-the-fact” (*ex post*)
- Economic regulation involves *ex ante* control of the supply or prices of products or services, on the presumption or expectation of ‘market failures’
- Trade (or industrial) policy instruments are primarily sector-specific and interventionist (even when there is no ‘market failure’)
  - Tariff barriers, import quotas, export subsidies, ‘picking winners’, creating ‘national champions’
  - Subject to GATT and GATS

# Final remarks

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- “Sword” and “shield”
  - How to make use of competition law as a “sword” to attack the anticompetitive or potentially anticompetitive practices of your market rivals
  - How to make use of the same law to “shield” yourself against allegations of anticompetitive behaviour
- “Re-educate” yourself of your business contracts, agreements and practices and assess their possible or potential anticompetitive effects
- An observation
  - Back in the 80s, the Trade Practices Commission (now Australian Competition and Consumer Commission) initiated cases against big corporations, but with very low “win” rates
  - Since the early 90s, all companies took compliance as a serious matter



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**Thank you**