CARTELS (INC EXCLUSIONARY PROVISIONS)

Competition Policy Review (Harper Review) Draft Report

Current position

Substantive law (cartels)

- Cartels are prohibited (criminally and civilly) by Division 1 of Part IV of the CCA
- Div 1 prohibits corporation making or giving effect to a contract, arrangement or understanding containing a cartel provision
- A provision is a cartel provision if either
  - It has the purpose or effect of price fixing; or
  - It has the purpose of allocating customers suppliers or territories restricting outputs or rigging bids

  and at least two or more parties to the agreement are, or are likely to be (or would be but for the agreement), in competition with each other (in *Norcast* interpreted to mean any possibility they are or would be in competition, provided not 'remote possibility')
- A limited defence exists for some contractual joint ventures
- Prohibition not expressly limited to arrangements affecting competition in Aust markets

Substantive law (exclusionary provisions (primary boycotts))

- Exclusionary provisions in agreements between competitors are *per se* banned by s 45 (defined in s 4D)

Harper Panel draft proposal (rec 22, chapter 17)

Substantive law

- Retain civil and criminal prohibitions
- Simplify the cartel conduct provisions (currently 'excessively complex')
  - Should 'apply to cartel conduct affecting goods or services supplied or acquired in Australian markets'
  - Should be confined to conduct involving firms that are actual competitors or likely to be (assessed on balance of probabilities)
  - Provide broad exemption for joint ventures – should not be confined to contractual JV's or to production and supply JV's (to be considered by s 45)
  - Add exemption for 'trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services' (would be prohibited by s 47 if anti-competitive)

Substantive law (exclusionary provisions (primary boycotts))

- Repeal (effectively covered by cartel prohibition on market sharing)