

A painting of a mountain landscape. The mountains are rendered in shades of brown, tan, and grey, with a prominent white snow patch on the central slope. In the foreground, a green tree stands on the left, and a blue river flows through a green valley. The sky is a pale, hazy blue.

**CARTEL EXCEPTIONS:
JOINT VENTURES
RELATED CORPORATIONS
EXCLUSIVE DEALING
ACQUISITION OF SHARES OR ASSETS**

**Competition Law Conference
Sydney, 23 May 2026**

Part IV, Division 1, Subdivision D, Sections 45AN, 45AO, 45AP, 45AR, 45AT

- Coordination of market conduct by Big Tech and other competitors widespread in the modern economy – impels re-examination of cartel exceptions
- Four cartel exceptions are re-examined here:
 - joint ventures (ss 45AO, 45AP)
 - related corporations (s 45AN)
 - exclusive dealing (s 45AR)
 - acquisition shares/assets (s 45AT)
- Other exceptions and escape routes include:
 - authorisation & other exceptions under Act ([1.80])
 - mergers
 - facilitating practices (eg price-matching)
 - interlocking directorates, common ownership
 - ‘acquihire’
 - algorithmic and AI agentic market coordination
 - evasive corporate structuring

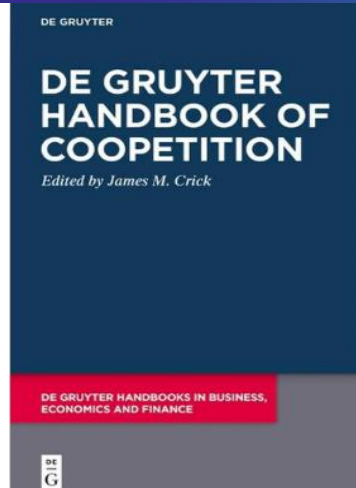
Four cartel exceptions – Rationale, Functionality, Repair

- Rationale/function
 - main function is to avoid per se liability in some situations likely to be pro-competitive, efficient, or innocuous
 - avoidance of overlap is a minor function of s 45AR, s 45AT
- Functionality/limitations
 - underreach
 - overreach
 - uncertainty
 - impracticality
- Repair
 - not within power of courts to cure limitations identified – [1.130]
 - legislative proposals [1.150]

Cartel exceptions warrant legislative care, attention, repair and maintenance

- Cartel exceptions are important escape routes from broad strict cartel prohibitions where conduct is pro-competitive or not harmful:
 - cartel prohibitions defined broadly
 - strict - not subject to a test of substantial lessening of competition, carve out of ancillary restraints, or US-style rule of reason
- The limitations from which the cartel exceptions now suffer largely result from legislative neglect or piecemeal change
- Competitor collaborations essential for managing pandemics, climate change, impacts of wars and other crises
- Competitor collaborations pervade modern commerce
 - digital platforms and digital 'ecosystems'
 - Big Tech alliances including by all major AI corporations
 - cooperative procurement by governments
- Ill-designed cartel exceptions can have bad effects, even after the exceptions have been amended
 - provisions in commercial contracts assumed to be protected by a cartel exception may not be
 - bungled ANZ cartel prosecution withdrawn in 2022 was based partly on former contract requirement for joint venture exception despite repeal of that requirement in 2017

ACCC authorises fuel majors to coordinate to ensure fuel supplies, with conditions



Cooperative Procurement

The Department of Finance is updating all guidance materials to reflect changes made to the Commonwealth Procurement Rules that take effect on 17 November 2025. Current guidance may not yet include these updates.

CDPP withdraws charges in bank criminal cartel case

Joint venture exceptions – ss 45AO, 45AP

- Section 45AP provides:
 - (1) Sections 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the defendant proves that:
 - (a) the cartel provision is:
 - (i) for the purposes of a joint venture; and
 - (ii) reasonably necessary for undertaking the joint venture; and
 - (b) the joint venture is for any one or more of the following:
 - (i) production of goods;
 - (ii) supply of goods or services;
 - (iii) acquisition of goods or services; and
 - (c) the joint venture is not carried on for the purpose of substantially lessening competition; and
 - (d) in a case where subparagraph 4J(a)(i) applies to the joint venture--the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and
 - (e) in a case where subparagraph 4J(a)(ii) applies to the joint venture--the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; of that body corporate.
- Rationale of the joint venture exceptions – [1.190]
- Elements of the joint venture exceptions – [1.200]–[1.230]
- *ACCC v Cascade Coal Pty Ltd* – [1.240]
- Joint venture v collaborative venture – [1.250]
- No-SLC purpose test v no-dominant purpose to reduce competition – [1.260]



Joint venture exceptions – ‘joint venture’ v ‘collaborative venture’ – [1.250]

- Core concept of ‘joint venture’ remains elusive
 - *ACCC v Cascade Coal Pty Ltd* interpreted joint venture broadly without defining boundary between contract and joint venture
- Concept that applies in US, EU, NZ and Canada is broader concept of a collaborative venture
 - joint ventures are treated as one among many kinds of competitor collaborations
 - ‘joint venture’ lacks precise meaning or antitrust consequence – *Areeda and Hovenkamp*, ¶1478a
- A collaborative venture requires collaboration but not necessarily ‘joint’ action
 - typical examples include consortia, partnerships, strategic alliances, syndicated lending arrangements, lender workout arrangements for insolvent borrowers, technology teaming agreements, innovation networks, and franchises

Joint venture exceptions – collaborative venture or activity exception – [1.250]

- Replace concept of a joint venture in ss 45AO and 45AP with concept of a collaborative venture or activity
 - eg Commerce Act 1986 (NZ) s 31(4):

In this Act, collaborative activity means an enterprise, venture, or other activity, in trade, that—

(a) is carried on in co-operation by 2 or more persons; and

(b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties
- Advantages
 - joint venture is merely one among many types of commercial collaboration
 - would avoid elusive concept of ‘joint venture’
- Application/scope
 - ‘collaborative venture’?
 - need for authorisation?
 - JV ultra-lights?

Commerce Commission alleges cartel activity involving significant players in Chr...

The Commerce Commission has today begun civil proceedings alleging cartel conduct in the Christchurch real estate market.

ACCC v NAB (2000) (interchange fee case)
The ACCC alleged that the bank had engaged in pricefixing as a result of an agreement with various financial institutions about the level of interchange fees. The ACCC alleged that the agreement had the effect or likely effect of controlling or maintaining the level of merchant service fees that these financial institutions charge to their merchant customers in exchange for supplying credit card transaction facilities. The proceedings were discontinued without any finding by the court after the Reserve Bank designated the credit card schemes. The ACCC was confident that its theory of the case was consistent with s 45A. A similar theory of the case was adopted by the NZ Commerce Commission in enforcement proceedings against credit card companies and banks.

12.4.4 JV Ultra-Lights

As the law stands, a JV Ultra-Light can be used to avoid liability for breach of the cartel prohibitions under Div 1. As discussed in Chapter 8,¹⁶⁰ a JV Ultra-Light is a joint venture created on a contractual basis for the dominant purpose of getting around the per se prohibitions against cartel conduct by means of a joint venture activity sufficient to come within the joint venture exceptions under ss 44ZZRO and 44ZZRP.

Joint venture exceptions – no-SLC purpose test v no-dominant purpose to reduce competition – [1.260]

- JV exceptions require D to prove joint venture not be carried on ‘for the purpose of substantially lessening competition’
 - does not follow US law or NZ law, which limit the exemption of collaborative activity from cartel liability from cartel liability where the dominant purpose of the collaborative activity is to lessen competition between any 2 or more parties to the activity
- No-SLC purpose test much complicates application of joint venture exceptions:
 - market definition
 - test in s 45AO unrealistic for jury trial
- No-SLC purpose test in the joint venture exceptions is too lax:
 - A sham joint venture may be used for the dominant purpose of lessening competition between two competitors but not for the purpose of substantially lessening competition in a market. For example, where there are many competitors in the market with similar market shares and degree of market power, and a cartel provision in the joint venture agreement affects only two of those competitors, D may be able to prove the purpose of the cartel provision was not to substantially lessen competition in the market.

Applying *Timken*

What is the dominant purpose of the venturers?
Most litigated joint venture cases involve cartel activity presented in the guise of a joint venture⁵. Typically, actual or potential competitors agree to allocate markets and/or customers, engage in price fixing, or indulge in other blatantly anticompetitive conduct. Their dominant purpose is to restrain trade. They attempt to conceal this purpose by structuring their agreement as a joint venture. In these cases the focus is on determining the intent of the venturers. If their intent is deemed to be primarily anti-competitive, no analysis of the alleged efficiencies created by the venture occurs.



Joint venture exceptions – no-dominant purpose to reduce competition between parties test – [1.260]

- Proposal

- Replace no-SLC purpose test in s 45AO(c) and s 45AP (1)(c) with requirement that a party seeking to rely on a collaborative activity exception prove that the dominant purpose of the collaborative activity was not to lessen competition between any parties to the activity
- Dominant purpose relates to collaborative activity, not cartel provision/s
- Objective dominant purpose test, as for legal professional privilege – *Medibank Private Limited v McClure* [2026] FCAFC 38, [23]-[26]

- Application/scope

- Lessen competition between any parties to the activity is the test, not no-SLC purpose test
- Efficiencies relevant but not a necessary condition
- Intention of individuals representing D relevant but not determinative – *Medibank Private Limited v McClure* [2026] FCAFC 38, [25]

Medibank Private Limited v McClure [2026] FCAFC 38

24 → These propositions have been developed and applied in many later authorities. While it has been observed that the ascertainment of the relevant purpose or purposes involves the application of a so-called “subjective” test, intention and purpose can be, and often are, ascertained from the objective circumstances, and direct evidence from the person claiming privilege may be rejected based on objective circumstances and the fact that a document may be objectively incapable of carrying out the proposed purpose. Ultimately, the question of purpose must be determined objectively, having regard to the evidence, the nature of the document in question and the parties’ submissions: *Diawara v National Australia Bank Ltd* [2023] FCA 1048 (at [10] per Abraham J). ¶

25 → Consistent with this principled approach is the particularly helpful decision of Finn J in *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357. His Honour emphasised the purpose of a corporation in procuring a document must be determined by reference to the totality of the evidence, including objective features and contemporaneous documents, and one must be careful not to reason as though the assertions of lawyers or officers are dispositive. The importance of that proposition is acute in a case of the present kind. Medibank is a large publicly listed corporation responding to a crisis across multiple fronts. A court determining the corporation’s purpose in creating documents within that response cannot proceed as though the statements of one or two senior actors exhaust the corporation’s institutional purpose. ¶

Related corporations exception – s 45AN

- Section 45AN provides:
 - (1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding if the only parties to the contract, arrangement or understanding are bodies corporate that are related to each other.
- Rationale of the related corporation exception – [1.300]
- Elements of the related corporation exception – [1.310]
- Case law – [1.340]
- Only parties to CAU must be related corporations – [1.350]
- Proposed legislative amendment – [1.350]



Related corporation exception – related corporations

- Related corporations – s 4A:

Bodies corporate are related to each other where the definitions under s 4A apply. Under s 4A, A and B are related corporations where the relationship between them is that of holding company and subsidiary. B and C are related corporations where B and C are subsidiaries of holding company A. B is a subsidiary of A and A is a holding company of B if:

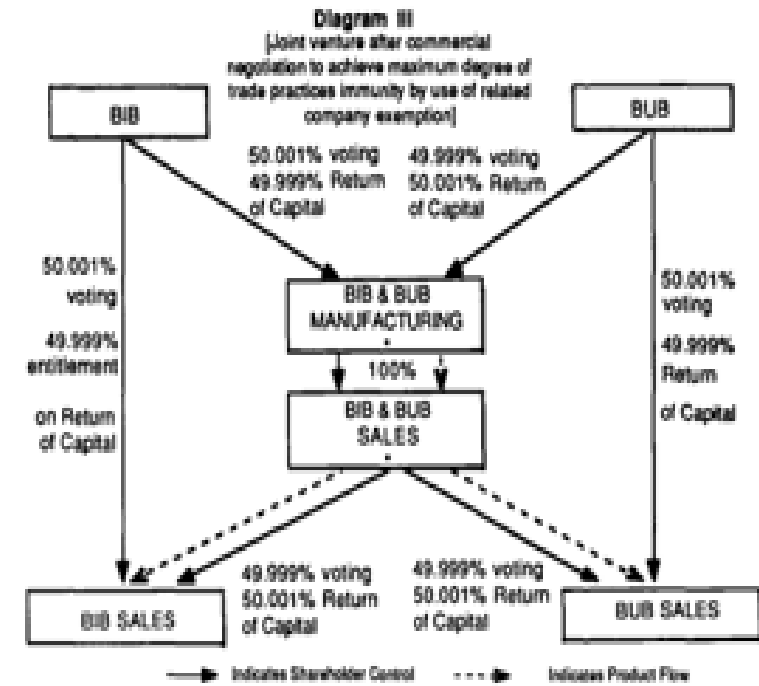
- → A controls the composition of the board of directors of B or ¶
- → A is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of B or ¶
- → A holds more than one-half of the allotted share capital of B (excluding capital that carries no right to participate beyond a specified amount in the distribution of either profits or capital) or ¶
- → B is a subsidiary of C and C is a subsidiary of A. ¶

- Definitive analysis of s 4A:

- W Pengilly, 'The Corporate Parent: Relevant Trade Practices Issues' (1988) 18 UWA LR 224

- Joint venture parties may be related corporations if venture is structured to attract s 4A

- related corporations exception not subject to restrictions of joint venture exceptions
- but commercial disadvantages of joint venture structure



[* Articles may contain provisions that matters of concern to the venturers are not to be undertaken by the company without consent of each shareholder]

NOTE: A similar result applies even if no separate sales company (Bib and Bub Sales) is set up. Bib and Bub Sales was established for purposes of illustrating a point in Diagram II and is carried through into the Diagram.

Related corporation exception – rule that only related corporations are parties to CAU – [1.350]

- Related corporation exception under s 45AN does not apply unless ‘the only parties’ to the contract, arrangement or understanding are related corporations
- Situations often arise where a party other than a related corporation is a party to a contract, arrangement or understanding between related corporations
 - a supplier may enter into a joint supply agreement with related corporations
 - eg corporate group procurement arrangements as in auto industry
- Agreements of those kinds often contain provisions that are cartel provisions as defined under s 45AD
 - related corporations may be likely competitors for the products supplied but for the joint supply agreement and price of the products is fixed or controlled by the supply agreement
- Related corporation exception does not apply in such cases because the supplier is not related to the related corporations entering into the CAU
- Related corporations in such cases are pursuing the common economic interest of their group and are not entering into a cartel agreement with a competitor outside the group – should be excepted from cartel liability

Agreements between related corporate bodies

Agreements solely between related corporate bodies will not fall within the cartel offences or civil prohibitions.

Related corporation exception – amendment – parties to CAU may include unrelated party that is not a competitor – [1.350]

- Proposal

- provide that sections 45AF, 45AG, 45AJ and 45AK do not apply to a CAU if the parties to CAU are:
 - (a) related bodies corporate; or
 - (b) related bodies corporate and another party that is not a competitor of any of those related bodies corporate if CAU is in furtherance of lawful interests of parties to CAU

- Application/scope

- complements proposed supply contract exception (as in situations where unrelated party to CAU is a competitor)
- would amendment proposed create a loophole?
- limit (b) by dominant purpose test parallel to that for collaborative venture exception?

Exclusive dealing exception – s 45AR

- Section 45AR provides:

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as giving effect to the cartel provision would, or would but for the operation of subsection 47(10) or section 88 or 93, constitute a contravention of section 47.

(2) Sections 45AG and 45AK do not apply in relation to the giving effect to a cartel provision by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or section 88 or 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorisation under section 88 is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7), conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

- Rationale of the exclusive dealing exception – [1.380]
- Elements of the exclusive dealing exceptions – [1.390]–[1.400]
- *Visy Paper Pty Ltd v ACCC* – [1.410]
- Removing the Visy trap – [1.420]
- Supply agreements between competitors – [1.430]–[1.440]



Exclusive dealing exception – Visy trap – [1.410]-[1.420]

- *Visy Paper Pty Ltd v ACCC* (2003) (HC) – exclusive dealing exception under s 45(6) did not apply:
 - two exclusionary provisions in an agreement restricting competition between Visy and a competitor
 - one of those exclusionary provisions was exclusive dealing conduct as defined in s 47
 - another exclusionary provision imposed a restriction on the acquisition of services by competitor – not an exclusive dealing condition
- ‘Visy trap’ – a supply agreement between competitors may be thought by the parties to be a routine exclusive dealing agreement but one of the exclusive dealing conditions turns out not be protected by s 45AR because the condition does not amount to exclusive dealing as defined by s 47
- Repeal s 47 (and s 45AR) – Harper Report (2015), Recommendation 33



Recommendation 33 – Exclusive dealing coverage

Section 47 of the CCA should be repealed and vertical restrictions (including third-line forcing) and associated refusals to supply addressed by sections 45 and 46 (as amended in accordance with Recommendation 30).

Exclusive dealing exception – supply agreements between competitors where cartel provision is not an exclusive dealing condition – [1.430]

- Exclusive dealing exception is limited to exclusive dealing and does not apply to many other types of vertical supply agreements between competitors that contain a cartel provision yet warrant exclusion from cartel liability, eg
 - a price-related provision in a supply agreement may control or be likely to control the competitor's price downstream ([1.450], Q 1)
- Gap accentuated in dual distribution arrangements by decision of High Court in *ACCC v Flight Centre Ltd* re status of principal and agent as competitors
- Supply agreements between competitors are increasingly essential in modern digital economy, including AI industry

Supply agreement exception – [1.440]

- Harper Report, Recommendation 27 (2015)

Recommendation 27 — Cartel conduct prohibition

The prohibitions against cartel conduct in Part IV, Division 1 of the CCA should be simplified and the following specific changes made:

- An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

- Commerce Act 1986 (NZ) s 32 – exemption for vertical supply contracts
- *Australian Cartel Regulation* (2011) 8.6
- LCA, submission to Treasury, Reform to ss 47 and 45AR of the *Competition and Consumer Act 2010* (Cth) (3 Sept 2021)
- Simon Snow, ‘Exclusive Dealing: Provisions in Need of Reconsideration?’ in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton, R Smith (eds), *Competition Law and Economics in Australia* (Routledge, 2025) Vol I, ch 18
- Why has Harper Recommendation 27 not been implemented?
 - no ‘burning platform’ in Treasury (see email by S 22, 3/9/2021, FOI disclosure)
 - ACCC opposition/resistance?
 - create loophole?
 - too difficult to draft the exception?
 - fallacies of delay (Bentham, *Handbook of Political Fallacies*, Part The Third)?

No ‘burning platform’

[FOI 3415 Document 3]

S 22

From: S 22
Sent: Friday, 3 September 2021 2:40 PM
To: Pearl, David; Jeremenko, Robert
Cc: S 22; S 47E(d)
Subject: RE: Reform to ss 47 and 45AR of the Competition and Consumer Act 2010 (Cth) [SEC=OFFICIAL]

OFFICIAL

Hi Robert & David

Just to provide some context, as this has arrived out-of-the-blue.

Section 47 of the CCA prohibits exclusive dealing e.g. the biggest widget maker threatening not to supply downstream businesses unless they source all their widgets from it. However, following the 2017 Harper competition amendments, everything prohibited by section 47 is also prohibited by section 45, which prohibits anti-competitive arrangements.

While it sounds like section 47 should just be repealed, naturally there are complications. In particular, the cartels provisions exclude (via s45AR) conduct that falls with section 47. So you would need to replace this exclusion with a new one (usually called a ‘vertical supply exemption’). This is where it gets difficult – the ACCC prefers a narrower exclusion (or not one at all) to the Law Council.

There is no burning platform here. There was a bit of disquiet about this issue a couple of years ago when the IP exemption to the CCA was repealed. Basically, film and media companies wrongly thought their contractual arrangements with overseas movie suppliers would be cartels without an IP or a vertical supply exemption. However this has died down.

Assuming we could figure out a new vertical supply exemption and deal with a couple of other issues, it would be useful to address section 47 when we next get to do a general CCA amendments bill (whenever that is).

S 22

2021 09 03 - S -
Reform to ss ...

Supply agreement exception – [1.440]

- Commerce Act 1986 (NZ) s 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.
- Section 32(1)(b)(i) too restrictive:
 - exception does not cover situations where competitor A supplies input X to competitor B and the cost of input X is likely to control the minimum price of output Y that B will need to charge when B supplies Y downstream
 - s 32(1)(b)(i) should provide: 'is a term or condition of the contract referred to in subsection (a)'
- Section 32(1)(b)(ii) retains unduly narrow 'purpose of a provision' concept:
 - improve safeguard by making the dominant purpose referable to the purpose of the contract, not the 'purpose of the provision' – parallel s 31(4) (dominant purpose of collaborative activity)
- Burdens of proof?
 - require any person seeking to rely on the exception to prove that the requisite elements were present, including the element that the dominant purpose was not to lessen competition between parties to the contract; see [1.230], [1.260] (burdens of proof for joint venture exceptions)
- Why limit to contract? Extend to CAU?

Acquisition of shares or assets exception – s 45AT(1)

- Section 45AT(1) provides:

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of:

- (a) any shares in the capital of a body corporate; or
- (b) any assets of a person.

Note also s 45AT(3):

(3) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides for an acquisition, if the acquisition is a notified acquisition.

- Rationale of the acquisition of shares or assets exception – [1.480]
- Elements of the acquisition of shares or assets exception – [1.490]–[1.510]
- *Norcast S.ár.L v Bradken Ltd (No 2)* (2013) – [1.520]
- *SA Brewing Holdings Ltd v Baxt* (1989) – [1.530]
- Exception applies where cartel provision not reasonably necessary for acquisition – [1.540]
- Exception does not apply where cartel provision is reasonably necessary but does not ‘provide for’ acquisition – [1.550]
- Exception invites manipulation and avoidance of cartel liability – [1.560]
- Proposed legislative amendment – [1.570]–[1.580]



Acquisition of shares or assets exception – applies even if cartel provision not reasonably necessary for acquisition – [1.540]

- A cartel provision may ‘provide for’ an acquisition of shares or assets where the provision is not reasonably necessary for the acquisition
 - too lax an escape route from cartel liability
 - s 1 of Sherman Act has been taken to require that restrictions imposed in a merger agreement be reasonably necessary and least restrictive available to preserve the assets
- Laxity of s 45AT not rectified by the goodwill protection power under s 51ABZG
 - under s 51ABZG, ACCC has the power to declare that the goodwill exemption under s 51(2)(e) does not apply to a restraint clause in a business or share sale agreement, where satisfied that the clause is not necessary to protect the buyer’s interest in the goodwill of the target business
 - however, s 51ABZG power applies to the goodwill exemption under s 51(2)(e) – does not apply to s 45AT exception

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JUSTICE DEPARTMENT SETTLES LAWSUIT AGAINST COMPUTER ASSOCIATES FOR ILLEGAL PRE-MERGER COORDINATION

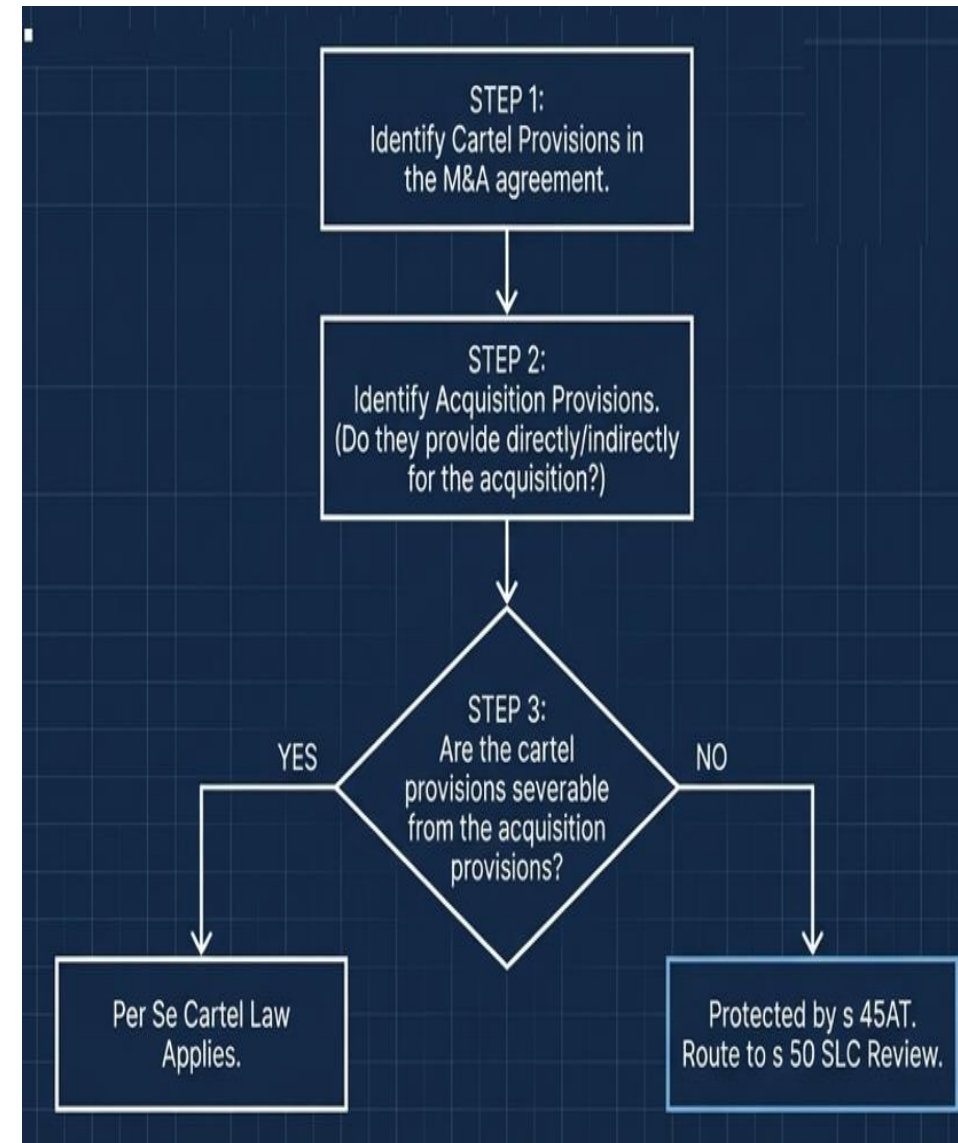
Department Obtains Injunction and \$638,000 in Civil Penalties

WASHINGTON, D.C. -- The Department of Justice today filed a proposed settlement with Computer Associates International Inc. and Platinum *technology* International *inc.* for violating pre-merger waiting period requirements and agreeing to restrict Platinum's ability to offer discounts to customers during the merger waiting period. As part of the settlement, Computer Associates will pay \$638,000 in civil penalties, and will be prevented from agreeing on prices, approving or rejecting proposed customer contracts, and exchanging prospective bid information with all future merger partners.

After Computer Associates and Platinum announced their proposed merger in March 1999, the parties agreed that Platinum would limit the price discounts and other terms it offered its customers during the mandatory pre-merger waiting period. The Department said that the conduct, commonly known as "gun jumping," violated the Hart-Scott-Rodino (HSR) Act of 1976, as well as Section 1 of the Sherman Act.

Acquisition of shares or assets exception – manipulation and avoidance of cartel liability – [1.500]

- Section 45AT invites manipulation and avoidance of cartel liability
- Wording ‘in so far as’ in s 45AT(1) implies a three-step analysis:
 - 1 identify the cartel provisions in the contract, arrangement or understanding;
 - 2 identify the provisions that provide directly or indirectly for the acquisition of shares or assets; and
 - 3 determine whether the cartel provisions in 1 are severable from the provisions in 2
- If any provision identified as a cartel provision in step 1 is a provision that provide directly or indirectly for the acquisition of shares or assets
 - the s 45AT(1) exception will apply *unless*
 - that cartel provision is unseverable from the provisions that provide directly or indirectly for the acquisition of shares or assets in step 2
- Where cartel provisions in 1 are unseverable from the provisions in step 2, s 50 will apply to those cartel provisions, not the cartel prohibitions



Acquisition of shares or assets exception – manipulation and avoidance of cartel liability – [1.560]

- Cartel provisions in merger agreements may be designed and drafted to make them unseverable from acquisition provisions in such agreements
- If the cartel provisions are unseverable from the acquisition provisions, those cartel provisions will not be subject to cartel liability
- Under the ‘blue pencil’ test of severability, a cartel provision is not severable where the cartel provision could not be removed without altering the nature of the contract and without having to add to, or modify, the wording in a way other than by excision
- What if the no-discounting pre-merger provision in *Computer Associates case* was a condition precedent?

US v Computer Associates

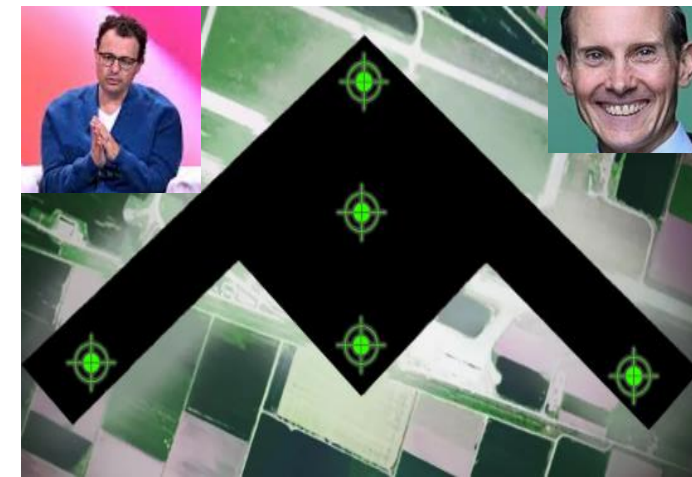
2. The Merger Agreement contained extraordinary “conduct of business” provisions that prevented Platinum from undertaking certain competitive activities during the HSR waiting period without CA’s approval, including determining the prices and terms it would offer to its customers. Under the Merger Agreement, Platinum could not, without CA’s prior written approval: offer discounts greater than 20% off list prices, vary the terms of customer contracts from an agreed-upon “standard” contract, offer computer consulting services over 30 days at a fixed price, or enter into contracts to provide year 2000 (“Y2K”) remediation services. CA was “the sole arbiter” of whether to grant exceptions to these business restrictions during the HSR waiting period and installed a Division Vice President at Platinum headquarters to approve Platinum customer contracts. Platinum conceded in its May 14, 1999, SEC 10-Q filing that the “extremely tight restrictions” on its ability to conduct business without CA’s consent “could have a severe detrimental effect” on its business.

Acquisition of shares or assets exception – proposed amendment – [1.570]-[1.580]

- Amend s 45AT(1) to provide that sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the provision is:
 - (a) for the purposes of the direct or indirect acquisition of:
 - (i) any shares in the capital of a body corporate; or
 - (ii) any assets of any person; and
 - (b) reasonably necessary to:
 - (i) enable the acquisition of the shares or assets to be made; or
 - (ii) to preserve the value of the shares or assets in order to protect the purchaser or seller
- Burdens of proof?
 - person seeking to rely on the acquisition of shares or assets exception should bear a persuasive as well as evidential burden of proof (see [1.230], [1.260] (burdens of proof for joint venture exceptions))
- Application/scope?

Conclusion – cartel exceptions, Big Tech and statutory change – [1.600]-[1.610]

- Cartel exceptions for joint ventures, related corporations, exclusive dealing and acquisition of shares/assets have important role in limiting scope of per se cartel liability
- These exceptions now suffer from underreach, overreach, uncertainty and impracticality in some key respects
- Statutory changes could resolve (summary Slide 25)
 - [1.250]-[1.260] (joint ventures)
 - [1.350] (related corporations)
 - [1.420]-[1.440] (exclusive dealing)
 - [1.540]-[1.580] (acquisition of shares or assets)
- Legislative attention to these and other cartel exceptions may be enlivened by power, influence and impact of Big Tech
 - Big Tech corporations depend on collaborations with competitors for their growth and survival
 - risk of cartel liability managed by liability control measures and adroit boundary-riding
 - cartel exceptions will be tested and loopholes and chinks exploited



Main statutory changes proposed

ss 45AO, 45AP	<ul style="list-style-type: none"> → Replace the concept of a joint venture with that of a collaborative activity → Require that a party seeking to rely on a collaborative activity exception prove that the dominant purpose of the collaborative activity was not to lessen competition between any parties to the activity
s 45AN	<ul style="list-style-type: none"> → Provide that sections 45AF, 45AG, 45AJ and 45AK not apply to CAU if parties to CAU are: <ul style="list-style-type: none"> (a) → related bodies corporate; or (b) → related bodies corporate and another party that is not a competitor of any of those related bodies corporate if CAU is in furtherance of lawful interests of parties to CAU
s 45AR	<ul style="list-style-type: none"> → Repeal s 47 → Create a supply agreement exception subject to the requirement that the dominant purpose of the CAU not be to lessen competition between any two or more parties to the CAU
s 45AT	<ul style="list-style-type: none"> → Provide that sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a CAU containing a cartel provision if the provision is: <ul style="list-style-type: none"> (a) → for the purposes of the direct or indirect acquisition of: <ul style="list-style-type: none"> (i) → any shares in the capital of a body corporate; or (ii) → any assets of any person; and (b) → reasonably necessary to: <ul style="list-style-type: none"> (i) → enable the acquisition of the shares or assets to be made; or (ii) → preserve the value of the shares or assets in order to protect the purchaser or seller

Industrial era cartel prohibitions and cartel exceptions for digital markets? [1.610]

- Proposed new digital competition regime would complement current legislative framework including existing cartel prohibitions and cartel exceptions
- Three basic questions have yet to be answered:
 1. What are main types of coordination of market conduct by competitors that are likely to occur in digital markets and which of those types of coordination are likely to be harmful?
 2. Are current cartel prohibitions and cartel exceptions fit for purpose of preventing or controlling harmful types of coordination by competitors?
 3. If they are not fit for purpose, what legislative changes or other measures are needed?
- Failure to address algorithmic collusion or AI agentic market coordination

