

# CIFR SYMPOSIUM & WORKSHOPS

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Competition Law and Policy in Australia –  
the next two decades

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# CPR Draft Report: Cartels under Part IV of CCA – Fixes?

- **Hot spots in Part IV include:**
  - complexity
  - ‘understanding’, ‘commitment’ and information exchange
  - ‘cartel provision’ – purpose & purpose/effect conditions
  - ‘cartel provision’ – competition condition
  - joint ventures and other collaborative activities
  - supply agreements between competitors
  - intellectual property exemptions
  - authorisation and alternatives to authorisation
- **Are key issues resolved by Draft Report?**

# CPR Draft Report: Cartels under Part IV of CCA – Fixes?

- **Complexity:**
  - Part IV Div 1 (cartel conduct) – ‘twenty page long labyrinth’ of ‘byzantine complexity’ that hinders workable interpretation and application by citizens, businesses, lawyers, regulators and judges
  - Part IV Div1A (information disclosure) – 10 pages of convolutions
- **Draft Report:**
  - Simplify CCA – remove overly-specified & redundant provisions (p 39)
  - Cartel prohibitions should be simplified (pp 41, 222) – see simpler model in Commerce (Cartels and Other Matters) Amendments Bill 2014 (NZ)
  - Repeal Div 1A (p 230)
  - Repeal s 45(2) prohibitions against exclusionary provisions (p 41)
  - Obscurity remains about role of principles-based drafting and future of various dud CCA concepts (eg ‘purpose of a provision’)

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- **‘Understanding’, ‘commitment’ and information exchange:**
  - ‘Understanding’ in ss 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK & s 45 requires element of ‘commitment’ – difficult to prove and subject to evasion
  - Part IV Div 1A prohibitions apply to unilateral disclosure of competitively sensitive information, but:
    - ∞ currently apply only to banking sector
    - ∞ exceptions leave some room for evasion
- **Draft Report:**
  - Repeal Part IV Div 1A (p 230)
  - Expand s 45 to cover ‘concerted practice’ – ‘a regular and deliberate activity undertaken by two or more firms’ (p 230)
  - **Unsatisfactory treatment of ‘concerted practice’:**
    - ∞ needs better definition
    - ∞ should apply to per se civil liability for cartel conduct (ie not merely to s 45)

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- ‘Cartel provision’ – purpose & purpose/effect conditions:
  - Concepts of price fixing, reduction of output, allocation of customers and bid rigging are uncertain in some significant & avoidable respects
  - Restriction on acquisition is not covered by s 44ZZRD (cf ss 4D, 45(2))
  - Concept of ‘purpose of a provision’ is unsatisfactory in several ways
  - Main problem is overreach of s 44ZZRD(3)
- Draft Report:
  - Commends proposed NZ approach – partly addresses 1<sup>st</sup> two problems
  - Does not address 3<sup>rd</sup> problem – ‘purpose of a provision’
  - Less overreach via proposed new exceptions (for jvs, supply agreements between competitors, block exemptions)
  - DR skates lightly over s 44ZZRD(2)(3):
    - ∞ not a ‘root and branch’ review of s 44ZZRD (2)(3)
    - ∞ no consideration of possible rule of reason or efficiencies exemption/defence

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- ‘Cartel provision’ – competition condition:
  - ‘Likely’ competitor test in s 44ZZRD(4) too wide – *Norcast v Bradken* (possibility (other than a remote possibility) that parties are or would be in competition with each other)
  - Absurdly complex drafting
- Draft Report:
  - ‘Likely’ should be redefined as meaning ‘more likely than not’ (p 223)
  - Complex drafting addressed to some extent by comparing simpler proposed NZ approach (p 222)
  - Focus on ‘likely’ only in s 44ZZRD(4) does not address similar problem of over-breadth in other parts of s 44ZZRD (eg likelihood of controlling a price under s 44ZZRD(2))

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- **Joint ventures and other collaborative activities:**
  - Present exceptions are ill-defined and suffer from undue restriction (eg the contract requirement in ss 44ZZRO, 44ZZRP), uncertainty (eg the meaning of ‘joint venture’, ‘purposes of a provision’) and complexity
- **Draft Report:**
  - General plea for simplification (p 39)
  - Current joint venture exceptions are too narrow (p 224)
  - Repeal joint venture defence under s 76C (p 41, by clear implication)
  - Proposed NZ collaborative activity exemption ‘may be too broad’ (p 224)
  - **Unhelpful in several key respects:**
    - ∞ no attempt to indicate/define what types of collaborative ventures should qualify
    - ∞ failure to address notorious obscurity of ‘purposes of a joint venture’
    - ∞ no explanation why NZ collaborative activity exemption ‘may be too broad’ – extensive consultation in NZ and A1 Commerce Commission draft guidelines



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- **Supply agreements between competitors:**
  - Supply agreements between competitors are prevalent and typically are pro-competitive but can be cartel offence or civil wrong unless authorised:
    - ∞ can be caught by s 44ZZRD(2)(3)
    - ∞ may not be excluded by competition condition under s 44ZZRD(4)
    - ∞ often not saved from per se liability by s 44ZZRS exclusive dealing carve-out
- **Draft Report:**
  - Exempt per se liability trading restrictions imposed by one firm on another in connection with the supply or acquisition of goods or services (p 225)
  - Mention of proposed NZ vertical supply exemption (p 224)
  - OK at high level, but:
    - ∞ unhelpful failure to endorse or reject NZ model
    - ∞ no attempt to discuss implications in *ACCC v Flight Centre* or *ACCC v ANZ*

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- **Intellectual property exemptions:**
  - Exemptions of IP licensing conditions under s 51(3) are subject to uncertain test that condition must 'relate to' protected subject matter
  - Anti-competitive cross-licensing by competitors can be exempt under s 51(3) from cartel prohibitions and even s 45(2) SLC prohibitions
- **Draft Report:**
  - Repeal s 51(3) but exempt IP licences from cartel prohibitions (p 87)
  - Resolves 2 problems above – SLC prohibitions under s 45 or s 47 apply, 'relates to' test no longer applies
  - **Unpersuasive and unsatisfactory:**
    - ∞ inconsistent with US and EU law that exempts the exercise of an IP right in order to get the benefit of the IP protection conferred by statute
    - ∞ far too much weight put on vague SLC test and costly/bureaucratic authorisation to exclude efficient IP licensing restrictions from liability

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- **Authorisation and alternatives:**
  - Authorisation is costly and bureaucratic and test is limited to overriding public benefit – absence of SLC is insufficient
  - No efficiencies exemption/defence, unlike US and EU
  - No block exemptions – contrast block exemptions under EU Art 101(3)
- **Draft Report:**
  - Extend authorisation to absence of SLC (p 249)
  - Introduce block exemptions – ‘safe harbours’ for business, reducing compliance costs and increasing certainty (p 252)
  - **Surprising failure to address rule of reason or efficiencies exemption/defence:**
    - ∞ not a ‘root and branch’ review unless this is considered
    - ∞ needed as complement to other exemptions and as alternative to authorisation
    - ∞ to say that such an exception or defence is not justiciable would be unpersuasive and inconsistent with US and EU law and extensive experience

# CPR Draft Report: Cartels under Part IV of CCA – Fixes?

- **Conclusions:**
  - Many useful recommendations in DR after many submissions
  - Some significant issues have not been adequately resolved
  - Some recommendations are problematic
  - Recent second round of submissions likely to assist
  - Will the future be tense?
    - ∞ how detailed will the Final Report be?
    - ∞ much will depend on extent of take-up by Government, Treasury, the States and the proposed expert legal panel redrafting the CCA
    - ∞ proclivity for tinkering with Part IV of CCA over past decade may continue
    - ∞ will the implementation process be transparent?

# Questions

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