FACILITATING PRACTICES, VERTICAL RESTRAINTS AND MOST FAVOURED CUSTOMERS

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I Most Favoured Customer Restraints: Horizontal and Vertical Implications under Australian Competition Law

A Coordinates

1. Facilitating practices are prevalent in commerce. So are most favoured customer (**MFC)** restraints. The effects of such practices and restraints can be pro-competitive or anti-competitive.[1] They have come under increased scrutiny by competition regulators and commentators in the US,[2] EU[3] and UK.[4] Is Australian competition law well-equipped to handle similar challenges?[5] Are the relevant provisions in the

1 See eg P Bucirossi, *Handbook of Antitrust Economics* (MIT Press, 2008), 335-340; S Salop & F Scott Morton, 'Developing an Administrable MFN Enforcement Policy' (2013) 27(2) Antitrust 15.

2 See eg DOJ/FTC, 'Public Workshop: Most-Favored-Nation Clauses and Antitrust Enforcement and Policy', 10 September 2012, Washington DC, at: http://www.justice.gov/atr/events/publicworkshop-most-favored-nation-clauses-and-antitrust-enforcement-and-policy; ABA, *Antitrust Law Developments (Seventh)* (2012) Vol I, 222-223, 259; F Scott Morton, 'Contracts that Reference Rivals' (2013) 27(3) Antitrust 72; A Edlin, 'Do Guaranteed-Low-Price Guarantees Guarantee High Prices and Can Antitrust Rise to the Challenge?' (1997) 111 Harvard LR 528; M Sargent, 'Economics Upside Down: Low-Price Guarantees as Mechanisms for Facilitating Tacit Collusion' (1993) 141 Univ. of Penn. LR 2055; D Clark, 'Price Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp' [1983] Wisconsin Law Review 887.

3 See eg J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) [14.104]-[14.110]; F Schaeffer, K Piro, A Rinne & A Boos, 'Competitor Parity Cluses: Increased Scrutiny of MFNs in the United States and Europe' [2015] (Dec) Antitrust Source 1; A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488; P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62; M Hviid, 'Vertical Agreements between Suppliers and Retailers that Specify a Relative Price Relationship between Competing Products or Competing Retailers', OECD, Hearing on Across Platform Parity Agreements, DAF/COMP(2015)6, 19 Oct 2015; V Soyez, 'The compatibility of MFN clauses with EU competition law' (2015) 36(3) ECLR 107; G Edwards, 'Developments in Europe: The End of Economics?', 13th Annual Competition Law and Economics Workshop, Adelaide, 23 October 2015, 19.

4 See eg OFT, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (2012), at: http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf; R Owen-Howes, 'Do me a favour!' [2014] (31 October) New LJ.

5 The question looms; see ACCC, Online accommodation booking sector inquiry (September 2015) at https://consultation.accc.gov.au/communications/online-accommodation-booking-sector; ACCC, *Online Vertical Restraints Special Project Report*, 2015 International Competition Network Annual

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Competition and Consumer Act 2010 (Cth) (**CCA**) prone to undue overreach, underreach or uncertainty?[6]

2. The main testing grounds for MFC restraints under the CCA are:
   - cartel-related prohibitions (see Part II);
   - prohibitions under ss 45 and 47 that are subject to a test of purpose, effect or likely effect of substantially lessening competition in a market (**SLC**) (see Part III);
   - misuse of market power (see Part IV); and
   - resale price maintenance (RPM) (Part V).[7]

3. Further testing grounds are not visited here. They include: mergers (as in the assessment of co-ordinated effects)[8] and misleading or deceptive conduct.[9]

4. The terms 'facilitating practice' and 'MFC restraint' are defined in Part IB. The potential anti-competitive significance of facilitating practices and MFC restraints is outlined in Part IC.

5. Part VI summarises the conclusions drawn about possible responsive solutions to the potential issues and difficulties identified in Parts II–V.

Meeting, at: http://www.icn2015.com.au/download/ICN2015-special-project-online-vertical-restraints.pdf; AEMC, Pipeline Regulation and Capacity Trading Discussion Paper, 18 September 2015, 12, at: http://www.aemc.gov.au/getattachment/13259307-3eef-4a7d-9660-6786ca573058/Pipeline-Regulation-and-Capacity-Trading-Discussio.aspx; G Houston & C Osborne, 'Competition Economics', The Asia-Pacific Antitrust Review, ch 1; Choice, 'How Low Do They Go? (2014) https://www.choice.com.au/shopping/packaging-labelling-and-advertising/advertising/articles/lowest-price-and-price-match-guarantees; R Smith & A Merrett, 'Lowest prices are just the beginning' (2012) 2 The State of Competition 1. For previous commentaries, see R Smith & A Merrett, 'Playing Favourites: The Competition Effects of Preferred Customer Arrangements' (2011) 7 European Competition 179; B Fisse, 'Avoidance and Denial of Liability for Cartel Conduct', Competition Law Conference, Sydney, 23 May 2009, 9-12, at: http://www.brentfisse.com/images/Fisse_Avoidance_&_Denial_of_Liability_for_Cartel_Offences_230509.pdf; S Henrick & C Penhallurick, 'Most Favoured Nations Clauses – Bane or Boon?' (2004) 12 TPLJ 78.

6 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 569 (critical assumptions (c), (e)). Further criteria may warrant consideration. They include resistance to evasion (consider eg S Buell, 'Good Faith and Law Evasion' (2011) 58 UCLA LR 611); and straightforwardness (consider eg Justice S Rares, 'Competition, Fairness and the Courts' (2014) 39 Australian Bar Rev 79).

7 See eg A Fletcher and M Hviid, 'Retail Price MFNs: Are they RPM "at its worst"?', Antitrust Law Journal, forthcoming.

8 See R Smith & A Merrett, 'Playing Favourites: The Competition Effects of Preferred Customer Arrangements' (2011) 7 European Competition J 179 at 201-202; R Smith & A Merrett, 'Lowest prices are just the beginning' (2012) 2 The State of Competition 1, at 2-3.

9 See Choice, 'How Low Do They Go? (2014) https://www.choice.com.au/shopping/packaging-labelling-and-advertising/advertising/articles/lowest-price-and-price-match-guarantees; C Busch, H Schulte, A Wiewiorowska-Domagalska & F Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law' [2016](1) J of European Consumer and Market law 3.

B ‘Facilitating practices’ and ‘MFC restraints’

6. The term **‘facilitating practice’**[10] is used as a convenient non-technical descriptor of activities in which firms engage to help coordinate their actions and avoid or reduce competition without the need for a meeting or other forms of explicit communication.[11] To amplify:

> ... [a facilitating practice] involves an activity, generally the provision or exchange of information in the market place, which makes coordination between competitors easier and more effective – easier because it facilitates communication, and more effective because it facilitates detection of cheating and administration of punishment for deviations. Such facilitation assists in overcoming the uncertainty associated with competition or the impediments to oligopolistic interdependence.[12]

Their effect or intended effect is thus horizontal.[13]

7. There are many types of facilitating practices. They include:[14]
   - public speech (e.g. discussion of conditions affecting price in the media);
   - private information exchanges (e.g. competitors sending price lists or manuals to each other);
   - advance price announcements (e.g. announcing a specific price increase in advance of its stated effective date);
   - price protection or ‘most favoured customer’ clauses (e.g. guaranteeing a buyer that it will be charged no more than the supplier’s most favoured customer, or that it will match or better a competitor’s price, or that the buyer will receive a retroactive reduction if the supplier charges anyone a lower

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10 See P Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen Law & Business, 2003) ¶1435c-¶1435i; L Kaplow, *Competition Policy and Price Fixing* (Princeton, 2013) 276-285; G Hay, ‘Facilitating Practices’ in ABA Section of Antitrust Law, *Issues in Competition Law and Policy* (ABA Book Publishing, 2008) Vol II, ch 50; S Salop, ‘Practices that (Credibly) Facilitate Oligopoly Coordination’ in J Stiglitz and G Mathewson (eds), *New Developments in the Analysis of Market Structure* (MIT Press, 1986) 271; RA Winter, ‘Price-Matching and Meeting Competition Guarantees’ in ABA Section of Antitrust Law, *Issues in Competition Law and Policy* (ABA Book Publishing, 2008) Vol II, ch 53; J Kattan, ‘Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment’ (1994) 63 Antitrust LJ 133;; I Ayres, ‘How Cartels Punish: A Structural Theory of Self-Enforcing Collusion’ (1987) 87 Columbia LR 295; R Rees, ‘Tacit Collusion’ (1993) 9 Oxford Review of Economic Policy 27; D Gilo & A Porat, ‘The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers and Anticompetitive Effects’ (2006) 104 Michigan LR 983; R Smith, A Duke & D Round, ‘Signalling, Collusion and Section 45 of the TPA’ (2009) 17 Competition & Consumer LJ 22; M Noble, ‘Facilitating practices: Innocuous, illegal or somewhere in between?’ (2010) 17 Competition & Consumer LJ 276.

11 See G Hay, ‘Facilitating Practices’ in ABA Section of Antitrust Law, *Issues in Competition Law and Policy* (ABA Book Publishing, 2008) Vol II, ch 50.

12 C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 41.

13 Not an element of liability under the CCA but familiar shorthand; compare the vestal filigree of *Visy Paper v ACCC* (2003) 216 CLR 1, 955-956.

14 Id at 42. The last two kinds of facilitating practices have been added here.

price within, say, six months);

- uniform delivery pricing methods (e.g. where suppliers each discount their regular free on board price plus transport to match a nearer rival's delivered price);
- basing-point pricing (where each seller charges a delivered price computed as a base price plus a freight charge from a specified location calculated conventionally from published tariffs regardless of the mode of transport actually used or regardless of whether the buyer transports the product themselves);
- product standardisation or benchmarking (e.g. where competitors publish the technical specifications to manufacture a product to a certain standard);
- cross-licensing of patents; and
- partial ownership of a competing firm (an investment in rival firms, even if passive, reduces the return of competitive conduct to the extent that competition lowers the value of the investment).[15]

8. A **'MFC restraint'** is a provision or statement that promises to give the customer contractual terms at least as favourable as those give or to be given to any other customer, over some specified time period.[16] Thus, a firm may promise to charge a buyer the same price as that charged to other customers. MFC restraints are thus a form of vertical restraint.[17]

9. The term 'MFC restraint' may be contrasted with price matching or price beating clauses, or low price guarantees (**LPG**).[18] LPGs are another species of price protection. Their competitive effect is often similar to that of MFC restraints but the effect may not be the same.[19] A basic difference is that LPGs reduce the incentive of rivals to lower the price whereas MFC restraints reduce the incentive of the MFC grantor to lower its own price in the future or to some selected customers. In some

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15 See S Salop & D O'Brien, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67 Antitrust LJ 559; P Bucirossi, *Handbook of Antitrust Economics* (MIT Press, 2008), 329-333; P Fotis & N Zevgolis, *The Competitive Effects of Minority Shareholdings* (Hart Publishing, 2016).

16 J Church & R Ware, *Industrial Organization: A Strategic Approach* (McGraw-Hill, 2000), ch 15.

17 On vertical restraints under the CCA see S Corones, *Competition Law in Australia* (6th ed, 2014) chs 9-10; D Clough, 'Law and Economics of Vertical Restraints in Australia' (2001) 25 MULR 551.

18 For a comprehensive review of various types of price parity restraints, see OFT, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (2012) ch 1, at: http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf.

19 See P Bucirossi, *Handbook of Antitrust Economics* (MIT Press, 2008), 335-340.

instances both MFC restraints and LPGs may be used.[20] This paper focusses on MFC restraints.

10. MFC restraints are often described as 'most-favoured-nation' (**MFN**) restraints.[21] Where price-related, as is typical, they are also labelled as price parity or price protection clauses.

11. A MFC restraint may be negotiated bilaterally and included as a provision in a contract. Alternatively, it may be conduct such as a statement in a policy announcement that is to apply to buyers or a particular category of buyers.

12. MFC restraints are used at different levels of distribution. They are common at the level of suppliers and intermediate goods producers, and at the level of retailers and end-customers. Much of the more recent focus of enforcers, courts and commentators on MFC restraints has been on 'retail MFNs' or 'platform MFNs'. Retail MFNs or platform MFNs relate to the use of a platform (eg a travel booking platform). A supplier using such a platform to market products guarantees the platform operator that it will not offer the same products at a cheaper price or on more advantageous terms through another platform. The other platform may be operated by a third party or by the supplier.

13. Online platform arrangements usually include such MFC restraints.[22] A distinction is often made in this context between 'broad' MFC restraints and 'narrow' MFC restraints.[23] Broad MFC restraints restrict a seller from offering lower retail prices to other platforms, including its own website. Narrow MFC restraints restrict a seller from offering a lower retail price on its own website, but not through other platforms.

14. MFC restraints generally centre on commitments by sellers, but they may also involve commitments by buyers.

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20 See R Smith & A Merrett, 'Playing Favourites: The Competition Effects of Preferred Customer Arrangements' (2011) 7 European Competition 179 at 196-197.

21 MFN clauses are a core part of WTO trade law; see WTO, *Understanding the WTO* (5th ed, 2015) 10-11, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

22 See ACCC; *Online Vertical Restraints Special Project Report*, 2015 International Competition Network Annual Meeting, 66-68, at: http://konkurrenceafgorelser.dk/sites/decisions/files/decisions/icn2015-special-project-online-vertical-restraints.pdf; P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62.

23 See further A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488.

15. A MFC restraint may be contemporaneous or retroactive. A retroactive MFC restraint entitles the buyer to a discount or refund if the seller charges anyone else a lower price within a specified period in the future.

16. A 'MFC Plus' restraint requires the seller to charge higher prices to other buyers.[24]

C Potential anti-competitive significance of MFC restraints

17. The most obvious competitive significance of MFC restraints is the incentive they give to lower prices or at least not to increase them. Thus, Posner J has described them as 'the sort of conduct that the antitrust laws seek to encourage.'[25]

18. Although MFC restraints at one time were taken to be of little concern under US antitrust law and competition laws elsewhere,[26] increasingly it has been recognised that anti-competitive effects may occur. Initially that recognition stemmed from the pathfinding work of Hay[27] and Salop[28] on the use of MFC restraints and other stratagems as facilitating practices. More recently, MFC restraints in online platform arrangements, especially retail MFN clauses, have generated considerable concern, enforcement action, and analysis.[29]

19. MFC restraints have two main potential 'horizontal' anticompetitive effects:[30]

   - they facilitate coordination of pricing or other conduct by competitors without the need for an explicit agreement; and
   - they tend to dampen competition by reducing the incentive of competitors to compete aggressively.

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24 See eg *United States v Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010).

25 *Blue Cross & Blue Shield United v Marshfield Clinic*, 65 F 3d 1406, 1415 (7th Cir. 1995).

26 See S Salop & F Scott Morton, 'Developing an Administrable MFN Enforcement Policy' (2013) 27(2) Antitrust 15.

27 G Hay, 'Oligopoly, Shared Monopoly, and Antitrust Law' (1982) 67 Cornell LR 439; 'Facilitating Practices: The Ethyl Case (1984)' in J Kwoka & L White (eds), *The Antitrust Revolution* (3rd ed , 199) 182; 'Facilitating Practices' in ABA Section of Antitrust Law, *Issues in Competition Law and Policy* (ABA Book Publishing, 2008) Vol II, ch 50.

28 S Salop, 'Practices that (Credibly) Facilitate Oligopoly Coordination' in J Stiglitz and G Mathewson (eds), *New Developments in the Analysis of Market Structure* (MIT Press, 1986) 271.

29 See A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488; P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62.

30 See J Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses' (1994) 64 Antitrust LJ 517, at 520-528; J Baker & J Chevalier, 'The Competitive Consequences of Most-Favored- Nation Provisions' (2013) 27(2) Antitrust 20, at 22-24. MFC restraints may also have exclusionary effects that affect a competitor.

20. MFC restraints may relate to conduct that has the effect or intended effect of coordinating price or other conduct in a market without the need for an explicit agreement between competitors. MFC restraints can allow one competitor to coordinate price or non-price conduct with other competitors by using incentives not to compete. This is largely why they are seen as a danger: the outcome of MFC-induced coordination is comparable to coordination reached by explicit agreement.

21. The first incentive to coordinate rather than compete is that a MFC grantor reduces an incentive to deviate from the MFC offer because it cannot limit its discounts to a single customer.[31] The effect is to set a price floor or non-price minimum. However, while a MFC restraint may make selective price cuts by a cartelist expensive and therefore less likely, such a clause also increases the price of retaliation.[32]

22. Secondly, where some buyers have MFC restraints with a particular supplier, other buyers may have a reduced incentive to try to bargain with that supplier. As Baker and Chevalier have explained:[33]

> A buyer is unlikely to spend time negotiating price with a [MFC grantor] that is committed not to discount, or to do so when getting a lower price would not give the [buyer] a cost advantage over its rivals.

23. Thirdly, the risk of cheating and destabilisation of cooordinated conduct is reduced by the fact that buyers are likely to monitor their suppliers' pricing to other customers, and discounts or other deviations from the minimum set by a MFC restraint are likely to rebound against the MFC grantor.

24. Whether or not MFC restraints are in fact likely to have anti-competitive effects depends on various factors. These include the number of competitors, ease of entry, market stability, and product stability:[34]

> First, most-favored-customer pricing becomes less profitable as the number of firms increases. The policy lets a firm restrict its ability to compete, but other firms still compete among themselves. As more firms remain in competition, the policy has less effect on their prices; therefore, a firm receives a smaller gain from this strategy. Second, price protection is less valuable if entry barriers are low. The policy leads to greater profits by helping firms set higher prices. Not only do the

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31 P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, 9-10, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62.

32 See P Bucirossi, *Handbook of Antitrust Economics* (MIT Press, 2008), 340; I Vandenborre & M Frese 'Most Favoured Nation Clauses Revisited' [2014] European Competition LR 588 at 590.

33 J Baker & J Chevalier, 'The Competitive Consequences of Most-Favored- Nation Provisions' (2013) 27(2) Antitrust 20, at 23.

34 T Cooper, 'Most-Favored-Customer Pricing and Tacit Collusion' (1986) 17 The RAND Journal of Economics 377, at 386-387.

> increased profits invite entry, but the policy also interferes with lowering price in response to entry. Without high entry barriers firms may have to limit increases in prices and profits to discourage entry. Third, the policy is less attractive in a rapidly changing environment. After a firm commits itself to a high price, a change in costs or demand could make that price inordinately high.
>
> ... Firms in some industries change product design frequently. A firm could easily hide a price reduction behind a design change. As a result, the policy would hardly affect a firm's ability to adjust price.

25. Price matching or price beating clauses offer a different kind of incentive to competitors not to undercut a firm’s prices. Unlike MFC restraints, they do not specify a price floor or other minimum. However, they may facilitate coordination by assisting the detection of undercutting:[35]

> Since a low-price guarantee normally imposes on consumers the burden of providing evidence of a cheaper offer, this policy can constitute an indirect means to which firms turn to collect information and monitor rivals’ behavior. It may be thought that low-price guarantees can produce coordinated effects because they reduce the profits a firm can reap by deviating from the concerted actions, as they render punishment more rapid.

26. MFC restraints may have the effect of dampening competition if they lead the firms in a market to compete less aggressively.[36] A MFC grantor commits itself to compete less aggressively. Competing firms may thereby be inclined to follow suit and also adopt MFC restraints. If so, the effect in the market could be to increase prices or lower quality.[37]

27. Competition may or may not be dampened by a MFC restraint:[38]

> If a firm knows that its rival does not want to get into a price war, maybe it will back off too, and the firms will reach a comfortable détente in which prices go up; that is what the “dampening competition” anticompetitive theory supposes. But that is not the only possibility. Perhaps the other [buyers] will instead take advantage of a less aggressive rival and try to steal its business, leading .. prices to fall. Accordingly, in evaluating a dampening competition theory it is necessary to analyze which way the firms in an industry will respond to the introduction of [a MFC restraint].

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35 P Bucirossi, *Handbook of Antitrust Economics* (MIT Press, 2008), 337.

36 See J Baker & J Chevalier, ‘The Competitive Consequences of Most-Favored- Nation Provisions’ (2013) 27(2) Antitrust 20, at 23-24. It has been argued that this theory is unlikely to materialise in the context of retail MFC restraints in Singapore: J Sim, L Poh & C Tay, ‘Do Retail MFN Clauses Lead to Softening of Competition?’ (2016) 7 Asian J of Law and Economics 101.

37 Baker and Chevalier see this as the kind of coordinated interaction that the US *Horizontal Merger Guidelines* describe as ‘parallel accommodating conduct’; see US DOJ and FTC Horizontal Guidelines (2010) 24-25, at: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

38 J Baker & J Chevalier, ‘The Competitive Consequences of Most-Favored- Nation Provisions’ (2013) 27(2) Antitrust 20, at 23.

28. MFC restraints may have exclusionary effects as distinct from the coordinating effects outlined above.[39] Thus, MFC restraints may have the effect of raising rivals' costs and thereby deterring new entry:[40]

> Firms that demand and get most-favored-customer treatment from important input suppliers are assured that new entrants and existing competitors will not be able to obtain lower costs by getting better prices from those suppliers. By reducing the ability of entrants or rivals to lower their costs, firms can achieve or maintain prices above competitive levels.

29. A pervasive feature of the literature on MFC restraints is the potential importance of efficiencies the positive competition or other welfare effects of which may outweigh adverse effects on competition.[41] Thus, Baker and Chevalier highlight three kinds of efficiencies that may arise from MFC restraints: avoiding hold-up and free-riding; reducing delays in transacting; and reducing transaction costs.[42]

30. The problem of hold-up arises where a firm makes a substantial investment specific to transacting with another party and is exposed to the risk that the other party will jeopardise that investment by switching to a competitor. [43] To avoid this problem, the firm may require a MFC restraint obliging the other party not to give a competitor a better deal. Long-term contracts are one such setting:[44]:

> [MFC restraints] can support long-term relationships with relation-specific investments, by protecting one party from opportunistic behavior by the other party. In such long-term contracts a fixed price can be unattractive, as it would impede efficient adjustments to new demand and cost conditions. However, a frequent price negotiation can put the party who has made the relation-specific investment at the mercy of the other party. A [MFC restraint] constrains the bargaining position of the strongest party and allows the price to change as market conditions vary.

31. MFC restraints are also used to prevent delays in transacting. Baker and Chevalier give this example: [45]

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39 Id at 24.

40 J Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses' (1994) 64 Antitrust LJ 517 at 525.

41 See eg A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488; OFT, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (2012), at: http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf.

42 J Baker & J Chevalier, 'The Competitive Consequences of Most-Favored- Nation Provisions' (2013) 27(2) Antitrust 20 at 20-22.

43 Id at 20-21.

44 P Bucirossi, *Handbook of Antitrust Economics* (MIT Press, 2008), 340. See K Crocker and T Lyon, 'What Do "Facilitating Practices" Facilitate? An Empirical Investigation of Most-Favored-Nation Clauses in Natural Gas Contracts' (1994) 37 J of Law & Economics 297 (empirical study of long term natural gas contracts led them to conclude that MFC restraints were used in that context for efficiency rather than as facilitating practices).

45 J Baker & J Chevalier, 'The Competitive Consequences of Most-Favored- Nation Provisions' (2013) 27(2) Antitrust 20, at 21.

> ... suppose a land developer wants to create a project that can only be completed if a number of small parcel holders sell their property. Each seller may want to be the last to make a deal. Once the other parcels are secured, after all, the developer may be willing to pay the last hold out much more than market value of the seller's property in order to ensure that the project would go forward. Under such circumstances, every seller has an incentive to hold out to become the last seller, thus endangering the whole project. An MFN can solve this hold out problem. If the developer promises initial sellers to pay the difference between the price they received and the price later sellers receive, that contractual provision could eliminate the incentive to delay and, perhaps, allow a project to go forward when it otherwise would not, generating an efficiency.

32. MFC restraints are often used to reduce transaction and negotiation costs.[46] Thus, a MFC restraint may guarantee that one contracting party will be entitled to the other party's best price without having to undertake costly negotiations:[47]

> Suppose .. that a start-up company is launching a new Internet video service. In order to launch, the startup must contract with numerous content providers such as record labels. Given the startup's uncertain prospects, a small record label may not find it worthwhile to expend the effort to negotiate a deal with the startup, a firm that may not even be in existence in a year's time. But the small label may be willing to reach a contract with the start-up if it can avoid the costs of bargaining over price, as it can by entering into an MFN that requires the small label to sell its content at terms equivalent to those at which a major record label sells its content to the start-up. This arrangement may allow the start-up to assemble a critical mass of content to launch its service. Absent the MFNs, the transaction costs of contracting may prevent the startup from getting off the ground.

However, MFC restraints impose monitoring costs (and the cost of litigation where necessary to enforce them).

33. Numerous commentators emphasise that the competition effects of MFC restraints and possible efficiencies vary widely and need to be examined in all the circumstances of each case.[48] Economists hold sway.

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46 Id at 22.

47 Ibid.

48 See eg A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488; OFT, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (2012), at: http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf; P Akman & M Hviid, 'A Most-Favoured-Customer Guarantee with a Twist' (2005) CCP Working Paper 05-8, at: https://www.uea.ac.uk/documents/107435/107587/ccp05-8.pdf; J Jacobson & D Weick, 'Contracts that Reference Rivals as an Antitrust Category' [2012] (April) The Antitrust Source 1; W Adkinson, Jr & T Lenard, 'Orbitz: An Antitrust Assessment' [2002] (Spring) Antitrust 76; J. van der Weer, 'Antitrust Scrutiny of Most-Favoured Customer Clauses: An Economic Analysis' (2013) 4 J Eur Comp L & Practice 301; M Arbatskaya, M Hviid & G Shaffer, 'On the Incidence and Variety of Low-Price Guarantees' (2004) XLVII Journal of Law and Economics 307; C Osborne, 'The effects of vertical restraints on competition: spotlight on most favoured nation clauses', Hong Kong Competition Summit, 21 April 2016; D Besanko & T Lyon, 'Equilibrium incentives for most-favored customer clauses in an oligopolistic industry' (1993) 11 International Journal of Industrial Organisation 347; D

II Cartel-Related Prohibitions

A Contract, arrangement or understanding containing a cartel provision

34. To what extent are MFC restraints caught by the prohibitions relating to a contract, arrangement or understanding (**CAU**) containing a cartel provision (under sections 44ZZF, 44ZZRG, 44ZZRJ and 44ZZRK of the CCA)? Is there undue overreach, underreach or uncertainty?

35. Two or more competitors may enter into an arrangement or understanding that one or both of them will adopt a MFC restraint specifying a minimum price level.[49] If so, plainly there will be a prohibited CAU containing a cartel provision as defined by s 44ZZRD(2). Setting a minimum price level is an archetypal form of price fixing. There may be price-fixing in the absence of agreement as to the precise price.[50]

36. One context where competitors understandably may use MFC restraints is joint bidding for tenders where protection may be needed against the white-anting of a joint bid by participation in other bids. Assume that A and B, two competing suppliers and installers of large scale solar plants in Australia, are requested by the NSW government to bid for several new plants. They could bid separately and are free to do so but think their chance of success is better if they bid jointly. They enter into MFC restraints that oblige them not to charge a lower amount for components in other bids than they charge for the same components in the joint bid. The MFC restraints here have the effect or likely effect of controlling the price at which the relevant components would be supplied by either party outside the joint bid. If so, the purpose/effect condition for a cartel provision under s 44ZZRD(2) would be met.[51] To get off the hook, the parties would seek to argue that the competition condition is not satisfied, or that a joint venture exception applies. Depending on the facts and the meaning of the term 'joint venture',[52] those arguments may or may not succeed.

Grether & C Plott, 'The effects of market practices in oligopolistic markets: An experimental examination of the Ethyl case' (1984) 22 Economic Inquiry 479; J Chen & Q Liu, 'The Effect of Most-Favored Customer Clauses on Prices' (2011) 59 The Journal of Industrial Economics 343.

49 See eg *United States v Apple, Inc.*, 952 F. Supp. 2d (S.D.N.Y. 2013).

50 See eg *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206, 228.

51 Joint bidding may not be caught by s 44ZZRD(3): C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 4.7.2.

52 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.2.

37. Per se liability under s 1 of the Sherman Act was imposed in *US v Apple, Inc*.[53] for price fixing. Apple entered into MFC restraints with ebook publishers. Those restraints facilitated price fixing. Apple was seeking to compete effectively against Amazon in the retail ebook market dominated by Amazon. Apple decided to use an agency model under which it would pay 30% commission. Apple wanted to protect its investments in the iBookstore and the iPad and did so partly by means of price caps to guard against unattractive prices being set by the publishers. Apple also required the publishers to price e-books in the iBookstore for no more than the price the publisher charged elsewhere. The publishers were also to match the pricing of Amazon and any other wholesale model distributor that was independently setting prices for the publisher's e-books. The latter requirement meant that the publishers were faced with the choice of incurring considerable losses (Amazon was selling some ebooks below cost) or requiring Amazon to adopt an agency distribution model under which the publishers would set the price of ebooks sold in Amazon's Kindle store. Amazon adopted an agency model and required parity pricing of the kind that Apple required from the publishers.

38. The US Department of Justice brought civil enforcement proceedings against Apple and the publishers for breach of s 1 of the Sherman Act. The publishers settled but Apple went to trial. The US District Court held that Apple's adoption of MFC restraints and agency agreements with publishers was a conspiracy designed to raise e-book prices and 'eliminate retail price competition'.[54] The orders made against Apple included these prohibitions:

> A. Apple shall not enforce any Retail Price MFN in any agreement with an E-book Publisher relating to the sale of E-books.
>
> B. Apple shall not enter into any agreement with an E-book Publisher relating to the sale of E-books that contains a Retail Price MFN.
>
> C. Apple shall not enter into or maintain any agreement with a Publisher Defendant that restricts, limits, or impedes Apple's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to purchase one

53 *United States v Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013). See further M Weiner & C Falls 'Counseling on MFNs After e-books' [2014] (Summer) Antitrust 68.

54 952 F. Supp. 2d 638 at 706-707. The MFC restraints were relevant to facilitate the conspiracy but were not the core legal concern. Under the CCA, the ebook agency distribution agreement between Apple and each of the publishers would itself seem to contain a cartel provision if Apple and each publisher were competitors or likely competitors under s 44ZZRD(4); would they be competitors under the decision in *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313 (under appeal to the High Court)?

or more E-books. [Subject to expiry after certain periods that differ in relation to each publisher]

39. The decision of the US District Court was upheld by the Second Circuit Court of Appeals.[55] The US Supreme Court rejected Apple's appeal.[56]

40. *US v Apple, Inc.* involved a so-called 'hub and spoke' conspiracy.[57] There was considerable evidence to support the existence of a rim (a horizontal agreement) to convert the hub and spokes of the vertical agreements between Apple and the publishers. The theory of the case in that respect is comparable to the approach taken by the Full Federal Court in *News Ltd v Australian Rugby League Ltd (No 2)*.[58]

41. In *News Ltd v Australian Rugby League Ltd (No 2)* News Ltd alleged that rugby league clubs (the spokes) had each entered an exclusionary agreement (Commitment Agreement) with the ARL, the league organiser (the hub). The Full Federal Court held that a CAU between the competing clubs was to be inferred from the circumstances. The Commitment Agreements were executed by the clubs in substantially identical form. They were executed within a short time of each other, in response to approaches to each club made by ARL representatives who emphasised the need for the clubs to be unified. The clubs must have understood that they were being asked 'to join all other clubs in undertaking not to participate in an unauthorised competition [ie the Super League]'.[59] Mutual consent to carry out a common purpose was to be inferred. The clubs were not merely hoping that the other clubs would join in.

42. The element of commitment for a CAU is necessary in hub and spoke cases as in any other. The element of commitment was not discussed explicitly by the Full Federal Court (the case was decided before the *Apco Service Stations* decision)[60] but is implicit in the finding that there was mutual consent to carry out a common purpose to take concerted action to adopt an exclusionary provision and that the clubs were not

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55 *United States v Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

56 *United States v Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), cert. denied, No. 15-565, 2016 WL 854227 (U.S. Mar. 7, 2016).

57 See further B Orbach, 'Hub-and-Spoke Conspiracies' [2016] (April) The Antitrust Source 1; O Odudu, 'Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion' (2011) 7 European Competition J 205; R Smith & A Duke, 'Information Exchange, Hub and Spoke Arrangements and Collusion' (2015) 43 ABLR 81; O Black, *The Conceptual Foundations of Antitrust* (CUP, 2005) ch 5; J Sandin, 'ABA section of Antitrust Law Spring Meeting 2016: Clarifying liability in hub-and-spoke conspiracies', 4 May 2016, at: http://www.antitrustlawsource.com/2016/05/aba-section-of-antitrust-law-spring-meeting-2016-clarifying-liability-in-hub-and-spoke-conspiracies/

58 (1996) ATPR ¶41-521.

59 (1996) ATPR ¶41-521 at 42529.

60 *ACCC v Apco Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452.

merely hoping that the other clubs would join in. The emphasis on common purpose in *News Ltd v Australian Rugby League Ltd (No 2)* (and in *TPC v David Jones (Australia) Pty Ltd*[61] is important: the presence of a common purpose helps to distinguish a CAU from mere 'conscious parallelism' or knowing interdependent action.[62] A common purpose may arise by inference where there is an expectation of reciprocal conduct by a competitor; that is the approach taken in *News Ltd v Australian Rugby League Ltd (No 2)*. Contrast the recent decision in *ACCC v Australian Egg Corporation Limited*[63] where no expectation of reciprocal conduct was found to exist.

43. **Overreach** arises where a MFC restraint agreed between competitors entails a cartel provision as defined by s 44ZZRD(2) but the MFC restraint is not anti-competitive. A provision in a CAU may 'control' a price within the meaning of s 44ZZRD(2) where the effect or likely effect is not necessarily harmful and may be welfare-enhancing.[64] One of many possible examples is the solar plant joint bidding scenario in paragraph 36 above.

44. In *Blue Cross & Blue Shield United v Marshfield Clinic*,[65] the medical health insurers Blue Cross and Blue Shield brought a claim partly under s 1 of the Sherman Act against the Marshfield Clinic and its affiliated physicians. The collusion alleged was that Marshfield Clinic and the physicians had agreed that Marshfield Clinic would pay them no more than what the physicians charged their other patients. This was said to put a floor underneath these physicians' prices - if they cut prices to their other patients their reimbursement from Marshfield Clinic would drop automatically. The claim was rejected by the Seventh Circuit Court of Appeals, per Posner J:[66]

> This is an ingenious but perverse argument. 'Most favored nations' clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. The Clinic did this to minimize the cost of these physicians to it, and that is the sort of conduct that the antitrust laws seek to encourage. It is not price-fixing.

45. The characterisation of the MFC restraint in *Blue Cross & Blue Shield United v Marshfield Clinic* as being a standard commercial device and not price fixing is

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61 (1986) 13 FCR 446 at 468.
62 (1986) 13 FCR 446 at 468.
63 [2016] FCA 69.
64 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 4.2.4.
65 65 F 3d 1406 (7th Cir. 1995).
66 65 F 3d 1406, 1415 (7th Cir. 1995).

reminiscent of the attempt of Lockhart J in the *Radio 2UE* case[67] to import a requirement of anti-competitiveness into the definition of price fixing under s 45A of the *Trade Practices Act 1974* (Cth). Lockhart J's approach has not been followed subsequently in Australia.[68] There is little doubt that the MFC restraint in *Blue Cross & Blue Shield United v Marshfield Clinic* would amount to the controlling of a price within the meaning of s 44ZZRD(2).

46. MFC restraints in the US health industry have been challenged in a number of cases, not on the basis of per se liability, but under the rule of reason.[69] MFC restraints have been prohibited under consent decrees, the underlying theory being that the MFC restraints encouraged coordinated pricing or discouraged price cutting to particular customers by obliging the seller to make the lower price available to one or more other customers.

47. It was contended by Apple in *US v Apple, Inc.* that the restraints imposed should not have been treated as horizontal price fixing but as vertical restraints subject to the rule of reason. That argument did not succeed. Although accepted by the dissenting judge in the Second Circuit Court of Appeals,[70] it was unpersuasive. In Orbach's explanation:[71]

> The proposition that proof of hub-and-spoke conspiracies requires showing of competitive effects where the underlying horizontal restraint is unlawful per se presses antitrust formalism to the extreme: it insists that there is a sharp distinction between vertical and horizontal arrangements and that vertical arrangements are likely to be procompetitive even when they facilitate cartels. For good reasons, most courts have rejected this proposition.

48. There is no room for rule of reason analysis under s 44ZZRD.[72] For example, in the solar plant joint bid illustration in paragraph 36 above, and on the facts of *Blue Cross & Blue Shield United v Marshfield Clinic* and *US v Apple, Inc.*, the MFC restraints in issue had the effect or likely effect of controlling a price within the meaning of s 44ZZRD(2). Whether or not such a controlling of price is justifiable in economic or other terms is irrelevant under the definition of a cartel provision in s 44ZZRD.[73]

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67 *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557, 566.

68 C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 93-94.

69 See ABA, *Antitrust Law Developments (Seventh)* (2012) Vol I, 222-223.

70 *United States v Apple, Inc.*, 791 F.3d 290,345-346 (2d Cir. 2015) (Jacobs J).

71 B Orbach, 'Hub-and-Spoke Conspiracies' [2016] (April) The Antitrust Source 1, 14.

72 Now much too late in the day. Contrast S Breyer, 'Five Questions about Australian Anti-Trust Law' (1977) 51 ALJ 28, 28-32.

73 C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 4.2.4.

49. It might be argued that the exclusive dealing exception under s 44ZZRS or that under s 45(6) would apply in the situation that arose in *US v Apple, Inc*. if the MFC restraints were restructured in such a way as to bring them within the definition of exclusive dealing in s 47 (see especially s 47(4)). Arguably s 44ZZRS could then be invoked to remove per se liability from the MFC restraints in the cartel provision in the CAU between Apple and the publishers. However, this argument is unlikely to succeed. The s 44ZZRS exclusive dealing exception applies 'in so far' as giving effect to the cartel provision would entail exclusive dealing. In a case like *US v Apple, Inc*, giving effect to the cartel provision would entail more than exclusive dealing: it would also entail *coordination* of the conduct of the competing publishers.[74]

50. The overreach discussed above could largely be avoided by improving the exemptions that apply to per se cartel-related liability. The first improvement would be to introduce a collaborative venture exemption along the lines of the collaborative activity exemption that is in the legislative pipeline in New Zealand.[75] The second would be an exemption for supply agreements between competitors, as recommended in the Harper Report (Recommendation 27) and along the lines of the supply exemption to be adopted in New Zealand.[76] Thirdly, use could be made of the block exemption mechanism proposed by the Harper Report[77] to exempt certain kinds of agreements that are likely to contain MFC restraints and yet be welfare-enhancing or at least not anti-competitive. Fourthly, if need be, consideration could be given to introducing a de minimis exemption similar to that in the EU.[78]

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74 As in eg the enforcement action taken by the TPC against Seven Network Limited, Nine Network Australia Pty Limited, Golden West Network Pty Limited and ors (1996), at: http://www.austlii.edu.au/au/journals/AUCCCJl/1996/48.pdf.

75 Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), new s 31.

76 Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), new s 32. See further the discussion and references in paragraphs 59-60 above.

77 Recommendation 39.

78 See EC, Notice 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/C 291/01). For the view that such an approach is unnecessary in relation to cartel conduct, see C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.16. A general de minimis rule applies to the CCA; see *Procter & Gamble Australia Pty Ltd v Energizer Pty Ltd* [2011] FCA 1347; D Heydon, 'The Trade Practices Act 1974, Section 45: Agreements in Restraint of Trade' (1975) 3 ABLR 262, 279, 289, 291. An unsuccessful attempt was made in *ACCC v P T Garuda Indonesia Ltd* [2016] FCAFC 42 to deny liability on the basis that the conduct was de minimis; see at [422], [454], [555] (Dowsett & Edelman JJ) (insufficient evidence provided; 'de minimis' a 'protean' term). See also *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC); *Telecom Corporation of New Zealand Limited v Commerce Commission* [2012] NZCA 278. The scope of the exemption in Australia is very narrow; that under the EU De Minimis Notice is considerably wider.

51. **Underreach** may arise where there is a cartel provision or a MFC restraint that is likely to coordinate prices or non-price conduct but there is no CAU between competitors. This is the prime feature of facilitating practices including MFC-based facilitating practices.[79]

52. *United States v General Electric Co.*[80] is a leading US example of the use of a MFC restraint as a facilitating practice. In this case, GE adopted a new pricing policy in 1963 for turbine generators. This pricing policy deployed three facilitating practices:

   (a) a detailed publicly-available price book that specified prices for components so that the total cost of a generator required by a particular buyer could be readily worked out;

   (b) public announcement of all price changes; and

   (c) a retroactive 'price protection' clause under which a price reduction by GE for one customer would entitle any customer who had paid the list price within the previous six months to an identical discount.

   Westinghouse introduced a parallel policy a year later. There was no evidence of any formal communication or agreement about these policies between GE and Westinghouse. After 12 years of coordinating the price of turbine generators by means of these facilitating practices, GE and Westinghouse were faced with the threat of a civil suit by the Department of Justice under s 1 of the Sherman Act. They chose to enter into a consent decree to end the practices. The consent decree prohibited the firms from publishing price books, offering MFC restraints to customers, or publicly announcing price changes.

53. Another leading US case, *EI Du Pont de Nemours & Co v Federal Trade Commission, Ethyl Corp v Federal Trade Commission* (*Ethyl Corp* case) [81], turned on the meaning and scope of the prohibition against unfair conduct under s 5 of the Federal Trade Commission Act. The FTC had held that the major domestic producers and sellers of lead anti-knock gasoline additives had breached s 5 by unilaterally using various facilitating practices including giving advance notice of price increases in the press, and MFC restraints under which the seller promised to charge the grantee of the MFC restraint any lower price given to other customers. There was no evidence of explicit or tacit collusion. However, these practices breached s 5 because they had

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79 See G Hay, 'Facilitating Practices' in ABA Section of Antitrust Law, *Issues in Competition Law and Policy* (ABA Book Publishing, 2008) Vol II, ch 50.

80 42 Fed Reg 170005 (1977).

81 729 F.2d 128 (1984).

a 'significant adverse effect on competition by promoting price uniformity at supracompetitive levels.'[82]

54. The Second Circuit Court of Appeals overturned the FTC order in *Ethyl Corp*. The Court held that, in cases where there is no tacit agreement between competitors, s 5 requires some element of 'oppressiveness'.[83] That element may be: (a) evidence of anticompetitive intent or purpose, or (b) the lack of an independent legitimate business reason for the conduct. The FTC had not required such oppressiveness and had failed 'to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable.'[84] Nor was there substantial evidence that the facilitating practices had lessened competition.

55. In Australia, it is unclear on the facts in *United States v General Electric Co.* whether or not there would be a CAU under the CCA. Under s 1 of the Sherman Act, an 'agreement' can be inferred from 'plus factors' and the requirement of 'commitment' is weaker than that required for an arrangement or understanding under the CCA.[85] In any event, the case was settled.

56. The *Ethyl Corp* case was based on s 5 of the FTC Act.[86] Section 5 applies to unilateral conduct and does not require an agreement between competitors. Moreover, there was no evidence of an agreement, much less of commitment in the *Apco Service Stations* sense.

57. CAU-based cartel prohibitions thus fall short of covering MFC-based facilitating practices where, as often may be the case, a MFC restraint is deployed unilaterally by a competitor and where it is difficult or impossible to prove the element of commitment. This underreach has been addressed to a limited and unsatisfactory extent by the prohibitions on unilateral disclosure of competitively sensitive information under Part IV Division IA (see Part IIB below). It has been addressed more adequately, albeit imperfectly, by the Harper Report proposal for the introduction of a prohibition against concerted practices that have the purpose, effect

82 729 F.2d 128, 144 (1984).

83 729 F.2d 128, 139 (1984). The decision is criticised in J Baker, 'Two Sherman Act section 1 dilemmas: parallel pricing, the oligopoly problem, and contemporary economic theory' (1993) 38 Antitrust Bulletin 143, 210-213.

84 729 F.2d 128, 138 (1984).

85 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 48.

86 See FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015) at: https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf

or likely effect of substantially lessening competition in a market (Recommendation 27). That proposal calls for refinement (see Part IIC below).

58. Where a MFC restraint is not contained in a CAU between competitors, liability may arise on other possible bases. In particular:

- the MFC restraint may be a SLC provision that is contained in a CAU between non-competitors, so that the SLC prohibition in s 45 applies (see Part III below);
- the MFC restraint may be exclusive dealing conduct to which the SLC prohibition in s 47 applies (see Part III below); and/or
- the MFC restraint may be a misuse of market power that is caught by s 46 (see Part IV below).

59. **Uncertainty** arises primarily from the operation of the competition condition in s 44ZZRD(4) in dual distribution arrangements. Dual distribution arrangements involving MFC restraints have been challenged by the ACCC.[87] The ACCC brought enforcement proceedings against Flight Centre in 2012, alleging that Flight Centre attempted to enter into anti-competitive arrangements with its competitors (Singapore Airlines, Malaysian Airlines and Emirates) to fix the prices at which the airlines would sell their international airfares on their websites. MFC restraints were the heart of these attempted anti-competitive arrangements. The MFC restraints would require the airlines not to charge prices less than Flight Centre's prices (including commission). The Federal Court held that Flight Centre and the airlines were competitors in the market for the supply of air travel distribution and booking services and had breached the prohibition against price fixing under s 45 of the *Trade Practices Act 1974* (Cth). That decision was overturned by the Full Federal Court.[88] Air travel distribution and booking services were part of the market for the supply of air travel. Flight Centre had acted as an agent of the airlines and was not in competition with them.[89] The High Court has granted the ACCC special leave to appeal.

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87 *ACCC v Australian and New Zealand Banking Group Ltd* [2013] FCA 1206; *ACCC v Flight Centre Ltd (No 2)* [2013] FCA 1313. See further A Christopher & T Fabricius, 'In competition with each other? Implications of the apparently divergent outcomes in Flight Centre and ANZ' (2015) 23 AJCCL 6.

88 *Flight Centre Ltd v ACCC* [2015] FCAFC 104.

89 An agency relationship does not necessarily mean the parties are not in competition with each other; each case is to be considered on its own facts: *Flight Centre Ltd v ACCC* [2015] FCAFC 104, [163].

60. The *Flight Centre* case has occasioned considerable commercial uncertainty for over 4 years already. On one view, the case should not have been prosecuted.[90] In any event, the problem should have been resolved earlier by an exemption from per se liability under cartel-related prohibitions in respect of provisions contained in supply agreements between competitors.[91] This has now been addressed by the Harper Report (Recommendation 27). However, the proposed exemption in s 45J in the Model Legislative Provisions seems unduly complicated and requires further consideration and redrafting in terms that more clearly reflect the approach taken under US and EU competition law.

B Unilateral disclosure of competitively sensitive information

61. Two prohibitions under Part IV Division 1A relate to the unilateral disclosure by a competitor of competitively sensitive information. Section 44ZZW prohibits the private disclosure of pricing information. Section 44ZZX prohibits the disclosure of pricing information or specified other kinds of competitively sensitive information for the purpose of substantially lessening competition in a market.

62. Part IV Division 1A has been widely criticised since its enactment in 2012.[92] Division 1A stemmed from a crude initiative of the then LNP Coalition Opposition[93] that spurred the then Labor Government into an ill-conceived response. The Harper

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90 See A Merrett & R Trindade, 'Flights of fancy or hard core cartels? When agents (allegedly) price fix' (2012) 8 The State of Competition 1, 4.

91 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.6; Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ) proposed s 32. It is unlikely that the proposed s 32 exemption would extend to a situation such as that in the Flight Centre case where the cartel provision in an agreement by Competitor A with Competitor B for the supply of goods or services by Competitor B to Competitor A did not relate to the price or other terms on which Competitor A will supply those goods or services but the price or other terms on which Competitor B would supply such goods or services to third parties. The proposed s 32 model requires adaptation to cover such a situation as well; see further EC, Commission Regulation (EU) No 330/2010 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, Article 2(4); P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, 23-32, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62.

92 See eg B Fisse & C Beaton-Wells, 'The Competition and Consumer Amendment (No 1) 2011 (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28; C Beaton-Wells and B Fisse, 'Australia's Proposed Information Disclosure Legislation: International Worst Practice', Competition Policy International, Antitrust Chronicle, 30 August 2011; K Tomasic, '"Price signalling" amendments to the Competition and Consumer Act 2010 (Cth): A principled response to the problem of tacit collusion?' ((2012) 19 Competition & Consumer Law Journal 176.

93 Competition and Consumer (Price Signalling) Bill 2010.

Report has recommended that these provisions be repealed.[94] The current Government has announced that it accepts this recommendation.[95]

63. Part IV Division 1A manifests overreach, underreach, and uncertainty.

64. **Overreach:**

- Part IV Division 1A imposes liability for unilateral disclosure of competitively significant information without any requirement that the disclosure facilitate the co-ordination of conduct between competitors so as to remove the need for competitors to collude explicitly. The underlying problem is that Part IV Division 1A was never designed to address facilitating practices in any adequate or comprehensive way but only price signalling and public announcement of competitively relevant information.
- The prohibition of private disclosure of pricing information under s 44ZZW is too sweeping. For example, a competitor would breach the prohibition if it were to disclose privately to another competitor the mere fact that it had a price-related MFC restraint in place. Such a disclosure would 'relate to a price' whether or not any details were given of the terms of the MFC restraint, the identity of the customer beneficiary or the number of customer beneficiaries. The preoccupation is with 'price signalling', not likely anti-competitive harm.

65. **Underreach**:

- Part IV Division IA applies to goods or services prescribed by regulation. Regulation 48 prescribes goods and services of taking deposits and advances of money by authorised deposit-taking institutions. There is no principled justification for such selective application. As a general policy, competition laws should apply across all sectors of the economy, and competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided.
- The exclusion under s 44ZZW(c) of a disclosure 'in the ordinary course of course' is remarkably lax and creates a substantial hurdle for enforcement of the prohibition.[96]

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94 Recommendation 29.

95 Government Response to the Competition Policy Review, 24 November 2015.

96 B Fisse and C Beaton-Wells, 'Private Disclosure of Price-Related Information to a Competitor "In the Ordinary Course of Business": A New Slippery Dip in the Political Playground of Australian Competition Law' (2011) 29 ABLR 367.

- Non-price MFC restraints may be material to competition but s 44ZZW is limited to price-related information.[97] Again, the underlying problem is that Part IV Division 1A was never designed to address facilitating practices squarely.
- The s 44ZZY(6) exception opens the way for the use of continuous disclosure as a vehicle for the use of facilitating practices without getting caught by s 44ZZW or s 44ZZX.[98]

66. **Uncertainty:**

- The key elements of 'disclosure', 'private disclosure' and 'accident' raise questions of interpretation the answers to which are not always obvious.[99]
- The 'ordinary course of business' carve out in s 44ZZW(c) is open to various possible interpretations none of which make sense as a matter of policy.[100]

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97 Contrast s 44ZZX which is much wider.

98 See B Fisse & C Beaton-Wells, 'The continual regulation of continuous disclosure: Information disclosure under the Competition and Consumer Amendment Bill(No1) 2011' (2011) 19 Competition & Consumer LJ 127.

99 For instance, consider whether or not there a 'private disclosure' in this scenario:

> The CEO of Bank A invites the CEO of Bank B to consider the possibility of increasing its home loan interest rates. The disclosure occurs over lunch in a hotel. The disclosure is recorded by U, an ACCC undercover agent sitting at the next table. The CEO of A is aware of U's presence but is indifferent about U being within earshot because he doubts that U will understand the significance of what is being said. Is this a 'private disclosure'? If the disclosure is not a private disclosure, U's undercover work will turn off per se liability under s 44ZZW and attract s 44ZZX and thereby the need for proof that Bank A had a SLC purpose.

100 B Fisse and C Beaton-Wells, 'Private Disclosure of Price-Related Information to a Competitor "In the Ordinary Course of Business": A New Slippery Dip in the Political Playground of Australian Competition Law' (2011) 29 ABLR 367.

C Concerted practices[101]

67. Under Recommendation 29 of the Harper Report, s 45 should be extended to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition. The model legislative provisions in Appendix A of the Harper Report seek to reflect this Recommendation:

> **45M Prohibited conduct** [currently section 45]
>
> A corporation shall not:
>
> …
>
> (c) engage in a concerted practice with one or more other persons if the concerted practice has the purpose, or has or is likely to have the effect, of substantially lessening competition.
>
> (4) For the purposes of paragraph (1)(c), competition means competition in any market in which a corporation that is a party to the concerted practice, or any body corporate related to the corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire, or be likely to supply or acquire, goods or services.

68. The prohibition proposed would be much easier to establish than a CAU in cases such as *United States v General Electric Co.* and *Ethyl*. On the difficulty of establishing a CAU in those cases, see the discussion above in Part IIA.

69. In the *Ebooks case,* [102] the European Commission investigated arrangements parallel to those subject to action by the DOJ in *US v Apple, Inc*. The EC's Preliminary Assessment expressed the concern that the publishers and Apple had engaged in a concerted practice that restricted competition by object in breach of Article 101. Allegedly the parties had pursued a common global strategy for the sale of e-books in order to raise retail prices or avoiding lower retail prices.[103] The case was settled on the basis of undertakings by the publishers and Apple. These undertakings were far-reaching. They required the publishers and Apple to terminate the agency agreements and imposed a number of restrictions on the use of MFC restraints. Those restrictions included obligations on the publishers:

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101 This section includes an adaptation of some material from C Beaton-Wells and B Fisse, Final Report; Submission, 22 May 2015, at: http://www.brentfisse.com/images/Beaton-Wells-and-Fisse-_Submission_Final%20Report_250515_FINAL.pdf.

102 Decisions of 12 December 2012 and 25 July 2013 in Case COMP/39.847 *Ebooks*. See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) [14.41]-[14.46].

103 EC, Commission Decision of 25.7.2013, at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_27536_4.pdf.

- to offer retailers other than Apple the opportunity to terminate any agency agreements for the sale of e-books that contained a retail price MFC restraint; and
- for a period of five years, not to enter into any agreement relating to the sale of e-books if the agreement contains a price MFC restraint.

70. To what extent would the proposed concerted practice prohibition generate undue overreach, underreach or uncertainty in the context of MFC restraints?

71. **Overreach** may arise from:

    (a) the inability of the SLC test proposed in the Harper Report to take efficiencies adequately into account;

    (b) the lack of a competition condition in the proposed s 45M; and

    (c) the danger of catching conduct that is not anti-competitive if, as has been suggested, the SLC test were to be removed in order to make proof of liability easier (compare the per se test under the cartel prohibitions in ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK).

72. The SLC test in s 45 may occasion overreach because it is incapable of taking efficiencies adequately into account (see Part III below). The same problem would arise under the SLC test in the concerted practice prohibition recommended in the Harper Report. The solution proposed is the introduction of a rule of reason where the SLC test applies. See Part III below.

73. The competition condition under the proposed s 45M(4) does not require that any of the persons engaged in the concerted practice be in competition with each other (or likely competition or competition or likely competition but for the concerted practice). Consistently with the concept of competitive harm associated with concerted practices, the prohibition should apply only to practices engaged in by competitors or likely competitors or persons who would be in competition or would be likely to be in competition but for the practice. Accordingly, the proposed s 45M should be amended to provide that a corporation shall not engage in a concerted practice with one or more persons who competes, is likely to compete or would, but for the concerted practice, compete or be likely to compete with the corporation if the concerted practice has the purpose, or has or is likely to have the effect of substantially lessening competition in a market. See the definition proposed in paragraph 78 below.

74. Some have expressed concern about extending liability to concerted practices without a SLC test on the grounds that to do so would be over-inclusive and capture conduct that is competitively benign, pro-competitive or welfare-enhancing. This concern is met in the EU by the limited extent to which the restriction by object limb of Article (1) of the EU Treaty applies[104] and by the efficiencies exception under Art 101(3) of the EU Treaty.[105] In Australia, the risk of overreach would be low if:

- the concept of 'concerted practice' is defined as suggested below (see paragraph 78) to require that the conduct be engaged in by a corporation for the purpose of coordinating the terms or conditions of supply or acquisition with a competitor in order to substantially lessen competition *between those competitors* - that purpose element limits liability to a greater extent than the object element under Art 101(1) ('object' does not mean 'objective', 'purpose', 'intent', or 'goal' but relates to the propensity of the conduct);
- there were alternative tests of liability – no SLC or SLC – and if the no SLC limb of the prohibition were subject to a block exemption[106] for MFC restraints that are not manifestly anti-competitive;[107]
- there were well-designed exceptions for collaborative activities and supply agreements between competitors;[108] and
- the avenue of authorisation were available in relation to concerted practices.[109]

75. **Underreach** may arise from the inclusion of a SLC test as a necessary element of the proposed prohibition. A SLC test would create an unnecessary hurdle for enforcement in cases where the coordination of conduct is manifestly anticompetitive.[110] *US v Apple, Inc*.[111] and *Ebooks*[112] are examples of such conduct. In *US v Apple, Inc,* per se

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104 See J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3C(8).
105 See J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3F.
106 Harper Report, Recommendation 39.
107 Compare Commission Regulation 230/2010 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 L102/1 (VBER), Article 4(a). See further , *Antitrust Law Developments (Seventh)* (2012) Vol I, ch 1B3a.
108 Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), new ss 31 and 32. See further Part IIA above.
109 This is not addressed in the Harper Report but presumably will be the case.
110 The ACCC took a similar position in ACCC Submission on the Draft Report, 26 November 2014, 47:

> Where conduct comprising a concerted practice leads to cartel-like outcomes, the ACCC considers that it should be prohibited on a per se basis, consistent with other cartel offences. As was outlined in the ACCC's Initial Submission, conduct such as anti-competitive information disclosures can be just as harmful as hard core cartels and are recognised as such in international best practice.

111 *United States v Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).
112 Decisions of 12 December 2012 and 25 July 2013 in Case COMP/39.847 *Ebooks*.

liability for price fixing was imposed. In *Ebooks* the EC intervened on the basis that there was a restriction by object under the object limb of Article 101(1) of the EU Treaty.[113] By contrast, a SLC test would be appropriate in cases where the case is not manifestly anticompetitive but potentially anticompetitive. MFC restraints generally fall into the latter category.[114] The solution proposed here is that there be alternative tests of liability – no SLC or SLC – and for the no SLC limb of the prohibition to subject to a block exemption[115] to exempt MFC restraints that are not manifestly anti-competitive;

76. The Harper Report suggests at one point that a concerted practice means conduct that is 'jointly arranged or carried out'. [116] Requiring joint action as a necessary condition of a concerted practice would be unduly restrictive.

77. **Uncertainty** would arise from the failure to define the concept of 'concerted practice'. The Harper Report considered that the word 'concerted' has a clear and practical meaning and no further definition is required for the purposes of a legal enactment.[117] That view is debatable. The opposing view is that a legislative definition is necessary in order to give adequate guidance to the courts, the ACCC, businesses and their advisers when they interpret and apply the proposed prohibition. In the absence of legislative guidance there is a risk that courts will draw on and may attempt to adapt the EU concept of a concerted practice in interpreting the new prohibition.

78. The following statutory definition of a 'concerted practice' has been proposed by Beaton-Wells and Fisse:[118]

> A concerted practice is conduct engaged in by a corporation for the purpose of:

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113 Considerable uncertainty surrounds what is meant by a restriction by object; see *Groupement des cartes bancaires (CB) v European Commission*, C-67/13 P - CB v Commission, 11 September 2014; J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3C(8). Note also that the UK CMA indicated that it could not be ruled out that MFN clauses qualify as by object infringements: Private motor insurance market investigation, Final report, 24 September 2014, Appendix 12.1, 20, at: https://assets.digital.cabinet-office.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf .

114 See P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 39-41, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62

115 Harper Report, Recommendation 39.

116 Harper Report, 60, 371.

117 Harper Report, 371-372.

118 C Beaton-Wells and B Fisse, Final Report; Submission, 22 May 2015, 11-12, at: http://www.brentfisse.com/images/Beaton-Wells-and-Fisse-_Submission_Final%20Report_250515_FINAL.pdf..

(a) coordinating the terms or conditions on which goods or services are supplied or acquired, to be supplied or acquired or likely to be supplied or acquired with a person who competes, is likely to compete or would, but for the concerted practice, compete with the corporation in relation to the supply or acquisition of those goods or services; and

(b) thereby substantially lessening competition between the corporation and that person in relation to the supply or acquisition of those goods or services.

79. The definition proposed seeks to adapt the EU concept of a concerted practice under Article 101(1) of the EU Treaty. However, it also seeks to define the concept of concerted practice more closely than Article 101(1) and also incorporates the CCA concepts of 'purpose', 'substantial', ' 'lessening' and 'competition'. The concept of 'coordination' is new to the CCA but is central to the meaning of a ‘concerted practice’ in the context of competition law.[119] It is a term that has been used and applied in numerous cases on Article 101(1). The purpose element of the proposed definition relates to the purpose of the corporate defendant, rather than the purpose of the concerted practice; the latter precept is insufficiently clear (must the purpose be shared by all parties to the contract, arrangement or understanding? by all persons engaged in the concerted practice?).[120] The competition test in the proposed definition is not a SLC test but focuses on the lessening of competition between the competitors who participate in the concerted practice. The test of ‘substantial’ in this context is less than ideal and would benefit from practical elucidation in case law and guidelines.

80. The application of the concept of a concerted practice in hub and spoke cases will need to be fleshed out in decisions, aided possibly by guidelines. The UK case law offers some useful guidance.[121] For instance, in *JJB Sports Plc v Office of Fair Trading*[122] the Court of Appeal formulated this test in the context of exchange of future price information:[123]

(I) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),

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119 As recognised and recommended in ACCC Submission on the Draft Report, 26 November 2014, 43.

120 If this approach is adopted, it would be useful to indicate the time at which the relevant purpose needs to have existed. On one view it should be sufficient for the purpose to be present at any time when the practice has occurred.

121 See O Odudu, ‘Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion’ (2011) 7 European Competition J 205; DLA Piper, Antitrust Matters, March 2016, 4, 7-9.

122 [2006] EWCA Civ 1318.

123 [2006] EWCA Civ 1318, [141].

(II) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and

(III) C does, in fact, use the information in determining its own future pricing intentions then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.

81. An intriguing question is how the concept of a concerted practice will be applied in relation to coordinated conduct on a platform or network that occurs, not as result of human coordination, but on a computer system where an algorithm generates what happens.[124] Presumably, coordinated conduct will often occur algorithmically. However, the element of 'distancing' required under EU law to prevent a concerted practice from arising presupposes that a human actor will be alerted by the relevant circumstances to distance a firm from the risk of engaging in coordination. The ECJ recently decided that the element of distancing should be interpreted and applied flexibly enough to take account of the technology affecting the situation.[125]

III SLC-Based Prohibitions

82. The SLC-based prohibitions under s 45 and s 47 are a further testing ground for MFC restraints and MFC restraints generally in cases where there is: (a) a CAU as required under s 45; or (b) exclusive conduct as defined by s 47. The SLC weapon faces challenges on this testing ground. One challenge is the difficulty of determining whether or not a MFC restraint is likely to work as a price stabilising or price lowering device.[126] Another challenge is the application of the SLC test to multi-party online platforms where MFC restraints are used to guard against hold-up and free-riding and to achieve other efficiencies.[127] Such arrangements can be complex and in Australia the likely effects on the process of competition need to be disentangled from efficiency considerations that do not affect competition and are hived off for distinct assessment under the test for authorisation or notification of

124 See further J Priluck, 'When Bots Collude', The New Yorker, April 25, 2015, at: http://www.newyorker.com/business/currency/when-bots-collude;A Ezrachi & M Stucke, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' (2015) at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591874

125 *Eturas,* Case C-74/14 (2016), discussed by A Lamadridat at: https://chillingcompetition.com/2016/01/22/ecjs-judgment-in-case-c-7414-eturas-on-the-scope-of-concerted-practices-and-on-technological-collusion/

126 Consider eg D Grether & C Plott, 'The effects of market practices in oligopolistic markets: An experimental examination of the Ethyl case' (1984) 22 Economic Inquiry 479.

127 Consider eg A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488.

overriding public benefit. Yet another challenge is that assessment of competitive effects often will not be confined to stand alone MFC restraints but will need to consider other provisions and other conduct that reflect a wider business strategy.[128]

83. The threshold requirements of a CAU or exclusive dealing exclude MFC-related conduct in many situations. Thus, unilateral public MFC-related announcements will not be contained in a contract, arrangement or understanding. Moreover, MFC restraints may involve exclusive dealing under s 47 but often will not. The Harper Report has recommended that there be no separate prohibition of exclusive dealing (Recommendation 33). Under that recommendation, it would seem that MFC-related conduct will be covered by s 45 only if there is a CAU containing a SLC provision (or a giving of effect to such a provision. MFC-related conduct alone is also subject to possible liability under s 46.

84. Where MFC restraints are contained in a CAU or are exclusive dealing, to what extent does the SLC test under s 45 or 47 give rise to undue overreach, underreach or uncertainty?

85. **Overreach** is a fundamental concern. MFC restraints often reflect efficiency considerations but efficiencies are relevant under the SLC test only to a limited extent. The SLC test is a competition test, not one that is geared to assessment of offsetting welfare-enhancing efficiencies.[129] There is no rule of reason.[130] As a result, MFC restraints may be caught by the SLC test under ss 45 and 47 unless authorised or, in the case of s 47, immunised by a valid notification to the ACCC. By contrast, a rule of reason applies in the US under s 1 of the Sherman Act and under Article 101 of the EU Treaty.

86. The literature on MFC restraints highlights the potential importance of efficiencies when assessing the competition and welfare effects of such clauses. The possible

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128 A point made in R Smith & A Merrett, 'Playing Favourites: The Competition Effects of Preferred Customer Arrangements' (2011) 7 European Competition 179, 197-198 (giving the Nielsen case in Canada (*R v D&B Cos of Canada* (1995) 64 Canadian Patent Reporter (3d) 216 (Competition Tribunal)) as one example).

129 See S Corones, *Competition Law in Australia* (6th ed, 2014) [1.170]; I Tonkin, 'Long-Term Contracts: When are they Anti-Competitive?' (1998) 6 CCLJ 13. Consider eg the result of applying the s 45 SLC test on the facts in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 (assuming that the refusal to deal was a provision in a CAU).

130 *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193, [270]-[273].

efficiencies, as outlined above in Part IB, include: avoiding hold-up and free-riding; reducing delays in transacting; and reducing transaction costs. [131]

87. The folly of trying to make a realistic assessment of the competition effects of MFC restraints without taking account of all underlying efficiencies is confirmed by Ezrachi's recent luminous paper, 'The competitive effects of parity clauses on online commerce'.[132] The efficiencies that need to be considered when assessing parity clauses in the context of price comparison websites (**PCW**) include the following:[133]

> Parity clauses are often introduced into the vertical relationship in order to minimise externalities and facilitate investment. Consider, for instance, a narrow MFN in which the supplier agrees not to offer the goods on its own website at a lower price or on better terms. This protection incentivises the PCW to invest in demand enhancing features, creating an accessible platform through which search costs are minimised and consumers can compare price and other non-price indicators (such as customer ratings, service and quality). Absent adequate safeguards, customers may use the PCWs to learn about the product or its characteristics, yet subsequently complete the transaction directly on the supplier's website or through other channels. Such externality would undermine investment and efficiency downstream – as the PCW will not see a return on its investment.
>
> In addition to its role in resolving the hold-up problem, parity supports risk sharing between upstream and downstream operators. The size of the investment by the PCW depends upon both the breadth of the protection afforded to the downstream platform, and the level of horizontal competition to which the PCW is exposed. Other benefits and efficiencies associated with MFNs include their role in preventing delays in transacting – removing uncertainty as to the availability of better alternative bargains – and in reducing transaction costs by avoiding the need for a constant negotiation of terms between the contracting parties.

88. Yet the efficiencies of MFC restraints are relevant to the SLC effect test in Australia only to the extent that they affect 'competition' in the sense of the process of the process of rivalry. That makes the test artificial and incomplete, in this context and generally in relation to vertical restraints. It also forces businesses to run the gauntlet of the law in the hope that the ACCC will apply its own internal secret ` rule of reason, or to seek shelter in the bureaucratic and costly enclaves of authorisation or notification. These processes are outmoded and would be

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131 See eg A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488.

132 (2016) 11 European Competition J 488. See also the merger-related critique in P Williams & G Woodbridge, 'The Relation of Efficiencies to the Substantial Lessening of Competition Test for Mergers: Substitutes or Complements?' (2002) 30 ABLR 435.

133 (2016) 11 European Competition J 488,491-492.

unnecessary if a rule of reason were to be introduced in Australia to complement the SLC test.[134]

89. Several submissions were made to the Harper Review for the adoption of a rule of reason test.[135] Those submissions have not been accepted, for reasons that are not discussed expressly in the Harper Report. One implicit reason is that the rule of reason test is not 'justiciable',[136] an issue that has been resolved in Australia by making the task of assessing efficiencies a task mainly for the ACCC in the authorisation process or the Australian Competition Tribunal. The claim that a rule of reason is not justiciable is difficult to swallow given the extensive US and EU experience in applying a rule of reason and its adoption in many countries including the US, the EU, the UK and Canada. There is no authorisation process like that in Australia in the US, the EU, the UK or Canada.[137]

90. Another implicit reason may be that the US rule of reason has various meanings and that it is too difficult to extract its essence from the US case law.[138] That position is supine. Undoubtedly, the US case law on the rule of reason has many twists and turns, with limited clarification by the US Supreme Court.[139] A comprehensive and detailed Australian statutory model with guidelines has yet to be advanced.[140] Although the Harper Review has turned a blind eye to that challenge, others may well fill the vacuum.

91. The implication for overreach of Recommendation 7 of the Harper Report may also be noted. Section 51(3) now exempts certain IP licensing conditions, including IP licensing conditions where the condition is a MFC restraint, from the cartel prohibitions and the prohibitions against anti-competitive agreements and exclusive dealing. The exemption covers certain conditions in licences or assignments of IP

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134 Authorisation does not exist in the US, the EU, the UK or Canada; see C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 8.13.3.

135 See eg Law Council of Australia, Submission on the Competition Policy Review Draft Report, November 2014, 25, at: http://competitionpolicyreview.gov.au/files/2014/12/LCA_Competition.pdf; ABA, Joint Comments, Nov 2014, at: http://competitionpolicyreview.gov.au/files/2014/12/ABA.pdf .

136 See S Corones, D Merrett & D Round, 'Building an Effective Trade Practices Commission' (2009) 49 Australian Economic History Rev 138 at 141-142 citing RB Stevens and BS Yamey, *Restrictive Practices Court* (1965) 23–138.

137 See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 8.13.3.

138 See D Heydon, 'The Trade Practices Act 1974, Section 45: Agreements in Restraint of Trade' (1975) 3 ABLR 262, 289-290.

139 See eg J Keyte & K Lent, 'Reasonable as a Matter of Law: The Evolving Role of the Court in Rule of Reason Cases' [2014] (Summer) Antitrust 62. But see ABA, *Antitrust Law Developments (Seventh)* (2012) Vol I, ch 1 B3b.

140 A detailed model has been advanced in the context of joint ventures; see A Harpham, D Robertson & P Williams, 'The Competition Law Analysis of Collaborative Structures' (2006) 34 ABLR 399.

rights in patents, registered designs, copyright, trademarks and circuit layouts. The exemption does not apply to the prohibitions relating to misuse of market power and resale price maintenance. Nor does it cover the transfer of IP rights, whether by licence or assignment.

92. In recommending the repeal of s 51(3), the Review Panel took the position that commercial transactions involving IP rights, including the assignment and licensing of such rights, should be subject to the CCA in the same manner as transactions involving other property and assets. Equation of IP rights with other types of property rights strikes a now familiar chord.[141]

93. The Harper Report claims that Recommendation 7 is consistent with the approach adopted in other major jurisdictions:[142]

> Most comparable jurisdictions have no equivalent to subsection 51(3). None of the US, Canada or Europe provide an exemption from competition laws for conditions of IP transactions. In those jurisdictions, IP assignments and licences and their conditions are assessed under competition laws in the same manner as all other commercial transactions. The courts in those jurisdictions distinguish between competitively benign and harmful IP transactions, taking account of all relevant circumstances of the transaction and the conditions imposed. There is no evidence that this has diminished the value of IP rights in those countries.

However, under US law and EU law, 'the relevant circumstances of the transaction' include the efficiencies served by the transaction and not merely the lessening or increasing of competition.[143] The operation of the rule of reason in those jurisdictions is not examined. Yet it is the rule of reason that largely explains why the value of IP rights has not been diminished for example in the US by the general application of competition prohibitions to IP-related conduct.[144]

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141 See I Eagles and L Longdin, 'Competition in Information and Computer Technology Markets: Intellectual Property Licensing and s 51(3) of the Trade Practices Act' (2003) 3 Queensland University of Technology LJ 31. For the view that it is misleading to equate IP with other types of property see I Lianos, 'A Regulatory Theory of IP: Implications for Competition Law' (2008) at: https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-1-2008.

142 Harper Report, 109.

143 See Federal Trade Commission and the US Department of Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) at: http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf; Federal Trade Commission and the US Department of Justice, *Antitrust Guidelines for 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; J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 10C.

144 See eg Federal Trade Commission and the US Department of Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) at: http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf.

94. **Underreach** seems to be a less significant potential issue.

95. The provision in s 45(4) for aggregating competitive effects is somewhat narrow. Section 45(4) enables the aggregation of the effect of CAUs or proposed CAUs – it does not enable the effect of MFC *conduct* (eg a public MFC announcement) or other related *conduct* to be aggregated together with CAU effects:

> (4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:
>
> (a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
>
> (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;
>
> together have or are likely to have that effect.

Contrast the aggregation provision in s 47(10). Section 47(10) provides for the aggregation of 'other conduct of the same or a similar kind.'

96. **Uncertainty** arises starkly from the obscure meaning of 'substantial' in the SLC test.[145] The case law offers limited guidance beyond telling us that 'substantial' does not mean 'large' or 'big'.[146] The opportunity to clarify the law was not taken by the High Court in *Rural Press Ltd v ACCC* (2003) where it was stated that 'substantial'

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145 See further P Armitage, 'The evolution of the "substantial lessening of competition" test – a review of case law' (2016) 44 ABLR 74; C Hodgekiss, 'Refocusing on the Fundamental Concepts of Competition and Substantial Lessening of Competition', Commercial Law Association, 31 July 2015; B Fisse, 'The Australian Competition Policy Review Final Report 2015: Sirens' Call or Lyre of Orpheus?', NZ Competition Law & Policy Institute, 26th Annual Workshop Auckland, 16 October 2015, Section IV, at: http://www.brentfisse.com/images/Fisse_Harper_Report_Critique_(Oct_2015).pdf ; B Fisse, 'Competition, Fairness and the Courts' (2014) 39 Australian Bar Rev 101 at 108; C Coops, 'Substantial lessening of competition test', Competition Law Workshop, Adelaide, 10-11 October 2014. On the further question of 'purpose' see D Robertson, 'The Primacy of Purpose in Competition Law – Pt 2' (2002) 10 CCLJ 11; P Scott, 'The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law' (2011) 19 Waikato Law Rev 168.

146 *Re Queensland Independent Wholesalers Ltd* [1995] ATPR 41-438 at 40,926. See also *Global Radio Holdings Limited v Competition Commission* [2013] CAT 26. Cf Malaysian Communications and Multimedia Commission, Guideline on Substantial Lessening of Competition (2014) [3.5] ('considerable or big').

means 'meaningful or relevant to the competitive process'.[147] A values-based judgment is required:[148]

> Economic laws .. embody evaluative concepts with normative dimensions. They require more for their interpretation and application than the mere discovery of pre-existing meaning. Indeed, their application in particular cases almost approaches a legislative function. They require characterisation of facts under some generic designation informed by a values-based judgment.

97. As a result, the assessment of evidence on the issue of substantiality depends much on impression and unstated assumptions.[149] Current guidelines do not assist much on this issue.[150]

98. Headway will not be made by inhaling the exhaust that the SLC test is a 'category of indeterminate reference'[151] or by consulting a dictionary. Progress will require practical elucidation of the test.[152] As Leuner has argued:[153]

> .. it is better to understand and debate the fundamentals of the effects will meet that standard, than to rely upon the vagaries of instinctual responses to competition law. Although many commentators debate the possible causes of competition effects and the factors that play a role in assessing the likelihood of competition effects, there is a need to focus on what will ultimately be indicative of a breach.

99. The slippery notion of a 'substantial' lessening of competition raises various questions:[154]

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147 (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ (stating also that the test is not whether the relevant effect was quantitatively more than insignificant or not insubstantial). Nor is the meaning of 'substantial' taken far in later cases; see eg *Seven Network v News Limited* (2009) 182 FCR 160. [581]–[585] (Dowsett & Lander JJ); *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT *Application by Chime Communications Pty Ltd (No 3)* [2009] ACompT 4.

148 Justice RS French, 'The Role of the Court in Competition Law' (2005) 2 at: http://www.austlii.edu.au/au/journals/FedJSchol/2005/4.html.

149 Consider eg *McHugh v The Australian Jockey Club* [2012] FCA 1441. For a rule of reason analysis of this case, see S Quo, '"Flogging a dead horse": Artificial insemination, breeding standards and antitrust' (2014) 42 ABLR 367.

150 See eg ACCC, *Merger Guidelines* (2008) [3.5] (The precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and will always depend on the particular facts of the merger under investigation. Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices) at: https://www.accc.gov.au/publications/merger-guidelines; Commerce Commission, *Agreements that Substantially Lessen Competition* (2012) ('[i]f the difference between the level of competition in the market with and without the agreement is considered to be substantial, the agreement will be illegal') at: http://www.comcom.govt.nz/business-competition/fact-sheets-3/slc-agreements/.

151 Compare J Stone, *Legal System and Lawyers' Reasonings* (1964) 263-7.

152 T Leuner, 'Time and the dimensions of substantiality' (2008) 36 ABLR 327. Compare indices of competition such as the Lerner index, price cost margin, and relative profit differences (see J Boone, 'A New Way to Measure Competition' (2008) 118 The Economic Journal 1245), and what would count as a 'substantial' difference between the factual and counterfactual for each index.

153 Leuner, 365-366.

- what is the necessary duration of competition effects required under the SLC test? [155]
- is the SLC test to be applied by reference not only to the competitive process but also to outcomes such as price effects?[156]
- if measured by price effects, what is the threshold? 5%?[157]
- is the type of product in itself a dimension of substantiality?
- is the size of the industry affected (or the amount of commerce affected) relevant to the assessment of substantiality?
- is the proportion of customers affected in the market a relevant dimension?
- are changes to margins or profitability relevant?
- is the standard of substantiality lower where the conduct is deliberately anti-competitive?
- is the standard of substantiality lower where the defendant has market power?[158]
- does the standard of substantiality vary in accordance with the probability of the competition lessening effects?

100. Leuner has advocated the use of guideline thresholds on: (a) the degree of harm to competition; (b) the critical duration of harm to competition; and (c) the probability of harm to competition.[159] The thresholds suggested as a starting point are: (a) a price increase threshold of 5%; (b) a critical duration threshold of 18 months; and (c) a probability threshold of 30%. Leuner concedes the difficulty of trying to measure any of the dimensions of substantiality precisely but contends that an approximate framework of the kind suggested is 'a roadmap of what a substantial lessening of competition looks like' and 'will assist the development of more consistent decision-

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154 Most of the questions set out below are raised by Leuner, 348-359.

155 See further D Robertson, 'Time and Risk: The Temporal Dimension of Competition Analysis and the Role of Long-Term Contracts' (1998) 26 ABLR 273.

156 For the argument that the SLC test under s 27 of the Commerce Act is concerned with the process of competition and not the effects of competition see J Land, J Owens & L Cejnar, 'The Meaning of "Competition"' (2010) 24 NZULR 98, 106-109 (an increase in prices may be an indication that competition has been lessened in a market but it is not itself an aspect of lessening of competition; a lessening of competition is determined by whether there is a lessening of the level of constraints on market power).

157 In *Commerce Commission v Woolworths Ltd & Ors* (2008) 12 TCLR 194 (CA) at [191] the Court of Appeal said that there is no precise metric.

158 Consider M Kadar, 'The Meaning of "Anticompetitive Effects" Under Article 102 TFEU', CPI Antitrust Chronicle, March 2016(1).

159 Leuner, 359-365.

making and hopefully lead to more debate in relation to the underlying policy issues.'[160]

101. Market share thresholds can be an expedient navigation aid.[161] They are used to provide safe harbours[162] under several EU block exemptions, including those relating to technology transfer agreements, vertical restraints and horizontal cooperation agreements. For example, under the technology transfer block exemption, a market share threshold of 20% applies in the case of agreements between competitors and a market share threshold of 30% in the case of agreements between non-competitors.[163] Case by case rule of reason assessment is required outside the safe harbours. The fact that market shares exceed a threshold does not give rise to any presumption of liability.[164]

102. Are market share rules of thumb legitimate under the SLC test in Australia given that the test is not cast in terms relative to the total competition in a market? In *Dandy Power Equipment v Mercury Marine*[165] Smithers J adopted this restrictive interpretation:

> Although the words 'substantially lessened in a market' refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus, a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market.

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160 Leuner, 363.

161 Contrast the more purist perspective in R Trindade, A Merrett & R Smith, '2014 – The Year of SLC' (2014) 21 The State of Competition.

162 Bright-line rules may be appropriate when used as safe harbours rather than as prohibitions: see D Crane, 'Rules Versus Standards in Antitrust Adjudication' (2007) 64 Washington & Lee LR 49, 84.

163 European Commission, Commission Regulation (EC) No 772/2004 on the application of Article 101(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L123/11 (TTBER); see further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 10C. Market share thresholds are also used in European Commission, Commission Regulation 230/2010 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 L102/1 (VBER); See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 9B. They are also used in European Commission, Notice 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/C 291/01).

164 See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) [10.119]-[10.122]. Some may possibly contend that these exemptions are too conservative to be useful. If that contention is valid, the thresholds can be adjusted accordingly.

165 [1982] ATPR 40,315 at 43,888. Contrast the argument advanced in *Rural Press Ltd v ACCC* (2003) 216 CLR 53, 57, on behalf of Rural Press:

> [a] substantial lessening of competition means considerable or large, not insubstantial or nominal. It is appropriate to take a quantitative, proportional, approach seeking the quantity of the market affected in determining whether there has been a substantial lessening of competition, particularly where the geographic and time dimensions of the market are narrow in scope.

103. The Harper Report does not discuss the possibility of recasting the SLC test in ways that clarify what amounts to anti-competitive conduct. As a result we are left with a SLC test that is vague. The proposed block exemption mechanism (Recommendation 39) could well be used to provide safe harbours[166] in some contexts. At this stage their intended nature and scope is unclear.[167]

104. The literature on MFC restraints offers useful tips to help steer clear of liability. Perhaps the best pointer is the checklist offered by Salop and Scott Morton:[168]

> [T]he following conditions suggest that MFNs are less likely to raise antitrust concerns:
>
> - *Received only by smaller buyers:* MFNs received only by small buyers comprising a small share of the market are likely to cause a smaller increase in seller price levels, perhaps additionally because the largest buyers may have sufficient bargaining power to prevent such price increases.
> - *Provided to buyers (all of which are small) by smaller sellers that lack market power:* MFNs offered by such sellers are unlikely to cause an increase in bargaining power or raise barriers to entry that would lead to consumer harm. Exceptions to this condition occur when a power buyer obtains MFNs from numerous small sellers or where the MFNs facilitate coordination among the small sellers.
> - *Unconcentrated markets:* Where neither the input market nor the output market are concentrated, coordination is less likely to be concern, even if there are MFNs. However, where only one of the markets is unconcentrated, the MFNs can raise barriers to entry or can facilitate coordination.
> - *Input with close substitutes:* Where inputs subject to MFNs have close substitutes, non-recipients can avoid being placed at a significant competitive disadvantage by purchasing a substitute input instead.
> - *As part of long-term contract with locked-in or sunk assets:* In this situation, MFNs may be a device for allocating cost and demand risk or for avoiding the potential for expropriation of efficient investment.
> - *In exchange for significant investment, particularly by initial customer or technology sponsor:* Providing an MFN can avoid delays and facilitate the launch of network effects by ensuring that an initial sponsoring buyer will not suffer a price disadvantage relative to other buyers that wait.
> - *Input has uncertain value for innovative new product, with resulting potential for delays and holdout problems:* Similar benefits of MFNs can occur when the value of the input is

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166 As in the EU for technology transfer agreements; see J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) [10.119]-[10.123].

167 This also leaves open the possibility of sector-specific rules that violate the Hilmer principle that competition laws should apply across the board without fear of or favour to lobbying or other sectoral interests.

168 S Salop & F Scott Morton, 'Developing an Administrable MFN Enforcement Policy' (2013) 27(2) Antitrust 15, 18-19.

unclear and early buyers fear being locked into long-term contracts at prices that do not reflect market values.

- *As part of the settlement of one in a series a number of law suits brought against the provider:* An MFN can be used to avoid holding out by plaintiffs hoping for a better settlement if they wait.

In contrast, the following conditions suggest that MFNs are more likely to raise competitive concerns, ceteris paribus. ... [They] suggest the need for further analysis of benefits and harms by counsel and the antitrust agencies:

- *Jointly adopted by horizontal agreement:* Antitrust is generally suspicious of horizontal agreements involving price because they are more likely to have anticompetitive effects and are presumed less likely to be efficiency enhancing.
- *Provided by large sellers with market power:* If a seller has market power, there is a greater concern that its MFN could have an anticompetitive purpose and effect.
- *Received by largest buyers:* Similarly, if MFNs are received by the largest buyers, they are more likely to lead to higher prices paid by rivals than they are to generate lower prices paid by the buyers who receive the MFNs.
- *Multiple MFNs with high market coverage:* The broader the coverage of MFNs, the more likely they are to have price effects downstream. This conclusion comes with caveat, however, that highly efficient MFNs are more likely to gain large coverage.
- *Highly significant input:* An MFN for an input that comprises just a trivial share of the buyers' cost is unlikely to generate substantial cost effects, whereas an MFN for a highly significant input can have that effect. Significant cost effects can both affect prices and impact entry and innovation.
- *Airtight MFN with audit rights and penalties for noncompliance:* If an MFN is easily evaded by the seller granting it, it is less likely to constrain the seller's prices to other buyer and, therefore, less likely to have anticompetitive effects.
- *Retroactive MFN, perhaps with penalties:* Retroactive MFNs can create larger disincentives for price discounts, particularly where there are penalties in addition to having to match the discounted price, thereby making price competition less likely.
- *MFN-plus provisions:* MFN-plus provisions promise the recipient a strictly lower price than what is paid by rivals. As a result, even if the recipient pays a higher input price, the profits earned from its resulting cost-advantage may more than offset the adverse impact of the higher input price. This term is more likely lead to consumer harm.
- *Obtained by a leading buyer in response to new entry by a low cost, innovative competitor:* This timing raises concerns that the purpose and likely effect of the MFN is to raise the cost and reduce the procompetitive impact of the new entrant.
- *Obtained by a leading buyer in exchange for an agreement by that buyer to deal exclusively with a leading seller:* This timing and connection to an exclusive dealing agreement raises concerns that the MFN and exclusive dealing have the purpose and likely effect of raising barriers to competition at both levels of the market.

- *Only claimed rationale is that the buyer is more concerned about the price it pays relative to other competitors, not the absolute level of the price paid:* A firm's competitive advantage and profits often are related more to the relative price it pays for inputs than the absolute price level. Where this occurs, a buyer may be willing to pay a higher input price in exchange for retaining a cost advantage, a condition that is more likely to lead to less price competition and consumer harm. Thus, it raises suspicions of anticompetitive purpose.
- *Only claimed rationale is that the largest buyer 'deserves' the lowest price:* The largest buyer sometimes (but not always) has the bargaining power to negotiate the lowest input price. But, entrants or smaller buyers sometimes have the ability to negotiate lower prices, and when they do, consumers may benefit from the increased competition. Where it occurs, the largest buyer's possibly greater bargaining power does not necessarily translate into consumer benefits or create an antitrust 'right'. Indeed, if the largest buyer would get the lowest price anyway, it does not need an MFN. ...

105. Useful as Salop and Scott Morton's checklist is when identifying the factors relevant to an assessment of the competition effects of MFC restraints, it does not inject meaning into the term 'substantial' in the SLC test. Care is also needed when using the checklist in Australia because the US constructs of relevant 'benefits' and 'harms' are not necessarily the same as those relevant to the narrower concept of 'competition' under the SLC test.

IV Misuse of Market Power

106. MFC restraints may breach the prohibition against misuse of market power under s 46 of the CCA. The possibility may be significant in cases where the conduct is or may be anti-competitive but is not caught by a cartel-related prohibition because there is no provable CAU between competitors. Another possibility is that a MFC restraint is imposed by unilateral conduct (eg a public announcement) in circumstances where there is no provable CAU between anyone. Conceivably it may also be more difficult in some cases to establish a substantial lessening of competition under the s 45 or s 47 SLC test than it is to establish the elements of misuse of market power.

107. There is no Australian case law directly on the application of s 46 to MFC restraints. However, conduct to similar effect was challenged in *ACCC v Australian Safeway Stores Pty Ltd*.[169] The ACCC alleged that Safeway had misused its market power by refusing to deal with wholesale bakers who had supplied bread to independent grocers at prices lower than those given to Safeway. At first instance, Goldberg J held that s

169 (2003) 129 FCR.339.

46 had not been contravened. The purpose of Safeway's 'bread policy' was to buy bread at a competitive price, not to deter or prevent competition. Nor had Safeway taken advantage of market power because it would have acted in the same way had it lacked market power. On appeal, a majority of the Full Federal Court held that s 46 had been contravened in 4 of the 9 refusals to deal alleged by the ACCC. In those 4 situations Safeway had not requested a competitive price before refusing to deal. Goldberg J had failed to examine the business rationale for that conduct: *why* had Safeway acted as it did? [170] The lack of a plausible rationale for that conduct meant that Safeway had taken advantage of its market power and had done so for the purpose of deterring the bakers from supplying bread to independent grocers at lower prices. Thus, on the element of taking advantage of market power, the majority disagreed with Goldberg J's finding that Safeway would have acted in the same way had the market been competitive:[171]

> ... in the present case, in a competitive wholesale market without excess capacity, Safeway would obtain no leverage by deleting a particular plant baker's bread. Safeway did not delete simply for the sake of doing so or because of any problems with quality of product, reliability of supply or other legitimate business considerations. It is clear that in the four instances with which we are concerned, Safeway's deletion of the plant baker's products was directed to the plant baker's conduct in supplying discounted bread to Safeway's retail competitor. A firm without market power would not have pursued a policy of deletion because to do so would have produced harm for itself without any countervailing benefit. A firm without market power would commercially be compelled to stock the full range of products in order to satisfy consumer demand. The only consequence of the deletion would be the adverse reaction of customers, of which there was ample evidence.

108. MFC restraints have been tested in the US under s 2 of the Sherman Act, and in the EU under Article 102 of the EU Treaty. A MFC clause was challenged in Canada in the *Nutrasweet case*,[172] where the Competition Tribunal held that the clause breached s 79 of the Competition Act 1985 (Can) (abuse of a dominant position).

109. The complaint in 2010 in *United States v Blue Cross Blue Shield of Mich.*[173] by the US Department of Justice is one striking example under s 2 of the Sherman Act. The complaint alleged that BCBSM's conduct had increased prices to consumers,

170 (2003) 129 FCR.339, [329].
171 (2003) 129 FCR.339, [330].
172 (1990) CT-1989-002 – Doc # 176a.
173 United States v Blue Cross Blue Shield of Mich., Civil Action No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010. See further J Young, 'Most Favored Nation Clauses in Self-Funded Health Insurance Policies' (2016) 49 Indiana LJ 823.

restricted output, created barriers to entry, and excluded competitors. BCBSM had a 60% market share in commercial health insurance. MFC restraints in BCBSM's contracts with hospitals had reduced competition in the market for health insurance by creating a pricing penalty for any hospital agreeing to serve an entrant at lower cost. The MFC restraints included 'MFN plus' clauses requiring hospitals to offer higher prices to BCBSM's competitors. These MFN plus clauses caused softer price competition and higher prices. The 'plus' ranged from 10% to 40% and hence directly raised rivals' costs. The complaint was withdrawn in 2013 when Michigan prohibited health insurers from including MFNs in contracts with health care providers.

110. The *ACNielsen case*[174] is one example from the EU. ACNielsen's standard contract with retail stores for the supply of sales data obliged the retailers to give ACNielsen the same terms as those offered by those retailers to other buyers of data. The European Commission objected to the MFC restraint on the basis that ACNielsen was dominant in the downstream-market for retail tracking services and had abused that dominant position by using exclusive data supply agreements in some countries and MFC restraints elsewhere to create barriers to entry. ACNielsen settled the case by entering into an undertaking. O'Donoghue and Padilla give this analysis:[175]

> Several elements appear to have triggered the Commission's intervention and the settlement of the case via an undertaking. First, Nielsen was responsible for a significant part—and in many cases all—of the retailers' revenues derived from the supply of sales data. The retailers were therefore reluctant to supply data to third parties at a lower price, since that would entail a significant loss of revenue to them. Second, competitors or new entrants had no realistic alternative to dealing with the retailers, because there were no other satisfactory sources of supply. An incomplete data set was commercially worthless. Finally, in addition to being essential for market entry, data acquisition was a high fixed cost for competitors and new entrants. As a virtual monopolist on the relevant market, Nielsen could afford to spread these fixed costs over a much larger revenue base than competitors and new entrants and thus pay a relatively high price for data. In contrast, it may have been uneconomic for competitors operating on a small scale to pay a similar data fee. The Commission found that this created a barrier to entry for new entrants, given high start-up costs and lack of economies of scale.

111. Does the application of s 46 to MFC restraints occasion undue overreach, underreach or uncertainty?

112. **Overreach** might arise as a result of the definition of the purpose element. The purpose of eg deterring or preventing a person from engaging in competition conduct

174 European Commission, XXVIth Report on Competition Policy (1996).

175 R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 15.4.5.

in that or any other market is sufficient under s 46. MFC restraints almost always are used for such a purpose but do not necessarily have the effect or likely effect of substantially lessening competition in a market. The lack of focus of the purpose element on competition as distinct from a competitor is a long-standing criticism of s 46:[176]

> .. the focus of the prohibition on showing the purpose of damaging a competitor is inconsistent with the overriding policy objective of the CCA to protect competition, and not individual competitors. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

113. It is also possible for situations to arise where a corporation with market power in market A but not market B is liable for taking advantage of market power, not in market A, but in market B. On one view this is overreach.

114. The main question is whether or not the efficiencies that often drive the use of MFC restraints can be taken into account sufficiently under s 46. At present, the take advantage element serves as an important avenue for avoiding liability in cases where efficiencies are relevant. In practical terms, where efficiencies explain the use of a MFC restraint, a corporation will not take advantage of market power because it is likely that it would have engaged in the same conduct if it did not have a substantial degree of power in the market.[177]

115. The position would not be the same under the revised s 46 recommended in the Harper Report.[178]

> **Recommendation 30 — Misuse of market power**
>
> The primary prohibition in section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.
>
> To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

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176 Harper Report, 61. This criticism seems exaggerated given the need to establish the element of taking advantage of market power before assessing the element of purpose; see A Merrett, 'Competitors, competition & the curious role of purpose' (2016) 24 The State of Competition 9.

177 See P Williams, 'The counterfactual test in s 46' (2013) 41 ABLR 93. See also R Smith, A Merrett & R Trindade, 'Even better than the real thing: The ongoing relevance of counterfactuals' (2016) 24 The State of Competition 1; G Edwards, 'Melway – a TCE Perspective' (2002) 10 TPLJ 77.

178 P Williams, 'The counterfactual test in s 46' (2013) 41 ABLR 93.

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

116. The requirement to have regard to efficiencies when assessing the effect or likely effect on competition does not change the present SLC test. Efficiencies already are relevant where they are likely to increase competition. Thus, if a MFC restraint caused a lessening of one aspect of competition in a market and created efficiency gains that more substantially increased another aspect of competition, the net effect under the SLC test would be to increase competition. For example:

(a) if a MFC restraint reduced transaction costs and those reduced costs were passed on to consumers, there may be an offsetting increase in price competition; or

(b) a MFC restraint could make it possible for the parties to enter into long term contracts, there may be an offsetting increase in competition by way of innovation, product quality or service to customers.

117. The key question is whether efficiencies can be taken into account where the conduct has the net effect or net likely effect of substantially lessening competition but there are efficiencies that outweigh the significance of that substantial lessening of competition by enhancing consumer welfare.[179] The answer under the Harper Report recommendation is 'No'. Recommendation 30 preserves the current distinction between, on the one hand, efficiencies that affect the net amount of competition and, on the other hand, efficiencies that relate only to consumer welfare. As in the setting of s 45, authorisation is the escape route in cases caught by the SLC test but where that detriment is outweighed by an increase to consumer welfare. A rule of reason would reduce the dependency on the authorisation process (see Part III above).

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179 See eg OFT, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (2012), 0.24, at: http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf; A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488. Consider eg the result of applying the proposed SLC test on the facts in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13. The counterfactual for the application of the SLC test is the world with and without the conduct that is alleged to substantially lessen competition, not the world with and without D having market power; the latter counterfactual would be flatly inconsistent with the intention of the proposed reform to remove the taking advantage element in s 46.

118. **Underreach,** it has been suggested, may arise where the defendant lacks substantial market power.[180] For instance, in an oligopoly context a member of the oligopoly may not have substantial market power and yet may be able unilaterally to orchestrate price or other market coordination by means of a MFC restraint. However, that seems unlikely.

119. A more likely situation is that where no one firm has market power but a number of firms do and where that collective market power is used to impose MFN restraints. This situation can easily arise in multi-party online platforms. In the EU, the concept of collective dominance is relied on to enable the application of under Article 102 of the EU Treaty.[181] As Akman has explained:[182]

> Regarding the treatment of platform MFC restraints under Article 102, clearly a hurdle that would not exist for their assessment under Article 101 is the requirement to establish that there is a dominant position on the relevant market. It should be noted that this dominant position does not have to be held by a single undertaking and one can envisage there being a position of collective dominance in these cases. For example, it might be that OTAs [online travel agents], insurance PCWs [price comparison websites], or publishers collectively occupy a dominant position in the markets for OTAs, insurance PCWs or publishing. Subsequently, the imposition of MFC restraints on their trading partners can be considered an exercise of such collective dominance that could potentially be abusive. Alternatively, a collectively dominant position may exist vertically in the relevant markets: it might be that, for example, the publishers and Apple, or the OTAs and IHG [InterContinental Hotels Group] together occupy a collectively dominant position. The possibility of platform MFC restraints constituting the abuse of a collectively dominant position provides a more legally sound option for assessing such clauses under competition law than approaching them under Article 101.

120. There is no concept of collective dominance or collective substantial market power under s 46.[183] However, under s 46(3A), substantial market power can be derived from CAUs and proposed CAUs with other parties. Section 46(3A) provides that:

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180 See further R Smith & A Merrett, 'Playing Favourites: The Competition Effects of Preferred Customer Arrangements' (2011) 7 European Competition 179, 200.

181 See J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch4C(3)(4); M Filippelli, *Collective Dominance and Collusion: Parallelism in EU and US Competition Law* (Edward Elgar, 2013).

182 P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, 44, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62.

183 *ACCC v Boral Ltd* (2001) 106 FCR 375, [149]; N Dutilh (ed), *Dealing with Dominance: The Experience of National Competition Authorities* (Kluwer, 2004) 275; D Banks, 'Collective Dominance – A Comparative Study' (1999) 7 TPLJ 88.

> In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate or bodies corporate has or have in that market that results from:
>
> (a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties; ...

Nonetheless, even relying on s 46(3A), it is possible for each of say four members of an oligopoly to be a party to the same set of CAUs or proposed CAUs without any of them individually acquiring substantial market power. This suggests perhaps that the element of market power in s 46 should be extended to cover a collective substantial degree of market power. However, the concept of collective dominance is not easily defined.[184] Trying to avoid the difficulties experienced with the concept in the EU seems unnecessary in Australia given that s 45 or the proposed concerted practices prohibition are likely to cover much of the same ground.

121. It is possible that the element of taking advantage of market power under s 46 may lead to underreach.[185] Cases may arise where a MFC restraint used anti-competitively by a firm with market power would be likely to be used if the firm lacked market power. The possibility exists because the benchmark for taking advantage is the likely conduct of a non-dominant firm. The benchmark was criticised in the Harper Report:[186]

> Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

Presumably this criticism extends to the context of MFC restraints as well as those of exclusive dealing, loss-leader pricing and cross-subsidisation. In any event, the Harper Report has recommended that s 46 be substantially revised to remove the element of taking advantage and to introduce a so-called effects test,[187] and the Government has accepted that recommendation.[188]

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184 See J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch4C(3).

185 Harper Report, 61. See further K Kemp, 'Uncovering the roots of Australia's misuse of market power provision: Is it time to reconsider?' (2014) 42 ABLR 329; K Kemp, '"Taking Advantage" of Substantial Market Power and other profit-focussed tests for unilateral anticompetitive conduct' (2015) 41 Monash Univ LR 655.

186 Harper Report, 61.

187 Recommendation 30.

188 'Fixing competition policy to drive economic growth and jobs', 16 March 2016.

122. **Uncertainty:** Looking ahead, the main area of uncertainty will be the SLC test under the forthcoming revised s 46. As discussed in Part III above, the term 'substantial' is pivotal to the operation of the SLC test but much in need of clarification.

VI Resale Price Maintenance

123. MFC restraints or similar restraints may give rise to a breach of the RPM prohibition under s 48. For example, a supplier may require a retailer not to sell products for less than those offered by competitors of the retailer. A MFC restraint imposed by a supplier on a resupplier (whether a competitor or non-competitor) will be caught by the prohibition under s 48 if the restraint falls with the definition of RPM under s 96. A RPM-based MFC restraint, or a parallel series of such restraints, under a CAU between competitors may be caught by a cartel-related prohibition or the SLC prohibition under s 45. The *US v Apple, Inc*. case[189] is an example of horizontal RPM, except for the fact that the relationship between each of the publishers and Amazon was that of principal and agent (a principal may impose a price on an agent without engaging in RPM)).[190]

124. Liability under s 48 may arise where a supplier imposes a MFC or similar price parity obligation on a retailer. Consider the price-related obligations that were challenged by OFT in the *UK Tobacco case*: [191]

> The Manufacturer's parity and differential requirements were expressed in a number of ways: (i) as a parity (for example, a requirement that the relevant Manufacturer's brand X be the same price as the competing Manufacturer's brand Y); (ii) as a fixed differential (for example, a requirement that the relevant Manufacturer's brand X must be z pence less than the competing Manufacturer's brand Y); and (iii) as a maximum differential (for example, a requirement that the relevant Manufacturer's brand X be no more expensive than the competing Manufacturer's brand Y, or that brand X be priced at least z pence less than brand Y). Those requirements were implemented in particular through regular communications by the Manufacturer of specific price points to the Retailer.

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189 *United States v Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

190 See S Corones, *Competition Law in Australia* (6th ed, 2014) [9.45], [10.55]; M Corrigan, 'Online travel agents' discounts raise competition concerns for UK regulator – what about Australia?' 23 November, 2013, at: http://www.claytonutz.com/publications/edition/26_september_2013/20130926/online_travel_agents_discounts_raise_competition_concerns_for_uk_regulator-what_about_australia.page.

191 OFT, 'Case CE/2596-03: Tobacco' (2010), as discussed in M Hviid, 'Vertical Agreements between Suppliers and Retailers that Specify a Relative Price Relationship between Competing Products or Competing Retailers', OECD, Hearing on Across Platform Parity Agreements, DAF/COMP(2015)6, 19 Oct 2015, 7-8.

Indirect means of specifying a minimum price are caught by s 48.[192] The indirect price restriction in (i) above entails a minimum resale price and s 48 would apply to them. However, the restrictions in (ii) and (iii) set a maximum resale price, and s 48 does not apply to maximum resale prices.

125. What is the potential overreach, underreach or uncertainty of s 48 (and s 96) in the setting of MFC restraints?

126. **Overreach** may arise by reason of the per se test of liability under s 48. As discussed earlier, efficiencies may explain the adoption of a MFC restraint and should be taken into account when determining liability. However, efficiencies these cannot be taken into account under the s 48 per se test. Nor could they be taken adequately into account even if a SLC test were to be introduced under s 48.[193] Some relief would result from the recommendation in the Harper Report that the notification process be extended to RPM (Recommendation 34). Ideally, a rule of reason test would apply under s 48.[194]

127. Retail MFN clauses have a similar anticompetitive effect to RPM[195] but are not subject to per se liability. RPM combines a vertical element (the seller's obligation to charge the price set by the producer) and an implicit horizontal element (the setting of prices at the same level across retailers). The latter horizontal element raises the more serious competition concerns. On that view, retail MFN clauses should not be treated more leniently by competition law than RPM. It would go to an extreme to extend per se liability to retain MFNs in order to make the test of liability for RPM and retail MFN restraints symmetrical. However, symmetry would be achieved by applying a rule of reason test or a SLC test to RPM as well as to retail MFNs. Where a MFC restrain is a cartel provision in a CAU between competitors, a per se test of liability will apply under the cartel prohibitions in Part IV.[196] Similarly, a RPM provision in a

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192 See S Corones, *Competition Law in Australia* (6th ed, 2014) [10.20]. See also *TPC v Mobil Oil Australia Ltd* (1984) 2 FCR 168, 183 ('a price may be specified by reference to some standard well known to the parties from which a price may be ascertained'). Contrast the narrower interpretation advanced in J Brebner, 'Resale Price Maintenance — The Need for Further Reform' (2001) 9 TPLJ 19, 27.

193 See the discussion in Part III above.

194 As under *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). See further S Corones, *Competition Law in Australia* (6th ed, 2014) [10.14].

195 A Fletcher & M Hviid, 'Broad Retail Price MFN Clauses: Are They RPM "at its Worst"?', Antitrust Law Journal, forthcoming, discussed in M Hviid, 'Vertical Agreements between Suppliers and Retailers that Specify a Relative Price Relationship between Competing Products or Competing Retailers', OECD, Hearing on Across Platform Parity Agreements, DAF/COMP(2015)6, 19 Oct 2015, 32.

196 See Part II above.

CAU between competitors may be a cartel provision and also subject to a per se test of liability under the cartel prohibitions in Part IV. Note further that in some cases there may be conspiracy to commit RPM where the object of committing RPM is subject to a per se test.[197]

128. **Underreach** may arise under s 48.

129. The RPM provisions under s 48 and 96 seem to assume that suppliers and not their buyers are the driving force. There is no prohibition against a reseller inducing a supplier to refuse to supply another person because of that other person's low pricing policy.[198] However, there is no underreach. Under s 76(1)(d) liability extends to the inducement or attempted inducement of a contravention of s 48 (and other provisions).

130. The main source of underreach is the limited extent to which s 48 will apply to MFC restraints in retail MFNs:[199]

   (a) If the platform subject to a MFC restraint is characterised as an agent of the supplier then liability for RPM under s 48 will not arise.[200] The better view is that platforms such as Booking.com or Expedia are agents.[201]

   (b) Typically there are no downstream resellers. Rather, platforms such as online travel agents and hotel reservation sites are equivalent to shopping malls or upstream suppliers of 'access to customers and sales logistics services'. If so, there is no RPM as defined by s 96.

   (c) The price level specified in a retail MFN may be a maximum price level. Maximum RPM is not covered by s 48.

   (d) A retail MFN will often impose a maximum price level on a platform and the effect of that maximum price level may be to impose a minimum price level on other platforms. RPM under s 48 will not apply unless a specified minimum price is 'made known' to the reseller subjected to RPM in the way prescribed by s 96(3)(a). The wording of s 96(3)(a) is narrow (the supplier

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197 As in the US litigation, In re: Online Travel Company Hotel Booking Antitrust Litigation, Case No. 3:12-cv-03515 (US District Court, Northern District of Texas), discussed in M Hviid, 'Vertical Agreements between Suppliers and Retailers that Specify a Relative Price Relationship between Competing Products or Competing Retailers', OECD, Hearing on Across Platform Parity Agreements, DAF/COMP(2015)6, 19 Oct 2015, 15-16.

198 Contrast Competition Act 1985 (Can) s 76(8).

199 See A Fletcher & M Hviid, 'Broad Retail Price MFN Clauses: Are They RPM "at its Worst"?', Antitrust Law Journal, forthcoming.

200 See S Corones, *Competition Law in Australia* (6th ed, 2014) [9.45], [10.55].

201 See P Akman, ibid.

must make it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less that a price specified by the supplier). If a retail MFN agreement between a supplier and platform A imposes RPM on platform A, s 96(3)(a) will not thereby be satisfied in relation to platform B or platform C: s 96(3)(a) must be satisfied in relation to platform B and platform C and that seems unlikely. If the supplier and several platforms are using a retail MFN to coordinate prices, the relevant basis of liability is not s 48, but a cartel prohibition under Part IV or s 45. Note that the prohibition against price fixing applies to the controlling of a minimum or maximum price. Nor further that the SLC prohibition apples to a CAU containing a RPM provision expect that maximum RPM is exempted by s s 45(5)(c)(iii).

131. Although the scope of s 48 is limited in the ways described above, the resulting underreach does not warrant redefinition of RPM under s 96. The s 48 prohibition was designed to deal with a particular kind of vertical restraint that has been selected out for per se treatment. It could not be extended to cover retail MFN agreements easily or sensibly. Where retail MFNs are anti-competitive, reliance can and should be placed on cartel prohibitions and the SLC prohibition under s 45. However, as amplified below, s 45 is too limited at present because it does not apply to maximum RPM.

132. Maximum RPM is carved out not only from s 48 (see s 96(3)) but also from s 45 (s 45(5)(c)(iii)). Excluding maximum RPM from the operation of the competition test under s 45 lacks apparent justification. This point was made in a submission to the Harper Review, with particular reference to the relevance of maximum RPM in MFNs.[202]

> [Carving out maximum RPM] simply doesn't work where a 'most favoured nation' (MFN) clause operates to set a maximum resale price for a reseller by reference to the price that reseller charges for a rival manufacture's product. The potential anticompetitive purpose or effects of such an MFN are not able to be considered. MFNs of that type are quite common.

That submission is not addressed in the Harper Report. Section 45(5)(c)(iii) should be repealed.

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202 Minter Ellison, Submission to the Competition Policy Review, June 2014, 7-8. See also J Brebner, ‘Resale Price Maintenance — The Need for Further Reform’ (2001) 9 TPLJ 19, 28.

133. **Uncertainty** may arise to whether or not RPM through a MFC clause is imposed by a principal on an agent.[203] A principal-agency relationship will exclude liability for RPM in Australia.[204] However, it may not be clear whether or not there is a 'genuine' principal-agency relationship. For instance, some uncertainty has arisen in the EU and UK as to whether or not an online platform such as Booking.com or Expedia.com is an agent of the hotels for which they make bookings.[205] The better view is that platforms like Booking.com and Expedia.com are to be treated as agents.[206] Unless and until an untoward view is taken by a court, statutory clarification would seem to be unnecessary in Australia.

VI Conclusions about MFC Restraints under Australian Competition Law

134. Aerial surveillance of the capacity of Australian competition law to govern MFC restraints shows pockets of overreach, underreach and uncertainty. Lawyers circle. Economists occupy higher ground.

135. Responsive possible improvements to the CCA suggested in Parts II−V above are summarised below.

133.1 *CAU-based cartel prohibitions* (Part IIA above)

- Overreach could largely be avoided by improving the exemptions that apply to per se cartel-related liability. The first improvement would be to introduce a collaborative venture exemption along the lines of the collaborative activity exemption that is in the legislative pipeline in New Zealand. The second would be an exemption for supply agreements between competitors, as recommended in the Harper Report (Recommendation 27) and along the lines of the supply exemption to be adopted in New Zealand and comparable to the exemption of such supply agreements in the EU. Thirdly, use could be made of the block exemption mechanism proposed by the Harper Report to exempt certain kinds of agreements that are likely to contain MFC restraints and yet be welfare-enhancing or at least not anti-competitive. Fourthly, consideration

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203 See eg M Bennett, 'Platforms: Retailers, Genuine Agents or None of the Above?' (2013) Competition Policy International, 8-9.

204 See S Corones, *Competition Law in Australia* (6th ed, 2014) [9.45], [10.55].

205 P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, 23-32, at: http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62.

206 See P Akman, ibid.

could be given to introducing a de minimis exemption similar to that in the EU.

- The underreach that may arise where there is a cartel provision or a MFC restraint that is likely to coordinate prices or non-price conduct but no CAU between competitors is curable by introducing a prohibition against concerted practices. That approach has been recommended in the Harper Report, but the Harper proposal needs to be revised (see Part IIC).
- The uncertainty that has resulted from the *Flight Centre* case in the context of dual distribution arrangements needs to be resolved by an exemption from per se liability under cartel-related prohibitions in respect of provisions contained in supply agreements between competitors. This has now been addressed by the Harper Report (Recommendation 27) but the proposed exemption in s 45J in the Model Legislative Provisions seems unduly complicated and requires further consideration and redrafting in terms that more clearly reflect the approach taken under US and EU competition law.

133.2 *Unilateral disclosure of competitively sensitive information* (Part IIB above)

- Part IV Division 1A impels repeal. This legislation was enacted with a view to combatting facilitating practices. However, the prohibitions and some of the exceptions to them suffer from patent overreach, underreach and uncertainty. The Harper Report has recommended their repeal (Recommendation 27). The Government has accepted that recommendation.

133.3 *Concerted practices* (Part IIC above)

- Overreach may arise from:
  (a) the inability of the SLC test proposed in the Harper Report to take efficiencies adequately into account;
  (b) the lack of a competition condition in the proposed s 45M; and
  (c) the danger of catching conduct that is not anti-competitive if the SLC test were to be removed in order to make proof of liability easier (compare the per se test under the cartel prohibitions in ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK).
- Overreach (a) could be resolved by introducing a rule of reason. Overreach (b) should be resolved by means of a competition condition requiring that the concerted practice be engaged in by competitors or likely competitors or

persons who would be in competition or would be likely to be in competition but for the practice.

- Overreach (c) could largely be avoided by the following means:
  - defining the concept of 'concerted practice' to require that the conduct be engaged in by a corporation for the purpose of coordinating the terms or conditions of supply or acquisition with a competitor in order to substantially lessen competition between those competitors;
  - there were alternative tests of liability – no SLC or SLC – and if the no SLC limb of the prohibition were subject to a block exemption for MFC restraints that are not manifestly anti-competitive;
  - there were well-designed exceptions for collaborative activities and supply agreements between competitors; and
  - the avenue of authorisation were available in relation to concerted practices.
- Underreach would flow from the SLC test that is a necessary element of in the prohibition recommended in the Harper Report. The SLC test creates an excessively onerous hurdle for enforcement in cases where, as in *US v Apple, Inc.* and *Ebooks*, the concerted practice is manifestly anti-competitive. The SLC test should apply in cases, including MFC restraints, where the conduct may be anti-competitive but the competition effects need to be assessed.
- Uncertainty would result if the concept of 'concerted practice' were not defined. The Harper Report considered that the word 'concerted' has a clear and practical meaning and that no further definition is required. That view is debatable. The following definition of a concerted practice has been proposed.

  > A concerted practice is conduct engaged in by a corporation for the purpose of:
  >
  > (a) coordinating the terms or conditions on which goods or services are supplied or acquired, to be supplied or acquired or likely to be supplied or acquired with a person who competes, is likely to compete or would, but for the concerted practice, compete with the corporation in relation to the supply or acquisition of those goods or services; and
  >
  > (b) thereby substantially lessening competition between the corporation and that person in relation to the supply or acquisition of those goods or services.

133.4 *SLC prohibition under CCA s 45* (Part III above)

- Overreach is a fundamental concern in MFC cases under s 45 because there is no rule of reason to exclude liability in situations where, as may often be the position, efficiencies explain and justify the restraint imposed and include efficiencies that relate to welfare and not the process of competition. The introduction of a rule of reason was proposed in submissions to the Harper Review but the question is evaded in the Report. The widespread use of MFC restraints in online platform arrangements makes this gap in the law all the more apparent. That gap can and should be filled by developing an Australian rule of reason that enables welfare enhancing efficiencies to be taken adequately into account. The degree of agility and innovation needed to do so is modest given the extensive fund of ideas and experience elsewhere.

- Underreach seems to be a much less significant potential issue under s 45. However, the provision in s 45(4) for aggregating competitive effects is unduly narrow because it is limited to CAUs and does not extend to *conduct* (compare s 47(10)). It should be extended to cover related conduct.
- Uncertainty arises starkly from the obscure meaning of 'substantial' in the SLC test. This is a black hole in Australian competition law. The void is frustrating in the context of MFC restraints because their competition effects are often far from clear and no one seems to know what is needed to be able to characterise as 'substantial' any net adverse effect on competition. Practical elucidation of the SLC test is needed by courts, advocates, regulators and commentators. The block exemption power recommended in the Harper Report should be used to create safe harbours comparable to those used in the EU.

133.5 *Misuse of market power* (Part IV above)

- Overreach is likely under the effects test proposed by the Harper Report (Recommendation 30). Under Recommendation 30 regard is to be had to efficiencies when assessing the effect or likely effect on competition. That does not change the current SLC test. The key question is whether efficiencies can be taken into account where the conduct has the net effect or net likely effect of substantially lessening competition but there are efficiencies that outweigh the significance of that substantial lessening of competition by enhancing consumer welfare. The answer under the Harper Report recommendation is 'No'. Recommendation 30 preserves the current distinction between, on the one hand, efficiencies that affect the net amount of competition and, on the other hand, efficiencies that relate only to consumer welfare. As in the setting of s 45, authorisation is the escape route in cases caught by the SLC test but where that detriment is outweighed by an increase in consumer welfare. A rule of reason would reduce the dependency on the authorisation process (see Part III above).

- Underreach may arise in the context of multi-party online platforms where MFC restraints may be used anti-competitively and yet where no one firm may have substantial market power. In this context it is possible that several firms may have collective substantial market power. In the EU such a situation is covered by the concept of collective dominance but there is no equivalent concept under the CCA. However, the concept of collective dominance is not easily defined. Trying to avoid the difficulties experienced with the concept in the EU seems unnecessary in Australia given that s 45 or the proposed concerted practices prohibition are likely to cover much of the same ground.
- Uncertainty − the main area of uncertainty will be the SLC test under the forthcoming revised s 46. As discussed in Part III above, the term 'substantial' is pivotal to the operation of the SLC test but much in need of clarification.

133.6 *Resale price maintenance* (Part V above)

- Overreach may arise by reason of the per se test of liability under s 48. As discussed earlier, efficiencies may explain the adoption of a MFC restraint and should be taken into account when determining liability. However, efficiencies cannot be taken into account under the s 48 per se test. Nor could they be taken adequately into account even if a SLC test were to be introduced under s 48. Some relief would result from the recommendation in the Harper Report that the notification process be extended to RPM (Recommendation 34). Ideally, a rule of reason test would apply under s 48.
- Underreach may occur. RPM is not well-suited to dealing with anti-competitive retail MFNs. The appropriate solution is not redefinition of RPM under s 96. The s 48 prohibition was designed to deal with a particular kind of vertical restraint that has been selected out for per se treatment. It could not be extended to cover retail MFN agreements easily or sensibly. Where retail MFNs are anti-competitive, reliance can and should be placed on cartel prohibitions and the SLC prohibition under s 45. However, s 45 is too limited

at present because it does not apply to maximum RPM. There is no apparent policy justification for excluding maximum RPM from the operation of s 45; s 45(5)(c)(iii) should be repealed.

- Uncertainty may arise as to whether or not RPM through a MFC clause is imposed by a principal on an agent. A principal-agency relationship will exclude the MFC clause from liability for RPM in Australia. Some uncertainty has arisen in the EU and UK as to whether or not an online platform such as Booking.com and Expedia.com is an agent. The better view is that platforms like Booking.com and Expedia.com are to be treated as agents. Unless and until an untoward view is taken by a court, statutory clarification would seem to be unnecessary in Australia.

136. Given the surge and recency of the Harper Review, is this survey a feat of sadistic ingratitude? Hopefully not. Exploring how the CCA applies to MFC restraints exposes significant issues that survive the Harper Report. Moreover, in the Australian market for responsive competition law solutions, MFC restraints may be a pro-competitive disruptive force.