



SCHOOL OF ACCOUNTING & COMMERCIAL LAW

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COML 304 COMPETITION LAW

Trimester One 2005

COURSE OUTLINE

Contact Details

Lecturers:

Associate Professor Yvonne van Roy (Course Co-ordinator)
Room RH 605
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Course Administrator:

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Office hours: Monday-Friday, 8.30am-5pm

Class Times and Room Numbers

Lectures: Monday, Wednesday, Thursday 9.30-10.20am in GB LT 2

Tutorials: There will be no compulsory tutorials. However, there will be four non-compulsory tutorials to assist with exam study. These will be held at the following times and locations:

Tutorials before Terms Exam:

1)	Monday 14 March	10.30-11.20am	RLWY 224
	Monday 14 March	11.30-12.20pm	RLWY 128
	Wednesday 16 March	10.30-11.20am	RLWY 222
	Thursday 17 March	10.30-11.20am	RLWY 224
2)	Thursday 24 March	10.30-11.20am	RLWY 224
	Monday 11 April	10.30-11.20am	RLWY 224
	Monday 11 April	11.30-12.20pm	RLWY 128
	Wednesday 13 April	10.30-11.20am	RLWY 222

Tutorials before Final Exam:

1)	Monday 9 May	10.30-11.20am	RLWY 224
	Monday 9 May	11.30-12.20pm	RLWY 128
	Wednesday 11 May	10.30-11.20am	RLWY 222
	Thursday 12 May	10.30-11.20am	RLWY 224
2)	Monday 23 May	10.30-11.20am	RLWY 224
	Monday 23 May	11.30-12.20pm	RLWY 128
	Wednesday 25 May	10.30-11.20am	RLWY 222
	Thursday 26 May	10.30-11.20am	RLWY 224

(Note that tutorial questions will be selected from Tutorials 1 and 2, and the Terms Tests and Final Examinations in Casebook 1).

Final Examination: In exam period 11-26 June 2005 (exact time to be advised). The exam will be completely open-book (i.e. students may bring anything they wish into the exam room).

Course Objectives

Aims of the Course:

The aims of this course are to investigate the policy of competition law, including the underlying economic theory and related issues of public welfare, and to make a detailed study of competition legislation in New Zealand, predominantly the Commerce Act 1986 (although the regulatory regimes in telecommunications and electricity will also be considered). There will be some discussion of overseas legislation, in particular the Australian Trade Practices Act 1974.

Course Objectives:

Students passing this course should be able to:

- 1) Explain the social and economic objectives underlying competition law in New Zealand, and to appreciate some of the different views concerning these.
- 2) Understand how the regime for control under the Commerce Act operates (and to some degree also, the Australian Trade Practices Act and the various regulatory regimes).
- 3) Know how to apply the provisions of the Commerce Act to fact situations.
- 4) Critically assess the judge's reasoning in cases, with respect to the words and underlying policies of the Commerce Act.

- 5) Understand the concerns underlying changes to the Act, and to critically analyse the effectiveness of these changes.

Relationship between Assessment Tasks and the Course Objectives:

The Terms Test will begin to assess objectives 2 and 3; the Research Essay will assess in particular objectives 2, 3 and 4, and the Final Examination will assess all 5 objectives.

Course Content

The course content will follow, as near as possible, the following schedule:

Schedule of Lectures		
Mon, Wed, Thur 09.30 – 10.20 am (Rm RH LT 3)		
Feb 21	YvR	1) Introduction to the course, to the Commerce Act
Feb 23	YvR	2) Objects clause s1A, Role of the CC, Overview
Feb 24	YvR	3) ARA case – introduction to ss 27 & 29
Feb 28	YvR	4) s27 issues – contracts, arrangements, understandings, s2(8) & (9) <i>Nicholas Enterprises, Morphet Arms, Giltrap, Ophthalmologists</i>
March 2	YvR	5) s27 issues – s3(5), purpose s2(5), effect, likely effect <i>Port Nelson, Tui Foods</i>
March 3	DC	6) s27 issues – relevant market
March 7	DC	7) s27 issues – competition, substantially lessening
March 9	DC	8) Economics & Competition Law
March 10	DC	9) Economics & Competition Law
March 14	DC	10) Economics & Competition Law
March 16	DC	11) 537-RPM
March 17	DC	12) 537-RPM
March 21	DC	13) Remedies – ss80, 81, 89 etc
March 23	YvR	14) s30 price fixing – introduction, <i>Caltex</i>
March 24	YvR	15) <i>Email, Giltrap</i> , s30 issues
March 28 – April 8, Mid Trimester Break		
April 11	YvR	16) ss31, 32, 33
April 13	YvR	17) s29 Exclusionary provisions, issues etc
April 14		18) TERMS TEST
April 18	YvR	19) s29 – <i>Tui Foods, News Ltd, South Sydney, Eastern Express, Rural Press</i>
April 20	YvR	20) Scope of the Act – ss4, 5, 6, 7; exceptions s44
April 21	YvR	21) Exceptions, ss45, 43 <i>Apple Fields</i>
April 25 – ANZAC DAY		
April 27	YvR	22) s36 – introduction, issues, <i>Queensland Wire</i>
April 28	YvR	23) s36 – substantial degree of power – <i>Boral, Melway, QW</i>
May 2	YvR	24) s36 – taking advantage of – <i>Melway, Boral, Rural Press, PAWA, c/w Telecom v Clear & Carter Holt</i>
May 4	YvR	25) s36 <i>Melway, Rural Press, Safeway</i>
May 5	YvR	26) s36 – predatory pricing – <i>Boral, Carter Holt etc</i>
May 9	DC	27) Authorisation, Public benefit
May 11	DC	28) Business Acquisitions
May 12	DC	29) Business Acquisitions
May 16	DC	30) Control of Oligopolies – difficulties with ss27 & 36 Research Essay Due
May 18	DC	31) Electricity regime

May 19	DC	32) Electricity regime
May 23	DC	33) Telecoms regulatory regime
May 25	DC	34) Telecoms regulatory regime
May 26	DC	35) Telecoms regulatory regime

Readings

The readings relevant to each topic area will be set out in handouts made available as the course progress. There will be set material to be read in preparation for most lectures. You should make a practice of bringing your relevant materials book and/or legislation (as appropriate) to lectures.

Set texts:

The Commerce Act 1986 (incorporating all amendments).
 Competition Law Materials (2005) – vols I & II.

Recommended Reading:

There are a number of useful reference books on Competition Law held in the Law Library (some on Closed Reserve). These include:

(NZ) Adhar, R, (ed) *Competition Law and Policy in New Zealand*

Collinge, J, *The Law Relating to the Control of Competition, Restrictive Trade Practices and Monopolies in New Zealand*, (1st Edn), 1969 (for information on the law up to the Commerce Act 1975)

Collinge, J, *The Law Relating to Restrictive Trade Practices and Monopolies, Merges and Takeovers in New Zealand*, (2nd Edn), 19j82 (for information on the Commerce Act 1975)

Brookers, *Gault on Commercial Law* – Chapters on the Commerce Act by Y van Roy, L Hampton, M Berry (& others)

Hampton, L F, Chapter VI (“Competition Law”) of *Butterworths Commercial Law in New Zealand* by Farrar and Borrowdale

Van Roy, Y, *Guidebook to New Zealand Competition Laws* (2nd Edn, CCH, 1991) (Note that this precedes the 2001 amendment)

(Aust) Taperell, G Q, *Vermeesch, R B and Harland, D J, Trade Practices and Consumer Protection*

Miller, R V, *Annotated Trade Practices Act*

Heydon, *Trade Practices Law* (Loose-leaf service)

Corones, S G, *Competition Law and Policy in Australia*

Corones, S G, *Restrictive Trade Practices Law*

Ransom and Pengilly, *Restrictive Trade Practices: Judgements, Materials and Policy*

Australian Trade Practices Reports (CCH)

Note that the Periodicals Section of the Commerce Library holds copies of the Discussion Papers relating to the various Amendments to the Commerce Act. Also, various reports and policies of the Commerce Commission may be found on its website (www.comcom.govt.nz),

including:

The Mergers and Acquisitions Guidelines

The Leniency Policy (under heading “The Commission”)

The Co-operation Policy (under heading “The Commission”)

Helpful also is the ACCC website: www.accc.gov.au

Assessment Requirements

The items of assessment for this course are, a terms test, a research essay, and a final examination. Students must do **all three** items of assessment. However, the marks for these items of assessment will be totalled in whichever of the following three ways is most favourable to the student.

EITHER	Terms Test	100 marks
	Research Essay	150 marks
	Final Exam	<u>250 marks</u>
	TOTAL	<u>500 marks</u>

OR	Terms Test	100 marks
	Final Exam	<u>400 marks</u>
	TOTAL	<u>500 marks</u>

(In this case the mark for the Research Essay will not count)

OR	Research Essay	150 marks
	Final Exam	<u>350 marks</u>
	TOTAL	<u>500 marks</u>

(In this case the mark for the Terms Test will not count)

The **Terms Test** will be held on Thursday 14th April, 9.30am – 10.20am (location to be advised).

The **Research Essay** is 2000 words (max), due Monday 16th May (see attached information).

The **Final Examination** is in June.

Essay Topic (due Monday 16th April, 2005).

The following fact situation has been taken from a case decided under s47 of the Australian Trade Practices Act 1974. There is no equivalent section in New Zealand Commerce Act 1986.

You are required to:

- 1) Assume that the fact situation took place in New Zealand. Discuss the case which could be argued against FILA under sections 27 and 36 of the Commerce Act 1986, and the chances of success.

(100 marks)

- 2) Discuss whether the practice of exclusive dealing is adequately covered by the Commerce Act 1986, and whether it would be helpful to include (in the Commerce Act) a section similar to s47 of the Australian Trade Practices Act.

(50 marks)

(Note that s47 of the Trade Practices Act is included in Volume 1 of the Course Materials), and helpful readings are included at the back of Volume 2 of the Course Materials).

The Fact Situation.

The AFL conducts the peak Australian Rules football competition, consisting of sixteen teams. Australian Rules is the most popular code in Australia except for New South Wales and Queensland. Nevertheless two teams in the AFL competition come from those States and there are many supporters there. The AFL competition commands high levels of corporate sponsorship, extensive media coverage for twelve months of the year and very large attendance at matches.

The AFL grants licenses for the use of trademarks, names, logos and other intellectual property associated with the teams. Wholesale sales of apparel pursuant to such licences amounted to \$20.6 million in 2001.

Apparel sold under licence from the AFL fall into two distinct categories, “On Field” and “Team Spirit”. On Field apparel consisted of products identical to those worn by the players when playing or training and other selected items worn and used by players and officials such as jackets, caps and sports bags. “Team Spirit” apparel is not identical to that worn by players but features the colours as well as other designs or logos of each of the AFL teams. It includes products such as T-shirts, polo shirts, jackets, casual jumpers, scarves and beanies. An item of apparel in the Team Spirit category is generally speaking of lesser quality than a comparable item in the On Field category and retails at a cheaper price, in some instances as much as forty per cent less.

FILA and other suppliers of sporting apparel such as Nike and Adidas had exclusive licences to supply On Field apparel to AFL teams. Each of such suppliers would be a sponsor of a team which it supplied and its logo would appear on the team’s On Field apparel. By 1 November 2002 FILA had licences to supply On Field apparel to the Western Bulldogs, Geelong, Essendon, Melbourne and Adelaide teams.

However, in the case of Team Spirit apparel manufacturers were licensed to produce apparel for all sixteen AFL teams. The main competing Team Spirit apparel manufacturers were, for jerseys, Burley Sekem Sports and Leisure Pty Ltd (Burley Sekem) and, for general supporter wear, Vivid Australia Pty Ltd (Vivid), Davenport Industries Pty Ltd, Heatly Pty Ltd and Illustrated Sports Clothing Pty Ltd. FILA and the other suppliers of On Field apparel also competed with these firms to supply Team Spirit apparel.

At retail level AFL licensed apparel was sold by specialist sporting retailers such as Rebel Sports, AMART and Market Sports, as well as general retailers such as Myer and Kmart. There were also specialist AFL apparel retailers, including stores run by the clubs themselves.

In late 2001 the AFL commenced a major restructure of its licensing system. It determined that from 2004 the only AFL apparel licensed for both On Field and Team Spirit apparel would be On Field sponsors and some existing category specialists. As a result of this policy, from late 2001 most Team Spirit licenses were not renewed upon expiry. Some Team Spirit licenses were renewed, but generally speaking this was only in relation to products where the On Field sponsor such as FILA did not have a competing product.

FILA's conduct

FILA is the Australian subsidiary of an Italian-based clothing manufacturer Fila Holdings Spa, one of the largest sportswear suppliers in the world with operations in over twenty countries and worldwide sales of approximately 1 billion Euro. It is seventy-six per cent owned by the Fiat Group. In 2001/2002 FILA was the third highest seller of sporting apparel in Australia, ranking behind Nike and Adidas.

In the context of the AFL license restructuring, FILA from September 2001 until June 2003 implemented what it called a Selective Distribution Policy (SDP). This was encapsulated in a confidential memorandum sent by Mr Carney on 13 January 2002 to FILA personnel. The essence of the SDP was that FILA would not supply its apparel to any retailer that stocked or planned to stock apparel for any FILA-sponsored team from a competing Team Spirit apparel licensee, and that FILA supplied its apparel to retailers on condition that the retailer would not acquire or stock AFL licensed apparel from a competing Team Spirit license. The memorandum included the following statements:

- (a) *"FILA as a brand will not legitimise 'non brands', chain store brands or other AFL or NRL licensees selling licensed product of clubs in which we invest considerable dollars, by having FILA products in the same retail environment",*
- (b) *"FILA has not supplied licensed product to a number of retailers as the retailers have a preference for the other licensees";*
- (c) *"One matter that is most important is that you cannot, and must not, advise any retailer FILA will not only supply on certain conditions. This is not the case. In simple terms, FILA will not legitimate other licensees by placing FILA products in the same retail store";*
- (d) *"There is only one authentic apparel sponsor of the clubs we sponsor and that is FILA. At the end of the day, market forces will determine if our strategy is correct. If we are correct, FILA sales will increase and sponsored clubs will increase. There will always be competition and there will always be other licensees. Some retailers will stock the other licensees in preference to FILA and there are some retailers we do not wish to supply. This is exactly the same circumstances with our generic FILA product. Our challenge is to grow the FILA brand and business by focusing and concentrating upon FILA".*

The result was that many AFL apparel retailers felt they had little choice but to comply with the SDP and change suppliers from their previous Team Spirit suppliers to FILA Team Spirit apparel for the five teams which FILA sponsored. Retailers were compelled to do this to ensure that their supply of the FILA On Field product continued.

Basic Requirements for Your Essay

(Note that marks will be deducted for failure to comply with these requirements.)

1. There should be an introduction and a conclusion, clearly headed as such.
2. Do not grossly exceed the word limit (10% tolerance is acceptable) - *after this point the work will not be marked.*
3. The due date will be strictly adhered to. However, if you consider you have a good reason for not meeting this deadline, please see the course co-ordinator as soon as you know you will have this problem. Otherwise, the penalty will be 5% per day (after the due date).
4. To reference the ideas or quotations from another work, use footnotes for guidance, look at the way this is done in the chapters and articles included in the materials books), or use the APA system you were shown in FCOM 110.
5. There should be a bibliography, listing the sources of information you have used for your essay; (note that a bibliography is not a substitute for referencing).
6. Provide a separate cover sheet that shows:

The Title
Your Name
The Course Code
7. Leave a 2 inch (5 cm) margin, to enable room for comments.
8. Write clearly or type your work.
9. Do not plagiarise (see pp10-11 for further information).

Penalties

(See “Basic Requirements for Your Essay”, above).

Mandatory Course Requirements

All three items of assessment are mandatory, i.e. the Terms Test, the Research Essay and the Final Exam.

Communication of Additional Information

Additional information concerning this course will be provided:

(i) in lectures and posted on the Commercial Law course notice board on Mezzanine Floor of the Rutherford House Building, and

(ii) on the **Blackboard** web-based software. The login is at <http://blackboard.vuw.ac.nz>. Your initial username and password are your SCS username and Student ID, and

(iii) you can obtain hard copies of course handouts from the Handouts Area (next to RH 623).

General University Policies and Statutes

Students should familiarise themselves with the University's policies and statutes, particularly those regarding assessment and course of study requirements, and formal academic grievance procedures.

Student Conduct and Staff Conduct

The Statute on Student Conduct together with the Policy on Staff Conduct ensure that members of the University community are able to work, learn, study and participate in the academic and social aspects of the University's life in an atmosphere of safety and respect. The Statute on Student Conduct contains information on what conduct is prohibited and what steps can be taken if there is a complaint. For queries about complaint procedures under the Statute on Student Conduct, contact the Facilitator and Disputes Advisor. This Statute is available in the Faculty Student Administration Office or on the website at:

www.vuw.ac.nz/policy/StudentConduct.

The policy on Staff Conduct can be found on the VUW website at:

www.vuw.ac.nz/policy/StaffConduct.

Academic Grievances

If you have any academic problems with your course you should talk to the tutor or lecturer concerned or, if you are not satisfied with the result of that meeting, see the Head of School or the Associate Dean (Students) of your Faculty. Class representatives are available to assist you with this process. If, after trying the above channels, you are still unsatisfied, formal grievance procedures can be invoked. These are set out in the Academic Grievances Policy which is published on the VUW website:

www.vuw.ac.nz/policy/AcademicGrievances.

Academic Integrity and Plagiarism

Academic integrity is about honesty – put simply it means **no cheating**. All members of the University community are responsible for upholding academic integrity, which means staff and students are expected to behave honestly, fairly and with respect for others at all times.

Plagiarism is a form of cheating which undermines academic integrity. Plagiarism is **prohibited** at Victoria.

The University defines plagiarism as follows:

Plagiarism is presenting someone else's work as if it were your own, whether you mean to or not.

'Someone else's work' means anything that is not your own idea, even if it is presented in your own style. It includes material from books, journals or any other printed source, the work of other students or staff, information from the Internet, software programmes and other electronic material, designs and ideas. It also includes the organization or structuring of any such material.

Plagiarism is not worth the risk.

Any enrolled student found guilty of plagiarism will be subject to disciplinary procedures under the Statute on Student Conduct (www.vuw.ac.nz/policy/studentconduct) and may be penalized severely. Consequences of being found guilty of plagiarism can include:

- an oral or written warning
- suspension from class or university
- cancellation of your mark for an assessment or a fail grade for the course.

Find out more about plagiarism and how to avoid it, on the University's website at: www.vuw.ac.nz/home/studying/plagiarism.html.

Students with Disabilities

The University has a policy of reasonable accommodation of the needs of students with disabilities. The policy aims to give students with disabilities an equal opportunity with all other students to demonstrate their abilities. If you have a disability, impairment or chronic medical condition (temporary, permanent or recurring) that may impact on your ability to participate, learn and/or achieve in lectures and tutorials or in meeting the course requirements, then please contact the Course Coordinator as early in the course as possible. Alternatively you may wish to approach a Student Adviser from Disability Support Services to confidentially discuss your individual needs and the options and support that are available. Disability Support Services are located on Level 1, Robert Stout Building, or phoning 463-6070, email: disability@vuw.ac.nz. The name of your School's Disability Liaison Person can be obtained from the Administrative Assistant or the School Prospectus.

Student Support

Staff at Victoria want students' learning experiences at the University to be positive. If your academic progress is causing you concern, please contact the relevant Course Co-ordinator, or Associate Dean who will either help you directly or put you in contact with someone who can.

The Student Services Group is also available to provide a variety of support and services. Find out more at www.vuw.ac.nz/st_services/ or email student-services@vuw.ac.nz.

VUWSA employs two Education Coordinators who deal with academic problems and provide support, advice and advocacy services, as well as organising class representatives and faculty delegates. The Education Office is located on the ground floor, Student Union Building, phone 463 6983 or 463 6984, email education@vuwsa.org.nz.