Law Council
OF AUSTRALIA

Business Law Section

Reform to ss 47 and 45AR of the *Competition and Consumer Act 2010* (Cth)

Treasury

3 September 2021

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About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

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- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee

- Technology in Mergers & Acquisitions Working Group

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The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

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- Mr Adrian Varrasso

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

For Further Information

The Competition and Consumer Committee (Committee) of the Business Law Section of the Law Council of Australia provides this submission, following discussions with representatives of Treasury in relation to the Commonwealth Government's ongoing consideration of reforms to s 47 of the *Competition and Consumer Act 2010* (Cth) (**CCA**)

The Committee would be pleased to discuss any aspect of this submission. Any queries can be directed to Jacqueline Downes, Chair of the Committee (Jacqueline.Downes@allens.com.au or (02) 9230 4850).

With compliments

Greg Rodgers
Chair, Business Law Section

Executive Summary

1. The Commonwealth Government's consideration of whether reforms to s 47 of the CCA may be appropriate dates back at least to the Competition Policy Review conducted by the Harper Panel.[1]

2. For the reasons set out below, the Committee considers that s 47 of the CCA is no longer fit for purpose. Insofar as it purports to regulate anti-competitive vertical conduct:

   (a) it is unnecessarily complex, difficult to understand and carries a high compliance and uncertainty cost;

   (b) it contains a number of anomalies, regulating certain types of vertical conduct but not others for no discernible policy reason; and

   (c) it has been rendered largely obsolete by recent amendments to the misuse of market power prohibition set out in s 46 of the CCA, except as to anti-overlap with the cartel provisions (s 45AR). Any potential gap in enforcement is mitigated by the combination of the anti-overlap provisions in s 45 and the introduction of the 'substantial lessening of competition' test into s 46, as discussed further below.

3. The current structure of the CCA reflects the recognition that the civil and criminal cartel prohibitions catch vertical arrangements and that most, if not all, of those arrangements should be exempted from those prohibitions and subject to other, more appropriate prohibitions. To the extent that s 47 acts as an anti-overlap provision, exempting defined vertical exclusive dealing conduct from the cartel provisions (including the criminal cartel offence provisions), the provision could be much simpler. The current complexity and anomalies create significant uncertainty as to whether particular conduct is likely to attract criminal liability.

4. The Committee submits that s 47 and s 45AR should be reformed, largely in line with the recommendations in the Final Report of the Harper Panel. The proposed amendments (set out below in Section D) are intended to repeal the existing s 47 and s 45AR (which relies on s 47 for its operation as an anti-overlap provision) and replace it with a simplified and fit for purpose exemption to the cartel provisions for vertical trading.

5. If the proposed amendments are accepted, the exemption will encompass all vertical arrangements (such arrangements still being subject to a 'substantial lessening of competition' test) except those that involve price fixing. The Committee considers this would significantly reduce (i) the complexity associated with the current wording; and (ii) the level of uncertainty about the circumstances in which the cartel exemption applies. Vertical dealings that raise genuine concerns of anti-competitive conduct

[1] See Professor Ian Harper, Peter Anderson, Sue McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015 (***Harper Review, Final Report***).

would continue to be regulated by the current prohibitions in section 45 and 46 of the CCA.

Submission

A Background to s 47 reform

6. Section 47 of the CCA was considered by the Harper Panel as part of its wide ranging Competition Policy Review. In its 2015 *Competition Policy Review: Final Report* (***Harper Review Final Report***), the Harper Panel recommended that:

   (a) so long as recommended changes to s 46 of the CCA were made, s 47 should be repealed;[2] and

   (b) a new exemption from the cartel provisions for vertical conduct should be introduced.[3]

7. In relation to the new cartel exemption, the Final Report noted at Recommendation 27 that:

   > *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 s 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition*.

8. Exposure Draft legislation (**Exposure Draft Legislation**) for the purposes of the Harper Review was released by Treasury for consultation in 2016. The Exposure Draft Legislation contained a new cartel exemption for vertical conduct (proposed new s 44ZZRS), but did not propose a repeal of s 47.[4] The Committee had a number of concerns with the proposed scope of the cartel exemption as set out in the Exposure Draft Legislation. Those concerns are set out in a submission dated 28 October 2016 that the Committee provided to Treasury.

9. The *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (**2017 Bill**) that was ultimately released did not contain the proposed new cartel exemption for vertical conduct. The Explanatory Memorandum to the 2017 Bill noted that:

   > *… the vertical trading restriction cartel exception was removed from this Bill, to be given further consideration and progressed in a future legislative package together with amendments to section 47*.[5]

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[2] Harper Review, Final Report, Recommendation 33 at 376.
[3] Harper Review, Final Report, Recommendation 27 at 367.
[4] *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (Cth), <https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments/supporting_documents/Exposure_Draft.pdf>.
[5] Parliament of the Commonwealth of Australia, *Competition and Consumer Amendment (Competition Policy Review) Bill* 2017, Explanatory Memorandum, 30 March 2017, at 140.

10. Nevertheless, the 2017 Bill did contain the amendments to s 46 of the CCA that had been recommended by the Harper Panel in the Final Report, and which the Harper Panel considered rendered s 47 redundant.

11. This submission relates to the proposed future legislative package dealing with s 47 reforms referred to in the above passage from the Explanatory Memorandum to the 2017 Bill.

12. **Appendix A** to this submission contains a comprehensive history of the reform steps since the Final Report, together with a summary of the relevant submissions from the Australian Competition and Consumer Commission (***ACCC***) and the Committee.

B Section 47 is no longer necessary

13. Following the Harper Review Final Report, amendments were made to the CCA effective November 2017 to amend:

    (a) s 47 such that third line forcing was no longer a per se contravention but instead subject to the competition test; and

    (b) s 46 to introduce an effects test for misuse of market power in line with the recommendation in the Final Report.

14. The amendments to s 46 of the CCA met the Harper Panel's pre-condition for its recommendation to repeal s 47 of the CCA.

15. In the wake of these reforms, the Committee considers that s 47 no longer serves any useful purpose except as a vertical exemption for cartel conduct (as set out in s 45AR). As it currently stands, the conduct which is prohibited by s 47 also likely contravenes either s 45 or s 46 of the CCA.

16. Broadly, s 47 prohibits four types of conduct where the conduct has the purpose, effect or likely effect of substantially lessening competition:

    (a) supplying or offering to supply goods or services on certain conditions or subject to certain restrictions: s 47(2) and s 47(6);

    (b) acquiring or offering to acquire goods or services on certain conditions or subject to certain restrictions: s 47(4);

    (c) refusing to supply goods or services or refusing to give or allow a discount, allowance rebate or credit in relation to the supply of goods or services for certain reasons: s 47(3) and s 47(7); and

    (d) refusing to acquire goods or services or refusing to acquire goods or services at a particular price for certain reasons: s 47(5).

17. To the extent that s 47 prohibits the conditional supply or acquisition of goods or services (or the offer to supply or acquire goods or services), this conduct is already covered by s 45 of the CCA. Section 45 prohibits any contract, arrangement or understanding which has the purpose, effect or likely effect of substantially lessening

competition. Any conditional supply or acquisition must be pursuant to a contract, arrangement or understanding. Any offer to do so would amount to an attempt to enter into such a contract, arrangement or understanding.

18. To the extent that s 47 prohibits refusals to supply or acquire goods or services, this conduct is now covered by the amended s 46. Section 46 now prohibits a corporation that has a substantial degree of market power from engaging in any conduct that has the purpose, effect or likely effect of substantially lessening in any relevant market. Refusals to deal have long been recognised as potential misuses of market power.[6]

19. While s 46 also requires that the corporation engaging in the refusal to supply or acquire has a substantial degree of market power, this requirement does not result in any practical narrowing of the scope of this prohibition compared with s 47. Simply put, a refusal by a corporation to supply or acquire goods or services will not have the likely effect of substantially lessening competition in a market if that corporation does not have a substantial degree of power in a market. To be a substantial lessening of competition, the lessening must be '*meaningful or relevant to the competitive process*'.[7] Without the relevant corporation having a substantial degree of market power, such a refusal to supply or acquire cannot have the required effect on competition. In such cases, the subject of the refusal will not be prevented or hindered from competing because it will have alternative suppliers or customers to turn to.

20. This position was clearly accepted by the Harper Panel in the Final Report:[8]

> *Section 46 has an additional limitation not expressed in section 47, namely, the prohibition only applies to a corporation that has substantial market power. However, this will not limit the effectiveness of the law. It is well accepted that vertical restrictions will not substantially lessen competition unless they are imposed by a corporation with substantial market power.*

21. The Harper Panel concluded:[9]

> *The Panel considers that vertical trading restrictions, and associated refusals to supply, can be addressed by a combination of section 45 and an amended section 46. In effect, section 47 would become a redundant provision. The Panel favours simplifying the CCA by removing unnecessary provisions.*

22. The position that is proposed by the Committee would be more consistent with the approach adopted in a number of overseas jurisdictions, as set out below. In those jurisdictions, vertical arrangements are generally regulated through broad provisions dealing with anti-competitive agreements and/or the misuse of market power. For instance:

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[6] See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177; ACCC, *Guidelines on Misuse of Market Power*, August 2018 at 9-10.
[7] See *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at [41].
[8] Harper Review, Final Report at 375.
[9] Harper Review, Final Report at 375.

- the European Union (***EU***) does not have an equivalent prohibition on exclusive dealing to s 47. Instead, exclusive dealing and vertical restraints are assessed under the general prohibition against agreements that have their object or effect the prevention, restriction or distortion of competition (Article 101(1) *Treaty on the Functioning of the European Union (**TFEU**)*) or as an abuse of dominance (Article 102 TFEU);[10]
- New Zealand, like the EU, does not have an equivalent prohibition on exclusive dealing. Instead, it regulates vertical restraints under its general anti-competitive agreement prohibition or taking advantage of market power prohibition (combined with an anti-overlap provision for cartel conduct);[11] and
- the United Kingdom, similar to the EU and New Zealand, does not have a prohibition specific to exclusive dealing. Rather, exclusive dealing is captured by the general prohibition on anti-competitive agreements.[12]

23. **Appendix B** to this submission contains a more detailed summary of the treatment of exclusive dealing in other jurisdictions.

C Section 47 is overly complex and inconsistent in its application

24. The Committee considers that s 47 as it currently stands is unnecessarily complex, resulting in uncertainties as to the circumstances in which it applies, including to exempt certain arrangements from the prohibitions against cartel conduct (under s 45AR). It also contains a number of anomalies, regulating certain types of vertical conduct but not others for no discernible policy reason.

25. The Final Report criticised the complexity of the current drafting of s 47:[13]

> *The Panel considers that the present form of section 47 suffers from two deficiencies. First, because it attempts to describe a considerable number of categories of (non-price) vertical restriction, it is difficult for a business person to read and understand. The complexity might be tolerated if it constituted a comprehensive code of prohibited trading conduct. But it does not: the types of vertical restrictions described in section 47 are not exhaustive.*

[10] Specifically, they are prohibited when they have the object or effect of preventing, restricting or distorting competition (*Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2016] OJ C 202/01 (entered into force 1 November 1993), article 101 (**TFEU**), and when they constitute an abuse of dominance (article 102 of the TFEU).
[11] The *Commerce Act 1986* (NZ) (***NZ Commerce Act***). The catch-all prohibition against anti-competitive agreements is set out in section 27(1) and (2) of the NZ Commerce Act. This section prohibits the making or giving effect to a contract, arrangement or understanding containing a provision that has the purpose, or has or is likely to have the effect of, substantially lessening competition in a market. The taking advantage of market power provision as set out in section 36(2) of the NZ Commerce Act. Section 32 of the NZ Commerce Act operates as an anti-overlap provision, exempting cartel provisions in contracts between a supplier of goods and services and its customer from the prohibition against cartel conduct under section 30 (provided the provision does not have the dominant purpose of lessening competition between the parties to the contract).
[12] Section 2 of the *Competition Act 1998* (UK) prohibits agreements between entities that may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK, and renders such agreements void.
[13] Harper Review, Final Report at 374-5.

26. The complexities in drafting and non-exhaustive nature of the definition of exclusive dealing in s 47 of the CCA give rise to considerable uncertainties for businesses in identifying whether a given vertical arrangement can be characterised as exclusive dealing.

27. The risks arising out of those uncertainties are particularly significant given that s 47 operates as an 'anti-overlap' provision that exempts certain arrangements from the per se civil and criminal cartel conduct prohibitions (under s 45AR of the CCA).

28. Four examples of important anomalies in the definition of exclusive dealing in the current s 47 are:

    (a) It is exclusive dealing to supply goods or services to a customer on the condition that the customer accepts a restriction on its ability to re-supply those goods or services, or re-supply goods or services acquired from a competitor of the supplier (s 47(2)(e) and (f)). It is not, however, exclusive dealing to supply goods or services to a customer on the condition that the customer accepts a restriction on its ability to supply its own goods or services.

    (b) It is exclusive dealing to supply goods or services on the condition that the customer accepts a restriction on its ability to acquire goods or services from a competitor of the supplier(s 47(2)(d)). It is not, however, exclusive dealing to supply goods or services on the condition that the customer accepts a restriction on its ability to acquire goods or services from a party who is not a competitor of the supplier.

    (c) It is exclusive dealing to acquire goods or services on the condition that the supplier accepts a restriction on its ability to supply goods or services (s 47(4)). It is not, however, exclusive dealing to acquire goods or services on the condition that the supplier accepts a restriction on its ability to acquire goods or services.

    (d) It is exclusive dealing to attach a condition to a licensee's re-supply of a good. It is not exclusive dealing for a licensor to limit the scope of the license by imposing a restriction over the territories to which or customers to whom the licensee may supply the relevant goods. This is because the condition attached to the registered owner's supply of a service (the grant of a licence) relates to the licensee's supply of a different product (goods) rather than constituting a limitation on re-supply under s 47(2).[14]

29. There is no policy justification for these anomalies and no reason why these types of legitimate vertical conduct excluded from the definition of exclusive dealing under s 47 are so inherently likely to be anti-competitive that they should be subject to per se cartel conduct prohibitions under s 45AR.

[14] Further examples relating to intellectual property are set out in Appendix C.

30. These gaps can have more than academic or definitional consequences. *Visy Paper Pty Limited v ACCC* (2003) 216 CLR 1 (***Visy***) is an example of the gap identified in 28(c). In this case, a singular non-compete clause relating to the collection of waste paper was found to simultaneously be a prohibition on supply and a prohibition on acquisition. The former characterisation fell within the definition of exclusive dealing as prescribed by s 47 but the latter did not. Consequently, the conduct came under the per se provisions of ss 45 and 4D (as they were then) despite one of the characterisations of the relevant conduct satisfying s 47(4). As a result, conduct which had been conceded by the ACCC at trial not to have had a purpose or the effect of substantially lessening competition was, nonetheless, prohibited outright and penalties were imposed.

31. The practical takeaway from *Visy* is that persons acquiring goods or services on the condition that the supplier accepts certain restrictions on their ability to supply goods or services must also ensure that the supply of goods or services subject of the restrictions *cannot also* be characterised as an acquisition. If it can, such an agreement could constitute cartel conduct (provided that the supplier is a competitor or potential competitor) and lead to criminal consequences. If not, the conduct would be exempted, and subject to the competition test in s 47(10). This disparity in outcome is evidently not based on any meaningful difference in the underlying commercial arrangement or the likelihood of harm to competition. Accordingly, the definition of exclusive dealing under the current s 47 and by extension, the operation of s 45AR which only exempts arrangements falling within the prescriptive definition of s 47 from the prohibitions against cartel conduct, risks producing artificial and unfair outcomes.

32. These types of vertical relationships should not contravene competition law unless there is a substantial lessening of competition. Where there is a substantial lessening of competition, conduct would be captured by the CCA (ss 45 or 46).

33. The anomalies in the application of s 47 are particularly apparent in the context of intellectual property (***IP***) licensing arrangements. **Appendix C** to this submission sets out examples of how the current drafting of s 47 of the CCA can result in uncertainty as to whether provisions of certain IP licensing agreements may result in civil or criminal liability under the cartel provisions.

34. The Committee considers that it is of critical importance that business are able to clearly discern the circumstances in which they may be at risk of engaging in cartel conduct (including by reference to the applicable exemptions to the cartel conduct rules). For these reasons, the Committee submits that s 47 and s 45AR (which relies on the definition of s 47 for its operation as an anti-overlap provision) should be repealed and replaced with a new, fit for purpose, exemption to the cartel provisions for vertical trading. This is particularly so given the recent repeal of the IP exception.[15]

[15] The exception was previously contained in section 51(3) of the CCA and was repealed in February 2019 by the passage of the *Treasury Laws Amendment (2018 Measures No. 5) Bill 2018*.

D A new vertical exemption for cartel conduct

35. The Committee submits that a new vertical exemption for cartel conduct should be introduced following the repeal of s 47 and s 45AR.

36. In the absence of such an exemption, the cartel prohibitions (a breach of which can attract criminal consequences) could apply to many legitimate and innocuous vertical arrangements. This would introduce unnecessary compliance costs and risk for businesses, with no countervailing benefit to competition or consumers.

37. For instance, the cartel conduct prohibitions operate in such a way that parties to a contract, arrangement or understanding functioning at different levels of a supply chain (eg, one as a wholesaler and the other as a retailer) can be caught by the prohibitions simply because it is likely that one of them could operate at the other level at some time in the future.[16]

38. Such arrangements are commonplace, especially in industries with a high degree of vertical integration, where supplying to or acquiring from a competitor or potential competitor occurs regularly, and is beneficial or even critical to the efficient functioning of the Australian economy. Prohibiting such conduct would be highly undesirable especially because, as explained in Section C above, sections 45 and 46 of the CCA already serve to comprehensively capture anti-competitive vertical conduct.

39. Further, the extended definition of 'party' has the effect of deeming all related entities to also be parties to a cartel,[17] making it all the more imperative to exempt legitimate vertical conduct from the application of the cartel prohibitions.

40. Any new vertical exemption should therefore encompass all vertical arrangements, except those that involve price fixing.[18]

41. The Committee considers this would strike an appropriate balance between recognising the legitimacy of vertical dealings by exempting them from the application of the *per se* cartel prohibitions while ensuring any vertical conduct raising genuine concerns (because it has been engaged in with the purpose, or would have the effect or likely effect, of substantially lessening competition) is still subject to enforcement under sections 45 and 46 of the CCA.

42. The Committee therefore proposes the adoption of an adapted version of the drafting proposed in the Exposure Draft Legislation, as follows:

[16] Section 45(4) of the CCA provides that the 'competition condition' to cartel conduct is satisfied if the parties to the contract, arrangement or understanding 'are or are likely to be', or 'but for any contract, arrangement or understanding, would be or would be likely to be, in competition with each other'.
[17] Section 45AC of the CCA.
[18] Price fixing conduct is proposed to be excluded, consistent with the current position where price fixing conduct does not fall within s 47 and is therefore not exempted from the cartel prohibitions under s 45AR.

Section [X] Restrictions on supplies and acquisitions

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

(a) the contract, arrangement or understanding is entered into between a supplier or likely supplier of goods or services and an acquirer or likely acquirer of the goods or services from that supplier;

(b) the cartel provision imposes an obligation that relates to:

(i) the acquisition by the acquirer of goods or services;
(ii) the supply by the acquirer, to any persons, of goods or services;
(iii) the re-supply by the acquirer of the goods or services;
(iv) the supply by the supplier of goods or services; or
(v) the acquisition by the supplier, from any person, of goods or services; and

(c) the obligation referred to in subsection (b) relates to the acquisition, supply or re-supply (as applicable):

(i) to or from a person, persons or a class of persons, irrespective of whether they are specifically identifiable; or

(ii) in a place, places, or class of places, irrespective of whether it is specifically identifiable.

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

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

43. **Appendix D** to this submission contains a marked-up version of the Committee's proposed new exemption against the exemption that was previously proposed in the Exposure Draft Legislation.

44. Section 93 of the CCA currently allows parties to notify exclusive dealing conduct to the ACCC. To ensure parties can continue to use the notification process for vertical arrangements (should section 47 be repealed), references to section 47 and its subsections in section 93 should be replaced with an appropriate definition for vertical conduct. The Committee considers that such a definition should be substantially based on subsection (3)(a) of the proposed vertical exemption described in paragraph 42 above and proposes the following definition:

Definition of vertical conduct that can be notified for the purposes of section 93

(a) a contract, arrangement or understanding entered into between a supplier or likely supplier of goods or services and an acquirer or likely acquirer of the goods or services from that supplier which imposes an obligation relating to:

  (i) the acquisition by the acquirer of goods or services;
  (ii) the supply by the acquirer, to any persons, of goods or services;
  (iii) the re-supply by the acquirer of the goods or services;
  (iv) the supply by the supplier of goods or services; or
  (v) the acquisition by the supplier, from any person, of goods or services; and

(b) the obligation referred to in subsection (a) relates to the acquisition, supply or re-supply (as applicable):

  (i) to or from a person, persons or a class of persons, irrespective of whether they are specifically identifiable; or
  (ii) in a place, places, or class of places, irrespective of whether it is specifically identifiable.

Appendix A: History of proposed reforms to s 47

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
Harper Review Final Report Harper Review Draft Report	In its Draft Report, the Harper Panel considered that: • Provisions on third line forcing should be brought into line with the rest of s 47 and only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.[19] • Section 47 should apply to all forms of vertical conduct.[20] By the Final Report, the Harper Panel adjusted its position, considering that vertical trading restrictions would be addressed by a combination of s 45 and the amended s 46, thereby rendering s 47 redundant.[21] In this circumstance, the Panel recommended that s 47 be repealed.[22] However, if s 46 was not amended as recommended, the Panel considered that s 47 should be simplified as set out below.[23]	These submissions were made in response to the Draft Report. ***Pros*** (1) The ACCC supported further clarifying the CCA and reducing complexity.[26] In particular, the ACCC saw value in simplifying the anti-overlap provisions in s 44ZZRS (i.e. the proposed s 45J, and now s 45AR) and 45(6). However, it noted that any amendment should 'not be so broad as to allow cartel conduct to slip through'.[27]	These submissions were made in response to the Draft Report. ***Pros*** (1) The LCA supported the Panel's proposal to simplify s 47.[39] The LCA submitted that it was appropriate to consider whether the highly prescriptive prohibitions in s 47 should be replaced with a revised set of rules that apply to 'vertical' restraints, where those restraints would have the purpose or be likely to have the	The Harper Review Final Report did not contemplate an 'acquire / acquire' scenario where an acquirer of goods or services wanted to impose conditions on the supplier's acquisition of goods or services. The Panel noted the ACCC's concerns, but nevertheless considered that the broader s 47 exemption in the cartel laws was necessary, as it did

[19] Harper Review, Draft Report, Draft Recommendation 27.
[20] Harper Review, Draft Report, Draft Recommendation 28.
[21] Harper Review, Final Report at 375.
[22] Harper Review, Final Report at 376.
[23] Harper Review, Final Report at 376.
[26] ACCC Submission to Harper Review Draft Report at 56.
[27] ACCC Submission to Harper Review Draft Report at 42.
[39] Law Council of Australia (Competition and Consumer Committee) Submission to Harper Review Draft Report at 34.

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
	Separately, the Panel also considered that a clearer exemption for vertical trading restrictions from the cartel prohibitions should be introduced as a new s 45J. In the Panel's view, the exemption should define the vertical trading restrictions that should be exempt from the per se cartel prohibitions without reference to s 47. The Panel's proposed exemption recognised that such conduct would be prohibited by s 45 (or s 47, if retained) if it has the purpose, effect or likely effect of substantially lessening competition.[24] The Panel's proposed sections 45J and 47 are set out below. ***45J Restrictions in supply and acquisition agreements*** *[currently section 44ZZRS]* *(1) Sections 45C, 45D, 45G and 45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision in so far as the cartel provision:* *(b) is imposed by a person (the **supplier**) in connection with the supply of goods or*	(2) The ACCC also supported the Panel's recommendation that third line forcing be brought into line with the rest of s 47 and only be prohibited where it substantially lessens competition.[28] (3) The Panel had also recommended the repeal of s 51(3), which would subject exclusive IP licensing to s 47. Section 51(3) provided a limited exception for certain IP licence conditions from the competition provisions of the CCA (except the misuse of market power and resale price maintenance provisions). The ACCC supported this	effect of substantially lessening competition.[40] (2) The LCA also supported the Panel's proposal to introduce a competition test for third line forcing.[41] The LCA considered that vertical restraints can be pro-competitive and that a *per se* prohibition presents an ongoing risk of stifling the delivery of substantial consumer benefits.[42] The LCA also strongly reiterated the importance of the third line forcing exemption for related bodies corporate.[43]	not believe that the existing exemption was 'adequate to protect legitimate conduct from the cartel laws'.[48]

[24] Harper Review, Final Report at 364 and 365.
[28] ACCC Submission to Harper Review Issues Paper at 87. This recommendation was implemented by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), Schedule 7.
[40] Law Council of Australia (Competition and Consumer Committee) Submission to Harper Review Issues Paper at 30.
[41] Law Council of Australia (Competition and Consumer Committee) Submission to Harper Review Draft Report at 34.
[42] Law Council of Australia (Competition and Consumer Committee) Submission to Harper Review Issues Paper at 59.
[43] Law Council of Australia (Competition and Consumer Committee) Submission to Harper Review Issues Paper at 60.
[48] Harper Review, Final Report at 365.

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
	*services to another person (the **acquirer**) and relates to:* *(i) the supply of the goods or services by the acquirer to the acquirer;* *(ii) the acquisition by the acquirer of goods or services that are substitutable for or otherwise competitive with the goods or services from others; or* *(iii) the supply by the acquirer of the goods or services or goods or services that are substitutable for or otherwise competitive with the goods or services;* *(c) is imposed by a person (the **acquirer**) in connection with the acquisition of goods or services from another person (the **supplier**) and relates to:* *(i) the acquisition of the goods or services from the supplier; or* *(ii) the supply by the supplier of the goods or services, or goods or services that are substitutable for or otherwise competitive with the goods or services, to others.*	recommendation and took the view that, where there are significant competition concerns, it is imperative that the use of IP rights be subjected to the CCA in the same way as any other property rights.[29] ***Cons*** (1) The ACCC cautioned against a broader carve-out from the cartel laws for vertical restrictions and opposed the amendments to s 47 proposed by the Panel as it considered the amendments would 'inappropriately broaden the scope of the prohibition which, due to the anti-overlap provisions, would consequently narrow the application of the cartel and exclusionary dealing	***Cons*** (1) The LCA considered the Panel's recommendation to repeal s 51(3) of the CCA[44] was premature in light of a proposed overarching review of IP by an independent body.[45] The LCA noted that if s 51(3) were repealed, s 47 would apply to exclusive IP licensing arrangements and it would be, in principle, incongruous that IP rights holders would not be allowed to exercise their exclusive rights conferred by statute. The LCA considered that the repeal would have the effect of discouraging licensing by the rights holder which could have	

[29] ACCC Submission to Harper Review Issues Paper at 17 and 62.
[44] Harper Review, Final Report at 42.
[45] Law Council of Australia (Competition and Consumer Committee) Submission to Harper Review Draft Report at 4.

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	Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the Criminal Code) and subsection (2) of this section. *(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45G or 45H bears an evidential burden in relation to that matter.* … ***47 Exclusive dealing*** *(1) Subject to this section, a corporation shall not, in trade or commerce, engage in exclusive dealing conduct.* *(2) A corporation (**supplier**) engages in exclusive dealing conduct if the corporation supplies, or offers to supply, goods or services to another person (**acquirer**), or does so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition (**supplier condition**):* *(a) relating to the supply of those or other goods or services by the supplier to the acquirer; or*	provisions.'[30] It suggested 'very careful consideration'[31] be given to any broadening of the cartel law exemptions relating to vertical arrangements. (2) In particular, the ACCC was concerned that the proposed s 47 was very broad and removed the existing prescription of the types of conduct in vertical supply arrangements subject to the s 47 prohibition. The ACCC considered that by de-coupling the prohibition on exclusive dealing from particular kinds of conduct, the proposed s 47 would have potentially far wider application. This type of amendment was	the downstream effect of reducing competition in the market.[46] More generally, the LCA submitted that comparable jurisdictions protected IP rights differently from other forms of property, and supported a corresponding safe harbour in Australian law to deal with uses of IP rights that are within the scope of the exclusive rights conferred by the relevant IP right.[47]	

[30] Harper Review at 365, citing ACCC Submission to Harper Review Draft Report at 40 and 56.
[31] ACCC Submission to Harper Review Draft Report at 40.
[46] Law Council of Australia (Intellectual Property Committee) Submission to Harper Review Draft Report at 4.
[47] Law Council of Australia (Intellectual Property Committee) Submission to Harper Review Draft Report at 3 and 9.

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	(b) preventing, restricting or limiting: *(i) the acquisition by the acquirer of goods or services from others; or* *(ii) the supply by the acquirer of goods or services to others.* *(3) A corporation (**supplier**) also engages in exclusive dealing conduct if the corporation refuses to supply goods or services to another person (**acquirer**), or refuses to do so at a particular price or with a particular discount, allowance, rebate or credit, for the reason that:* *(a) the acquirer has not agreed to a supplier condition referred to in subsection (2); or* *(b) the acquirer has previously acted inconsistently with a supplier condition referred to in subsection (2).* *(4) A corporation (**acquirer**) engages in exclusive dealing conduct if the corporation acquires, or offers to acquire, goods or services from another person, or does so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition (**acquirer condition**):*	seen to have 'significant implications'.[32] In the ACCC's view, this broadening 'may create a loophole for firms to establish (vertical) contractual arrangements which serve little purpose other than to ensure substantively horizontal agreements are technically excluded from the cartel provisions.'[33] For example, the ACCC considered that two competitors could establish reciprocal agency arrangements that neither ever utilise.[34] The ACCC noted that in the digital age, firms increasingly utilise multiple channels to market to end users, but this is unlikely to be the		

[32] ACCC Submission to Harper Review Draft Report at 56.
[33] ACCC Submission to Harper Review Draft Report at 41.
[34] ACCC Submission to Harper Review Draft Report at 41.

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	(a) relating to the acquisition of those or other goods or services by the acquirer from the supplier; or *(b) preventing, restricting or limiting the supply by the supplier of goods or services to others.* *(5) A corporation (**acquirer**) also engages in exclusive dealing conduct if the corporation refuses to acquire goods or services from another person (**supplier**), or refuses to do so at a particular price or with a particular discount, allowance, rebate or credit, for the reason that:* *(a) the supplier has not agreed to an acquirer condition referred to in subsection (4); or* *(b) the supplier has previously acted inconsistently with an acquirer condition referred to in subsection (4).* *(6) Subsection (1) does not apply to exclusive dealing conduct unless:* *(a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market; or* *(b) the engaging by the corporation in that conduct, and the engaging by the*	sole form of distribution, such that business relationships may be vertical or horizontal at different levels. Whether that is the case would be a question of degree, and ultimately fact, according to the ACCC.[35] The ACCC did not support a broadly drafted s 47 in this context. (3) The ACCC considered that the proposed reforms to s 47 'would be a significant change to the policy settings.'[36] An expanded s 47 would broaden the limited exception for particular cases of exclusive dealing from the cartel provisions. Where conduct falls within the scope of s 47, it is only prohibited if it has the purpose, effect or likely		

[35] ACCC Submission to Harper Review Draft Report at 41.
[36] ACCC Submission to Harper Review Draft Report at 42.

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	corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition in a market. *(7) Subsection (1) does not apply to exclusive dealing conduct if the only parties to the conduct are related bodies corporate.* *(8) In this section:* *(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;* *(b) a reference to competition shall be read as a reference to competition in any market in which:* *(i) the corporation engaging in the conduct or any body corporate related to that corporation; or* *(ii) any person whose business dealings are restricted, limited or otherwise*	effect of substantially lessening competition, rather than being prohibited *per se* as under the cartel provisions. The ACCC strongly opposed this change in policy settings.[37] The ACCC also noted that, in its view, the Harper Review's examples of pro-competitive territorial restrictions in the context of franchising would not necessarily breach the cartel prohibitions in any case and could fall within the scope of s 47 as then drafted.[38]		

[37] ACCC Submission to Harper Review Draft Report at 56 and 57.
[38] ACCC Submission to Harper Review Draft Report at 41.

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	circumscribed by the conductor, if that person is a body corporate, any body corporate related to that body corporate; supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.[25]			
Exposure Draft	The Exposure Draft included a new exception for vertical trading restrictions from the cartel conduct prohibitions. The Exposure Draft relevantly provided as follows: ***44ZZRS Restrictions on supplies and acquisitions*** *(1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision to the extent that the cartel provision:* *(a) imposes, on a party to the contract, arrangement or understanding (the **acquirer**) acquiring goods or services from another party to the contract,*	***Pros*** (1) The ACCC noted that a criticism of s 47, and accordingly s 44ZZRS, may be that it is overly prescriptive in terms of the types of conduct concerned.[50] However, the ACCC generally disagreed with the approach to simplification in the Exposure Draft. ***Cons*** (1) The ACCC did not support the proposed provision in the Exposure Draft and	***Pros / broadening*** (1) The current vertical arrangements exemption to cartel conduct in s44ZZRS(1) of the CCA applies to conduct which would, or would but for the operation of s47(10), contravene s47(1) of the CCA. The LCA considered that the Exposure Draft removed this link between ss 44ZZRS(1) and 47 of the CCA and provided a	The proposed wording in the Exposure Draft was, in some respects, both broader and narrower than the existing s 47. The Exposure Draft did not contemplate the repeal of s 47 (see the proposed s 44ZZRS(3)). The Explanatory Materials suggest that the types of arrangements captured under the

[25] Harper Review, Final Report at 509, 515 and 516 (Appendix A).
[50] ACCC Submission to the Exposure Draft at 4.

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	arrangement or understanding, an obligation that relates to: *(i) the acquisition by the acquirer of the goods or services; or* *(ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or* *(iii) the supply by the acquirer of the goods or services or of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or* *(b) imposes, on a party to the contract, arrangement or understanding (the **supplier**) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to:* *(i) the supply by the supplier of the goods or services; or* *(ii) the supply by the supplier, to any person, of other goods or services*	submitted that the most effective course would be to consider amendments to the cartel provisions as part of the government's proposal to further simplify the competition law, including s 47. In particular, the ACCC cautioned against amending s 44ZZRS without detailed consideration of amendments to s 47.[51] (2) The ACCC was concerned that the cartel prohibitions may be inappropriately narrowed by the proposed anti-overlap provision because of its breadth.[52] In the ACCC's view, it is critical to confine the scope of the exemption to parties in a	standalone exemption for certain restrictions on competition that are imposed by either a supplier or acquirer in circumstances where they are also in competition with each other.[61] This view is consistent with the Explanatory Materials which also state that the amendments are intended to broaden the exemption to vertical trading restrictions by removing the specific reference to s 47 and providing for the types of vertical trading restriction arrangements that fall within the exception.[62]	exception would be subject to other provisions of the CCA, including sections 45 and 47.[67] The Explanatory Materials do not otherwise explain why it was considered that s 47 should not be repealed.

[51] ACCC Submission to the Exposure Draft at 5.
[52] ACCC Submission to the Exposure Draft at 5.
[61] Law Council Submission (Competition and Consumer Committee) to the Exposure Draft at 10.
[62] Exposure Draft Explanatory Materials at 2.30.
[67] Exposure Draft Explanatory Materials at 2.31.

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	that are substitutable for, or otherwise competitive with, the goods or services. *Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the Criminal Code and subsection (2) of this section).* *(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.* *(3) This section does not affect the operation of section 45 or 47.* The Exposure Draft also included amendments to s 47 to subject third line forcing to the competition test as recommended by the Harper Review.[49] Otherwise, the Exposure Draft did not include other amendments to s 47.	supply or acquisition relationship. Any collusion that is primarily referable to the competitive relationship between businesses should be dealt with under the cartel prohibitions.[53] By removing the specific link to s 47, the breadth of the proposed provision and the lack of specificity around how such conduct might otherwise be addressed in the CCA was of 'significant concern'[54] according to the ACCC. The current specific reference to s 47 was said to provide 'some distinct boundaries'[55] to the operation of the anti-overlap provision and the courts had interpreted the	(2) The proposed exemption expands the application of the exemption available to parties in a supplier and acquirer relationship. For example, the exemption would apply to restrictions imposed on an acquirer not to supply goods or services that are substitutable for, or otherwise competitive with the goods or services supplied by the supplier to the acquirer. Currently, s 47(2) does not include this condition and therefore the current exemptions could not apply to this restriction.[63] ***Cons / narrowing***	

[49] Exposure Draft, Schedule 8; Harper Review, Final Report at 63.
[53] ACCC Submission to the Exposure Draft at 4.
[54] ACCC Submission to the Exposure Draft at 5.
[55] ACCC Submission to the Exposure Draft at 4.
[63] Law Council Submission (Competition and Consumer Committee) to the Exposure Draft at 11.

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		provisions in an appropriately restrictive way so the cartel provisions still applied to the rest of the agreement which was outside the anti-overlap provision's scope.[56] (3) According to the ACCC, the scope of the proposed exemption is unclear and complex, therefore raising the risk it will be interpreted in ways which have unintended consequences.[57] The ACCC was concerned that the wording in the proposed s 44ZZRS would introduce a de-facto 'product market' type test which would be particularly concerning in the context of prosecuting criminal cartel conduct.[58]	(1) The LCA considered that the proposed amendment also materially narrowed the application of the exemption in certain circumstances. The proposed amendment required a specific type of relationship or connection between the goods or services supplied or acquired and the goods or services which are subject to the restriction, that being that the goods or services must be 'substitutable for' or 'otherwise competitive with' one another (see the proposed s 44ZZRS(1)(b)(ii)). Sections 47(2)(d) and 47(4) of the CCA do not	

[56] ACCC Submission to the Exposure Draft at 4 and 5.
[57] ACCC Submission to the Exposure Draft at 5.
[58] ACCC Submission to the Exposure Draft at 4.

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
		According to the ACCC, this proposed exemption may result in juries being required to consider market issues which would be inappropriate. The ACCC 'strongly cautions against the introduction of this type of test into the cartel prohibitions'[59] and referred to its submissions to the Harper Review (see above).[60]	require this relationship or connection between the goods or services supplied or acquired and the goods or services which are the subject of a restriction (although, it was acknowledged s 47(2)(d) requires that the restriction be on acquiring goods or services from a competitor of the supplier). Accordingly, the LCA recommended that the proposed 'goods or services that are substitutable for, or otherwise competitive with' requirement is replaced with, simply, 'goods or services' to more closely align the drafting of the proposed exemption with the	

[59] ACCC Submission to the Exposure Draft at 4.
[60] ACCC Submission to the Exposure Draft at 4.

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
			existing scope of restrictions in s 47.[64] (2) The proposed drafting did not provide an exemption for circumstances where the purchaser acquired goods or services from the supplier on the condition that the supplier does not acquire goods or services from any third party. This could have implications, for example, where a restriction involves a restraint on both the supply and acquisition by the supplier. There would seem to be no basis for not permitting a restriction of this type to receive the benefit of the proposed exemption to the cartel laws.	

[64] Law Council Submission (Competition and Consumer Committee) to the Exposure Draft at 10 and 11.

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
			Accordingly, the LCA recommended that s 44ZZRS(1)(b) be amended to include obligations imposed on the supplier that relate to the acquisition by the supplier, from any person, of goods or services.[65] (3) The proposed drafting suggests that a price restriction imposed by an acquirer or a supplier could potentially be exempt from the per se cartel prohibitions. It is not clear whether it was intended that *any* obligation 'relating to' the supply by the supplier of goods or services would fall within the potential scope of the exemption (including conditions	

[65] Law Council Submission (Competition and Consumer Committee) to the Exposure Draft at 11.

Report / Reform	Position / Proposed Drafting	ACCC Submissions	LCA Submissions	Other Comments
			relating to price which might otherwise be prohibited by the operation of s 44ZZRD(2)).[66]	
Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) (***Harper Review Bill***)	The Explanatory Memorandum to the Harper Review Bill noted that 'stakeholders' had raised concerns that the proposed vertical trading restriction 'would be open to abuse by firms not genuinely in a … vertical relationship'.[68] Consequently, the Government removed the vertical trading exception from the Harper Review Bill.[69] The Government noted that it would be given further consideration and progressed in a future legislative package together with amendments to s 47.[70]	N/A	N/A	

[66] Law Council Submission (Competition and Consumer Committee) to the Exposure Draft at 11 and 12.
[68] Explanatory Memorandum to the Harper Review Bill at 139.
[69] Explanatory Memorandum to the Harper Review Bill at 139.
[70] Explanatory Memorandum to the Harper Review Bill at 139. The failure to create the exception when repealing CCA s 51(3) is not addressed in the Explanatory Memorandum to the *Treasury Laws Amendment (2018 Measures No 5) Bill 2018* (Cth) or the Second Reading Speech.

Appendix B: Treatment of exclusive dealing in other jurisdictions

1. European Union

The European Union does not have an equivalent prohibition on exclusive dealing to section 47 of the CCA.

Instead, exclusive dealing and vertical restraints are assessed under the general prohibitions on anti-competitive agreements and abuse of dominance. Specifically, they are prohibited:

- when they have the object or effect of preventing, restricting or distorting competition (Article 101 of the *Treaty on the Functioning of the European Union* (***TFEU***));[71] and
- when they constitute an abuse of dominance (Article 102 of the TFEU).

In the context of Article 101, the Vertical Block Exemption sets out a framework for assessing whether vertical restraints have the object or effect of distorting competition.[72] Under this framework, vertical restraints are either:

- **Presumed to be legal (*the safe harbour*):** in which case they are exempt from the application of Article 101(1) of the TFEU;
- **Presumed to be illegal (*the hardcore restrictions*):** in which case the burden of proof is reversed, so that the restraint is presumed to fall within the scope of Article 101(1) of the TFEU; or
- **Not subject to any presumption (*individual effects test*):** in which case they are subject to the normal assessment of whether they have the object or effect of distorting competition.

The European Commission has also published non-binding guidelines on vertical restraints, setting out the manner in which the Vertical Block Exemption will be applied and giving guidance on how vertical restraints falling outside the Vertical Block Exemption will be assessed (***Vertical Restraint Guidelines***).[73]

(a) The safe harbour

There are two general 'safe harbours' for vertical restraints:

- **The Vertical Block Exemption:** provides a safe harbour for vertical restraints where the supplier's and the buyer's respective market shares do not exceed 30% of the relevant markets for the products/services subject to the restraint.[74]

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[71] *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2016] OJ C 202/01 (entered into force 1 November 1993), Article 101 (***TFEU***).
[72] *Regulation (EU) No 330/2010 of the Commission of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices* [2010] OJ L 102/1 (***Vertical Block Exemption***).
[73] *Guidelines (EU) of the Commission on Vertical Restraints* [2010] OJ C 130/1 (***Vertical Restraint Guidelines***).
[74] Vertical Block Exemption (n 2) article 3.

(iv) When a vertical restraint falls within the scope of the safe harbour, it is exempt from the enforcement of article 101(1) of the TFEU by the European Commission and member state competition authorities and courts.[75]

- **The De Minimis Notice:** provides a safe harbour for vertical restraints where the supplier's and the buyer's respective market shares do not exceed 15% of the relevant markets for the products/services subject to the restraint.[76]

(v) Vertical Restraints falling within the scope of the safe harbour of the De Minimis Notice are exempt from the application of article 101(1) of the TFEU by the European Commission, but not by member state competition authorities and courts.[77]

(b) The hardcore restrictions

The Vertical Block Exemption contains a list of 'hardcore restrictions' which are excluded from the 'safe harbours' of the Vertical Block Exemption and the De Minimis Notice.[78] The European Commission's Vertical Restraints Guidelines also state that hardcore restrictions are presumed to fall within the scope of article 101(1) of the TFEU, unless the parties demonstrate pro-competitive effects that satisfy the exception in article 101(3) of the TFEU.[79]

The hardcore restrictions are:

- resale price maintenance;[80]
- restrictions on the territory into which, or of the customers to whom, the buyer may sell the relevant goods or services, other than the following types of restrictions:
    - the restriction of active sales into the exclusive territory or exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, provided that such restrictions are imposed by the supplier on its direct buyers (and so do not limit sales by the buyer's customers);
    - the restriction of sales to end users by a buyer operating at the wholesale level;
    - the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system;
    - the restriction of a buyer from reselling components supplied for the purpose of incorporation to customers who would use them to manufacture the same type of goods as those produced by the supplier;[81] and

[75] Ibid article 2.
[76] *Notice (EU) of the Commission on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* [2014] OJ C 291/1 (***De Minimis Notice***).
[77] Ibid article 8; *Expedia Inc v Autorité de la concurrence* (Court of Justice of the European Union, C-226/11, ECLI:EU:C:2012:795, 13 December 2012).
[78] Vertical Block Exemption (n 2) article 4.
[79] Vertical Restraint Guidelines (n 3) [47].
[80] Vertical Block Exemption (n 2) article 4(a).
[81] Vertical Block Exemption (n 2) article 4(b).

- restrictions on members of a selective distribution system, operating at a retail level, from selling to end users;[82]
- restrictions on cross-supplies between distributors within a selective distribution system;[83] and
- restrictions between a supplier of components and a buyer who incorporates those components, on the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.[84]

2. New Zealand

Similar to the EU, and as distinct from Australia, New Zealand also does not have an equivalent prohibition to the exclusive dealing prohibition in section 47 of the CCA.

Instead, the *Commerce Act 1986* (NZ)[85] (**NZ Commerce Act**) regulates vertical restraints, including exclusive dealing conduct, under its general anti-competitive agreement prohibition or taking advantage of market power prohibition. The only type of vertical restraint that is explicitly legislated for and prohibited by the NZ Commerce Act is resale price maintenance, as set out in sections 37 to 42. The NZ Commerce Act is enforced by the New Zealand Commerce Commission (**NZCC**).

The catch-all prohibition against anti-competitive agreements is set out in section 27(1) and (2) of the NZ Commerce Act. This section prohibits the making or giving effect to a contract, arrangement or understanding containing a provision that has the purpose, or has or is likely to have the effect of, substantially lessening competition in a market. This applies to both horizontal agreements between competitors, as well as vertical agreements.

Vertical restraints may also be caught by the taking advantage of market power provision as set out in section 36(2) of the NZ Commerce Act. This provision prohibits a person with a substantial degree of power in a market taking advantage of that power for a proscribed purpose.[86] The proscribed purposes are:

- restricting the entry of a person into that or any other market;
- preventing or deterring a person from engaging in competitive conduct in that or any other market; or
- eliminating a person from that or any other market.

[82] Ibid article 4(c).
[83] Ibid article 4(d).
[84] Ibid article 4(d).
[85] See *Commerce Act 1986* (NZ) available at: https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87623.html?search=ts_act_commerce+act_resel_25_a&p=1
[86] The New Zealand Government has proposed amending section 36 of the Commerce Act to align with the misuse of market power provision in Australia – which prohibits firms with a substantial degree of power in a market from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market: Ministry of Business, Innovation & Employment, 'Review of Section 36 of the Commerce Act and Other Matters', *Competition Regulation and Policy* (Web Page, 8 June 2020) <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/review-of-section-36-of-the-commerce-act-and-other-matters/>.

As noted by the NZCC, the types of vertical restraints that can be caught by these prohibitions include exclusive dealing and tying arrangements.[87]

To illustrate, the New Zealand High Court applied section 27 of the NZ Commerce Act when assessing Fisher & Paykel's exclusive dealing arrangements in *Fisher & Paykel Ltd v Commerce Commission*.[88] At the time, Fisher & Paykel was the sole New Zealand manufacturer of whitegoods and a major supplier to the New Zealand market. It had been including exclusive dealing clauses in its distribution agreements with retailers for over 40 years, which required that the retailer not stock or sell the whitegoods of any other distributor. Despite Fisher & Paykel's significant market power, the High Court held that the exclusive dealing clauses did not have the effect of substantially lessening competition in the market for distribution and sale to retailers of whitegoods in contravention of section 27, including because Fisher & Paykel had lost a significant share of the market and was facing fierce competition due to the lessening of tariff and import barriers.

Section 32 of the NZ Commerce Act operates as an anti-overlap provision, exempting cartel provisions in contracts between a supplier of goods and services and its customer from the prohibition against cartel conduct under section 30 (provided the provision does not have the dominant purpose of lessening competition between the parties to the contract).

3. United States

Exclusive dealing in the United States (**US**) is not *per se* prohibited, but rather is subject to a competition test known as the 'rule of reason'. Under this test, both the competitive effects of the conduct (including any potential pro-competitive effects) and its purpose are considered in order to determine whether the conduct is anti-competitive.

Exclusive dealing is not addressed by a single legislative provision, and may be dealt with under:

- section 1 of the *Sherman Antitrust Act of 1890* (**Sherman Act**), which prohibits contracts in restraint of trade;
- section 2 of the Sherman Act, which prohibits monopolisation;
- section 3 of the *Clayton Antitrust Act of 1914*, which prohibits the sale of goods on the condition that the purchaser refrain from buying a competitor's goods, if the effect may be to substantially lessen competition; and/or
- section 5 of the *Federal Trade Commission Act of 1914*, which prohibits unfair methods of competition.

Courts typically apply the rule of reason test through a burden-shifting approach.[89] The applicant must first show a significant anti-competitive effect (e.g. a price increase or market power).[90] Second, the burden shifts to the respondent to demonstrate a legitimate pro-competitive justification for the conduct.[91] Third, if the respondent is successful in showing a

[87] New Zealand Commerce Commission, 'Taking Advantage of Market Power', *Avoiding Anti-competitive Behaviour* (Web Page) <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/taking-advantage-of-market-power>.
[88] [1990] 2 NZLR 731; (1990) 3 NZBLC 101,655.
[89] Michael A Carrier, 'The Four-Step Rule of Reason' (2019) 33(2) *Antitrust* 50.
[90] Ibid.
[91] Ibid.

legitimate pro-competitive justification, the burden shifts back to the applicant to demonstrate that the restraint is not reasonably necessary to achieve the restraint's objectives, or that the defendant's objectives could be achieved by less restrictive means.[92]

Anti-competitive effects are typically found in cases where the restriction results in a significant portion of available distribution methods being 'tied up', or where competitors are unable to establish their own distribution networks.[93] On the other hand, exclusive dealing may be found to be pro-competitive in circumstances where it prevents free-riding by aligning distributor and manufacturer incentives, or otherwise benefits consumers (for example, by helping to ensure supply).[94] In addition, the US courts have typically regarded exclusive dealing contracts terminable in less than a year as presumptively lawful.[95]

4. United Kingdom

Similar to the European Union, the United Kingdom (**UK**) does not have a prohibition specific to exclusive dealing. Rather, exclusive dealing is captured by the general prohibition on anti-competitive agreements.

Section 2 of the *Competition Act 1998* (UK) (**UK Competition Act**) prohibits agreements between entities that may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK, and renders such agreements void.[96] This prohibition follows the structure of the TFEU (as detailed above). The UK Competition Act is enforced by the Competition and Markets Authority.

This provision is specified to apply to agreements which (among other things):

- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As such, the prohibition captures conduct which would fall under a specific exclusive dealing prohibition, such as agreements which provide for:

- exclusive or selective distribution (including territory and customer allocation or restrictions);
- exclusive purchasing or supply; or
- tie-in sales, bundling quantity forcing.

[92] Ibid.
[93] United States Department of Justice, 'Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act', *Antitrust Division* (Web Page, 25 June 2015) <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-8#N_45_>.
[94] Ibid.
[95] *Roland Mach Co v Dresser Indus Inc*, 749 F 2d 380, 395 (Posner J) (7th Cir, 1984).
[96] UK Competition Act sections 2(1), (4).

Section 2 of the UK Competition Act is moderated by section 9(1), which provides that the prohibition will not apply where the economic benefits of an agreement outweigh its anti-competitive effects.

Protection under the European Union Vertical Block Exemption (as detailed above) is also available until 31 December 2020 (the end of the Brexit transition period). The UK Vertical Guidelines[97] cite the definition of vertical agreements given in the European Commission's 1999 Vertical Block Exemption,[98] which was revised in the European Commission's 2010 Vertical Block Exemption, which provides as follows:

> [A]n agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[99]

Section 2 of the UK Competition Act does not apply to purely unilateral conduct, as it requires an agreement between parties. However, unilateral conduct by dominant companies may instead be caught by the Chapter II prohibition in the UK Competition Act.

5. Canada

Part VIII of the *Competition Act*[100] (**Canadian Competition Act**) regulates matters which are reviewable by the Competition Tribunal (**Tribunal**) and captures restrictive trade practices, including various types of vertical restraints such as exclusive dealing, refusal to deal and tied selling.[101] These matters may be reviewed on a discretionary basis, and are not *per se* illegal in recognition of the fact that these practices are not always harmful to competition.[102]

Section 77(2) of the Canadian Competition Act provides that the Tribunal may make certain orders where it finds that exclusive dealing, because it is engaged in by a major supplier (which is likely to come down to whether the supplier has market power[103]) of a product in a market or because it is widespread in a market, is likely to (a) impede entry into or expansion of a firm in a market, (b) impede introduction of a product into or expansion of sales of a product in a market, or (c) have any other exclusionary effect in a market, with the result that competition is or is likely to be lessened substantially.

The Canadian Competition Act includes some exceptions, including where exclusive dealing is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market.[104]

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[97] Office of Fair Trading, *Vertical Agreements: Understanding Competition Law* (Guidelines, December 2004) [3.3].
[98] *Regulation (EU) No 2790/1999 of the Commission of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices* [1999] OJ L 336/21.
[99] Vertical Block Exemption (n 2) article 1(a).
[100] *Competition Act* RSC, 1985, c. C-34 (**Canadian Competition Act**).
[101] Ibid sections 75, 77.
[102] Competition Bureau, 'Restricting the Supply and Use of Products', *Tools for Consumers and Businesses* (Web Page, 11 May 2015) <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03802.html>.
[103] Thomson Reuters, '§ 116:9. Exclusive dealing, tied selling', *Laws of International Trade* (September 2020).
[104] Canadian Competition Act (n 30) section 77(4).

‘Exclusive dealing’ is broadly defined and encompasses (a) any practice involving a supplier supplying products on condition that the downstream customer (i) deals only or primarily in the supplier’s products (or the products of another supplier designated or nominated by the supplier in question), or (ii) refrains from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and (b) any practice whereby a supplier induces a downstream customer to meet one of the above conditions by offering to supply to the customer on more favourable terms if the customer agrees to meet such condition.[105]

Under section 75(1) of the Canadian Competition Act governs the jurisdiction of the Tribunal where there is a refusal to deal. The Tribunal may make certain orders where it finds that the following five factors are satisfied: (a) a person is substantially affected in their business or is precluded from carrying on business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms, (b) that person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market, (c) that person is willing and able to meet the usual trade terms of the supplier or suppliers of the product, (d) the product is in ample supply, and (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

The Tribunal has previously found that ‘adverse effect’ (as in section 75) is a lower threshold than ‘substantial lessening or prevention of competition’ (as in section 77).[106]

[105] Canadian Competition Act (n 30) section 77(1).
[106] Lexology, ‘Vertical Agreements in Canada’ (9 April 2019), citing *B-Filer v The Bank of Nova Scotia* [2006] Comp Trib 42.

Appendix C: Limitations of the exclusive dealing anti-overlap provision relating to intellectual property

Set out below are some examples of challenges that may arise in relation to the application of the exclusive dealing anti-overlap provision to relatively standard intellectual property transactions.

In some cases, conduct consistent with the below examples may not satisfy the 'purpose condition' or 'competition condition' however this will not always be a straightforward assessment.

Example 1: licence of trade mark with restrictions on customers and territories

A registered owner of a trade mark may grant a non-exclusive licence to a manufacturer to apply that mark to goods and supply them to customers in Australia. The registered owner also supplies substitutable goods to customers in Australia, and therefore the registered owner and licensee may be considered competitors in relation to the supply of the goods.

A restriction on the territories and customers to whom the licensee may supply the relevant goods may involve a customer allocation agreement, but not constitute exclusive dealing due to the narrow scope of subsection 47(2). This is because the condition attached to the registered owner's supply of a service (the grant of a licence) relates to the licensee's supply of a different product (goods) rather than constituting a limitation on the re-supply of the service.

It is arguable that such a condition is not a restriction on supply but a limit or delineation of the scope of the trade mark licence. However, there should not be doubt about the application of the cartel prohibition in such circumstances.

In contrast, if the registered owner instead supplied the manufactured goods bearing its trade mark to the licensee subject to the same restrictions, they would constitute limitations on re-supply and likely fall within subsection 47(2). Further, if the licensee's acquisition of the service (trade mark licence) was subject to a condition on the customers to whom the registered owner may supply the relevant goods, this would likely constitute exclusive dealing as described in subsection 47(4).

Example 2: exclusive licence of patent rights

The registered owner of a patent relating to a new and advanced feature of Product A manufactures this product overseas for supply in markets outside of Australia. The patentee decides to grant an exclusive licence to another manufacturer to exploit the patent for the purposes of supplying Product A in Australia. The patentee and licensee are both capable of manufacturing and supplying substitutable products in Australia, and may therefore be considered competitors in relation to the supply of such products.

The terms of the exclusive licence provide that the licensee must not manufacture and supply its own product in Australia that competes with Product A. Such a condition of the licence could involve a production or supply restriction, but may not constitute exclusive dealing within subsection 47(2) on the basis that it does not involve a limitation on the acquisition or re-supply of goods or services by the licensee.

There does not appear to be a strong justification for a limitation on the licensee's ability to manufacture its own similar competing product being per se unlawful in circumstances where it has been appointed to develop and promote the patentee's product in Australia. This is particularly so in light of the position that a condition that the licensee may not acquire and re-supply products manufactured by a competitor of the patentee would likely fall within subsection 47(2).

Example 3: field of use restriction

Company A is the exclusive licensee of a patent relating to a chemical compound that it uses as an input in an industrial cleaning product. The chemical compound can also be used as an input into household cleaning products.

Company A enters into an licence agreement with Company B, which enables Company B to manufacture the compound for use in its household cleaning products. Company B has a strong position in supplying household cleaning products and Company A has a strong position in supplying industrial cleaning products. Both companies supply various cleaning agents that compete with each other across a range of uses.

Under the agreement, the permitted 'field of use' of the compound is limited so that Company B can only use it in household cleaning products and cannot, for example, use it for the purpose of industrial applications.

Such a field of use licence restriction may constitute a supply restriction for the purposes of the cartel provisions, but would not constitute exclusive dealing as it does not involve a limitation on acquisition or re-supply by Company B.

Similar to example 1, it is arguable that such a condition is not a supply restriction but a limit or delineation of the scope of the patent licence. However, there should not be doubt about the application of the cartel prohibition in such circumstances.

Appendix D: Comparison of 2016 Exposure Draft and wording proposed by the Committee

Section [x] ~~44ZZRS~~: Restrictions on supplies and acquisitions

(1) Sections 45AF, 45AJ, 45AG and 45AK~~44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK~~ do not apply in relation to ~~making or giving effect to,~~ a contract, arrangement or understanding ~~that~~ containing~~s~~ a cartel provision, in so far as: ~~to the extent that the cartel provision imposes an obligation that relates to:~~

(a) the contract, arrangement or understanding is entered into between a supplier or likely supplier of goods or services and an acquirer or likely acquirer of the goods or services from that supplier; and

(b) the cartel provision ~~The~~ imposes~~, on a party to the contract, arrangement or understanding (the ***acquirer***) acquiring goods or services from another party to the contract, arrangement or understanding,~~ an obligation that relates to:

~~(i)~~ the acquisition by the acquirer of ~~the~~ goods or services; ~~or~~

~~(ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or~~

~~(iii) the supply by the acquirer of the goods or services or of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or~~

~~(ii)~~ (ii) the supply by the acquirer, to any persons, of goods or services; or

~~(iii)~~ (iii) the re-supply by the acquirer of the goods or services;

~~imposes, on a party to the contract, arrangement or understanding (the ***supplier***) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to~~:

~~(iv)~~ the supply by the supplier of ~~the~~ goods or services; or

~~(v) supply by the supplier, to any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services.~~

~~(ii)~~ (iv) the acquisition by the supplier, from any person, of goods or services.

(c) the obligation referred to in subsection (b) relates to the acquisition, supply or re-supply (as applicable):

(i) to or from a person, persons or a class of persons, irrespective of whether they are specifically identifiable; or

(ii) in a place, places or class of places, irrespective of whether it is specifically identifiable.

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

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK ~~44ZZRJ or 44ZZRK~~ bears an evidential burden in relation to that matter.

~~(3) This section does not affect the operation of section 45 or 47.~~