

**ACCC GUIDELINES ON REPEAL OF SECTION 51(3) COULD NOT AND DO NOT
RESOLVE NEED FOR COMPETITOR SUPPLY/ACQUISITION EXCEPTION TO CARTEL
PROHIBITIONS UNDER COMPETITION AND CONSUMER ACT 2010 (CTH)**

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**A. ACCC Guidelines on Repeal of s 51(3) Could Not and Do Not Resolve Need for
Competitor Supply/Acquisition Cartel Exception as Recommended by Harper
Report**

The Treasury Laws Amendment (2018 Measures No. 5) Act 2019 (**TLA Act**) repealed 51(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).¹ The TLA Act did not create an exception from cartel liability for procompetitive IP licensing agreements and other supply agreements between competitors (**Competitor Supply/Acquisition Cartel Exception**).²

The lack of any Competitor Supply/Acquisition Cartel Exception is inconsistent with Recommendation 27 of the *Competition Policy Review Final Report* (31 March 2015) (Harper Report).³ Recommendation 27 was that the repeal of s 51(3) of the CCA be accompanied by a Competitor Supply/Acquisition Cartel Exception that excepts procompetitive supply and acquisition contracts between competitors including IP licences.

The failure to follow Recommendation 27 has resulted in the overreach of Australia's cartel prohibitions in a wide range of IP licensing situations, including everyday examples of procompetitive IP licences. There is no Competitor Supply/Acquisition Cartel Exception to this day.

The ACCC Guidelines (<https://www.accc.gov.au/publications/guidelines-on-the-repeal-of-subsection-513-of-the-competition-and-consumer-act-2010-cth>) could not and do not resolve

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¹ For the view that s 51(3) should not have been repealed see A Duke, 'The Repeal of Section 51(3) of the Competition and Consumer Act: A Mistake in Need of Correction' (2020) 43(1) UNSW Law Journal 250.

² See further C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.6. Literature on corporate strategy canvasses the advantages of entering into agreements with competitors in order to increase output or improve efficiency; see eg AM Brandenburger & BJ Nalebuff, *Co-Opetition* (1997); A Kosansky and T Schaefer, 'Should you swap commodities with your competitors?' (2010)(2) Supply Chain Quarterly.

³ Available at <http://competitionpolicyreview.gov.au/>.

the problems of overreach that arise from repealing s 51(3) without also creating a Competitor Supply/Acquisition Cartel Exception. The overreach is shown by Examples 1 – 6 below.

The Guidelines do not mention Recommendation 27 and the underlying explanation for that Recommendation. Nor do they resolve situations of the kind set out in Examples 1 – 6 below. Implementation of the Harper Report has been botched.

This commentary includes, in updated form, some parts of previously published material.⁴

Example 1 – territorial restriction

1. A and B manufacture batteries for e-vehicles. A is based in California, B in Geelong. A plans to establish a manufacturing base in Australia unless it can obtain sufficient revenue by licensing its patented technology to a manufacturer that already has a manufacturing plant in Australia. A licenses its patented technology to B on terms that satisfy A's commercial strategy. A condition of the licensing agreement is that B will not export batteries that it manufactures using A's patents unless A consents in writing in advance (the "Non-Export Provision").
2. An IP licensing condition of this kind is not unusual and will not necessarily be anti-competitive.⁵
3. The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3)(a)(iii) applies: the Non-Export Provision has the substantial purpose of restricting or limiting the supply of goods made by the use of A's patents in a market in Australia.⁶ The competition condition under s 45D(4) applies: but for the patent licensing agreement with B, A is a likely competitor of B in Australia in relation to the supply of batteries for e-vehicles.
4. The s 51(3) exception is likely to have applied in this example. A territorial restriction of this kind probably "relates to" A's patents within the meaning of the subsection.⁷

⁴ B Fisse, 'Harper Report Implementation Breakdown: Repeal of Section 51(3) of Competition and Consumer Act 2010 (Cth) and Lack of Proposed Supply/Acquisition Agreement Cartel Exception' (2019) 47(1) Australian Business Law Review 127; B Fisse, 'Competition Law and Intellectual Property in Australia – Traps for Unwanted Catches' Competition Policy International 14 October 2019.

⁵ See TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 22-23; American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015) 80-84.

⁶ One of several purposes is sufficient if it is a substantial purpose: CCA, s 4F(1)(a). The better view is that a substantial immediate purpose is sufficient to satisfy the purpose condition under s 45AD(3): see 'Australian Cartel Law: Biopsies' (2018) 11-13, at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf.

⁷ TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 22. For an incisive analysis of the s 51(3) "relates to" test see F Hanks, 'Intellectual property rights and

5. The exclusive dealing exception under s 45AR would not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).
6. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.
7. The Non-Export Provision would be covered by the Exposure Draft Bill (October 2016) s 44ZZRS exception (see subsection (1)(a)(iii)).
8. There is the limited and bureaucratic possibility of authorisation. The test for authorisation in relation to cartel prohibitions is whether the public detriment of the cartel provision is sufficient to outweigh any public detriment. It is insufficient to show that the cartel provision does not have the purpose, effect or likely effect of substantially lessening competition in a market.

Do the ACCC Guidelines resolve the concerns raised by Example 1?

No. They could not do so because what is required is a Competitor Supply/Acquisition Cartel Exception, not merely guidelines.

The lack of a Competitor Supply/Acquisition Cartel Exception is unsatisfactory. The main consequences are likely to be:

- IP holders who wish to licence IP to a competitor or likely competitors may seek authorisation by the ACCC. This process requires the applicant to show overriding public benefit (not merely an absence of a likely substantial lessening of competition). The process is bureaucratic, costly and short-term (authorisation is often for 5 years or less). There is no authorisation process in the US, the EU and Canada.
- Some IP holders will incur the time and expense of trying to find other exceptions, including the exclusive dealing exception, the joint venture exceptions or a class exemption (as yet there is no relevant class exemption under s 95AA). In many situations these exceptions will not apply and the exercise will be a waste of time.
- Some IP holders will do nothing and take the risk of enforcement proceedings by the ACCC and the possible consequences of penalties and adverse publicity. That is a risky strategy. It is unlikely to commend itself to directors or shareholders but they may not discover it until too late.

competition in Australia' in SD Ackerman (ed), *The Interface Between Intellectual Property Rights and Competition Policy* (2007) 315, at 322-324.

- IP holders who proceed unprotected by authorisation (or other exception) will run the gauntlet of the licensee later getting out of the licensing agreement on the basis that the licensing restrictions that are cartel provisions are illegal and void.
- It is possible that Australia will be seen by some as an unattractive jurisdiction into which to license IP to competitors. If so, that would be an economic disadvantage.
- It is possible that the absence of a Competitor Supply/Acquisition Cartel Exception will incline IP holders, business people and practitioners to have less respect for Australian competition law that they would otherwise have. Respect for the law is an important factor in bringing about compliance with the law.

Example 2—field of use restriction

1. A devises a new resin for use in fibreglass and supplies fibreglass products using this resin in several fields, namely boats, planes, and swimming pools. It has strong distribution and marketing channels in the fields of boats and planes, but not in that of swimming pools. B is a competing supplier in all three fields but has a particularly strong position in the field of swimming pools. A decides to maximise the value of its patented formula for the new resin by licensing the patent to B in the field of swimming pools (“Field of Use Provision”).
2. An IP licensing condition of this kind is not unusual and will rarely be anti-competitive. The orthodox view is that:
 - (a) patent owners may grant licences extending to all uses or limited to use in a defined field; and
 - (b) the possibility of anti-competitive effects should be tested by assessing the competition effects, not by resorting blindly to per se liability.⁸
3. The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii)) applies: the Field of Use Provision has the substantial purpose of restricting or limiting the supply of goods made by B with the use of A’s patent in a market in Australia. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of swimming pools.
4. The s 51(3) exception is likely to have applied in this example. A field of use restriction of this kind “relates to” A’s patent within the meaning of the subsection.

⁸ American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015) 85-89.

5. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).
6. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.
7. The Field of Use Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover a field of use restriction such as this.
8. There is the limited and bureaucratic possible solution of authorisation: see [8] in Example 1.

Do the ACCC Guidelines resolve the concerns raised by Example 2?

No. They could not do so because what is required is a Competitor Supply/Acquisition Cartel Exception, not merely guidelines.

The lack of a Competitor Supply/Acquisition Cartel Exception is unsatisfactory. The consequences are as indicated for Example 1.

Example 3 – quality restriction

1. A and B compete in the market for building cladding products. A supplies “SafeClad” cladding materials. A has a registered trademark for SafeClad materials. B is contracted to distribute SafeClad cladding materials in Australia. The contract licenses the use of the trademark SafeClad by B. One condition is that B will not use the SafeClad trademark on any cladding materials unless the materials have been tested by an independent testing lab and have passed the exacting “X-FLAM” anti-flammatory safety standard specifications specified by A in the licensing agreement (the “Anti-Flammatory Provision”).
2. An IP licensing condition of this kind is hardly uncommon and will rarely be anti-competitive. Such a provision is intended to ensure that the IP owner’s brand reputation is not damaged by the use of a defective or unsafe product.⁹
3. The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: one substantial purpose of the Anti-Flammatory Provision is to restrict or limit the supply of goods bearing the SafeClad mark in Australia. The

⁹ TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 25.

competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of building cladding products.

4. The s 51(3) exception would have applied in this example: see s 51(3)(c).
5. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).
6. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.
7. The Anti-Flammatory Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover an IP licensing restriction such as the Anti-Flammatory Provision.
8. There is the limited and bureaucratic possible solution of authorisation: see [8] in Example 1.

Do the ACCC Guidelines resolve the concerns raised by Example 3?

No. They could not do so because what is required is a Competitor Supply/Acquisition Cartel Exception, not merely guidelines.

The ACCC Guidelines attempt to explain the concerns away by contending that there is no cartel provision in such a situation but the reason given is unpersuasive.

The ACCC contends (at p 8):

“... the ACCC does not consider that the provision satisfies the purpose condition. In other words, it does not appear to be a substantial purpose of Firms A and B to restrict or limit the supply of building cladding materials.

Instead, the purpose of the possible cartel provision appears to be placing quality requirements on the production of cladding material bearing the SafeClad trademark in order to assure the safety of the materials and maintain the goodwill associated with the SafeClad trademark.”

This contention is unpersuasive: The *ultimate* purpose of the Anti-Flammatory Provision is to ensure that the IP owner's brand reputation is not damaged by the use of a defective or unsafe product. The *immediate* purpose is to restrict the supply of cladding materials bearing the Safe-Clad trademark unless the cladding materials comply with the Anti-Flammatory condition. Both the ultimate purpose and the immediate purpose are each a *substantial* purpose within the meaning of s 4F(1) of the CCA. The test under s 4F(1) is one of substantial

purpose, not dominant purpose. Accordingly, the immediate purpose stipulated above is a sufficient “purpose” under the definition of a cartel provision in s 45D(3(a)(iii) of the CCA.

The wording in [2] in Example 3 can be revised to make this pellucidly clear:

“An IP licensing condition of this kind is hardly uncommon and will rarely be anti-competitive. Such a provision has two weighty purposes: (a) to restrict the supply of cladding materials bearing the Safe-Clad trademark unless the cladding materials comply with the Anti-Flammatory condition; and (b) to ensure that the IP owner’s brand reputation is not damaged by the use of a defective or unsafe product.”

A secondary point is that the ACCC Guidelines suggest that the definition of a cartel provision in s 45D(3(a)(iii) is more limited in scope than it is. The Guidelines suggest that a substantial purpose “of Firm A and Firm B” must be “to restrict or limit the supply of building cladding materials”. Not so:

- Firm A and Firm B need not necessarily have a shared substantial purpose. If Firm A sought and caused the inclusion of the Anti-Flammatory Provision in the trademark licensing agreement (as is almost certain), then Firm A’s intention will be the purpose of the Anti-Flammatory Provision. If Firm B has a different intention, that won’t matter (*Seven Network Ltd v News Ltd* (2009) 262 ALR 160, [859]–[887] (Dowsett and Lander JJ)).
- Under s 45D(3(a)(iii) it is sufficient that the substantial purpose was to restrict the supply of cladding materials bearing the Safe-Clad trademark unless the cladding materials comply with the Anti-Flammatory condition: the purpose need not be to restrict the supply of cladding materials in the market generally.

Example 4 – removal of blocking patent restriction

1. A and B compete in the market for smartphone chip technology in Australia. Each holds a patent that blocks the other from using market-leading smartphone chip technology in their smartphones. A licenses its blocking patent to B and B licenses its blocking patent to A. The licences are non-exclusive. They are unrestricted except that the parties agree not to commence litigation for infringement of each other’s blocking patent (“Non-Litigation Provision”) during the term of the reciprocal licensing agreement. A and B wish to avoid any further distraction and cost from continuing to litigate their respective patent claims.

2. IP licensing conditions imposed in settlement of IP disputes may be anti-competitive but often are pro-competitive.¹⁰ The Non-Litigation Provision here is efficient and not a “naked” anti-competitive restraint.¹¹
3. However, the cross-licensing agreement in this example contain a cartel provision. The purpose condition under s 45D(3)(a)(iii) applies: one substantial purpose of the Non-Litigation Provision is to restrict the supply of smartphone chip technology by A and B by constraining A and B from fully exploiting their respective patent rights. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of smartphone chip technology in Australia.
4. The s 51(3) exception seems unlikely to have applied in this example: the non-litigation provision may not “relate to” the underlying patents in the sense required by the subsection. The view has been expressed that:¹²
 - a. Conditions prohibiting a licensee from challenging the owner’s intellectual property rights do not relate to the subject matter of the licence. Furthermore, they give an owner a collateral advantage by entrenching the owner’s statutory rights by contract.
5. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).
6. There is no joint venture between A and B hence the joint venture exceptions under s 45AO and s 45AP will not apply.
7. The Non-Litigation Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover an IP licensing restriction such as a no-challenge provision.
8. There is the limited and bureaucratic possible solution of authorisation: see [8] in Example 1.

Do the ACCC Guidelines resolve the concerns raised by Example 4?

No. They could not do so because what is required is a Competitor Supply/Acquisition Cartel Exception, not merely guidelines.

¹⁰ See further H Hovenkamp, M Janis & M Lemley, ‘Anticompetitive Settlement of Intellectual Property Disputes’ (2003) 87 *Minnesota Law Review* 1719.

¹¹ See further TK Cheng, ‘Antitrust Treatment of the No Challenge Clause’ (2016) 5 *Journal of Intellectual Property & Entertainment Law* 437.

¹² TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 27.

The lack of a Competitor Supply/Acquisition Cartel Exception is unsatisfactory. The consequences are as indicated for Example 1.

Example 5 –grant-back restriction

1. A and B compete in a market for the development of certain kinds of cancer-removal technology. A has a killer patent for a leukaemia-related technology and licenses the technology to B on condition that B grant a non-exclusive licence back to A of further leukaemia-related discoveries by B (“Grant-Back Provision”).
2. A non-exclusive licence of this type is pro-competitive absent unusual circumstances.¹³
3. The licensing agreement in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii)) applies: one substantial purpose of the Grant-Back Provision is to restrict B’s choice of to whom it will supply the service of a patent licence to use a further discovery. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of patent-licences for leukaemia-related technology.
4. The s 51(3) exception would not have applied in this example. The Grant-Back Provision relates to future discoveries. It does not relate to the patent that A licenses to B.¹⁴
5. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47.
6. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.
7. The Grant-Back Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception unless the further discovery was “substitutable for, or otherwise competitive with” the IP license; the further discovery may not necessarily meet that requirement. The drafting of Exposure Draft Bill s 44ZZRS does not adequately cover an IP licensing grant-back provision in all situations where such a provision is unlikely to be anti-competitive.
8. There is the limited and bureaucratic possible solution of authorisation: see [8] in Example 1.

¹³ See American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015) 136-142.

¹⁴ TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 27.

Do the ACCC Guidelines resolve the concerns raised by Example 5?

No. They could not do so because what is required is a Competitor Supply/Acquisition Cartel Exception, not merely guidelines.

The lack of a Competitor Supply/Acquisition Cartel Exception is unsatisfactory. The consequences are as indicated for Example 1.

Example 6—anti-cloning restriction

1. Apple and Microsoft entered into a cross-licensing agreement. The agreement covered technical and design patents and also sought to prevent verbatim copying of products by means of an anti-copying provision (“Anti-Cloning Provision”).¹⁵
2. IP licensing conditions of this kind seem a normal incident of industrial self-protection. They are hardly a “naked” restraint that warrants per se liability.
3. In Australia, the Anti-Cloning Provision is a cartel provision. The purpose condition under s 45D(3(a)(iii)) applies: a substantial purpose of the Anti-Cloning Provision is to prevent the parties from supplying copies of each other’s technology. The competition condition under s 45D(4) applies: the parties are competitors in the relevant market/s for the kinds of computer technology affected by the cross-licensing agreement.
4. The s 51(3) exception probably would not have applied in this example: the Anti-Cloning Provision does not appear to “relate to” the underlying patents in the sense required by the subsection.
5. The exclusive dealing exception under s 45AR will not apply. The condition imposed by the parties is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).
6. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.
7. The Anti-Cloning Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover an IP licensing restriction of this kind.
8. There is the limited and bureaucratic possible solution of authorisation: see [8] in Example 1.

¹⁵ ‘Apple and Microsoft cross-license deal includes “anti-cloning” protections going back to 1997’ The Verge, Aug 13, 2012, 279, at: <https://www.theverge.com/2012/8/13/3239977/apple-and-microsoft-cross-license-agreement-includes-anti-cloning>.

Do the ACCC Guidelines resolve the concerns raised by Example 6?

No. They could not do so because what is required is a Competitor Supply/Acquisition Cartel Exception, not merely guidelines.

The lack of a Competitor Supply/Acquisition Cartel Exception is unsatisfactory. The consequences are as indicated for Example 1.

B. Policy and best practice

Policy

The key policy considerations basically are:

- (a) Per se liability for cartel conduct, criminal or civil, should be defined in such a way as to catch only conduct that, in the vast majority of instances, is clearly and substantially anti-competitive.
- (b) Supply/acquisition agreements between competitors are endemic in commerce and generally are pro-competitive or harmless.
- (c) Supply/acquisition agreements between competitors should be excluded from per se liability for cartel conduct unless they are likely to be clearly and substantially anti-competitive.
- (d) Supply/acquisition agreements between competitors are likely to be clearly and substantially anti-competitive where the prime purpose of an agreement is not to increase output or enhance efficiency but to lessen competition between the parties.

Best practice to date

Best practice to date is now found in the US, the EU and New Zealand. Contrast the Competitor Supply/Acquisition Cartel Exception proposed in Exposure Draft Bill s 44ZZRS, which, as discussed below, is seriously flawed.

US and EU

There is no specific Competitor Supply/Acquisition Cartel Exception in the US or the EU.

However, much the same effect is achieved in the US by limiting per se liability for cartel conduct under s 1 of the Sherman Act to “naked restraints” on competition. Supply/acquisition agreements between competitors typically are subject to rule of reason analysis. See further ABA, *Antitrust Law Developments (Eighth)* Vol 1, 52-85.

Similarly, in the EU, per se liability for cartel conduct under Article 101 of the EU Treaty is limited to so called “hard core” cartel conduct. Supply/acquisition agreements between

competitors are subject to the ancillary restraints doctrine that applies under Article 101(1) and the efficiency defence under Article 101(3). See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) [3.235- 3.269], [3.455-3.506].

The approach adopted in the US and the EU largely avoids the overreach of per se liability for cartel conduct but is not readily adaptable for use in Australia. The US and EU approaches rely heavily on case by case application of high-level legislative provisions. By contrast, the CCA takes the very different approach of prescribing the law in considerable detail. The cartel prohibitions are broadly defined but are not read down by the courts so as to limit their application to cases of clear anti-competitive harm. Exemption from per se liability for cartel conduct depends instead on a large of number of specific exemptions (eg for joint ventures, exclusive dealing, acquisition of assets). At present under the CCA there is no Competitor Supply/Acquisition Cartel Exception.

New Zealand⁶

There is an exemption for “vertical supply contracts” under the *Commerce Act 1986* (NZ). Section 32 provides:

32 Exemption for vertical supply contracts

- (1) Nothing in section 30 applies to a person who enters into a contract that contains a cartel provision, or who gives effect in relation to a cartel provision in a contract, if—
 - (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and
 - (b) the cartel provision—
 - (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and
 - (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.

The NZ vertical supply contract exemption is subject to the requirement that the cartel provision in issue “not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.” The NZ safeguard is consistent with the policy need to guard against the use of supply/acquisitions in attempts to evade the law against cartel conduct but could be improved by making the dominant purpose referable to the purpose of the accused or defendant.

¹⁶ See also PNG, *Consumer and Competition Framework Review: Final Report and Recommendations* (May 2017) Recommendations 79, 99, 102, available at: https://3c2356ed-c2cc-48e8-bcc4-9e08d49eaa13.filesusr.com/ugd/43809e_43ccc327d7224b1b9a407de0d95f6e74.pdf.

The vertical supply exception under s 32 of the *Commerce Act* would probably apply to many IP licensing restrictions, including those of the kind set out in Examples 1 – 6 in Part VI below. The wording “relates to” in s 32 is unlikely to be interpreted restrictively; it appears to require no more than a relationship between the IP restriction and the supply or likely supply of the relevant goods.¹⁷ If so, each of the IP restrictions in Examples 1 – 6 “relates to the supply or likely supply of the goods or services to the customer or likely customer” and would come within s 32. Straightforward legislative clarification would make this crystal clear.

Australian proposals in Harper Report and Exposure Draft Bill

The Model Legislative Provisions appended to the Harper Report included an exemption for restrictions on supply or acquisition by competitors (s 45J). The Exposure Draft Bill in October 2016 included a similar exemption; the following section would replace the then s 44ZZRS (“**Exposure Draft s 44ZZRS**”):

44ZZRS Restrictions on supplies and acquisitions

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision to the extent that the cartel provision:
 - (a) imposes, on a party to the contract, arrangement or understanding (the acquirer) acquiring goods or services from another party to the contract, arrangement or understanding, an obligation that relates to:
 - (i) the acquisition by the acquirer of the goods or services;
 - (ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or
 - (iii) the supply by the acquirer of the goods or services or of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or
 - (b) imposes, on a party to the contract, arrangement or understanding (the supplier) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to:
 - (i) the supply by the supplier of the goods or services; or
 - (ii) the supply by the supplier, to any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services.

¹⁷ Contrast CCA former s 51(3), which required a relationship between the IP condition and the relevant IP right.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the Criminal Code and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.
- (3) This section does not affect the operation of section 45 or 47.

One concern expressed about the Exposure Draft s 44ZZRS exemption was that it would not cover some vertical restrictions that would be exempt under the exclusive dealing exemption in the current law.¹⁸ However, that concern could be met by deleting the words after “goods or services” in the phrase “goods or services that are substitutable for, or otherwise competitive with”.¹⁹ Another concern was that the Exposure Draft s 44ZZRS exemption would not cover situations where an obligation is imposed on a supplier that relates to the acquisition by the supplier, from any person, of goods or services.²⁰ That concern could be met by amending the provision to cover that situation.

More importantly, the Exposure Draft s 44ZZRS exception was not drafted with IP licensing restrictions in mind and is seriously flawed in that respect. Thus, Exposure Draft s 44ZZRS does not cover many kinds of IP licensing restrictions on a competitor that are pro-competitive or innocuous. See Examples 2 – 6 above.

Another flaw is that Exposure Draft s 44ZZRS, unlike s 32 of the *Commerce Act 1986* (NZ), does not include a requirement that cartel provision in issue “not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.” As discussed above, one key policy principle is that supply/acquisition agreements between competitors are likely to be clearly and substantially anti-competitive where the prime purpose of an agreement is not to increase output or enhance efficiency but to lessen competition between the parties.

By contrast, the joint venture exemptions under s 45AO and s 45AP of the CCA require that “the joint venture is not carried on for the purpose of substantially lessening competition”. That approach is unsatisfactory:²¹

This requirement in s 45AO and s 45AP does not follow US law or NZ law, which exclude exemption where the dominant purpose of the party relying on the exemption is to lessen competition between any 2 or more parties.²² Incorporating a SLC test in

¹⁸ Law Council of Australia, Competition & Consumer Committee Business Law Section, Submission on Competition Law Amendments: Exposure Draft Consultation, 28 Oct 2016, 10-11.

¹⁹ *Id.*, at 11.

²⁰ *Ibid.*

²¹ See B Fisse, ‘Australian Cartel Law: Biopsies’ (2018) 25-26, at:

²¹ https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf

²² *Commerce Act 1986* (NZ) s 31(2)(b)); *Timken Roller Bearing Co v United States*, 341 US 593, 597–8 (1951). See further Beaton-Wells & Fisse, *Australian Cartel Regulation*, 8.4.3.2.

an exemption to per se prohibitions, albeit a purpose test, is highly questionable. Apart from the complexity of market definition and the SLC test, there may be cases where a sham joint venture is used in order to eliminate competition between two competitors but no further and not to the extent of substantially lessening competition in a market.

C. Getting Out of the Bog

- Implementation of the Harper Report has been botched.²³ Under Recommendation 27 of that Report, repeal of s 51(3) of the CCA was to be accompanied by a Competitor Supply/Acquisition Cartel Exception that excepts procompetitive supply and acquisition contracts between competitors including IP licences. Surprisingly, s 51(3) has been repealed without introducing a Competitor Supply/Acquisition Cartel Exception.
- The ACCC Guidelines on the repeal of s 51(3) could not and do not resolve the lack of a Competitor Supply/Acquisition Cartel Exception. An exception to the cartel prohibitions is required, not mere guidelines.
- Supply/acquisition agreements between competitors generally are excluded from per se cartel liability in the US and the EU. However, US and EU competition laws are principles-based and cannot simply be pasted into the CCA, which is much more prescriptive and detailed.
- Consideration should be given to following the model provided by s 32 of the *Commerce Act 1986* (NZ), subject to minor possible refinements.
- The s 32 model relates generally to procompetitive supply agreements between competitors. It covers procompetitive IP licences between competitors but extends well beyond that particular context. The need for a Competitor Supply/Acquisition Cartel Exception arises in many non-IP situations. See Attachment 1, Example A.
- Section 32 of the *Commerce Act* avoids the serious flaws of Exposure Draft s 44ZZRS and its precursor in the Model Legislative Provisions attached to the Harper Report (s 45J). Exposure Draft s 44ZZRS and s 45J should not be followed.
- The importance of collaborative supply arrangements between competitors as part of the response to climate change and COVID-19 accentuates the need for a

²³ See Examples 1–6 above. For a similar view by a co-author of the Harper Report see: O'Bryan J, 'The repeal of s 51(3) of the Competition and Consumer Act 2010 (Cth)', at: <https://www.fedcourt.gov.au/digital-law-library/iudqes-speeches/iustice-obryan/obryan-i-20190410>.

Competitor Supply/Acquisition Cartel Exception. See Attachment 2, Example B (a COVID mutation of Example 1 above).

ATTACHMENT 1

Non-IP supply/acquisition agreements between competitors are an everyday part of modern commerce. They include input supply agreements, interconnection agreements, facilities access agreements, outsourcing agreements and digital platform agreements. Such agreements with competitors often contain cartel provisions as broadly defined by s 45AD of the CCA. As the law stands, the parties may easily be exposed to criminal and civil liability under the cartel prohibitions unless the cartel provision is covered by an exception (eg joint venture exceptions, exclusive dealing exception, authorisation). The only exception available will often be authorisation. Authorisation is costly and bureaucratic and is not an efficient practical solution.

There are many examples where pro-competitive supply or acquisition agreements between competitors will be caught by the CCA cartel prohibitions unless they are authorised. Take for instance Example A below.

Example A.

Assume that XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market. Neither XCO nor YCO are prevented from deciding to acquire Product D or Product E from alternative sources at any time.

Each reciprocal supply provision is a cartel provision, as defined by ss 45AD(3)(a)(iii) and (4). XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) (s 45AD(3)(a)(iii)). It is irrelevant that the purpose is conditional: the purpose required to satisfy the purpose condition under s 45AD(3) may be conditional or unconditional. Nor can it be maintained that the 'real' or 'ultimate' purpose of each reciprocal supply provision is not a s 45AD(3) purpose but a purpose to 'act in the best interests of the market' or to 'improve competition': if the substantial purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 45AD(3)(a), it is irrelevant whether or not D believes that the restriction is in the best interests of the market or a way of improving competition.

Further examples are discussed in C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 8.6.

ATTACHMENT 2

Example B.

A and B manufacture ventilators. A is based in California, B in Geelong. A plans to establish a manufacturing base in Australia unless it can obtain sufficient revenue by licensing its patented technology to a manufacturer that already has a manufacturing plant in Australia. A licenses its patented technology to B on terms that satisfy A's commercial strategy. A condition of the licensing agreement is that B will not export ventilators that it manufactures using A's patents unless A consents in writing in advance (the "Non-Export Provision").

- An IP licensing condition of this kind is not unusual and will not necessarily be anticompetitive.
- The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii)) applies: the Non-Export Provision has the substantial purpose of restricting or limiting the supply of goods made by the use of A's patents in a market in Australia.
- The competition condition under s 45D(4) applies: but for the patent licensing agreement with B, A is a likely competitor of B in Australia in relation to the supply of ventilators.
- The former s 51(3) exception is likely to have applied in this example. A territorial restriction of this kind probably "relates to" A's patents within the meaning of the subsection.
- The exclusive dealing exception under s 45AR would not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).
- There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.
- There is the limited and bureaucratic possibility of authorisation. The test for authorisation in relation to cartel prohibitions is whether the public detriment of the cartel provision is sufficient to outweigh any public detriment. It is insufficient to show that the cartel provision does not have the purpose, effect or likely effect of substantially lessening competition in a market.
- Authorisation would be unnecessary if, as recommended in the Harper Report (Recommendation 27), the cartel prohibitions were subject to an exception for supply/acquisition agreements between competitors.