

# CARTELS (INC EXCLUSIONARY PROVISIONS)

Competition Policy Review (Harper Review) Final Report and Government Response

## Current position

### Substantive law (cartels)

- Cartels are prohibited (criminally and civilly) by Division 1 of Part IV of the CCA
- Div 1 prohibits corporation making or giving effect to a contract, arrangement or understanding containing a cartel provision
- A provision is a cartel provision if either
  - It has the purpose or effect of price fixing; or
  - It has the purpose of allocating customers suppliers or territories restricting outputs or rigging bids**and** at least two or more parties to the agreement are, or are likely to be (or would be but for the agreement), in competition with each other (in *Norcast* interpreted to mean any possibility they are or would be in competition, provided not 'remote possibility')
- A limited defence exists for some contractual joint ventures
- Prohibition not expressly limited to arrangements affecting competition in Aust markets

### Substantive law (exclusionary provisions (primary boycotts))

- Exclusionary provisions in agreements between competitors are *per se* banned by s 45 (defined in s 4D)

## Harper Panel final recommendation (rec's 27 and 28)

### Substantive law (recommendation 27)

- Retain civil and criminal prohibitions
- Simplify the cartel conduct provisions (currently 'excessively complex')
  - Should 'apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia'
  - Should be confined to conduct involving firms that are actual competitors or likely to be (where likely means *on balance of probabilities*)
  - Provide broad exemption for joint ventures (noting such conduct will be prohibited by s 45 if anti-competitive)
  - Add exemption for 'trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services', including IP (would be prohibited by s 45 (or s 47 if retained) if anti-competitive)

### Substantive law (exclusionary provisions (primary boycotts))

- Repeal, with amendment to definition of cartel conduct to address any resulting gap.

## Government response

The Government has supported both recommendations 27 and 28.

### Cartels (recommendation 27)

- 'The Government supports simplification of the prohibitions on cartel conduct, and will amend the current exception for joint ventures to provide appropriate exemptions for demonstrable and deliberative joint venture activity.
- The Government accepts that the prohibitions on cartel conduct are complex and will develop exposure draft legislation for consultation with the public and states and territories to simplify definitions to improve clarity and certainty, while retaining specificity and meaning.
- Exposure draft legislation to broaden the joint venture exemption so that it does not limit legitimate commercial transactions (such as through vertical supply arrangements) will also be developed for consultation.'

### Exclusionary provisions (primary boycotts) (recommendation 28)

- 'The Government supports simplifying the prohibitions on exclusionary conduct and will develop exposure draft legislation for consultation with the public and states and territories.
- The prohibition of exclusionary provisions is unnecessary and increases the complexity of the law. The definition of exclusionary provisions overlaps substantially with the definition of market sharing, which is a form of cartel conduct. Simplification can be achieved by amending the cartel provisions and removing the prohibitions on exclusionary provisions.'

[summary prepared 28 June 2016]

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