CARTEL EXCEPTIONS

JOINT VENTURES, RELATED CORPORATIONS, EXCLUSIVE DEALING, AND ACQUISITION OF SHARES OR ASSETS

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THEME

Four cartel exceptions

[1.10] This paper examines four of the cartel exceptions under Part IV, Division 1, Subdivision D of the Competition and Consumer Act 2010 (Cth) (the Act). The cartel exceptions significantly limit the scope of the cartel prohibitions, which are defined broadly and strictly (they are not subject to a test of substantial lessening of competition). The exceptions suffer from underreach, overreach, uncertainty and impracticality in some significant respects. Those limitations invite statutory reform. Legislative amendments are proposed.

INTRODUCTION

Role of cartel exceptions under Part IV, Division 1, Subdivision D of the Act

[1.20] The prohibitions against cartel conduct under the Act are subject to the exceptions under ss 45AL to 45AU of the Act. These exceptions significantly limit the scope of the cartel prohibitions. The prohibitions are defined in broad terms that, standing alone, would extend cartel liability far beyond the bounds of economic principle, business acceptance, judicial patience, and political toleration.

Cartel agreements prohibited under the Act must contain a 'cartel provision' but that concept is not limited to 'hard-core' or 'naked' cartel conduct (ie conduct that is patently anti-competitive).[1] On the contrary, 'cartel provision' is defined in broad terms that may catch pro-competitive or harmless conduct as well as to anti-competitive conduct. Exceptions help to exclude pro-competitive or harmless conduct from liability given that the definition of a 'cartel provision' does not do so.

The cartel prohibitions impose per se liability. Per se liability does not require an anti-competitive effect or likely effect or an anti-competitive subjective or objective purpose. The underlying policy assumption is that price fixing, market sharing and other forms of cartel conduct generally are anti-competitive. However, per se liability potentially catches some cases where the conduct is pro-competitive or harmless. Exceptions seek to avoid that unwanted result.

The cartel offences introduced in 2010 are defined in terms that parallel the definition of civil cartel prohibitions but have some additional fault elements.[2] The fault required by those additional fault elements is typically present in civil cases, and does little to limit the scope of criminal cartel liability. As a result, accused who wish to deny criminal cartel liability often need to rely on an exception, such as the joint venture exception under s 45AO, or the exclusive dealing exception under s 45AR.

Cartel exceptions under ss 45AL to 45AU

[1.30] These are the cartel exceptions under ss 45AL to 45AU:

- Cartel exceptions excluding cartel liability for conduct by single economic units:
  - (a) joint ventures (s 45AO, s 45AP);
  - (b) related corporations (s 45AN);
  - (c) dual-listed companies (s 45AS);
  - (d) collective acquisition and joint advertising (s 45AU).
- Cartel exceptions excluding cartel liability for conduct subject to test of substantially lessening competition under a non-cartel prohibition:
  - (a) exclusive dealing (s 45AR);
  - (b) acquisition of shares or assets (s 45AT);
- Cartel exceptions excluding cartel liability for conduct subject to per se liability under a non-cartel prohibition:
  - (a) Resale price maintenance (s 45AQ).

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* Brent Fisse Lawyers, Sydney; brentfisse@gmail.com. Forthcoming, M Marquis (ed), *Australian Competition Law in a Changing Context: A Handbook for Research and Teaching* (LawBook, 2026) ch 11. This paper adapts and builds on material from earlier publications, especially C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) (*Australian Cartel Regulation*) ch 8. Rob Nicholls kindly provided material on big tech and competitor collaborations. The usual disclaimers apply.

1 *Australian Cartel Regulation*, ch 4.

2 *Australian Cartel Regulation*, ch 5.

- Cartel exceptions excluding cartel liability for conduct subject to grant of authorisation or notification procedure:
  (a) collective bargaining notification (s 45AL);
  (b) cartel conduct subject to grant of authorisation (s 45AM);
  (c) acquisition subject to notification (s 45AMA).

All of these exceptions are significant in the legislative scheme of cartel liability. Some are less clear-cut than others to interpret and apply. This paper focusses on the exceptions relating to joint ventures, related corporations, exclusive dealing and acquisition of shares or assets.

Structure

[1.40] The first part of this paper, Context and Change, describes the legislative framework, the interpretation and application of exceptions to cartel prohibitions, and the question of statutory reform. Particular cartel exceptions are then examined, under these headings:

- Joint Ventures
- Related Corporations
- Exclusive Dealing
- Acquisition of Shares or Assets.

Terminology

[1.50] Terms and abbreviations:

'ACCC' – Australian Competition and Consumer Commission`

'affirmative defence' – an exception in relation to which the defendant carries a persuasive as well as an evidential burden of proof;

'CAU' – contract, arrangement or understanding;

'D' – a defendant, respondent, or accused;

'SLC' – substantial lessening of competition.

CONTEXT AND CHANGE

Legislative framework of cartel exceptions and other exceptions that may be relevant

[1.60] The legislative framework consists of the cartel exceptions under ss 45AL to 45AU, and other exceptions under the Act that may be relevant to cartel conduct. Those other exceptions include authorisation under s 88(1), class exemptions under s 95AA, and exceptions under s 51.[3.]

This legislative framework is a patchwork sewn over five decades. Over that period there have been at least four reviews of competition law in Australia, including the Harper Review in 2016.[4] The reviews have resulted in various amendments. For instance, the amendments in 2017 re-defined the joint venture exceptions and gave the ACCC power to create class exemptions.

The legislative framework is distinctively Australian. The legislative models in the US, the EU, NZ and Canada differ in many ways from each other and from those in the Act.

Cartel exceptions under Part IV, Division 1, Subdivision D of the Act

[1.70] The cartel exceptions under Part IV, Division 1, Subdivision D of the Act relate specifically to cartel prohibitions. These exceptions are as listed in [1.30]. They limit the scope of civil and criminal cartel liability significantly. The cartel offences are also subject to defences under Part 2.3 of the Criminal Code (including the defence of mental impairment under s 7.3).

The main rationale of the joint venture and related corporation exceptions is to exclude cartel liability from conduct coordinated within single economic units; see [1.190], [1.300]. The main rationale of the exclusive dealing and acquisition of shares exceptions is to exclude per se liability from cartel liability where a per se test would catch numerous cases of pro-competitive or harmless conduct; see [1.380], [1.480].

Other exceptions to cartel prohibitions

[1.80] Other exceptions under the Act offer further possible avenues for denying cartel liability. They include:

- authorisation under s 88(1);
- notification of exclusive dealing or resale price maintenance under s 93;
- class exemptions under s 95AA;
- exceptions created under Commonwealth legislation and state or territorial legislation (s 51(1));
- Crown immunity and derivative Crown immunity (s 2A);
- partnership exception (s 51(2)(d));
- conditions of employment exception (s 51(2)(a));
- compliance with standards exception (s 51(2)(c));
- goodwill protection exemption (s 51(2)(e));
- export of goods exception (s 51(2)(g)); and
- liner cargo shipping services exemptions (Part X).

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3 See further Y Svetiev, *Corones' Competition Law Australia* (Lawbook Co, 8th ed, 2023) (*Corones' Competition Law Australia*) 249-274; *Australian Cartel Regulation*, ch 8.

4 Australian Government, The Treasury, *Competition Policy Review Final Report* (31 March 2015).

Limited scope of cartel exceptions and other exceptions

[1.90] The scope of the cartel exceptions or other exceptions does not extend as far as some may possibly expect.[5] For instance:

- small corporations are not exempt from cartel liability under the Act;
- there is no de minimis exception;
- intellectual property licensing conditions are not excepted (s 51(3) was repealed in 2019);
- underwriting agreements and funding syndicates are not excepted specifically and may not always be covered by a cartel exception or protected by authorisation; and
- settlement agreements in litigation are not the subject of specific exception.

Authorisation

[1.100] The cartel exceptions include the particular exception under s 45AM for a cartel provision that is subject to authorisation by the ACCC. The general exception for authorisation by the ACCC under s 88 of the Act is important in the context of cartel conduct. Situations often arise in commerce where the cartel exceptions or other exceptions do not apply and yet where there is a commercial or other justification for the cartel conduct proposed. Many applications have been made to authorise competitor collaborations, as in the context of coordinated responses to Covid-19 and climate change.[6]

The test of authorisation for cartel conduct under s 90(7) is whether the benefit or likely benefit to the public of the conduct would outweigh the detriment to the public that would result or be likely to result from the conduct. Public detriment includes a lessening of competition. The absence of a SLC effect or likely effect is not a sufficient basis for authorisation of cartel conduct (s 90(8)(a)).

Authorisation by the ACCC is discussed elsewhere.[7]

Class exemptions

[1.110] The power to create class exemptions under s 95AA could be used by the ACCC to create exemptions in many situations, in the fashion set many decades ago by the European Commission with the use of block exemptions.[8] Class exemptions could much reduce the need for authorisation or reliance on the cartel exceptions or other exceptions. The class exemption created by the ACCC for collective bargaining by smaller businesses has generally been welcomed.[9] The ACCC recently has requested proposals for further class exemptions from some stakeholders including the Business Council of Australia.[10]

Interpretation and application

[1.120] Interpretation and application of the cartel exceptions formally is up to the courts. The discussion of the legal elements of the exceptions in [1.200]-[1.230] (joint ventures), [1.310]-[1.330] (related corporations), [1.390]-[1.400] (exclusive dealing), and [1.490]-[1.510] (acquisition of shares or assets) distils

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5 See further *Australian Cartel Regulation*, ch 8.

6 See further Australian Competition and Consumer Commission, 'Sustainability Collaborations and Australian Competition Law: A Guide for Business' (2025) at: https://www.accc.gov.au/about-us/publications/sustainability-collaborations-and-australian-competition-law-a-guide-for-business.

7 See eg *Corones' Competition Law Australia*, 267-274.

8 See European Commission, 'Block Exemption Regulations', at https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/block-exemption-regulations_en.

9 Collective Bargaining Class Exemption, 3 June 2021.

10 As a result of a request by Treasury to the ACCC and other branches of government to consider regulatory reforms for reducing red tape. The ACCC consultation process does not appear to be public. For a critique of the class exemption process, see B Fisse, 'The Productivity Commission's Recommendations on the Intellectual Property Exemption under the Competition and Consumer Act' (2017) 45 ABLR 260, 268-269.

the main case law and commentaries. Leading cases are discussed in more detail in [1.240] (joint ventures), [1.340] (related corporations], [[1.410} (exclusive dealing), and [1.520]-[1.530] ((acquisition of shares or assets).

The case law in this area is sparse. Those wishing to interpret and apply the exceptions often rely on means of navigation other than case law. They include ACCC guidelines, corporate internal rules on compliance and liability control, books and journal articles, law firm 'infomercials', and general legal know-how.

Role of courts and restrictive interpretation of elements of cartel liability

[1.130] The role of the courts is to interpret and apply statutory exceptions under the Act, not to prescribe judicial exceptions. Unlike the position in US antitrust law, there is no doctrine of ancillary restraints under the Act. Nor is there any process of judicial inquiry into whether or not the rule of reason applies to various different categories of conduct between competitors.[11] That said, some let-offs have been created by interpreting the elements of cartel liability restrictively.

One such let-off has been the requirement of 'commitment' that some courts have read into the term 'arrangement or understanding' that is part of the definition of a CAU in the cartel prohibitions.[12] That created an escape route for cartelists. If commitment is a requisite element of an arrangement or understanding, cartel liability can be avoided by the tactic of discussing prices (or output, allocation of customers or bids) but studiously stopping short of making any commitment.[13] It has now been held that commitment is not a stringent requirement in all cases nor a legal element implied by the word 'understanding' but may go to proof of an understanding.[14] That appears to have closed the escape route discussed above, about two decades after the escape route was miscreated.

Another let-off is the way the courts have allowed an ultimate legitimate purpose to trump an immediate substantial purpose to engage in cartel conduct.[15] In *News Ltd v South Sydney*,[16] a majority of the High Court held that the purpose of a term of an agreement to merge two rugby league competitions was not an exclusionary purpose because the end in view was to save the game of rugby league from financial ruin. That decision is difficult or impossible to reconcile with s 4F, which provides that, where a purpose is one of several purposes and is a substantial purpose, it qualifies as a 'purpose' under the Act. One substantial purpose of the restrictive term in the South Sydney case was to restrict the supply or acquisition of services.

Application of cartel exceptions and other exceptions may be complex

[1.140] Applying the cartel exceptions and other exceptions in practice is often more complex than simply identifying and applying one relevant exception. For instance, in the context of litigation settlement agreements between competitors it may be necessary to rely on a combination of three or four exceptions and to structure and draft the settlement agreement accordingly.[17] That is easier said than done.

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11 Contrast eg *US v Brewbaker*, 87 F.4th 563 (4th Cir. 2023). See generally Antitrust Law Section, *Rule of Reason Handbook* (ABA Book Publishing, 2026).

12 See eg *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161; B Fisse and R Nicholls, 'Anti-Competitive Agreements Between Competitors and Cartel Enforcement' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition Law and Economics in Australia* (Routledge, 2025) Vol I, ch 8, 157-160.

13 That escape route does not avoid potential liability under s 45(1)(c) for entering into a concerted practice. However, that prohibition is subject to a SLC test, which partly explains why the prohibition has rarely been enforced.

14 *BlueScope Steel Limited v Australian Competition and Consumer Commission* [2025] FCAFC 118, [193]-[207].

15 *Australian Cartel Regulation*, 104-105; J Clarke, 'Proof of Purpose' (2023) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4547587.

16 (2003) 213 CLR 563.

17 See *Australian Cartel Regulation*, 8.12.

Statutory reform invited

[1.150] The four cartel exceptions discussed in this paper suffer in key respects from the limitations discussed in [1.250]-[1.260] (joint ventures), [1.350] (related corporations), [1.420]-[1.440] (exclusive dealing), and [1.540]-[1.580] (acquisition of shares or assets). Changes in the statutory provisions are needed to overcome those limitations. The statutory changes raised for consideration in this paper would require straightforward amendments to the Act. A 'root and branches'[18] review of the Act is unnecessary for that purpose.

Cartel exceptions warrant legislative care, attention, repair and maintenance

[1.160] There are reasons why the cartel exceptions warrant legislative care, attention, repair and maintenance:

- cartel liability is subject to potentially severe sanctions and remedies and cartel exceptions are often relevant as avenue for denying liability in situations where the conduct is pro-competitive or not harmful;
- many of the limitations from which the cartel exceptions now suffer and which are discussed in this paper are the result of legislative neglect or piecemeal change;
- competitor cooperation is important in responding effectively to pandemics, climate change, and wars;[19]
- supply agreements between competitors promote efficiency and productivity in commerce;
- competitor collaborations are all-pervasive in the development of AI by Big Tech;[20]
- ill-designed cartel exceptions can have bad effects on enforcement even after the exceptions have been amended, as in the bungled ANZ cartel prosecution that was withdrawn in 2022.[21]

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18 A metaphor sometimes used to describe the Harper Review in 2015.

19 As reflected by Australian Competition and Consumer Commission, 'Sustainability Collaborations and Australian Competition Law: A Guide for Business' (2025) at: https://www.accc.gov.au/about-us/publications/sustainability-collaborations-and-australian-competition-law-a-guide-for-business; New Zealand Commerce Commission, "Competitor Collaboration Guidelines' (2018) at: https://www.comcom.govt.nz/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

20 See AM. Brandenburger and BJ Nalebuff. *Co-opetition: A Revolution Mindset that Combines Competition and Cooperation* (Crown, 1998); JF Moore, *The Death of Competition: Leadership & Strategy in the Age of Business Ecosystems* (Harper Business, 1996); JM Crick (ed), *De Gruyter Handbook of Coopetition* (De Gruyter, 2025); references n 82 below. One of many examples is the Microsoft-OpenAI partnership, a $13 billion investment; see T Groza, 'AI Partnerships Beyond Control Lessons from the OpenAI-Microsoft Saga', March 21 2025, at: https://law.stanford.edu/2025/03/21/ai-partnerships-beyond-control-lessons-from-the-openai-microsoft-saga/

21 The theory of the case prosecuted was partly that the joint venture exceptions at the time of the conduct did not apply because the cartel provisions alleged were not contained in a contract, a requirement that had been repealed by the amendment of the joint venture exceptions in 2017. See B Fisse, 'Australian Cartel Law: Recent Developments – First Set of Two Sets' (2023) 51 ABLR 70, 72-78.

JOINT VENTURE EXCEPTIONS

Joint venture exceptions under s 45AO and s 45AP

[1.170] Sections 45AO and 45AP provide joint venture exceptions that apply to cartel offences and civil cartel prohibitions respectively. The joint venture exceptions have common basic elements. 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.

Joint venture exceptions apply to cartel prohibitions but not other prohibitions

[1.180] Joint ventures are subject to possible liability under the cartel prohibitions and other prohibitions including the prohibitions against anti-competitive agreements (s 45(1)(a)(b)), concerted practices (s 45(1)(c)), misuse of market power (s 46) and exclusive dealing (s 47). The exceptions under ss 45AO and 45AP apply only to the cartel prohibitions. The other prohibitions mentioned are subject to a SLC test.

Rationale of joint venture exceptions

[1.190] Joint ventures between competitors are prevalent in commerce. Joint venture parties often agree to fix a price at which the output of the joint venture is to be supplied and impose restrictions on their freedom to compete against the joint venture or each other. Such agreements often contain cartel provisions.

The main underlying rationale of the joint venture exceptions is that a joint venture is a single economic unit. Thus, in *Texaco Inc. v Dagher*,[22] the US Supreme Court held that a fully integrated Shell–Texaco joint venture did not engage in price-fixing when it sold Shell and Texaco-branded gasoline petrol at the same price:

> ... the pricing policy challenged here amounts to little more than price setting by a single entity – albeit within the context of a joint venture – and not a pricing agreement between competing entities with respect to their competing products.[23]

A second underlying rationale is that ancillary restraints are needed in joint ventures to make a joint venture work commercially.[24] An ancillary restraint is a restraint on the conduct of a party that is objectively necessary to achieve the core objectives of a venture where those objectives are lawful and pro-competitive or competitively neutral.

Legal elements of joint venture exceptions

[1.200] The joint venture exceptions require a 'joint venture', as defined by s 4J and as qualified by s 45AO(d) and (e) and s 45AP(1)(d), for the production or supply of goods and/or the acquisition of goods or services.

Under s 4J, a 'joint venture' requires:

- an 'activity in trade or commerce' and
- in the case of unincorporated joint ventures, the carrying on of that activity 'jointly by two or more persons' or
- in the case of incorporated joint ventures, a body corporate 'formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate'.

The wording 'joint venture' bears its ordinary meaning, as elaborated in *United Dominions Corporation Ltd v Brian Pty Ltd* by the High Court of Australia.[25] subject to the minor gloss of s 4J of the Act. Whether or not a venture is a joint venture depends on looking for characteristics said to be common in joint ventures. Those characteristics include the exercise of joint control of the joint undertaking by the participants in the venture, and the joint or community of interest of the participants in the performance of the undertaking where they associate in the undertaking for mutual commercial gain. The process of running through a list of characteristics in search of a joint venture in a contract between competitors leaves much to subjective judgement and does not always yield clear answers.

The terms 'joint venture' and 'carried on jointly' do not necessarily require an economic integration of functions or necessarily be calculated to achieve efficiencies.[26] Some commentators have suggested that there is such a requirement. However, that interpretation is difficult to reconcile with the statutory wording or the legislative explanatory material.[27]

The joint venture must be one carried on jointly by the parties to the contract, arrangement or understanding containing the cartel provision, as per s 45AO(d) and (e) and s 45AP(1)(d). That requirement

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22 547 US 1 (2006).

23 547 US 1, 4 (2006).

24 See *Australian Cartel Regulation*, 288; G Werden, 'The Ancillary Restraints Doctrine after *Dagher*' (2007) 8 The Sedona Conference Journal 17.

25 (1985) 157 CLR 1, 10.

26 *Australian Cartel Regulation*, 271-273.

27 Ibid.

appears to exclude a joint venture where most but not all of the parties to the CAU carry on the venture jointly. However, it is unnecessary under s 45AO or s 45AP that all parties to the CAU be competitors.

'For the purposes of a joint venture' and 'reasonably necessary for undertaking the joint venture'

[1.210] The cartel provision must be 'for the purposes of a joint venture' and 'reasonably necessary for undertaking the joint venture'.

The wording 'for the purposes of a joint venture' requires a cartel provision to be connected with the purposes of a joint venture and, applying s 4F(1), the purposes must be substantial purposes.[28] On one interpretation, 'purposes' mean the subjective intentions of the parties to the joint venture.[29] An intention to create efficiencies by having a joint venture and thereby reduce cost or improve product quality is an example of a subjective purpose. On another possible interpretation, 'purposes' mean the objectives of the parties to the joint venture determined objectively but having regard to the subjective intentions of the parties.[30]

Where the purposes of the parties to a joint venture differ, the purposes of the cartel provision are to be ascertained by reference to the purposes of the party or parties who sought and caused the inclusion of the cartel provision in the CAU.[31]

A cartel provision may be for the purposes of a joint venture where the joint venture is contemplated but did not exist when the provision was included in a contract, arrangement or understanding.[32]

The wording 'reasonably necessary for undertaking the joint venture' applies to a cartel provision whether the provision is an ancillary restraint or a core provision in a joint venture. The requirement excludes unreasonable restraints from protection under the joint venture exceptions. For instance, a restraint on the price to be charged for a product produced by a production joint venture may not be reasonably necessary to undertake the joint venture where the efficiencies to be gained from the venture relate to joint production and not to joint marketing.[33]

'For the purpose of substantially lessening competition'

[1.220] The joint venture must not be carried on 'for the purpose of substantially lessening competition'.

The word 'purpose' in this context appears to mean a subjective purpose that is substantial.

'Competition' appears to be shorthand for competition in a market.[34]

Burdens of proof

[1.230] Under s 45AO, a defendant bears a persuasive burden of proof as well as an evidential burden of proof. Under s 45AP any person who wishes to rely on the exception under this section bears a persuasive burden of proof as well as an evidential burden of proof. The standard of proof required to meet a persuasive burden of proof is proof on the balance of probabilities.

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28 Competition and Consumer Act 2010 (Cth) s 4F(1).

29 *ACCC v Cascade Coal Pty Ltd* [2019] FCAFC 154, [230]-[283] is inconclusive on this question.

30 *ACCC v Cascade Coal Pty Ltd* [2019] FCAFC 154, [230]-[283] is inconclusive on this question.

31 *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, [859]–[887] (Dowsett and Lander JJ).

32 *ACCC v Cascade Coal Pty Ltd* [2019] FCAFC 154, [283].

33 *Corones' Competition Law Australia*, 256-257.

34 The Explanatory Memorandum [2.26] equates the SLC test in s 45AO with that in the former s 76C; s 76C(2) made it clear that the term 'competition' referred to competition in a market.

Case law on joint venture exceptions – *ACCC v Cascade Coal Pty Ltd*

[1.240] Only one case has been decided in Australia on the meaning and application of a joint venture exception. In *ACCC v Cascade Coal Pty Ltd*,[35] the ACCC alleged bid rigging by Cascade Coal Pty Ltd, Loyal Coal Pty Ltd, Voope Pty Ltd and Buffalo Resources Pty Ltd in an arrangement relating to a government tender for coal exploration licences. Under the arrangement, Loyal agreed to withdraw its bid under the tender if Cascade granted Buffalo a 25% interest in a proposed joint venture for the Mount Penny coal release area. The Federal Court of Australia held that the provision for Loyal to withdraw its bid was not an exclusionary provision because Cascade, Loyal and Voope were not competitors under the tender and the provision did not have the purpose of preventing the acquisition of coal exploration licences. If there was an exclusionary provision, the joint venture defence under s 76 of the Trade Practices Act 1974 (Cth) would have applied. The Full Court upheld the trial judge's decision.

The decision of the Full Court is significant in two main respects relating to the joint venture exceptions. First, a 'joint venture' was found to exist where the joint activity and joint contributions by the parties to the venture fell short of a full-scale integration of business functions. Secondly, it was held that a provision may be 'for the purposes of a joint venture' where the joint venture did not exist when the provision was included in a CAU, or never came to exist.[36]

The decision leaves open the question of whether the wording 'purposes of a joint venture' means: (a) the subjective intentions of the parties to the joint venture; or (b) the objectives of the parties to the joint venture determined objectively but having regard to the subjective intentions of the parties.[37]

Proposed reform – collaborative venture, not joint venture

[1.250] The core concept of a 'joint venture' remains elusive. The decision of the Full Federal Court in *ACCC v Cascade Coal Pty Ltd*[38] interpreted the concept broadly without defining the boundary between a contract and a joint venture. In contrast, the concept that applies in the US, EU, NZ and Canada is the broader concept of a collaborative venture.[39] Thus, under s 1 of the Sherman Act (US), efficiency enhancing collaborations between competitors are exempted and joint ventures are treated as one among many relevant kinds of competitor collaborations.[40]

A collaborative venture requires collaboration but not necessarily 'joint' action. Many ventures are more likely to be collaborative ventures than joint ventures. Typical examples of collaborative ventures include consortia, partnerships, strategic alliances, syndicated lending arrangements, lender workout arrangements for insolvent borrowers, technology teaming agreements, innovation networks, and franchises.

It has therefore been proposed that the concept of a joint venture in sections 45AO and 45AP be replaced by the concept of a collaborative activity.[41] That is the approach taken under s 31 of the Commerce Act 1986 (NZ). 'Collaborative activity' is defined by s 31(4):

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35 [2019] FCAFC 154.

36 [2019] FCAFC 154, [276]-[283].

37 *ACCC v Cascade Coal Pty Ltd* [2019] FCAFC 154, [230]-[283] leave that question up in the air.

38 [2019] FCAFC 154.

39 *Australian Cartel Regulation*, 292-293. See eg Commerce Act 1986 (NZ) s 31.

40 See Zelle LLP, 'Stop, Collaborate and Listen! What to Know About the FTC and DOJ's Withdrawal of the Competitor Collaboration Guidelines' (2025) at: https://www.jdsupra.com/legalnews/stop-collaborate-and-listen-what-to-9527746/. Revised guidelines are proposed: see https://www.ftc.gov/news-events/news/press-releases/2026/02/federal-trade-commission-department-justice-seek-public-comment-guidance-business-collaborations.

41 *Australian Cartel Regulation*, 8.3.4.5. That proposal was later followed in Commerce Act 1986 (NZ) s 31. See further J Land, 'Joint Ventures and the Collaborative Activity Exemption' [2014] NZLJ 190.

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.'

Proposed reform –replace no SLC test with test of no dominant purpose to lessen competition between parties to the collaborative activity

[1.260] The exceptions in s 45AO and s 45AP require that D prove that the joint venture not be carried on 'for the purpose of substantially lessening competition'. That approach 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.[42] Incorporating a SLC test in an exemption to per se prohibitions, albeit a SLC purpose test, and although as an affirmative defence, much complicates the application of the joint venture exceptions.[43] That is partly because of the need for market definition. Moreover, the SLC test in s 45AO is impractical given that the test is to be applied by a jury. The orthodox view is that requiring juries to apply a SLC test is unrealistic.

The no-SLC purpose test in the joint venture exceptions is also too lax. Cases can and do arise where a sham joint venture is 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. The joint venture exceptions should not apply where the main objective of a joint venture is to lessen competition between any competitors that are parties to the joint venture.

It has therefore been proposed that the no-SLC purpose test in s 45AO(c) and s 45AP (1)(c) be amended. One approach would be a 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.[44] The dominant purpose test would be objective, as it is for the dominant purpose test that applies in the context of legal professional privilege. Efficiencies likely to be gained by implementing the collaborative venture are relevant to the application of that dominant purpose test but efficiency-enhancement is not the test.

Questions

[1.270] Consider these questions:

1. Should a 'joint venture' be defined as requiring a venture undertaken for the purpose or likely effect of creating efficiencies?

2. Would the amendments discussed in [1.250]-[1.260] allow corporations to avoid cartel liability too easily?

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42 *Timken Roller Bearing Co v United States*, 341 US 593, 597–598 (1951); Commerce Act 1986 (NZ) s 31(2)(b). See further the explication and application of the dominant purpose test in the context of legal professional privilege in *Medibank Private Limited v McClure* [2026] FCAFC 38, [23]-[26].

43 See further B Fisse, 'Australian Cartel Law: Recent Developments – First Set of Two Sets' (2023) 51 ABLR 70, 76-78; *Australian Cartel Regulation*, 286-287.

44 The dominant purpose test under s 31 of the Commerce Act, unlike that under s 32, avoids using the concept of 'purpose of a provision', which is unduly narrow; see [11.440].

3. The reforms outlined would reduce the need to seek authorisation for competitor collaborations. Would reducing the need for authorisation in that way be desirable? What would be the advantages and would they outweigh any disadvantages?

RELATED CORPORATIONS EXCEPTION

Related corporations exception to cartel prohibitions under s 45AN

[1.280] 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.

Similar related corporations exceptions apply to other prohibitions

[1.290] Similar related corporations exceptions apply to the prohibition against anti-competitive agreements under s 45(1)(a)(b)) (s 45(8)), the prohibition against concerted practices under s 45(1)(c)(s 45(8), and the prohibition against exclusive dealing under s 47(s 47(12)).

Rationale of related corporations exception

[1.300] The rationale for the related corporation exception under s 45AN is that related corporations are part of a single economic enterprise within which individuals and operating units are free to enter into agreements with each other in pursuit of the interests of that enterprise.

In *Copperweld Corporation v Independence Tube Corporation*,[45] the US Supreme Court held that, under s 1 of the Sherman Act, the coordinated activity of a parent and its wholly-owned subsidiary is to be treated as that of a single enterprise. Given that a parent may assert full control at any moment if the subsidiary fails to act in the parent's interest, a parent and its wholly-owned subsidiary have a unity of purpose or common design. Coordination between a corporation and a wholly-owned subsidiary is not a 'sudden joining of two independent sources of economic power previously pursuing separate interests'.[46]

Legal elements of related corporations exception

[1.310] Section 4A defines when bodies corporate are 'related to each other'.[47]

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.

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45 452 US 752, 769–71 (1984).

46 452 US 752, 773 fn 20 (1984).

47 See further W Pengilley, 'The Corporate Parent: Relevant Trade Practices Issues' (1988) 18 University of Western Australia Law Review 224.

Dual listed companies

[1.320] Dual listed companies and their related bodies corporate are related corporations under s 4A(5A).[48] The s 45AN exception would apply to dual listed corporations but for s 45AS. Section 45AS excludes cartel liability where the parties to the relevant CAU are dual listed companies.

Burdens of proof

[1.330] An evidential burden of proof lies on a defendant who wishes to rely on the related corporation exception to deny liability for a cartel offence (Criminal Code, s 13.3). An evidential burden of proof lies on any person who wishes to rely on the exception to deny liability in relation to contravention of a civil cartel prohibition (s 45AN(2)). Corporations are presumed not to be related to each other unless the contrary is established (s 4A(6)).

Case law on related corporations exception

[1.340] The case law to date is on the meaning of the s 4A definition of related corporations for the purpose of the Act. For instance, it has been held that statutory corporations are not related corporations[49] and that the Crown is not a holding company of a corporation in which it has a controlling interest.[50]

The definition of related corporations in s 4A is prescriptive. That prescriptive approach avoids the need for litigation about whether or not the economic principle of a single economic enterprise does or does not apply in particular cases. The meaning and scope of the single economic enterprise principle requires case-by-case determination in US antitrust law and EU competition law.[51] A large body of case law has been generated, a process that is less certain and more costly than that required to apply s 45AN.

Proposed reform – extend exception to cover situation where related corporations enter into CAU with third party that is not a competitor

[1.350] The 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.

For example, a supplier may enter into a joint supply contract, arrangement or understanding with a group of related corporations that are likely competitors for the products supplied but for that CAU. Agreements of that kind often contain provisions that are cartel provisions as defined under s 45AD. But the related corporation exception does not apply because the supplier in such a situation is not related to the related corporations entering into the agreement.

The 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. It is therefore proposed that s 45AN be amended to reflect the underlying single economic enterprise rationale. That could be done by providing that sections 45AF, 45AG, 45AJ and 45AK not apply to a contract, arrangement or understanding if the parties to the contract, arrangement or understanding are:

(a) bodies corporate that are related to each other; or

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48 See the discussion and critique in *Australian Cartel Regulation*, 8.2.2.

49 *Stillwater Pastoral Company Pty Ltd v Stanwell Corporation Ltd* [2024] FCA 1382.

50 *Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495.

51 *Australian Cartel Regulation*, 264.

(b) bodies corporate that are related to each other and another party that is not a competitor of any of the related bodies corporate where the contract, arrangement or understanding is in furtherance of the lawful interests of the parties to the contract, arrangement or understanding.[52]

Questions

[1.360] Consider these questions:

1. Would the amendment discussed in [1.350] allow corporations to avoid cartel liability too easily?
2. What if competitor A is owned and controlled jointly by B and C, two other corporate competitors? Are A, B and C related corporations within the s 45AN exception?
3. What if competitors A and B agree to become related corporation in order to be able to fix prices and, having become related corporations, proceed to fix prices? Does the s 45AN exception apply? Should the exception apply?

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52 The same applies to the related corporation exception under s 45(8).

EXCLUSIVE DEALING EXCEPTION

Exclusive dealing exception under s 45AR

[1.370] 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 exclusive dealing exception

[1.380] The exclusive dealing exception under s 45AR is an important safe harbour from cartel liability for cartel provisions in distribution and other arrangements between competitors where the restriction on competition is an exclusive dealing restriction.

The s 45AR exception seeks to avoid per se liability in a type of case where an agreement between competitors is likely to be pro-competitive or harmless and where a SLC test is needed to avoid overreach. The exception is not concerned merely with avoiding overlap between cartel and non-cartel prohibitions.

Legal elements of exclusive dealing exception

[1.390] The s 45AR exception applies in so far as giving effect to a cartel provision in issue would be exclusive dealing in contravention of the prohibition against exclusive dealing in s 47 but for the operation of s 47(10) or authorisation by the ACCC, or effective notification under the exclusive dealing notification procedure.

The first and foremost legal element of s 45AR is that, to qualify for the exception, a cartel provision must an exclusive dealing condition as defined by s 47. Numerous instances of exclusive dealing are set out in s 47(2)−(9), and a cartel provision must be at least one of them to qualify for the s 45AR exception. See *Visy Paper Pty Ltd v Australian Competition and Consumer Commission*,[53] as discussed in [1.410].

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[53] (2003) 216 CLR 1. See also *ACCC v Qteq Pty Ltd* [2025] FCA 371, [398]-[414].

The various instances of exclusive dealing set out in s 47(2) to (9), are each defined in terms that require interpretation and application. The terms 'acquire directly or indirectly', 'on condition that', 'supply', and 'to a limited extent', have been interpreted and applied by the courts. That case law is discussed elsewhere.[54]

Burdens of proof

[1.400] An evidential burden of proof lies on a defendant who wishes to rely on the exclusive dealing exception to deny liability for a cartel offence (Criminal Code, s 13.3). An evidential burden of proof lies on any person who wishes to rely on the exception to deny liability for a civil cartel prohibition (s 45AN(3)).

Case law on exclusive dealing exception – *Visy Paper Pty Ltd v Australian Competition and Consumer Commission*

[1.410] In *Visy Paper Pty Ltd v Australian Competition and Consumer Commission*,[55] the High Court of Australia held that the exclusive dealing exception under s 45(6) did not apply where there were two exclusionary provisions in an agreement restricting competition between Visy and a competitor and only one of those exclusionary provisions was exclusive dealing conduct as defined in s 47. The other alleged exclusionary provision imposed a restriction on the acquisition of services by the competitor and, under the definition of exclusive dealing conduct in s 47, a restriction on the acquisition of services is not an exclusive dealing condition.[56]

The decision creates the 'Visy trap'. [57] 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.

Proposed reform – remove Visy trap by repealing s 47

[1.420] The Visy trap would disappear if, as recommended by the Harper Report, s 47 (and s 45AR) were to be repealed.[58] That recommendation has yet to be followed.

Supply agreements between competitors raise a more fundamental question

[1.430] A more fundamental question is whether supply agreements generally should be subject to a cartel exception for the many situations where they are pro-competitive or harmless.[59] The s 45AR exception is confined to exclusive dealing and neglects many other types of vertical supply agreements between competitors that warrant exclusion from cartel liability. Supply agreements between competitors usually are pro-competitive, but often include cartel provisions that are not exclusive dealing conditions.

The Harper Report in 2015 recommended that the Act be amended to exempt supply/acquisition agreements between competitors (including intellectual property licensing) from the cartel prohibitions.[60] However, s 51(3) was repealed in 2019 without introducing an exception to cover pro-competitive supply

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54 Eg *Corones' Competition Law Australia*, ch 6.

55 (2003) 216 CLR 1. See also *ACCC v Qteq Pty Ltd* [2025] FCA 371, [398]-[414].

56 See further W Pengilley, 'ACCC Concedes That You Are not Acting with Substantially Anticompetitive Purpose But You Are Punished by the Court Anyway: The Full Court Visy Penalty Case' (2006) 21 Australia & New Zealand Trade Practices Law Bulletin 113, 114.

57 *Australian Cartel Regulation*, 300.

58 Australian Government, The Treasury, *Competition Policy Review Final Report* (31 March 2015) Recommendation 33, at https://treasury.gov.au/publication/p2015-cpr-final-report.

59 *Australian Cartel Regulation*, 8.6.

60 Australian Government, The Treasury, *Competition Policy Review Final Report* (31 March 2015) Recommendation 27, at https://treasury.gov.au/publication/p2015-cpr-final-report..

and IP licensing agreements between competitors. That gap is unsatisfactory and has been widely criticised.[61]

Exempting supply contracts from cartel liability –statutory models and proposals

[1.440] Vertical supply contracts are exempted from cartel liability under the Commerce Act 1986 (NZ):

> 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 is broadly consistent with the approach taken in US, EU and Canadian competition law.

Section 32(1)(b)(i) of the Commerce Act is too restrictive. The 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. Section 32(1)(b)(i) should provide: 'is a term or condition of the contract referred to in subsection (a)'. Resale price maintenance is subject to the prohibition under s 48(1) and the cartel exception for resale price maintenance under s 45AQ.

Section 32(1)(b)(ii) provides 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.' That safeguard should be improved by making the dominant purpose referable to the purpose of the contract, not the 'purpose of the provision'.[62] That improvement would parallel s 31(4) of the Commerce Act, under which the dominant purpose test relates to the collaborative activity, not the purpose of a cartel provision.

A further amendment would be to require any person seeking to rely on the exception to prove that the requisite elements were present, including the element that the dominant purpose of the contract was not to lessen competition between parties to the contract; see [1.230], [1.260] (burdens of proof for joint venture exceptions).

It will also be wondered why a supply agreement exception should be limited to contracts given that cartel provisions may also arise where the supply agreement is not formalised as a contract but is an arrangement or understanding.

Questions

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[61] See eg S Snow, 'Exclusive Dealing: Provisions in Need of Reconsideration?' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition Law and Economics in Australia* (Routledge, 2025) Vol I, ch 18; Justice M O'Bryan, 'The repeal of s 51(3) of the Competition and Consumer Act 2010 (Cth)' (2019) at: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-obryan/obryan-j-20190410.

[62] See further J Land, 'Intellectual Property and the Prohibition on Cartel Conduct in New Zealand Competition Law' (2024) 31 NZ Univ LR 113, 126-128.

[1.450] Consider these questions:

1. Is there a price fixing provision in the example below? If there is a price fixing provision, does s 45AR apply to it? If there is a cartel provision but s 45AR does not apply to it, is there any exception other than authorisation by the ACCC that would exclude cartel liability?

   C and D manufacture and supply lithium EV batteries and compete against each other in the wholesale market for lithium EV batteries. C sources from D about half of the lithium EV batteries that it supplies in the market. The lithium EV batteries supplied to C by D at the price of $X cost C 10% more than C's own cost of production (Y). C therefore charges customers more for the lithium EV batteries sourced from D than for the batteries that C manufactures itself.

2. Does s 45AR exclude cartel liability in the example below? If it does, does the section need to be rethought and amended?

   Corporations E and F are big tech AI companies. They use each other's large language models (LLMs). They enter into a mutual supply agreement under which E agrees to supply E's LLMs to F on the condition that F will not re-supply any of E's LLMS unless all of E's LLMS are included in F's VchatGPT, and F agrees to supply F's LLMS to E on condition that E will not re-supply any of F's LLMS unless all of F's LLMs are included in E's WchatGPT applications. The dominant purpose of the exclusive dealing conditions is to lessen competition between E and F in the market for applications like VchatGPT and WchatGPT. Assume that the market is highly competitive with around 100 significant competitors including major US, Chinese and European AI companies.

3. Would a vertical supply contract exception (see [1.430]-[1.440] make it too easy for corporations to avoid cartel liability?

ACQUISITION OF SHARES OR ASSETS EXCEPTION

Acquisition of shares or assets exception under s 45AT

[1.460] 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.

Application of s 45AT and similar exceptions

[1.470] Where the s 45AT(1) exception applies, an acquisition may be subject to liability under s 50 which prohibits acquisitions that have the effect or likely effect of substantially lessening competition or creating, strengthening or enhancing substantial market power.[63] Similar exceptions to that under s 45AT(1) apply to the prohibition against anti-competitive agreements (s 45(7)) and the prohibition against concerted practices (s 45(7)), but not the prohibition against misuse of market power.

Rationale of application of shares or assets exception

[1.480] The acquisition of shares or assets exception in s 45AT(1) seeks to make mergers and acquisitions subject to assessment under s 50 of the Act and not under the cartel prohibitions. The type of conduct (acquisition of shares or assets) is unlikely to substantially lessen competition in the general run of cases and a competition test or a test relating to substantial market power is needed to avoid the overreach that would result from per se cartel liability. The exception is not concerned merely with avoiding overlap between the cartel prohibitions and that under s 50.

Legal elements of application of shares or assets exception

[1.490] The s 45AT exceptions apply in so far as a cartel provision 'provides directly or indirectly' for the acquisition of shares or assets.[64] The wording 'provides .. for' is narrower than the wording 'relates to'.[65] A provision 'provides .. for' an acquisition only if it prescribes some step to be taken to effect the acquisition.[66] There is no requirement in s 45AT(1) that the cartel provision be reasonably necessary for the acquisition of shares or assets.[67] Nor is there any requirement that the cartel provision be a central term or a condition precedent of the acquisition of shares or assets.

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63 Section 50(3).

64 See further *SA Brewing Holdings Ltd v Baxt* (1989) 23 FCR 357; *Norcast S.ár.L v Bradken Ltd (No 2)* [2013] FCA 235. These cases are discussed in [1.520].

65 *Norcast S.ár.L v Bradken Ltd (No 2)* [2013] FCA 235, [281].

66 *Norcast S.ár.L v Bradken Ltd (No 2)* [2013] FCA 235, [284].

67 *ACCC v Cryosite Ltd* [2019] FCA 116 was a decision on penalty, not liability.

Three-step analysis

[1.500] The wording 'in so far' as in s 45AT(1) implies a three-step analysis:[68]

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 1 is a provision that provides directly or indirectly for the acquisition of shares or assets, then the s 45AT(1) exception will apply to that cartel provision unless the cartel provision is unseverable from the provisions in 2. Where all cartel provisions in 1 are unseverable from the provisions in 2, s 50 will apply to those cartel provisions and not the cartel prohibitions.

Burdens of proof

[1.510] An evidential burden of proof lies on a defendant who wishes to rely on the acquisition of shares or assets exception under s 45AT(1) to deny liability for a cartel offence (Criminal Code, s 13.3). An evidential burden of proof lies on any person who wishes to rely on s 45AT to deny liability in relation to contravention of a civil cartel prohibition (s 45AT(2)(4)).

Case law on acquisition of shares or assets exception – ***Norcast S.ár.L v Bradken Ltd (No 2)***

[1.520] The wording 'provides for' the acquisition of shares or assets in s 44ZZRU, an earlier version of s 45AT(1) was interpreted and applied in as *Norcast S.ár.L v Bradken Ltd (No 2)*.[69] Norcast wanted to sell NWS, a subsidiary, but not to Bradken. A plot was hatched under which Castle Harlan Group (CHG) would acquire NWS through a subsidiary, BC Ltd, and Bradken would then acquire around 90% of the share capital in BC Ltd. The Federal Court held that a provision in the arrangement or understanding between Bradken and CHG (the Bidding Provision) was a bid-rigging provision, and that the bid-rigging provision was not excepted from cartel liability by s 44ZZRU. The provisions that provided 'directly' for the acquisition of the NWS shares by Castle Harlan and Bradken were contained in a draft Share Purchase Agreement (SPA) and a Subscription, Governance and Purchase Agreement (SGPA), not the bid-rigging arrangement. Nor did the bid-rigging provision provide 'indirectly' for the acquisition of shares in BC Ltd: [70]

> The Bidding Provision related to the two stages of the NWS sales process .. , not to the eventual acquisition of the shares. Once stage 2 was complete, and Castle Harlan had lodged a final bid and Bradken had not, the work of the Bidding Provision was complete. For the same reason, s 50 did not and could not apply to the Bidding Provision in the Bid Rigging Arrangement – the provision did not directly or indirectly effect any acquisition.

On that interpretation, a cartel provision under s 45AT does not provide directly or indirectly for an acquisition of shares or assets unless the provision prescribes some step that is to be taken to effect the acquisition.

SA Brewing Holdings Ltd v Baxt

[1.530] In *SA Brewing Holdings Ltd v Baxt*,[71] the question arose whether s 155 notices validly referred to s 45 when the conduct in issue arguably was an acquisition of shares or assets that s 45(7) made subject to s 50, not s 45. It was held by the Full Court of the Federal Court of Australia that the s 155 notices were valid.

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68 See *Norcast S.ár.L v Bradken Ltd (No 2)* [2013] FCA 235, [283] following *Australian Cartel Regulation*, 301.

69 [2013] FCA 235.

70 [2013] FCA 235, [284].

71 (1989) 23 FCR 357.

The conduct related to the control of production facilities and could not be characterised as relating to the acquisition of the assets of SA Brewing or a related corporation.[72] The Court also discussed the meaning and implications of the words 'in so far as' in s 45(7) and indicated that s 50 will apply where it is not possible to sever a s 45 provision from other provisions that relate to the acquisition of shares or assets:[73]

> .. the words "in so far as" in s 45(7) preserve the application of s 45 to the relevant contract, arrangement or understanding if it can stand with the excluded provisions severed and still amount to a contravention. There may be cases where no severance is possible and the exclusion of the acquisition provision effectively excludes the entire transaction from the application of s 45.

Those observations apply to s 45AT. That means that s 50 and not the cartel prohibitions will apply to cartel provisions in a merger or other agreement where they cannot be severed from other provisions in the agreement relating to the acquisition of shares or assets. That creates a loophole in the cartel prohibitions, as discussed in [1.560].

Undue laxity of acquisition of shares or assets exception

[1.540] A cartel provision may provide for an acquisition of shares or assets where the provision is not reasonably necessary for the acquisition.[74] For example, a merger agreement between competitors may include a provision that controls the prices that the target may charge before the merger is completed. That provision 'provides for' the acquisition of the assets or shares: pricing in accordance e with the provision is a step to be taken to effect the acquisition (see [1.490]). In such a situation, s 45AT allows too lax an escape route from cartel liability. By contrast, s 1 of the Sherman Act has been taken to require that restrictions imposed in a merger agreement be reasonably necessary and the least restrictive available to preserve the assets.[75]

The laxity of s 45AT is not rectified by the goodwill protection power under s 51ABZG. Under s 51ABZG, the 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, the s 51ABZG power applies to the goodwill exemption under s 51(2)(e). It does not apply to the s 45AT exception.

Unduly limited scope of acquisition of shares or assets exception

[1.550] Conversely, a cartel provision may be reasonably necessary for an acquisition and yet not 'provide for' the acquisition. In that situation s 45AT does not apply and, to avoid cartel liability, D will have to rely on some other exception.

The goodwill exception under s 51(2)(e) of the Act may save the day to some extent in some cases. A provision that is solely for the protection of the purchaser in respect of the goodwill of the business is exempt from liability under the cartel prohibitions and other prohibitions including those under s 45. However, a sole purpose test is more onerous than a test of reasonable necessity. The s 51(2)(e) exception is also limited to the protection of goodwill. Cartel provisions in merger agreements may be reasonably necessary to enable an acquisition to be carried out without being for the protection of the purchaser or the protection of goodwill. For instance, exclusion of particular assets in the sale of a business may be for the protection of the *seller* where the seller wishes to use those excluded assets in another business.

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72 (1989) 23 FCR 357, 373.

73 (1989) 23 FCR 357, 372.

74 No such requirement was read into s 44ZZRU in *Norcast S.ár.L v Bradken Ltd (No 2)* [2013] FCA 235.

75 See WJ Vigdor (ed), *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange* (American Bar Association, 2006) ch 3.

Acquisition of shares or assets exception invites manipulation and avoidance of cartel liability

[1.560] Section 45AT invites manipulation and avoidance of cartel liability. Cartel provisions in merger agreements may be designed and drafted to make them unseverable from acquisition provisions in a such agreements. If the cartel provisions are unseverable from the acquisition provisions, the cartel provisions will not be subject to cartel liability. Under the 'blue pencil' test of severability,[76] 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.

Proposed amendment of s 45AT

[1.570] It would be possible to 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) preserve the value of the shares or assets in order to protect the purchaser or seller.

A 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)).

Advantages of proposed amendment of s 45AT

[1.580] The approach indicated in [1.570] would have several advantages, including these:

- the reasonable necessity test in (b) would preserve cartel liability in situations where parties to a merger try to use a cartel provision to restrain competition unreasonably before a merger is completed;
- the reasonable necessity test in (b) would exclude cartel liability where a cartel provision is pro-competitive and where per se liability would be unjustified and extreme; and
- removing the wording 'in so far as' would end the opportunity to evade cartel liability by drafting merger agreements so as to make cartel provisions unseverable from acquisition provisions.

Questions

[1.590] Consider these questions:

1. Consider the *Consumer Associates* case in 2002.[77] The merger agreement prohibited Platinum, the seller, from giving discounts of more than 20% during the preclosing period without the consent of Computer Associates. That restriction was challenged under s 1 of the Sherman Act by the US Department of Justice. Would the cartel provision in that case be subject to cartel liability in Australia? Would the s 45AT exception apply?

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[76] *SST Consulting Services Pty Limited v Rieson* [2006] HCA 31, [46].

[77] *US* v *Computer Associates International, Inc,* Civil No 01-0262 (GK), 20 November 2002, at: https://www.justice.gov/atr/case-document/final-judgment-55.

2. The ACCC has suggested that pre-merger restrictions on competition between the merging parties who are competitors need to be 'reasonably necessary' for undertaking the merger.[78] Is there a legal basis for that suggestion? Does s 45AT impose any such requirement?
3. Assume that a merger agreement is to be used by competitors as a pretext before and after the merger to enable them to engage in price fixing without incurring cartel liability. Could a price fixing provision be drafted so as to make the provision unseverable from the other provisions in the merger agreement and hence not subject to cartel liability?

[78] ACCC, 'Gun jumping risks for merger transactions', April 2019, at: https://www.accc.gov.au/system/files/1565_Gun%20jumping%20fact%20sheet_FA.pdf.

CONCLUSION: CARTEL EXCEPTIONS, BIG TECH AND STATUTORY REPAIR

Cartel exceptions invite statutory repair

[1.600] The cartel exceptions relating to joint ventures, related corporations, exclusive dealing and acquisition of shares or assets are the focus of this paper. These exceptions play an important role by limiting the reach of the cartel prohibitions. The cartel prohibitions are defined broadly and strictly and would otherwise have silly results. However, the exceptions suffer from underreach, overreach, uncertainty and impracticality in some key respects. Statutory changes could address and resolve those concerns. Particular amendments are suggested. See [1.250]-[1.260] (joint ventures), [1.350] (related corporations), [1.420]-[1.440] (exclusive dealing), and [1.540]-[1.580] (acquisition of shares or assets).

Cartel exceptions, Big Tech and legislative response

[1.610] Incremental development of cartel exceptions over five decades has resulted in gaps and other shortcomings. That is partly explained by the absence of any effective institutional mechanism in Australia for the care, maintenance and continual improvement of the Act. A further explanation is that the cartel exceptions examined here are a backwater, rarely the subject of legislative or judicial scrutiny.

Cartel exceptions may come more into focus as a result of the power, influence and impact of big tech corporations.[79] Big tech corporations much depend on collaborations between competitors for their growth and survival.[80] The risk of cartel liability is managed by liability control measures and adroit boundary-riding.[81] It is inevitable that cartel exceptions will be tested and that their loopholes and chinks will be exploited. It is possible as a result that law makers may take more interest in the care, maintenance and repair of those exceptions.

The statutory repairs proposed in the discussion above relate to the current Act. The discussion does not extend to the reform of the Act that may be needed to guard against harmful coordinated conduct in digital markets. A new digital competition regime has been proposed for Australia.[82] That new regime would complement the current legislative regime including the cartel prohibitions and the cartel exceptions.

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79 The many books on big tech companies and their implications for society include D Acemoglu and S Johnson, *Power and Progress: Our Thousand-Year Struggle over Technology and Prosperity* (Basic Books UK, 2023).

80 See ACCC, 'Recent developments in artificial intelligence: Industry Snapshot', December 2025, 24-36, at: https://www.accc.gov.au/about-us/publications/recent-developments-in-ai-industry-snapshot; US, FTC, 'Partnerships Between Cloud Service Providers and Ai Developers - FTC staff Report on AI Partnerships & Investments 6 (b) Study' (2025) at: https://www.ftc.gov/system/files/ftc_gov/pdf/p246201_aipartnerships6breport_redacted_0.pdf; M Pagani and TH Davenport, 'How AI Changes Partner Collaboration', MIT Sloan Management Review, November 20, 2024; N Gupta, F Urmetzer1 & S Ansari, 'Big-tech Strategic Partnerships in Artificial Intelligence' (2025) 20(3) International Journal of Business and Management 57; T Groza and A Wierzbicka, 'Mergers by Other Means? AI Partnerships and the Frontiers of (Post-)Industrial Organization' (2024) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4967357; L Blanquez, 'Mergers & Acquisitions, AI and Antitrust: The New Creative Ways for Big Tech to Enter the AI Market and Avoid HSR Rules', The Antitrust Attorney Blog, July 21, 2024, at: https://www.theantitrustattorney.com/mergers-acquisitions-ai-and-antitrust-the-new-creative-ways-for-big-tech-to-enter-the-ai-market-and-avoid-hsr-rules/; RJ Rhee and DD Sokol, 'Control Capture and Competition' (2026) 103 Wash. U L Rev (forthcoming); TM Jorde and DJ Teece, 'Innovation, Cooperation and Antitrust' (1989) 4 High Technology LJ 1.

81 On liability control and boundary-riding see *Australian Cartel Regulation*, ch 12.

82 Australian Treasury, 'A new digital competition regime proposal: Proposal Paper', December 2024, (https://treasury.gov.au/sites/default/files/2024-12/c2024-547447-pp.pdf). Submissions on the tentative proposals in that paper were requested by 14 February 2025. Remarkably, as at 23 May 2026, the submissions had yet to be published by Treasury (https://treasury.gov.au/consultation/c2024-547447). Exposure draft legislation has yet to be published.

Several questions arise.[83] What are the 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? [84] Are the current cartel prohibitions and cartel exceptions fit for the purpose of preventing or controlling harmful types of coordination by competitors? If they are not fit for purpose, what legislative changes or other measures are needed? Those questions are not answered by the ACCC digital inquiry reports[85] or the Treasury Proposal Paper for a new digital competition regime.[86] For instance, it is unlikely that current cartel law or the prohibition against concerted practices is capable of preventing or controlling harmful algorithmic collusion or AI agentic coordination of market conduct.[87] Remarkably, that incapacity is not addressed by the ACCC and Treasury blueprints to date for a new Australian digital competition regime.

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83 There are many other questions including the fundamental question of whether industrial era competition law and its focus on rivalry are ill-suited to digital markets: see P Colomo, *The New EU Competition Law* (Hart Publishing, 2023); N Petit, *Big Tech & The Digital Economy: The Moligopoly Scenario* (Oxford University Press, 2020).

84 One useful starting point is S Thomas, 'Horizontal Restraints on Platforms: How Digital Ecosystems Nudge into Rethinking the Construal of the Cartel Prohibition' (2020) 44 World Competition 53.

85 See eg ACCC, Digital platform services inquiry, Final Report, March 2025, at: https://www.accc.gov.au/system/files/digital-platform-services-inquiry-final-report-march2025.pdf

86 Reference, n 83.

87 See Fisse and Nicholls, 'Anti-Competitive Agreements Between Competitors and Cartel Enforcement', 173-179.

Further reading

Australian Competition and Consumer Commission, 'Sustainability Collaborations and Australian Competition Law: A Guide for Business' (2025) at: https://www.accc.gov.au/about-us/publications/sustainability-collaborations-and-australian-competition-law-a-guide-for-business

Australian Competition and Consumer Commission, 'Recent developments in artificial intelligence: Industry Snapshot', December 2025, at: https://www.accc.gov.au/about-us/publications/recent-developments-in-ai-industry-snapshot

Australian Government, The Treasury, *Competition Policy Review Final Report* (31 March 2015) 372-385, 397-405, at https://treasury.gov.au/publication/p2015-cpr-final-report

C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) ch 8

A Coorey, *Australian Competition Law: The Comprehensive Guide* (Jurisprudentia, 2024) ch 7

European Commission, 'Block Exemption Regulations', at https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/block-exemption-regulations_en

MA Lemley and MT Wansley, 'Coopting Disruption' (2025) 105 Boston University Law Review 457

New Zealand Commerce Commission, "Competitor Collaboration Guidelines' (2018) at: https://www.comcom.govt.nz/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

W Pengilley, 'The Corporate Parent: Relevant Trade Practices Issues' (1988) 18 University of Western Australia Law Review 224

S Snow, 'Exclusive Dealing: Provisions in Need of Reconsideration?' in J Clarke, A Fels, B Fisse, D Healey, M Marquis, J Middleton and R Smith (eds), *Competition Law and Economics in Australia* (Routledge, 2025) Vol I, ch 18

Y Svetiev, *Corones' Competition Law Australia* (Lawbook Co, 8th ed, 2023) 249-274

WJ Vigdor (ed), *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange* (American Bar Association, 2006) ch 3

United States of America, Federal Trade Commission and Department of Justice and Federal Trade Commission, 'Antitrust Guidelines on Collaborations among Competitors' (2000) at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (withdrawn on 11 December 2024 because they did not reflect subsequent case law –revised guidelines are proposed: see https://www.ftc.gov/news-events/news/press-releases/2026/02/federal-trade-commission-department-justice-seek-public-comment-guidance-business-collaborations)

Zelle LLP, 'Stop, Collaborate and Listen! What to Know About the FTC and DOJ's Withdrawal of the Competitor Collaboration Guidelines' (2025) at: https://www.jdsupra.com/legalnews/stop-collaborate-and-listen-what-to-9527746/