

School of Accounting and Commercial Law

COML 304 COMPETITION LAW

Trimester One 2 2006

COURSE OUTLINE

Contact Details

Course Co-ordinator: Associate Professor Yvonne van Roy (Course Co-ordinator)
Room RH 605
Telephone: 463-6762
Email: Yvonne.vanRoy@vuw.ac.nz
Office hours: Tuesday 1-3pm

Lecturer: Mr David Carter
Room RH 727
Telephone: 463 5233 ext 7009
Email: David.Carter@vuw.ac.nz
Office hours: Monday 3-5pm

Course Administrator: Marina Dobrovolskaya
Room RH 708
Telephone: 463 5775
Email: Marina.Dobrovolskaya@vuw.ac.nz
Office hours: Monday-Friday, 8.30am-5pm

Class Times and Room Numbers

Lectures: Monday, Tuesday, Wednesday 10.30-11.20am in GB LT 4

Tutorials/Workshops: There will be no compulsory tutorials. However, there will be four non-compulsory workshops to assist with exam study, two before the terms test, and two before the final exam. These will be held at the following times and locations:

Workshops before Terms Test:

- | | | | |
|----|--------------------|-------------|----------|
| 1) | Wednesday 22 March | 11.30-12.20 | RLWY 129 |
| | Tuesday 28 March | 11.30-12.20 | RLWY 129 |
| 2) | Wednesday 29 March | 11.30-12.20 | RLWY 129 |
| | Tuesday 4 April | 11.30-12.20 | RLWY 129 |

Workshops before Final Exam:

- | | | | |
|----|------------------|-------------|----------|
| 1) | Tuesday 16 May | 11.30-12.20 | RLWY 129 |
| | Wednesday 17 May | 11.30-12.20 | RLWY 129 |
| 2) | Tuesday 30 May | 11.30-12.20 | RLWY 129 |
| | Wednesday 31 May | 11.30-12.20 | RLWY 129 |

Final Examination:

In exam period 5-23 June 2006 (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; and the Research Essay 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, Tues, Wed 10.30 – 11.20 am (Rm GBLT 4)

Feb 27	YvR	1) Introduction to the course, to the Commerce Act
Feb 28	YvR	2) Objects clause s1A, Role of the CC, Overview
March 1	YvR	3) ARA case – introduction to ss 27 & 29
March 6	YvR	4) s27 issues – contracts, arrangements, understandings, s2(8) & (9) <i>Nicholas Enterprises, Morphett Arms, Giltrap, Ophthalmologists</i>
March 7	YvR	5) s27 issues – s3(5), purpose s2(5), effect, likely effect <i>Port Nelson, Tui Foods</i>
March 8	DC	6) Economics & Competition Law
March 13	DC	7) Economics & Competition Law
March 14	DC	8) Economics & Competition Law
March 15	DC	9) s27 issues – Relevant Market
March 20	DC	10) s27 issues – Competition, Substantially Lessening
March 21	DC	11) s37-RPM
March 22	DC	12) s37-RPM (tutorial at 11.30, RLWY 129)
March 27	DC	13) Remedies – ss80, 81, 82, 89 etc
March 28	YvR	14) s30 price fixing – introduction, <i>Caltex</i> (tutorial at 11.30, RLWY 129)
March 29	YvR	15) <i>Email, Giltrap</i> , s30 issues (tutorial at 11.30, RLWY 129)
April 4	YvR	16) ss31, 32, 33
April 5	YvR	17) Scope of the Act – ss4, 5, 6, 7; Exceptions s44 (tutorial at 11.30, RLWY 129)
April 6		18) TERMS TEST
April 10 – April 21, Mid Trimester Break		
April 24	YvR	19) Exceptions, ss45, 43 <i>Apple Fields</i>
April 25		ANZAC DAY
April 26	YvR	20) s29 Exclusionary provisions, issues etc
May 1	YvR	21) s29 – <i>Tui Foods, News Ltd, South Sydney, Eastern Express, Rural Press</i>
May 2	YvR	22) s36 – introduction, issues, <i>Queensland Wire</i>
May 3	YvR	22) s36 – substantial degree of power – <i>Boral, Melway, QW</i>
May 8	YvR	24) s36 – taking advantage of – <i>Melway, Boral, Rural Press, PAWA, c/w Telecom v Clear & Carter Holt</i>
May 9	YvR	25) s36 <i>Melway, Rural Press, Safeway</i>
May 10	YvR	26) s36 – predatory pricing – <i>Boral, Carter Holt etc</i>
May 15	DC	27) Sector-Specific Regulation
May 16	DC	28) Sector-Specific Regulation (tutorial at 11.30, RLWY 129)
May 17	DC	29) Sector-Specific Regulation (tutorial at 11.30, RLWY 129)
May 22	DC	30) Sector-Specific Regulation
May 23	DC	31) Sector-Specific Regulation
May 24	DC	32) Authorisation, Public benefit; Research Essay Due
May 29	DC	33) Business Acquisitions
May 30	DC	34) Business Acquisitions (tutorial at 11.30, RLWY 129)
May 31	DC	35) Control of Oligopolies – difficulties with ss27&36 (tutorial at 11.30, RLWY 129)

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 (2006) – 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 (C/R)). These include:

- (NZ) Adhar, R, (ed) *Competition Law and Policy in New Zealand* (C/R, Law Library)
- 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* (C/R, Law Library).
- Miller, R V, *Annotated Trade Practices Act* (C/R, Law Library)
- Heydon, *Trade Practices Law* (Loose-leaf service) (Law Library)
- Corones, S G, *Restrictive Trade Practices Law* (C/R, Law Library)
- Ransom and Pengilly, *Restrictive Trade Practices: Judgements, Materials and Policy* (C/R, Law Library)
- Australian Trade Practices Reports* (CCH) (Law Library)

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 Wednesday 6th April, 10.30am – 11.20am (location to be advised).

The Research Essay is 2000 words (max), due Wednesday 24th May (see attached information).

The Final Examination is in June.

ESSAY TOPICS

(due Wednesday 24th May, 2006): You may choose either topic A or topic B

TOPIC A

The news item on the following page appeared recently in the Sunday Times newspaper (12/2/06).

Advise the wine supplier as to their chances of success if action was taken against Progressive Enterprises under the Commerce Act 1986. In particular:

1) Advise the wine suppliers about what they would need to be able to show in order to succeed under sections 27 and 29 of the Commerce Act.

(60 Marks)

2) Advise the wine suppliers about what they would need to be able to show in order to succeed under section 36 of the Commerce Act. Discuss whether this would be different if the court chose to follow the approach taken by the Privy Council in *Telecom Corporation of NZ v Clear Communications* [1995] 1 NZLR 385; (1994) 5 NZBLC103,552 instead of the approach adopted by the High Court of Australia in *Melway Publishing Pty Ltd v Robert Hicks* (2001) 178 ALR 253; ATPR 41-805; and subsequent cases).

(90 Marks)

(Total of 150 Marks)

Notes:

- Copies of *ACCC v Australian Safeway Stores Pty Ltd* (2003) ATPR 41-935 are available on closed reserve in the Law Library.
- The full texts of the *Telecom v Clear*, *Queensland Wire* and *Melway* cases are in Volume 2 of the course materials, as are the headnotes for the *Safeway*, *Boral*, *Rural Press* and *NT Power Generation* cases.
- You are advised to read the following article in Volume 2 of the course materials: "Taking Advantage of Market Power: Should New Zealand Adopt the Approach of the High Court of Australia" (2005) 11 NZBLQ 319.

Winemakers eye legal options over strongarm tactics

By GREG NINNESS

WINE SUPPLIERS are considering action under the Commerce Act after alleged bullying tactics by Australian-owned supermarket group Progressive Enterprises.

Several spoken to by the *Sunday Star-Times* say Progressive threatened to boycott their products after they offered discount deals to rival wine retailers.

Progressive operates the Foodtown, Woolworths and Countdown supermarkets in New Zealand.

All of the wine suppliers spoken to by the *Star-Times* did so on condition of strict anonymity out of fear that if they were identified, their products could be removed from Progressive's supermarket shelves, a move that could cripple their businesses.

The winemakers say they came under intense pressure from Progressive after they struck deals with rival retailers Blackmarket and the Fine Wine Delivery Company.

Blackmarket is an internet trader that allows its customers to bulk-buy wine directly from wineries at discount prices.

The Fine Wine Delivery Company is an Auckland retailer that offers discount prices and does a large amount of business over the internet.

Suppliers say Progressive started to bare its teeth in the middle of last year when the Fine Wine Delivery Company opened a new website selling wines for under \$15 a bottle, which brought it into direct competition with supermarkets.

Several suppliers say as soon as

their products appeared on the Blackmarket or Fine Wine Delivery Company websites, Progressive threatened to remove their wines from its stores.

Most caved in and stopped supplying the websites, but at least one firm is known to have had its wines deleted from Progressive's stores as a direct consequence of deals it cut with the web retailers.

An executive at a large wine firm told the *Star-Times* he was astounded when a senior Progressive manager told him it was his company's policy to delist any supplier who dealt with Blackmarket "to teach them a lesson".

Such talk has fuelled speculation within the industry that Progressive's buying policies may be coming perilously close to a breach of the Commerce Act.

Under the Act, it is illegal for any company with a substantial degree of market power to use that power to prevent or deter a business from engaging in competitive behaviour.

Several suppliers who have felt the wrath of Progressive's buying policies and have chosen to suffer in silence say they are now considering their options under the Act.

They were encouraged when Victorian supermarket Safeway, also owned by Progressive's parent company Woolworths, was fined \$A9 million (\$9.8m) this month for price fixing and abusing its market power.

■ **Disclosure: The *Sunday Star-Times* is in partnership with blackmarket.co.nz to offer a wine club to readers.**

TOPIC B

“To a degree, the practice of law requires certainty, as certainty breeds predictability. In relation to competition law, arguably one of the most important concepts is defining the “Market”. In that light, one of the fundamental problems of the Commerce Act 1986 and the Court’s interpretation of the Act is that with the mix of economic theory, practical empirics, and the multitude of tests for the ‘market’, a business is never quite sure what market they are in until the court informs them”.

Required:

Critically evaluate the above statement. In your answer, provide legislative evidence and relevant case law to support your position.

(Total of 150 Marks)

Notes:

Through reference to lecture notes, the volumes of materials, and other readings, you are required to evaluate the above statement. This means that **we expect you to express an opinion as to whether or not you agree or disagree with the statement, as well as providing an explanation of why you hold your opinion.** There are no wrong answers, but the clarity of the arguments in support of your opinion will be considered.

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 2inch (5 cm) margin, to enable room for comments.

8. Write clearly or type your work.
9. Do not plagiarise (see p9 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).

Faculty of Commerce and Administration Offices

Railway West Wing (RWW) - FCA Student Administration Office

The Student Administration Office is located on the ground and first floors of the Railway West Wing. The ground floor counter is the first point of contact for general enquiries and FCA forms. Student Administration Advisers are available to discuss course status and give further advice about FCA qualifications. To check for opening hours call the office on (04) 463 5376.

Easterfield (EA) - FCA/Law Kelburn Office

The Kelburn Campus Office for the Faculties of Commerce & Administration and Law is situated in the Easterfield Building - it includes the ground floor reception desk (EA005) and offices 125a to 131 (Level 1). The office is available for the following:

- Duty tutors for student contact and advice.
- Information concerning administrative and academic matters.
- FCA Student Administration forms (e.g. application for academic transcripts, requests for degree audit, COP requests).
- Examinations-related information during the examination period.

Check with the Student Administration Office for opening times (04) 463 5376.

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.

Manaaki Pihipihinga Maori and Pacific Mentoring programme (Faculties of Humanities and Social sciences and Commerce and Administration).

- **What:** Academic Mentoring for Maori and Pacific students studying at all levels in the above faculties. Weekly sessions for an hour with a mentor to go over assignments and any questions from tutorials or lectures. Registered students can use the faculty's study rooms and computer suite at any time at Kelburn and Pipitea.
- Mature student and Post grad network

If you would like to register as a mentor or mentee please contact the coordinator.

Where:

Melissa Dunlop
Programme Coordinator
Room 109 D
14 Kelburn Parade: back courtyard
Ph: (04) 463 6015
Email: Maori-Pacific-Mentoring@vuw.ac.nz

Please Note: A mentoring room will also be running at Pipitea Campus starting January. Please contact the Programme Coordinator for details.