

**THE COMPETITION AND CONSUMER ACT 2010:
CARTELS, ANTICOMPETITIVE AGREEMENTS AND MISUSE OF MARKET POWER**

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I State of Play of Competition Law Reforms on Cartels, Anticompetitive Agreements and Misuse of Market Power

1. The *Competition Policy Review Final Report* (31 March 2015) (Harper Report)¹ made numerous recommendations for changes to the Competition and Consumer Act 2010 ('CCA'). Many of those recommendations were accepted in the Government Response to the Competition Policy Review (24 November 2015). An Exposure Draft Bill reflecting the Government's Response and setting out proposed amendments to the CCA was published on 5 September 2016. The ACCC released a draft Framework for misuse of market power guidelines for consultation at the same time. The Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 was introduced into Parliament on 1 December 2016. The Senate Economics Legislation Committee reported on this Bill on 16 February 2017. This Bill possibly might be enacted soon. Further progeny of the Exposure Draft Bill are in vitro.
2. Many of the proposed changes to the CCA, if enacted, will be welcome (eg repeal of the prohibitions against third line forcing; amendment of s 83 (admissions of fact in certain proceedings as prima facie evidence); extension of s 155 to cover investigations of alleged contraventions of court enforceable undertakings). Other proposed changes are troubling and may need correction. There are also questionable omissions. This paper reviews the practical implications of what lies ahead in the following areas:
 - cartel prohibitions (Section II);
 - price signalling and concerted practices (Section III);
 - cartel exemptions (Section IV);

¹ Available at <http://competitionpolicyreview.gov.au/>.

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- agreements substantially lessening competition and exclusive dealing (Section V); and
 - misuse of market power (Section VI).
3. The discussion to follow focusses mainly on the unwanted effects that seem likely in the event of adoption of the proposed reforms. It offers an alternative perspective to the vapidness of the Exposure Draft Explanatory Materials and the Explanatory Memorandum for the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.
 4. Animating questions include:
 - Are the proposed changes likely to work effectively? Will they resolve known problems?
 - To what extent will the proposed changes minimise overreach, underreach and uncertainty in the application of the CCA?²
 5. The possibility of simplification of the CCA is not addressed here. The hope induced by the Harper Report³ has been dispelled by the generally prescriptive CCA drafting style used in the Exposure Draft Bill.⁴
 6. This paper adheres to the current section numbering system in the CCA. The sections in Part IV Division 1 are to be renumbered if the Exposure Draft Bill is enacted.⁵

² See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 569 (critical assumptions (c), (e)). Further criteria may warrant consideration, including: risk of error in application (see eg F Easterbrook, 'The Limits of Antitrust' (1984) 63 Tex LR 1; F Beckner III & S Salop, 'Decision Theory and Antitrust' (1999) 67 Antitrust LJ 41); resistance to evasion (see eg W Laufer, *Corporate Bodies and Guilty Minds* (Univ of Chicago Press, 2006) chs 4-6; S Buell, 'Good Faith and Law Evasion' (2011) 58 UCLA LR 611); and straightforwardness (see eg Justice S Rares, 'Competition, Fairness and the Courts' (2014) 39 Australian Bar Rev 79; A Raskolnikov, 'From Deterrence to Compliance: Legal Uncertainty Reexamined' (2016) at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731356; A Marmor, *The Language of Law* (OUP, 2014) ch 5; J Golden, 'Redundancy: When Law Repeats Itself' (2016) 94 Texas LR 629).

³ See especially Recommendations 23 and 27.

⁴ Some useful pruning has been undertaken (eg the revision of s 46(3) and (4); the repeal of ss 45B and 45C; the repeal of s 47(6) and (7)). However, the statement in the Government Response to Competition Policy Review that '[t]he Government will develop a proposal to further simplify the remaining provisions of the CCA, following stakeholder consultation by the Treasury including with the ACCC, business groups and legal advisers' seems to have fallen off the agenda.

⁵ See further J Holden, *The Mathematics of Secrets: Cryptography from Caesar Ciphers to Digital Encryption* (2017).

II Cartel Prohibitions (ss 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK)

A Cartel provision - Purpose/effect condition (price fixing) (s 44ZZRD(2))

7. No amendment to the purpose condition in s 44ZZRD(2) was proposed in the Harper Report. None is made in the Exposure Draft Bill.
8. ***The broad potential reach of s 44ZZRD(2) remains.*** Recollect the breadth of s 44ZZRD(2) given the interpretation in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd*⁶ of the former corresponding provision in s 45A of the *Trade Practices Act 1974*. The purpose or effect of ‘controlling’ a price was interpreted in *CC (NSW)* as a purpose or effect of restraining a freedom that would otherwise exist as to a price to be charged.⁷ Lindgren J rejected the argument that the degree of control over price was relevant for the purposes of s 45A; he specifically rejected the proposition that the control would have to be significant or substantial.⁸ This interpretation is controversial.⁹ It does not reflect the dictionary meaning of ‘to control’ as ‘to hold sway over, exercise power or authority over; to dominate, command’.¹⁰ Moreover, it leaves a broad range of supply agreements between competitors exposed to per se illegality as price-fixing, notwithstanding that such agreements typically will be pro-competitive or competitively neutral.¹¹
9. ***Overreach can result from s 44ZZRD(2).*** A provision in a contract arrangement or understanding (‘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.¹² Joint bidding is one arena where this can occur:

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

⁶ (1999) 92 FCR 375.

⁷ *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 413 [168].

⁸ *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 405–6 [130].

⁹ It was adopted in *Australian Competition and Consumer Commission v Pauls Ltd* [2003] ATPR ¶41–911, 46,626 [123]–[126] (albeit distinguished on the facts), but resiled from in *Australian Competition and Consumer Commission v Australian Medical Association (WA)* [2003] ATPR ¶41–945, 47 261 [195].

¹⁰ See JA Simpson and ESC Weiner, *The Oxford English Dictionary*, 2nd edn, Clarendon Press, Oxford, 1989; *The Macquarie Dictionary*, Macquarie Library Pty Ltd, Sydney, 1981, 410–11. See further *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 20 ALR 31; *Re Insurance Council of New Zealand (Inc)* [1989] 2 NZBLC (Com) 99–522, 104–482

¹¹ See the discussion in A Nicotra and J O’Regan, ‘Dare to Deem: Does Section 45A Trade Practices Act Prohibit “Pro-Competitive” Price Fixing?’, Paper presented at the Law Council of Australia Trade Practices Workshop, 19 August 2001. See also C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.6.

¹² See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 4.2.4.

could bid separately and are free to do so but think their chance of success is better if they bid jointly. They enter into Most Favoured Customer ('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. Their intention is to protect themselves against the white-anting of their joint bid by participation in other bids. The MFC restraints 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.¹³ 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',¹⁴ those arguments may or may not succeed. Authorisation by the ACCC is possible, but that is a bureaucratic and costly possible solution. A new exemption for collaborative activities would be far more expedient.¹⁵

10. ***Does s 44ZZRD(2) require or allow a counterfactual analysis of what the price to be charged would be without the price fixing provision?*** The better view is that a counterfactual analysis is irrelevant in this context but some doubt lingers on:¹⁶

- The law, as stated and applied in *ACCC v CC (NSW)* by Lindgren J,¹⁷ is that: 'An arrangement or understanding has the effect of 'controlling price' if it restrains a freedom that would otherwise exist as to a price to be charged.'
- In *ACCC v Pauls Ltd* O'Loughlin J seems to have taken the view that an agreement does not control a price if the price charged or offered pursuant to the agreement is a market price.¹⁸ But that is not the position as stated by Lindgren J. O'Loughlin J's interpretation introduces a counterfactual analysis that is inconsistent with the wording and purpose of the provisions defining price fixing.
- O'Loughlin J's interpretation comes close to allowing competitors to deny liability for price fixing if the price is a 'reasonable price'. That interpretation

¹³ Joint bidding may not be caught by s 44ZZRD(3): C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 4.7.2.

¹⁴ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.2.

¹⁵ See Section IV B below.

¹⁶ Contrast *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 413 [168] (Lindgren J) with: *ACCC v Pauls Ltd* [2003] ATPR ¶41-911 46 624–46 626 [117]–[128] (O'Loughlin J); *ACCC v Australian Abalone Pty Ltd* (2007) ATPR 42-199 (where it was argued that the relevant prices were controlled by international market forces); N Hutley, 'Challenging the Australian Competition and Consumer Commission's Pleadings in Cartel Cases' in M Legg (ed), *Regulation, Litigation and Enforcement* (2011) ch 7.

¹⁷ (1999) 92 FCR 375, 413 [168].

¹⁸ [2003] ATPR ¶41-911 46 624–46 626 [117]–[128].

was rejected emphatically by US Supreme Court in *United States v Socony Vacuum Oil Co*:¹⁹

‘Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale, and protects that vital part of our economy against any degree of interference.’

- O’Loughlin J’s interpretation would create loopholes and necessitate potentially complex counterfactual assessment. The purpose of s 44ZZRD(2) is partly to avoid the creation of loopholes and the need for difficult or protracted counterfactual analysis.
 - The correct application of s 44ZZRD(2) in relation to the question of whether or not a provision controls a price is relatively straightforward: have the competitors agreed to impose a restriction on their freedom to determine the price to be charged or offered by either or both of them? If the answer to that question is “yes”, the price is controlled. The answer to that question in *ACCC v Pauls Ltd* should have been “Yes”.
11. ***The unsatisfactory concept of ‘purpose of a provision’ survives.*** This concept, as currently interpreted in Australia, relates to the subjective intention²⁰ of the party or parties who happen to be ‘responsible for introducing the provision’.²¹ The test of who is ‘responsible for introducing a provision’ can be difficult to apply. A preferable approach would be to focus on the intention of each particular defendant or, for civil liability, to test the purpose of a provision objectively by reference to the provision and not the subjective intention of merely some of its adherents.²²
12. ***The meaning of ‘likely’ in s 44ZZRD(2) has yet to be settled definitively.*** Does ‘likely’ mean merely a ‘real possibility’ or ‘real chance’ rather than a high likelihood or a risk that is more probable than not?²³ This question was left open in *ACCC v CC*

¹⁹ 310 US 150, 220 (1940).

²⁰ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J, but with reservations), 587 [65] (Gummow J), 638 [216] (Callinan J). Cf. Kirby J: at 605 [127], 606 [130].

²¹ *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, 347–52 [859]–[887] per Dowsett and Lander JJ.

²² See further D Robertson, ‘The Primacy of Purpose in Competition Law – Pt 2’ (2002) 10 CCLJ 11.

²³ See further I Wylie, ‘What is ‘likely’ in the Competition and Consumer Act 2010?’ (2012) 20 Competition & Consumer Law Journal 28.

(NSW) Pty Ltd²⁴ by Lindgren J. However, the ‘real chance’ test has since been adopted in several cases.²⁵ The Explanatory Materials on the Exposure Draft Bill leave the issue up in the air:²⁶

By removing the specific definition in the cartel conduct provisions, the intention is that ‘likely’ will have a consistent meaning where it is used throughout Part IV, and the existing jurisprudence will inform the meaning of ‘likely’ in the cartel conduct provisions.

B Cartel provision - Purpose condition (s 44ZZRD(3)) (restriction on supply, allocation of customers, bid rigging)

13. Recommendation 28 of the Harper Report recommended repeal of the prohibition of exclusionary provisions in s 45(2)(a)(i) and s 45(2)(b)(i), and amendment of the definition of cartel conduct to address any resulting gap in the law. That recommendation has been followed. The Exposure Draft Bill repeals ss 4D, 45(2)(a)(i) and 45(2)(b)(i). It also amends the purpose condition in s 44ZZRD(3)(a) by adding the following words at the end:

‘(iv) the acquisition, or likely acquisition, of goods or services from persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or’

This change is a welcome consolidation albeit one that should have been achieved when the cartel-related amendments to the CCA were first made in 2009.

14. **Reduction of output, allocation of customers and bid rigging under s 44ZZRD(3) raise significant questions of interpretation.** These questions include:

- the relevance or otherwise of a longer term positive effect on output where there is an immediate or short-term negative effect on output (under s 44ZZRD(3)(a)(i));
- how far 44ZZRD(3)(a)(ii) extends – presumably it catches the example given in *News Limited v South Sydney*²⁷ of an agreement by two restaurants to reduce the number of seats available between them (unlike the position under s 4D, there is no requirement in s 44ZZRD(a)(ii) that the reduction in capacity be directed at a particular person or class of persons);

²⁴ [1999] FCA 954, [165].

²⁵ See, e.g., *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2005) ATPR ¶42–066 at [633], and the cases there cited; *Australian Gas Light Co v Australian Competition and Consumer Commission* [2003] ATPR ¶41–966, 47 704 [343].

²⁶ At [2.20].

²⁷ (2003) 215 CLR 563, 574–5 [20]–[23].

- whether under 44ZZRD(3)(a)(iii) there is any particularity inherent in the phrase ‘persons or classes of persons’;²⁸
- what amounts to an ‘allocation’ under s 44ZZRD(3)(b) (eg where competitors A and B agree not to contest the opportunity to take business away from each other’s existing customers, have they ‘indirectly’ ‘allocated’ the customers?);
- whether joint or consortium bidding entails bid rigging as defined by s 44ZZRD(3)(c) – the Explanatory Memorandum evades the question.²⁹

‘In relation to consortium bidding arrangements, the cartel provisions are not intended to catch legitimate joint bids. Joint bid arrangements between competitors that avoid restrictions on an individual participant’s ability to compete for business are less likely to raise concerns.’

The Harper Report implicitly leaves the answers to these questions to case law development. There are no ACCC guidelines to assist interpretation by business or their advisers.

15. ***The repeal of the limited definition of the term ‘likely’ in s 44ZZRB is a footling change.*** Under s 44ZZRB the term ‘likely’ means a possibility that is not remote. This definition applies only in relation to: (a) a supply of goods or services; (b) an acquisition of goods or services; the product of goods; and (d) the capacity to supply services. The test likely to apply to that subject matter in s 44ZZRD(3) after the repeal of s 44ZZRB is the test of ‘real chance’ but the question has yet to be settled definitively.³⁰

C Cartel provision - Competition condition (s 44ZZRD(4))

16. Under Recommendation 27 in the Harper Report, the cartel prohibitions in the CCA should be confined to conduct involving firms that are actual or likely competitors, where ‘likely’ means on the balance of probabilities. That recommendation responded to the concern expressed that the test applied by the Federal Court in *Norcast v Bradken*³¹ imposed too low a threshold, especially given the potential exposure to criminal liability. The test applied in *Norcast v Bradken* asked merely if there was a possibility (other than a remote possibility) that the two relevant parties to the CAU would be in competition with each other. The Exposure Draft Bill does not

²⁸ See I Wylie, ‘Cartel Output Restrictions – Construction and Common Sense Collide and Particularity of “Persons” under the Trade Practices Act 1974’ (2010) 38 ABLR 23, 32–6.

²⁹ Explanatory Memorandum: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), [1.42].

³⁰ See the discussion at [12] above.

³¹ *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235.

adopt the recommendation that the test of likelihood for the competition condition be one of likely on the balance of probabilities. The Exposure Draft Bill repeals the definition of ‘likely’ in s 44ZZRB but, contrary to the assumption made both by Gordon J in *Norcast v Bradken* and the Harper Report, the s 44ZZRB definition does not apply to the competition condition under s 44ZZRD(4): the s 44ZZRB definition is limited to other subject matter. In s 44ZZRD(4) the term ‘likely’ probably means ‘real chance’ although the question has yet to be settled definitively.³²

17. ***The Exposure Draft Bill amends the competition condition in s 44ZZRD(4) by requiring that the alleged competitors compete in relation to goods or services in trade or commerce within Australia or between Australia and places outside Australia.*** The particular amendments proposed are:

- Paragraphs 44ZZRD(4)(c) to (e)
After “services” (last occurring), insert “in trade or commerce”.
- Paragraph 44ZZRD(4)(f)
After “goods” (last occurring), insert “in trade or commerce”.
- Paragraphs 44ZZRD(4)(g) and (h)
After “services” (last occurring), insert “in trade or commerce”.
- After paragraph 44ZZRD(4)(h), insert:
“(ha) if subparagraph (3)(a)(iv) applies in relation to preventing, restricting or limiting the acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or”
- Paragraphs 44ZZRD(4)(i) and (j)
After “services” (last occurring), insert “in trade or commerce”.
- Subsection 44ZZRD(4) (note)
Repeal the note, substitute:
Note 1: Party has an extended meaning—see section 44ZZRC.
Note 2: Trade or commerce is defined in section 4 to mean trade or commerce within Australia or between Australia and places outside Australia.

18. The proposed change requires a clear and specific nexus between the cartel conduct and Australia. By contrast, in *Norcast v Bradken*,³³ the cartel prohibitions were held to apply to an arrangement concerning a tender for the sale of a Canadian corporation,

³² See the discussion at [12] above.

³³ *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235.

which had business operations in Canada, Malaysia and Singapore, where the seller was based outside Australia and the tender was conducted outside Australia.

D Cartel Offences (ss 44ZZRF, 44ZZRG)

19. *The cartel offences enacted in 2009 have been the subject of only two prosecutions to date, against corporate accused.*³⁴ There have been no prosecutions against individuals in serious cases,³⁵ including cases where banks allegedly have rigged rates.³⁶ There was much hue and cry in 2008-2009³⁷ that jail is the sanction most likely to deter cartelists. The mantra has often been heard since.³⁸ However, the track record in Australia is zero prosecution of individual accused in over 7 years. Are the cartel offences worth all the effort that has gone into creating them and gearing up for prosecutions?³⁹

20. *The Harper Report did not address several burning questions about the cartel offences:*

- why has the criminalisation of cartel offences in Australia been such a damp squib?
- what justification is there for the apparent Australian practice of treating bank bill swap rate cases as market manipulation under s 1041A of the Corporations Act 2001 and not as cartel offences under the CCA?

³⁴ See 'Criminal cartel charges laid against K-Line', 15 November 2016, at: <http://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-k-line>; 'Australia's first criminal cartel charge laid against NYK', 18 July 2016, at: <http://www.accc.gov.au/media-release/australia%E2%80%99s-first-criminal-cartel-charge-laid-against-nyk>. There are many possible explanations. One is the challenge of joint trial of a corporation and the employees alleged to have participated in cartel conduct, partly because evidence obtained by reliance on s 155 may be admissible against the corporation but not individuals. For some of the other issues that arise see Gordon J, 'Criminalisation of Cartel Conduct' (2011) 34 Australian Bar Review 177.

³⁵ On the importance of individual responsibility for cartel conduct see C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 6.6; C Beaton-Wells & B Fisse, 'US Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique' (2011) 56 Antitrust Bulletin 277.

³⁶ See eg 'ASIC widens rate-rigging net', SMH 5 April 2016, 19; 'ACCC rate rigging probe well advanced', The Australian, 7 March 2016; M Taibbi, 'Everything Is Rigged: The Biggest Price-Fixing Scandal Ever', RollingStone, 25 April 2013; Council on Foreign Relations, 'Understanding the Libor scandal', 12 October 2016, at: <http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729>.

³⁷ See eg G Samuel, 'Delivering for Australian consumers: making a good Act better', 25 June 2008, National Press Club, Canberra, 5-6.

³⁸ See eg R Sims, 'CCA compliance in interesting times', 24 February 2017, at: <http://www.accc.gov.au/speech/cca-compliance-in-interesting-times>.

³⁹ See further C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011).

- given the criticisms that have been made of the ACCC Immunity Policy and the complementary immunity policy of the Commonwealth Director of Public Prosecutions, should they be further revised?⁴⁰ and
- are there adequate safeguards against the danger of the cartel offences being used by the ACCC mainly against easy small targets?

III Price Signalling (Part IV, Div 1A) and Concerted Practices (EDB s 45(1)(c))

21. Recommendation 29 of the Harper Report:

The 'price signalling' provisions of Part IV, Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

Section 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.

Recommendation 29 is followed in the Exposure Draft Bill. The Exposure Draft Bill repeals Part IV Division 1 A and amends s 45 to include this prohibition against concerted practices:

(1) A corporation must not: ...

(c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition [in a relevant market as defined in proposed s 45(3)(b).

A Price signalling

22. Part IV Division 1A prohibits 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. Part IV Division 1A stemmed from a crude initiative of the then LNP Coalition Opposition⁴¹ that spurred the then Labor Government into an ill-conceived response.⁴² That response has been widely criticised.⁴³

⁴⁰ See eg C Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 *Journal of Antitrust Enforcement* 126; C Beaton-Wells & C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015).

⁴¹ Competition and Consumer (Price Signalling) Bill 2010.

⁴² Compounded by extraordinary propaganda; see B Fisse, 'Misleading, Deceptive and Bankrupt: The Second Reading Speech on the Competition and Consumer Amendment Bill

23. ***Part IV Division 1A produces 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. Section 44ZZW is preoccupied with 'price signalling' instead of focussing on likely anti-competitive harm.

24. ***Part IV Division 1A suffers from underreach:***

- Part IV Division 1A 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

(No 1) 2011, at:

http://www.brentfisse.com/images/Fisse_Misleading_deceptive_and_bankrupt.pdf.

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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.

the prohibition.⁴⁴

- Non-price MFC restraints may be material to competition but s 44ZZW is limited to price-related information.⁴⁵ 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.⁴⁶

25. ***Part IV Division 1A occasions uncertainty:***

- The key elements of ‘disclosure’, ‘private disclosure’ and ‘accident’ raise questions of interpretation the answers to which are not always obvious.⁴⁷
- 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.⁴⁸

B Concerted practices

26. The proposed prohibition against concerted practices (Exposure Draft Bill s 45(1)(c)) is open to criticism in three main respects: overreach; underreach; and uncertainty.
27. ***The SLC test in s 45(1)(c) may occasion overreach because it is incapable of taking efficiencies adequately into account*** (see Section V below). The same problem will arise under the SLC test in the concerted practice prohibition. The solution proposed is the introduction of a rule of reason where the SLC test applies. See Section V below.

⁴⁴ 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.

⁴⁵ Contrast s 44ZZX which is much wider.

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ 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.

28. ***There is no competition condition in the proposed prohibition against concerted practices.*** The proposed s 45(1)(c) prohibition 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 45 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 [32] below.
29. ***Underreach is likely to arise from the inclusion of a SLC test as a necessary element of the proposed prohibition against concerted practices.*** A SLC test will create a hurdle for enforcement in cases where the coordination of conduct is manifestly anticompetitive.⁴⁹ The proposed s 45(1)(c) prohibition would not necessarily rectify the problem that arose in *Apco Service Stations Pty Ltd v ACCC*,⁵⁰ where the ACCC was unable to prove that the frequent communication of price information by one competitor to another amounted to an understanding. A concerted practice would be easier to establish than an understanding in such a case, but the SLC test must also be satisfied under the proposed s 45(1)(c). That may be possible if a narrow geographic market definition is adopted but a narrow market definition may not prevail.
30. 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 Treaty for the Functioning of the European Union ('EU Treaty')

⁴⁹ 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.

⁵⁰ *ACCC v Apco Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452.

applies⁵¹ and by the efficiencies exception under Art 101(3) of the EU Treaty.⁵² In Australia, the risk of overreach would be low if:

- the concept of ‘concerted practice’ is defined as suggested below (see [32]) 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 exemption⁵³ for MFC and other restraints that are not manifestly anti-competitive,⁵⁴
- there were well-designed exceptions for collaborative activities and supply agreements between competitors;⁵⁵ and
- the avenue of authorisation is available in relation to concerted practices.⁵⁶

31. ***Uncertainty is likely to 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.⁵⁷ Much the same view is expressed in the Explanatory Memorandum to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016:⁵⁸

As is the case for other forms of coordination dealt with by section 45, concerted practices are not defined in the Act. The interpretation of a ‘concerted practice’ should be informed by international approaches to the same concept, where appropriate. Broadly, international jurisprudence suggests that coordination between competitors, where cooperation between firms is substituted for the uncertainties and risks of independent competition, is potentially a concerted practice.

⁵¹ See J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3C(8).

⁵² See J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3F.

⁵³ Harper Report, Recommendation 39.

⁵⁴ 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).

⁵⁵ Cf eg Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), new ss 31 and 32. See further Section IVB below.

⁵⁶ As is the position under the Exposure Draft Bill, proposed s 88.

⁵⁷ Harper Report, 371-372.

⁵⁸ [3.18].

The opposing view is that: (a) the EU law on the concept of a concerted practice is far from clear;⁵⁹ and (b) 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.

32. The following statutory definition of a 'concerted practice' has been proposed by Beaton-Wells and Fisse:⁶⁰

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.

33. 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.⁶¹ 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?).⁶² 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 perhaps less than ideal and would benefit from practical elucidation in case law and guidelines.

⁵⁹ See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3C(4).

⁶⁰ 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.

⁶¹ As recognised and recommended in ACCC Submission on the Draft Report, 26 November 2014, 43.

⁶² 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.

34. Guidelines would be useful but do not appear yet to be a twinkle in the eyes of our competition lawmakers or enforcers.

IV Cartel Exemptions (Supply/Acquisition Agreements between Competitors (EDBs s 44ZZRS) and Joint Ventures (ss 44ZZRO, 44ZZRP))

A Supply/Acquisition Agreements between Competitors

35. Recommendation 27 of the Harper Report includes a proposed exemption from cartel prohibitions for supply/acquisition agreements between competitors:

An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition. The 'price signalling' provisions of Part IV, Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

This recommendation is followed in the Exposure Draft Bill. The following section would replace the current s 44ZZRS:

44ZZRS Restrictions on supplies and acquisitions

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision to the extent that the cartel provision:
- (a) imposes, on a party to the contract, arrangement or understanding (the acquirer) acquiring goods or services from another party to the contract, arrangement or understanding, an obligation that relates to:
 - (i) the acquisition by the acquirer of the goods or services;
 - (ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or
 - (iii) the supply by the acquirer of the goods or services or of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or
 - (b) imposes, on a party to the contract, arrangement or understanding (the supplier) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to:
 - (i) the supply by the supplier of the goods or services; or

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

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

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.
- (3) This section does not affect the operation of section 45 or 47.

Practical importance of s 44ZZRS exemption

36. ***The proposed s 44ZZRS exemption is important in the many situations where pro-competitive supply or acquisition agreements between competitors control a price or impose a restriction that amounts in law to a cartel provision.*** This is one of many examples.⁶³

Assume that XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market. Neither XCO nor YCO are prevented from deciding to acquire Product D or Product E from alternative sources at any time.

Each reciprocal supply provision is a cartel provision, as defined by ss 44ZZRD(3)(a)(iii) and (4). XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) (s 44ZZRD(3)(a)(iii)). It is irrelevant that the purpose is conditional: the purpose required to satisfy the purpose condition under s 44ZZRD(3) may be conditional or unconditional. Nor can it be maintained that the 'real' or 'ultimate' purpose of each reciprocal supply provision is not a s 44ZZRD(3) purpose but a purpose to 'act in the best interests of the market' or to 'improve competition': if the substantial purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 44ZZRD(3)(a), it is irrelevant whether or not D believes that the restriction is in the best interests of the market or a way of improving competition.

Under the proposed s 44ZZRS(1)(a)(iii), each of the reciprocal provisions in the example above would be exempt from liability for cartel conduct.

⁶³ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.6.4.

Implications of decision of High Court in *Flight Centre*

37. ***The proposed s 44ZZRS exemption is important in dual distribution arrangements where the principal and the agent are competitors under the decision of the High Court in the Flight Centre case.***⁶⁴ Unless the s 44ZZRS exemption is available, the *Flight Centre* decision is likely to cause crash landings.

38. Background:

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. The MFC restraints sought by Flight Centre would require the airlines not to charge prices lower than Flight Centre's prices (including commission).

At first instance, 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) ('TPA'). That decision was overturned by the Full Court.⁶⁵ The Full Court rejected the ACCC's theory of the case that Flight Centre and the airlines were competitors in the market for the supply of air travel distribution and booking services; there was no such market. Flight Centre had acted as an agent of the airlines when supplying tickets for international travel and was not acting in competition with them.⁶⁶ A majority of the High Court (French CJ dissenting) overturned the decision of the Full Federal Court and remitted the case to the Federal Court for determination of penalty. Costs were not awarded to the ACCC given the problematic way in which it had presented its case.⁶⁷

39. Three majority judgments were given. This is the core reasoning expressed by Kiefel and Gageler JJ in their joint majority judgment:

- Flight Centre was in competition with each airline. The competition was in a market for the supply, to customers, of contractual rights to international air carriage. The competition existed in that market notwithstanding that Flight Centre supplied in that market as agent for each airline.⁶⁸

⁶⁴ *Flight Centre Ltd v ACCC* [2015] FCAFC 104. For a fuller discussion see B Fisse, 'The High Court decision in ACCC v Flight Centre: Crash Landings Ahead?' (2017) 45 ABLR 61

⁶⁵ *Flight Centre Ltd v ACCC* [2015] FCAFC 104.

⁶⁶ However, 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].

⁶⁷ See [2016] HCA 49, [93] (Kiefel and Gageler JJ).

⁶⁸ [2016] HCA 49, [26].

- The relevant market was not a market for the supply of air travel distribution and booking services. That construct was artificial and commercially unrealistic. What the ACCC chose to describe as booking services were in reality no more than essential and inseparable incidents of selling a ticket to a customer. An airline selling a ticket directly to a customer could not realistically be described as supplying a distribution service to itself.⁶⁹ The market is better identified as having been a market for the supply of contractual rights to international air carriage to customers or, in short, as a market for international airline tickets.⁷⁰
- Flight Centre was free under the Agency Agreement to sell or not to sell an international airline ticket of any Carrier. The Agent was also free under the Agency Agreement to sell any ticket to any customer at any price.⁷¹
- The TPA contained nothing inherently inconsistent with the notion of an agent and a principal both being suppliers of contractual rights against the principal. Nor did it contain anything inconsistent with the notion of an agent supplying contractual rights against the principal in competition with the principal supplying contractual rights directly against itself.⁷² To the extent that an agent might be free to act, and to act in the agent's own interests, the mere existence of the agency relationship did not in law preclude the agent from competing with the principal for the supply of contractual rights against the principal. Whether or not competition might exist in fact then depended on the competitive forces at play.⁷³
- Two considerations were critical to the outcome of the ultimate question of whether Flight Centre sold international airline tickets to customers in a market in competition with the airlines. First, Flight Centre's authority under the Agency Agreement extended not only to deciding whether or not to sell an airline's tickets but also to setting its own price for those tickets. Secondly, there is no suggestion that Flight Centre was constrained in the exercise of that authority to prefer the interests of the airlines to its own.⁷⁴
- Flight Centre was free in law to act in its own interests in the sale of an airline's tickets to customers. That is what Flight Centre did in fact: it set and pursued its own marketing strategy, which involved undercutting the prices not only of other travel agents but of the airlines whose tickets it sold. When Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not.⁷⁵

⁶⁹ [2016] HCA 49, [56].

⁷⁰ [2016] HCA 49, [92].

⁷¹ [2016] HCA 49, [34].

⁷² [2016] HCA 49, [82].

⁷³ [2016] HCA 49, [83].

⁷⁴ [2016] HCA 49, [89].

⁷⁵ [2016] HCA 49, [90].

38. ***The High Court decision in Flight Centre extends the scope of per se liability for cartel-related conduct in the context of dual distribution arrangements.*** This is a significant concern:

- Dual distribution arrangements proliferate in commerce.⁷⁶ Generally they are output-enhancing. The use of dual distribution has increased markedly in the digital economy, where online platforms have added major new distribution channels. At least after the decision of the Full Court, the orthodox view in Australia was that dual distribution arrangements based on a principal-agent relationship were almost always beyond the reach of per se cartel-related conduct.
- Per se liability is a serious matter, partly because of the relative ease of proof and partly because the penalties potentially are severe. The risk is not limited to civil liability: the interpretation in *Flight Centre* of the competition condition in s 45A of the *Trade Practices Act* also applies to the competition condition under s 44ZZRD of the CCA in relation to both cartel offences and civil cartel prohibitions.
- Price fixing is not the only type of cartel conduct affected by the decision in *Flight Centre*: the interpretation of the competition condition in *Flight Centre* applies to the competition condition for exclusionary provisions as defined by s 4D of the CCA and cartel provisions as defined by s 44ZZRD of the CCA. As defined by s 44ZZRD, a cartel provision may exist not only where the purpose or effect is to fix prices but also where the purpose is to prevent, restrict or limit supply.
- Per se liability enables the ACCC to avoid the need to establish the substantial lessening of competition test ('SLC test') under s 45, s 47 or the proposed new s 46,⁷⁷ and increases the leverage of the Commission to induce settlements instead of having SLC cases tested in court. The application of the SLC test to dual distribution arrangements, including MFC and price parity clauses, is much in need of clarification.⁷⁸ Gordon J's gloss in *Flight Centre* that 'Flight Centre's proposal, if implemented, would have substantially lessened competition by keeping up prices'⁷⁹ is no substitute for clarification.

40. The decision in *Flight Centre* means that dual distribution arrangements will now be subject to per se liability in a significantly wider range of situations than that resulting from the decision of the Full Court. For instance, it seems possible that the decision

⁷⁶ See further RW Palmatier, JC Narver, L Stern, Al El-Ansary, & E Anderson, *Marketing Channel Strategy* (8th ed, 2016) ch 5.

⁷⁷ See Exposure Draft Bill, s 46; Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

⁷⁸ See B Fisse, 'Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge' (2016) 44 ABLR 325, 343-350.

⁷⁹ [2016] HCA 49, [184].

of the Full Court in *ACCC v Australian and New Zealand Banking Group Ltd*⁸⁰ would have been overturned by the High Court had that decision been appealed by the ACCC as well as the decision of the Full Court in *Flight Centre*.

41. ***The decision in Flight Centre will imperil MFC and price parity clauses in online dual distribution arrangements if an online platform is characterised as being a competitor of the supplier of services available to consumers directly from the supplier or on the online platform.*** At least in some situations, the online platform may lack the essential indicia of competitorhood indicated by Kiefel and Gageler JJ, namely: (a) freedom to determine price (in the context of alleged price fixing); and (b) freedom to act in its own interests instead of preferring the interests of the supplier.⁸¹
42. The ACCC settlement in September 2016 with Expedia and Booking.com⁸² sheds little light on the question. According to the ACCC media release, Expedia and Booking.com agreed to amend certain parity clauses in their contracts with Australian hotels. They agreed not to require the hotels to offer room rates via Expedia or Booking.com equal to or lower than those offered on any other online travel agent, or to offer room rates via Expedia or Booking.com equal to or lower than those offered on an accommodation provider's offline channels. However, Expedia or Booking.com could require hotels not offer rates on their own websites below those offered to Expedia or Booking.com. That narrower degree of parity⁸³ was permitted by the ACCC but would entail cartel liability if Expedia or Booking.com were competitors of the hotels and not merely their agents. Unfortunately, the ACCC's theory of the case is unclear from the ACCC media release and there does not appear to be any undertaking under s 87B (no undertaking is recorded on the ACCC's Public Register). It may have been a SLC case under s 45 in which event the competition condition under s 44ZZRD(4) would not have been relevant. Whatever the ACCC's theory of the case was, after the decision in *Flight Centre* online platforms should not assume that narrow parity clauses will necessarily exclude cartel liability: they will

⁸⁰ *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* [2015] FCAFC 103.

⁸¹ See [2016] HCA 49, [89] (Kiefel and Gageler JJ). For the view that online platforms should generally be characterised as agents, not as competitors, see P Akman, 'A Competition Law Assessment of Platform Most-Favoured Customer Clauses' (2016) 12 *Journal of Competition Law & Economics* 781. However, query what results flow from the application of Kiefel and Gageler JJ's core indicia of competitorhood to online platforms in Australia.

⁸² ACCC, 'Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels', Media Release, 2 September 2016, at: <http://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels>.

⁸³ On broad v narrow parity clauses and their implications see A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 *European Competition J* 488.

be subject to cartel liability if their relationship with a supplier under a CAU is characterised as being that of a competitor and if there is otherwise a cartel provision as defined by s 44ZZRD.

43. ***In the wake of Flight Centre, existing or forthcoming dual distribution contracts, arrangements and understandings will need to be checked for compliance with cartel prohibitions under Part IV Division 1 and the prohibitions relating to exclusionary provisions under s 45.*** Such a check will not cure cases of non-compliance that are detected and rectified. However, corrective compliance may incline the ACCC not to take enforcement action and, in the event of enforcement action, such compliance initiatives will be relevant to mitigation of penalty. It may also be noted that the ACCC immunity policy⁸⁴ is an inducement to disclose cartel conduct to the Commission and thereby gain immunity.
44. ***The exemption of supply/acquisition agreements under the Exposure Draft Bill (s 44ZZRS) would exclude cartel-related liability in many situations including the type of situation that arose in Flight Centre.*** Plainly s 44ZZRS(1)(b) would cover the fact situation in the *Flight Centre* case and exclude liability for price fixing under the CCA. The s 44ZZRS exemption would apply in many other cases, including the online booking investigation settled by the ACCC with Expedia and Booking.com in September 2016. The exemption is not limited to dual distribution situations.⁸⁵ It applies to competitors. It is irrelevant whether or not the parties are in a principal-agent relationship.

Need to broaden the proposed s 44ZZRS exemption in some respects

45. ***The proposed s 44ZZRS exemption is narrower than the current s 44ZZRS exemption in some respects and should be broadened.*** The proposed s 44ZZRS does not exempt some vertical restrictions that would be exempt under the current law because of the breadth of the exclusive dealing practices in s 47.⁸⁶ The wording 'goods or services that are substitutable for, or otherwise competitive with' should be amended by deleting the words after 'goods or services'.⁸⁷ Nor does the proposed s 44ZZRS exemption cover situations where an obligation is imposed on a supplier

⁸⁴ ACCC, *Immunity and Cooperation Policy for Cartel Conduct* (2014).

⁸⁵ On the need to exempt supply agreements between competitors from per se liability generally including in situations other than dual distribution arrangements see C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 303-308.

⁸⁶ LCA, Competition & Consumer Committee Business Law Section, Submission on Competition Law Amendments: Exposure Draft Consultation, 28 Oct 2016, 10-11.

⁸⁷ Id at 11.

that relates to the acquisition by the supplier, from any person, of goods or services; the wording should be amended accordingly.⁸⁸

Harper reform exemptions and retrospectivity

46. ***The proposed s 44ZZRS exemption (and other Harper reform exemptions) should apply retrospectively.***⁸⁹ Unless the exemption applies retrospectively, it will not exempt cartel provisions or exclusionary provisions in CAUs, or giving effect to a cartel provision or exclusionary provision, where the CAU or conduct occurred prior to the commencement of s 44ZZRS. The better view is that the s 44ZZRS exemption (and other exemptions under the Harper reforms) should operate retrospectively at least from the time of commencement of the cartel prohibitions under the CCA.⁹⁰

B Joint ventures and other collaborative activities between competitors

47. Recommendation 27 of the Harper Report saw the need to broaden the existing joint venture exemptions from liability for cartel conduct:⁹¹

A broad exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.

The Exposure Draft Bill amends ss 44ZZRO and 44ZZRP in three main ways. First, the exemptions are to apply where a cartel provision is contained in an arrangement or understanding as well as where they are contained in a contract. Secondly, the exemptions are no longer excluded where a joint venture is for the acquisition of goods or services. Thirdly, the required nexus between the cartel provision and the joint venture is that the cartel provision is 'for the purposes of a joint venture' or 'reasonably necessary for undertaking a joint venture'.

48. The first and second of the above changes proposed in the Exposure Draft Bill are welcome: they belatedly remove arbitrary and ill-advised limitations on the scope of

⁸⁸ Ibid.

⁸⁹ The exemption would apply prospectively under the relevant provisions of the Exposure Draft Bill.

⁹⁰ Retrospective application is problematic where a legislative provision *inculpat*es a defendant (see eg C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 275-276), but the position is different where the provision *exculp*ates from criminal or civil penal liability.

⁹¹ For detailed criticism of ss 44ZZRO and 44ZZRP, see B Fisse, 'New Zealand Government Proposes New Anti-Cartel Law with Collaborative Activity Exemption that Highlights Flaws in Australian Joint Venture Exceptions' at: http://www.brentfisse.com/images/Fisse_Proposed_NZ_collaborative_activity_exemption_010_72013.pdf; C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.

the joint venture exceptions. In other respects, however, the Exposure Draft Bill disappoints.

‘Joint venture’

49. ***The term ‘joint venture’ remains uncertain.***⁹² The wording ‘carried on jointly’ under the definition of ‘joint venture’ in s 4J is less than clear and is narrower than the concept of a collaborative activity:

- The exceptions under s 44ZZZ(3A) and s 44ZZZ(5) for certain kinds of legitimate cooperation by competitors were enacted in the 2011 amendments on price signalling because that conduct was not necessarily of a kind that would entail the joint carrying on of an activity as required for the exception under 44ZZZ(3).
- It is unclear whether the term ‘joint venture’ requires an efficiency-enhancing integration of business functions or whether merely joint activity is sufficient. Some commentators have contended that an economic integration of functions is required but s 4J does not say that explicitly. The relevant Explanatory Memorandum does not answer the question.⁹³

50. ***Australia should follow world best practice and adopt the concept of a ‘collaborative activity’ instead of that of a ‘joint venture’.*** The concept of ‘collaborative activity’ is adopted in the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 31. That approach is consistent with US, EU and Canadian competition law:

- Under s 1 of the *Sherman Act* (US) efficiency enhancing collaborations between competitors are exempted. Joint ventures are treated as merely one among many relevant kinds of competitor collaborations.⁹⁴
- Horizontal co-operation agreements are regulated under Art 101(1) and (3) of the European Treaty. The concept of a horizontal co-operation agreement is broad and includes joint ventures and a wide range of other competitor

⁹² C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 271-272.

⁹³ See Explanatory Memorandum, Trade Practices Amendment Bill 2006 (Cth), [5.283] – [5.284].

⁹⁴ See US Federal Trade Commission and the US Department of Justice, Antitrust Guidelines for Collaborations Among Competitors, April 2000, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

collaborations.⁹⁵

- In Canada, competitor collaborations are subject to a defence of ancillary restraint under s 45(4) of the *Competition Act 1985*. The defence of ancillary restraint applies to any kind of collaboration between competitors and is not limited to joint ventures.⁹⁶

‘For the purposes of a joint venture’

51. ***The proposed condition that the cartel provision be ‘for the purposes’ of a joint venture echoes the current law but remains obscure.***⁹⁷ For instance, does the wording ‘for the purposes’ mean: solely for the purposes of a joint venture?; predominantly for the purposes of a joint venture?; substantially for the purposes of a joint venture? Are the relevant ‘purposes’ determined objectively or do they depend on the subjective intention of all or some of the parties to the joint venture? Notorious as these uncertainties are, they are not the subject of comment let alone clarification in the Explanatory Materials on the Exposure Draft Bill.

‘Reasonably necessary for undertaking a joint venture’

52. ***The proposed alternative condition that the cartel provision be ‘reasonably necessary for undertaking a joint venture’ falls short in several significant respects:***
- Unlike the position in the US, the ‘reasonably necessary’ condition is not a necessary condition but an alternative to the condition that the cartel provision be ‘for the purposes of undertaking a joint venture’. This leaves the door open for sham joint ventures because the ‘purpose’ condition is loosely worded and does not plainly require that the dominant purpose collaborative activity not be for the dominant purpose of lessening competition between any 2 or more of the parties.⁹⁸

⁹⁵ See European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (January 2011), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

⁹⁶ See Canada Bureau of Competition, Competitor Collaboration Guidelines (2009), available at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

⁹⁷ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.4.

⁹⁸ Cf (Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 31(2)(b)); *Timken Roller Bearing Co v United States*, 341 US 593, 597–8 (1951). See further C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.4.3.2.

- The ‘reasonably necessary’ condition needs to be explained and clarified by means of guidelines. The collaborative activity exemption proposed in NZ is the subject of instructive draft guidelines by the NZ Commerce Commission.⁹⁹ These guidelines make it clear that the test of reasonable necessity is to be interpreted and applied in a commercially realistic way. For instance, they make it clear that the cartel provision in issue need not necessarily be the one and only way of pursuing the collaborative activity.
- The ‘reasonably necessary’ condition does not differentiate between civil and criminal liability. Criminal liability should require subjective blameworthiness on the part of the offender in relation to the elements of offences and the elements of exceptions or defences. Thus, a collaborative activity exemption from cartel offences should be subject to a defence of genuine belief that the cartel provision is reasonably necessary for the collaborative activity (with an evidential burden of proof on the accused).¹⁰⁰

V Agreements substantially lessening competition (s 45) and exclusive dealing (s 47)

53. The Exposure Draft Bill extends the application of the SLC test in an important way, namely the introduction of an effects test in s 46 (see Section VI below).¹⁰¹ The Exposure Draft Bill preserves s 47 (exclusive dealing) except for the provisions relating to third line forcing; the Harper Report recommended that s 47 be repealed in its entirety. Little has been said about the SLC test itself.¹⁰²

⁹⁹ Revised draft of August 2014 at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/>. See further J Land, ‘Joint Ventures and the Collaborative Activity Exemption’, 24th Annual Workshop of the Competition Law and Policy Institute of New Zealand, 2 August 2013; J Land, ‘Joint Ventures and the collaborative activity exemption’ [2014] New Zealand Law Journal 190; J Land and A Schiff, ‘Analysing Collaborative Activities’ [2014] New Zealand Law Journal 230; J Land, ‘The Case for Pro-Competitive Collaborations’, NZ Productive Markets Forum - Developments in Competition Law, Policy and Regulation, Nov 2014.

¹⁰⁰ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 290. This approach avoids the concept of ‘honest belief’ as used in the proposed Commerce Act s 82B(2)(a) under the NZ anti-cartel Bill. ‘Honesty’ like ‘dishonesty’ is a populist term that admits spurious defences; see C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 2.4.1.

¹⁰¹ Unlike the Harper Report, the Exposure Draft Bill preserves s 51(3).

¹⁰² See Harper Report, 61, 341.

A 'Substantial'

54. ***Uncertainty arises starkly from the obscure meaning of 'substantial' in the SLC test.***¹⁰³ The case law offers limited guidance beyond telling us that 'substantial' does not mean 'large' or 'big'.¹⁰⁴ 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' means 'meaningful or relevant to the competitive process'.¹⁰⁵ A values-based judgment is required.¹⁰⁶

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.

55. As a result, the assessment of evidence on the issue of substantiality depends much on impression and unstated assumptions.¹⁰⁷ Current guidelines do not assist much on this issue.¹⁰⁸

¹⁰³ 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; K Kemp, 'A Comparative Analysis of Effects-Based Tests for Unilateral Anticompetitive Conduct' (2016) 36-39, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731414; 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](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.

¹⁰⁴ *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').

¹⁰⁵ (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.

¹⁰⁶ 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>.

¹⁰⁷ 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.

¹⁰⁸ 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

56. Headway will not be made by inhaling the vapour that the SLC test is a 'category of indeterminate reference',¹⁰⁹ by consulting a dictionary or by looking for quick answers in other jurisdictions such as the US or the EU where a similar test applies.¹¹⁰ Progress will require practical elucidation of the test.¹¹¹ As Leuner has argued:¹¹²

.. 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.

57. Progress will also require facing up to the issue of what is meant by 'substantial' instead of pretending the issue does not exist or somehow does not matter. The ACCC has adopted an ostrich-like position on the issue. In a submission to the Senate Economics Committee reviewing the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 the ACCC made these claims:¹¹³

[The SLC test] has a demonstrated ability to effectively filter harmful anti-competitive conduct from benign or pro-competitive conduct. ...

Further, it is a test applied internationally to conduct and so will also be well understood by multinational firms carrying on business in Australia.

The fact is that no one knows with any clarity what 'substantial' means in the SLC test, whether in Australia, the US, the EU, Canada or NZ. If no one knows with any clarity what 'substantial' means in the SLC test, it is fanciful to suggest that the SLC

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/>.

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Compare J Stone, *Legal System and Lawyers' Reasonings* (1964) 263-7.
See eg D Bok, 'Section 7 of the Clayton Act and the Merging of Law and Economics' (1960) 74 Harvard LR 226; J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) 267-268.
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.

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Leuner, 365-366.

¹¹³

At 3.

test effectively filters anti-competitive conduct from benign or pro-competitive conduct.¹¹⁴

58. ***Various potentially significant questions are entailed by the SLC test but have rarely been discussed:***¹¹⁵

- what is the necessary duration of competition effects required under the SLC test?¹¹⁶
- is the SLC test to be applied by reference not only to the competitive process but also to outcomes such as price effects?¹¹⁷
- if measured by price effects, what is the threshold? 5%?¹¹⁸
- 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?¹¹⁹

¹¹⁴ The ACCC discussion in its Merger Guidelines (2008) at 11 is very woolly eg ‘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’. Consider also the nebula in ACCC, Anti-competitive agreements, at: <https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-agreements> that :

‘Substantial’ has been defined in case law as large, weighty, big, real or of substance or not insubstantial. However it is not straightforward; the meaning of substantial depends on the context and in a relative sense.

An effect is considered to be substantial if it is important or weighty in relation to the size of the particular market.

¹¹⁵ Most of the questions set out below are raised by Leuner, 348-359. The meaning of ‘competition’ is also relevant; see H Demsetz, *The Economics of the Business Firm: Seven Critical Commentaries* (CUP, 1995), Seventh Commentary (‘The intensity and dimensionality of competition’).

¹¹⁶ See further D Robertson, ‘Time and Risk: The Temporal Dimension of Competition Analysis and the Role of Long-Term Contracts’ (1998) 26 ABLR 273.

¹¹⁷ 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).

¹¹⁸ 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.

- does the standard of substantiality vary in accordance with the probability of the competition lessening effects?
59. 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.¹²⁰ 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-making and hopefully lead to more debate in relation to the underlying policy issues.’¹²¹
60. Market share thresholds can be an expedient navigation aid.¹²² They are used to provide safe harbours¹²³ 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.¹²⁴ 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.¹²⁵

¹¹⁹ Consider M Kadar, ‘The Meaning of “Anticompetitive Effects” Under Article 102 TFEU’, CPI Antitrust Chronicle, March 2016(1).

¹²⁰ Leuner, 359-365.

¹²¹ Leuner, 363.

¹²² Contrast the more purist perspective in R Trindade, A Merrett & R Smith, ‘2014 – The Year of SLC’ (2014) 21 *The State of Competition*.

¹²³ 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.

¹²⁴ 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. See also 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); see further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) 3.295-3.297.

¹²⁵ See further J Faull & A Nikpay, *The EU Law of Competition* (3rd ed, 2014) [10.119]-[10.122]. Some may contend that these exemptions are too conservative to be useful. If that contention is valid, the thresholds can be adjusted accordingly.

61. 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*¹²⁶ 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.

62. 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 or class exemption mechanism (Recommendation 39, Exposure Draft Bill, proposed s 95AA) could well be used to provide safe harbours¹²⁷ in some contexts. At this stage their intended nature and scope is unclear.

B Rule of reason test?

63. ***There is no rule of reason test to take efficiencies adequately into account.*** The SLC test is a competition test, not one that is geared to assessment of offsetting welfare-enhancing efficiencies.¹²⁸ There is no rule of reason.¹²⁹ As a result, 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 Act¹³⁰ and, in practical effect, under the exemption in Article 101(3) of the EU Treaty.¹³¹

¹²⁶ [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.

¹²⁷ 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].

¹²⁸ See S Corones, *Competition Law in Australia* (6th ed, 2014) [7.140], [7.145]; I Tonking, ‘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).

¹²⁹ *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193, [270]-[273].

¹³⁰ See ABA, *Antitrust Law Developments (Seventh)* (2012) Vol I, ch 1 B3b.

¹³¹ See J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 3F.

64. Consider, as one illustration, MFC restraints.¹³² The literature on MFC restraints highlights the potential importance of efficiencies when assessing the competition and welfare effects of such clauses. The possible efficiencies include: avoiding hold-up and free-riding; reducing delays in transacting; and reducing transaction costs.¹³³
65. 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'.¹³⁴ The efficiencies that need to be considered when assessing parity clauses in the context of price comparison websites ('PCW') include the following:¹³⁵
- 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.
66. Yet the efficiencies of MFC or other restraints are relevant to the SLC effect test in Australia only to the extent that they affect 'competition' in the sense of the process

¹³² See further B Fisse, 'Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge' (2016) 44 ABLR 325.

¹³³ See eg A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2016) 11 European Competition J 488. See further

¹³⁴ (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.

¹³⁵ (2016) 11 European Competition J 488,491-492.

of competitive rivalry.¹³⁶ 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 might become unnecessary if a rule of reason were to be introduced in Australia to complement the SLC test.¹³⁷

67. Several submissions were made to the Harper Review for the adoption of a rule of reason test.¹³⁸ 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',¹³⁹ 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. Given the rule of reason or comparable statutory approaches, there is no authorisation process in the US, the EU, the UK or Canada.¹⁴⁰
68. 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.¹⁴¹ That position is

¹³⁶ See further S Corones, *Competition Law in Australia* (6th ed, 2014) [2.170], [7.140] ('rivalry' an 'amorphous concept').

¹³⁷ The authorisation process 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. Compare however the narrow and implausible view of the US rule of reason in G Werden, 'Antitrust's Rule of Reason: Only Competition Matters' (2014) 79 *Antitrust LJ* 713. Worked examples are overdue to show exactly the differences in how competition and efficiencies are treated under: (a) the Australian SLC test; (b) the US rule of reason; and (c) Article 101 and Article 102 of the EU Treaty.

¹³⁸ 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>. See also I Wylie, 'Roots, Branches and Other Objects – One Step Beyond the Harper Review?' (2014) 42 *ABLR* 436, 444.

¹³⁹ 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.

¹⁴⁰ See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 8.13.3. The exemption under Article 101(3) of the EU Treaty approximates to the test for authorisation in Australia but no authorisation procedure applies to Article 101.

¹⁴¹ See D Heydon, 'The Trade Practices Act 1974, Section 45: Agreements in Restraint of Trade' (1975) 3 *ABLR* 262, 289-290. But see ABA, *Antitrust Law Developments (Seventh)* (2012) Vol I, ch 1 B3b; H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard UP, 2005, ch 5; A Gavil, 'Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice' (2012) 85 *S Cal LR* 733.

supine. Undoubtedly, the US case law on the rule of reason has many twists and turns, with limited clarification by the US Supreme Court.¹⁴² A comprehensive and detailed Australian statutory model with guidelines has yet to be advanced.¹⁴³ Although the Harper Report turned a blind eye to that challenge, a project for future commentators is to fill the vacuum.

C Exclusive dealing

69. ***The separate prohibition of exclusive dealing under s 47 is unnecessary and mischievous but has been retained.*** The Harper Report recommended that s 47 be repealed.¹⁴⁴ No adequate explanation has been given by the Government why s 47 should be retained.¹⁴⁵ The definitions of exclusive dealing in s 47 are quirky and complicated.¹⁴⁶ There is no equivalent section in the *Commerce Act 1986* (NZ); exclusive dealing cases are subject to s 27, which is comparable to s 45 of the CCA. Nor is there an equivalent legislative provision in the US or the EU. Countries trading with Australia will notice that s 47 has no counterpart in the UNCTAD *Model Law on Competition*.

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ Harper Report, Recommendation 33.

¹⁴⁵ No explanation is given in the Exposure Draft Explanatory Materials. The Government Response to the Competition Policy Review (24 November 2015) on Recommendation 33 states that: 'Simplification of section 47 will be considered as part of the proposal to further simplify the competition law in response to Recommendation 23 and in light of the outcome of further consultation on Recommendation 30.'

¹⁴⁶ See S Corones, *Competition Law in Australia* (2014, 6th ed) ch 9. One mischievous quirk is the 'Visy trap' as mapped in C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 300:

In *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, the High Court held that the exclusive dealing exception under s 45(6) did not apply where there were two exclusionary provisions in an agreement restricting competition between Visy and a competitor and only one of those exclusionary provisions was exclusive dealing as defined in s 47. The other alleged exclusionary provision imposed a restriction on the acquisition of services by the competitor and, under the definition of exclusive dealing conduct in s 47, a restriction on the acquisition of service is not an exclusive dealing condition. The distinction is not only technical, but also arbitrary. [footnotes omitted]

VI Misuse of Market Power (s 46)

A Effecting the effects test

70. The Harper Report recommended that an effects test be adopted in s 46:

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:

- 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.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

71. The 'take advantage' limb of s 46 would be repealed under Recommendation 30. The take advantage test has given rise to difficulties of interpretation, thereby 'undermining confidence in the effectiveness of the law'.¹⁴⁷ More significantly, the test is not well adapted to identifying a misuse of market power because it takes non-dominant firm conduct to be the benchmark for competitive behaviour.¹⁴⁸

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

¹⁴⁷ 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.

¹⁴⁸ Harper Report, 61.

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.

72. The s 46 purpose test would also be repealed. The reason given echoes a long-standing criticism of s 46:¹⁴⁹
- .. 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.
73. The proposed effects test seeks to give the prohibition against misuse of market power a sound economic foundation and to bring Australian law more into line with effects-based approaches in other jurisdictions¹⁵⁰ apart from NZ.¹⁵¹ However, the recommendation has had a volatile reception¹⁵² and the degree of attention given to this ‘totem’ of competition reform has been described by the Chairman of the Productivity Commission as ‘absurd’.¹⁵³ The main objections that have been raised are canvassed below.
74. The other proposals in Recommendation 30 – repeal of the Birdsville amendment,¹⁵⁴ extending authorisation to misuse of market power, introduction of ACCC guidelines on s 46, and reconsideration of s 46A – are salutary.¹⁵⁵
75. The Harper Report recommendation that an effects test be adopted in 46 has been followed in the Exposure Draft Bill which in turn has largely been followed in the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.¹⁵⁶

¹⁴⁹ Harper Report, 61.

¹⁵⁰ For the view that the differences have been exaggerated see P Williams, ‘Should an effects test be added to section 46’, Competition Law Conference, Sydney, 24 May 2014.

¹⁵¹ On s 36 of the Commerce Act see M Sumpter, *New Zealand Competition Law and Policy* ((2010) ch 10; L Hampton & PG Scott, *Guide to Competition Law* (2013) ch 6; R Ahdar, ‘The unfulfilled promise of New Zealand’s monopolisation law: Sources, symptoms and solutions’ (2009) 16 *Competition & Consumer LJ* 291; NZ Productivity Commission, *Boosting productivity in the services sector* (May 2014) 7.2.

¹⁵² See ‘Effects test debate is too theological, Abbott says’, AFR 9 Sept 2015, 9; ‘Cabinet split over business crackdown’, AFR 1 Sept 2015, 1. For one non-political critique see P Williams, ‘The counterfactual test in s 46’ (2013) 41 *ABLR* 93.

¹⁵³ P Harris, ‘Reviving Harper’, Australian Competition Policy Summit 2015, Sydney, 22 Sept 2015, 1 at: <http://www.pc.gov.au/news-media/speeches/competition-policy-summit-2015>.

¹⁵⁴ CCA, s 46 (1AA). See B Reid, ‘Section 46 – in search of a port in the storm’ (2010) 38 *ABLR* 41.

¹⁵⁵ Subject however to the question of whether or not the authorisation process is still justifiable in any context - see Section V.

¹⁵⁶ Unlike the position under the Harper Report and the Exposure Draft Bill, the required SLC effect cannot be in ‘any other market’: the proposed s 46(1)(a)(b) and (c) limit the scope of s 46 to situations where there is an actual or likely supply or acquisition of goods or services by

Under the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 the proposed s 46(1) and (2) provide:

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
 - (a) that market; or
 - (b) any other market in which that corporation, or a body corporate that is related to that corporation:
 - (i) supplies goods or services, or is likely to supply goods or services; or
 - (ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or
 - (c) any other market in which that corporation, or a body corporate that is related to that corporation:
 - (i) acquires goods or services, or is likely to acquire goods or services; or
 - (ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.
- (2) Without limiting the matters to which regard may be had in determining for the purposes of subsection (1) whether conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, regard must be had to the extent to which:
 - (a) the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competitiveness in that market; and
 - (b) the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring the potential for competitive conduct or new entry into that market.

76. The Senate Economics Legislation Committee majority report on the Competition and Consumer Amendment (Misuse of Market Power) Bill (16 February 2017) recommended that the Bill be passed but that the mandatory factors in the proposed s 46(2) be removed. The Government has now said that it proposes to amend the Bill

to remove the mandatory factors.¹⁵⁷ The small business lobby seems to have prevailed over the big business lobby.¹⁵⁸

77. None of the political carry-on resolves the most fundamental practical problems raised by the proposed s 46 effects test.¹⁵⁹ These problems are discussed below.

B Exclusionary conduct?

78. ***The proposed amendments to s 46 do not require exclusionary conduct that has the purpose, effect or likely effect of substantially lessening conduct in a market.*** They require only conduct that has the purpose, effect or likely effect of substantially lessening conduct in a market. By contrast, the US law on monopolisation and the EU law on abuse of a dominant position do require exclusionary conduct.¹⁶⁰ A requirement of exclusionary conduct should be included if the effects test is to be introduced.¹⁶¹ Such a requirement would preclude liability in cases where, for example, a dominant firm ceases production in Australia and thereby substantially lessens competition in a market.

C Uncertainty?

79. ***The proposed effects test will make compliance with s 46 less certain partly because, unlike the current purpose test, an effects test requires information that a corporation with market power does not readily have.***¹⁶²

[An effects based prohibition] requires the firm to assess the likely effect of its conduct where it cannot have full information about the likely competitive options of

¹⁵⁷ 'Morrison to unveil competition law changes', AFR, 23 March 2017, 7.

¹⁵⁸ Compare eg 'Small business lobby worried by effects test,' AFR, 17 January 2017, 4; with D Gilbert, 'Harper competition recommendation too broad, will deter rivalry' The Australian, 5 October 2016.

¹⁵⁹ See eg the misguided concern about the mandatory factors in C Emerson, 'Coalition sells out to consumers', AFR, 28 March 2017 38.

¹⁶⁰ See ABA, *Antitrust Law Developments (Seventh)*, Vol , ch 2; J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 4; R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) ch 4. Compare PE Areeda and H Hovenkamp, *Antitrust Law* (2nd ed, 2002) ¶651a (exclusionary conduct = acts that (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (a) do not benefit consumers at all, or (b) are unnecessary for the particular consumer benefits that the acts produce, or (c) produce harms disproportionate to the resulting benefits).

¹⁶¹ See eg Competition Act 1998 (South Africa) s 8(c)(d); as discussed in K Kemp, 'The South African Example: A Legislated Effects-Based Test and Efficiency Defence for Misuse of Market Power', Submission to the Competition Policy Review, 29 April 2014, at http://competitionpolicyreview.gov.au/files/2014/06/Kemp_K.pdf.

¹⁶² Russell McVeagh, 'Final Report of Australian 'Root and Branch' competition review released: A blueprint for NZ's 'bonsai' review of the Commerce Act?' 1 April 2015, 1, at: <http://www.russellmcveagh.com/Publications/ViewPublication/tabid/176/Title/final-report-of-australian-root-and-branch-competition-review-released-a/pid/381/Default.aspx>

other market participants. This can have the undesirable, and potentially chilling effect of uncertainty, leading to inaction.

A firm's conduct can have effects in downstream or upstream markets it is not active in. Here, the firm has even less of the information required to undertake the necessary effects assessment.¹⁶³

80. There is some force in this concern. However, corporations with market power are accustomed to making SLC assessments under s 45 and s 47, as Rod Sims, Chairman of the ACCC, has emphasised.¹⁶⁴

Firms large and small are subject to section 45 of the Act. This section prohibits a corporation from making a contract, arrangement or understanding that has the purpose or likely effect of substantially lessening competition.

This section can potentially capture conduct that is largely unilateral in nature. For example, contracts entered into by a firm to acquire all of an input necessary for the establishment of a major new competitor may have the purpose or effect of substantially lessening competition. Despite the contractual element of the conduct this conduct is unilateral in nature and could be captured by section 45. ...

The point is that firms, large and small, have for a long time been operating in an environment where they must assess whether their conduct is likely to substantially lessen competition. There is little or no evidence that I am aware of that operating within this law is deterring firms, large or small, from competing aggressively.

That said, there are differences between the assessment of agreements and the assessment of unilateral conduct.¹⁶⁵

... cases involving agreements are different in the sense that the firms can always choose not to make an agreement, or to make a different agreement, or amend some aspect of it to comply with objections under competition law. The firms are also more likely to have detailed knowledge of the effect of an agreement on their output and to be able to quantify the synergies created by cooperation. The same cannot generally be said of most unilateral conduct.

81. ***The main area of uncertainty in the proposed s 46 is the SLC test.*** Although the SLC test is familiar and long-standing, the meaning of the core concept of 'substantial' is vague. As discussed in Section V above, the term 'substantial' is pivotal to the operation of the SLC test but much in need of clarification. For instance,

¹⁶³ However, unlike the position under the Harper Report and the Exposure Draft Bill, the required SLC effect cannot be in 'any other market': the proposed s 46(1)(a)(b) and (c) limit the scope of s 46 to situations where there is an actual or likely supply or acquisition of goods or services by the corporation or another prescribed entity.

¹⁶⁴ 'Section 46: the Great Divide', Competition Law Conference, Sydney, 30 May 2015, 6-7, <https://www.accc.gov.au/speech/section-46-the-great-divide>.

¹⁶⁵ R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 381.

it is unclear what degree of lessening of competitive rivalry is required or over what period of time the effect or likely effect on competition needs to be assessed. The Harper Report did not address this vagueness but would extend it to unilateral conduct under s 46. The Explanatory Memorandum to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 tries to dodge the problem by offering this sop:¹⁶⁶

‘Substantially lessening competition’ is an existing concept within the competition law, and the jurisprudence that has developed under other provisions of Part IV of the Act will inform the application of this test to section 46.’

D Efficiencies?

82. ***The proposed SLC test in s 46 is fundamentally incapable of taking adequate account of efficiencies.*** The proposed s 46 under the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 introduced last December 2017 (and under the Exposure Draft Bill) included mandatory factors. These mandatory factors required account to be taken of efficiencies when applying the SLC test under s 46 but did not override the SLC test. The Government now proposes to remove the mandatory factors.¹⁶⁷ This has been a tempest in a teapot because, with or without the mandatory factors in question, the proposed SLC test does not take efficiencies into account except to a limited and insufficient extent.
83. ***The proposed effects test recognises efficiencies to the extent that they promote competitive rivalry but does not carve out cases where efficiencies have the effect (or likely effect) of substantially lessening competition yet promote consumer welfare.***¹⁶⁸ Assume that a monopoly supplier of rare earth materials decides to cease supplying those materials because it has acquired a major technology manufacturer and wants to use all the materials in order efficiently to manufacture superior high-technology products with strong export as well as domestic potential. Assume further that the refusal to continue to supply rare earths is likely to raise downstream rivals’ costs so considerably as to drive them out of business over the next 18-24 months. It is difficult to see why that welfare-enhancing

¹⁶⁶ [1.27].

¹⁶⁷ ‘Morrison to unveil competition law changes’, AFR, 23 March 2017, 7.

¹⁶⁸ On the limited relevance of efficiencies under the SLC test see S Corones, *Competition Law in Australia* (6th ed, 2014) [1.170]; Gilbert + Tobin, ‘Where to now for big business, small business and market power? (2015) at: <http://ecomms.gtlaw.com.au/rv/ff001e946600b6f9cde38f2982459a1307b93802>. See also R O’Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 430-431. An effects test for misuse of market power has existed in the telecommunications sector under s 151AJ of the CCA since 1997 with little apparent protest about neglect of efficiencies considerations.

conduct would not entail a likely substantial lessening of competition in the downstream markets affected.¹⁶⁹ The process of rivalry test under the *QCM/I* canon is a test of competitive rivalry, not a test of consumer welfare.¹⁷⁰ ‘Competition on the merits’,¹⁷¹ ‘normal competition’ and ‘genuine undistorted competition’ promote consumer welfare but in some circumstances consumer welfare may be promoted by conduct that substantially lessens competition. The proposed ACCC guidelines on s 46 cannot plug the gap between the SLC test and a consumer welfare test. Those seeking exemption in such cases will need to apply for authorisation, a solution that is cumbersome and bureaucratic.¹⁷² By contrast, the Draft Report¹⁷³ proposed a defence requiring a corporation to prove that the conduct in question would be: (a) a rational business decision by a corporation that did not have a substantial degree of power in the market; and (b) likely to have the effect of advancing the long-term interests of consumers.¹⁷⁴ That defence was criticised in submissions on various grounds including impracticality¹⁷⁵ and was rejected in the Harper Final Report.

84. ***Efficiencies are relevant to the extent that they are likely to increase competition.***¹⁷⁶ Thus, if a MFC restraint caused a lessening of one aspect of

¹⁶⁹ Perhaps the monopolist's new plan might *increase* competitive rivalry in the market(s) for the high-technology products and that increase might offset the reduction in competitive rivalry in the market for the rare earth materials. However, the SLC test as currently interpreted (and as it would be under the Harper Report, the Exposure Draft Bill and the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016) does not support such an offset between competition effects in one market with those in another. The Explanatory Memorandum to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 at [1.31] states that: ‘The requirement to consider both anti-competitive and pro-competitive conduct emphasises that section 46 is not intended to capture conduct that is pro-competitive overall’ is not true in this context. Thanks are due to Katharine Kemp for these comments on the example given in the text.

¹⁷⁰ *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169 at 188-189.

¹⁷¹ See eg R O’Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 361-362.

¹⁷² Note that, as is the position in the EU, the proposed block exemption mechanism would not apply to misuse of market power.

¹⁷³ Competition Policy Review Draft Report September 2014, at: <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>.
¹⁷⁴ Draft Report, Draft Recommendation 25. Compare NZ Productivity Commission, *Boosting productivity in the services sector*, Report 133 (May 2014), 134.

¹⁷⁵ See eg Submission by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia, 20 November 2014, 17-19, at: http://competitionpolicyreview.gov.au/files/2014/12/LCA_Competition.pdf. On the consumer welfare defence under Article 102 of the TFEU see R O’Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 5.4.3.

¹⁷⁶ See *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-752, 40,733; *Fisher & Paykel v Commerce Commission* [1990] 2 NZLR 731; *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* [1997] TCLR 463. See further S Corones, *Competition Law in Australia* (6th ed, 2014) 42; T Leuner, ‘Time and the dimensions of substantiality’ (2008) 36 ABLR 327, 343; K Kemp, ‘A Comparative Analysis of Effects-Based Tests for Unilateral

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.¹⁷⁷ 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.

85. ***Efficiencies do not negate liability under the proposed s 46 SLC test if the conduct has the net effect or net likely effect of substantially lessening competition in a relevant market.***¹⁷⁸ The proposed s 46 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 to consumer welfare. For example, MFC clauses in long-term contracts may reduce the extent of rivalrous competition but promote consumer welfare by facilitating efficient price adjustment.¹⁷⁹ As in the setting of s 45, authorisation is the escape route in cases caught by the SLC test where the SLC detriment is outweighed by an increase to consumer welfare. A rule of reason would reduce the dependency on the authorisation process (see Section V above).

E Guidelines?

86. ***Useful guidelines on the proposed s 46 SLC test have yet to emerge.*** No set of worked examples demonstrate exactly how the SLC test is meant to work under the proposed revised s 46. The draft guidelines circulated by the ACCC in September

Anticompetitive Conduct' (2016) 39-41, at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731414.

¹⁷⁷ See further B Fisse, 'Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge' (2016) 44 ABLR 325, 350-355.

¹⁷⁸ 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.

¹⁷⁹ 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.

2016¹⁸⁰ are only a 'framework', not actual guidelines. The framework and the examples given fall well short of what is needed.¹⁸¹

87. Unfortunately, any proximate attempt to provide detailed guidelines on the operation of the effects test under s 46 will quickly expose two inconvenient truths:

(a) the test of 'substantial' in the SLC test is so vague as to defy illustration by means of instructive worked examples; and

(b) the SLC test is a competition test, not a test that assesses whether or not a substantial lessening of competition is justified by efficiencies.

VII Conclusion: Towards Innovation, Agility and Growth in Australian Competition Law

88. The Harper Report, the Exposure Draft Bill and the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 leave much to be desired in relation to cartels, anticompetitive agreements and misuse of market power. Significant practical questions remain unresolved. This paper has sought to identify those questions and to inquire if anything can be done to resolve or at least to alleviate them.

89. Headlines:

Cartel Prohibitions (Section II)

- The broad potential reach of s 44ZZRD(2) remains.
- Overreach can result from s 44ZZRD(2).
- Does s 44ZZRD(2) require or allow a counterfactual analysis of what the price to be charged would be without the price fixing provision?
- The unsatisfactory concept of 'purpose of a provision' survives.
- The meaning of 'likely' in s 44ZZRD(2) has yet to be settled definitively.
- Reduction of output, allocation of customers and bid rigging under s 44ZZRD(3) raise significant questions of interpretation.

¹⁸⁰ ACCC, Draft Framework for Misuse of Market Power Guidelines, September 2016, at: <https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark/>.

¹⁸¹ For some of the issues see LCA, Business Law Section, Competition and Consumer Committee, Submission, 'Framework for Misuse of Market Power Guidelines', 26 October 2016, '<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/submissions/3197---Framework-for-Misuse-of-Market-Power-Guidelines.pdf>'.

- The repeal of the limited definition of the term 'likely' in s 44ZZRB is a footling change.
- The Exposure Draft Bill amends the competition condition in s 44ZZRD(4) by requiring that the alleged competitors compete in relation to goods or services in trade or commerce within Australia or between Australia and places outside Australia.
- The cartel offences enacted in 2009 have been the subject of only two prosecutions to date, against corporate accused.
- The Harper Report did not address several burning questions about the cartel offences.

Price Signalling and Concerted Practices (Section III)

- Part IV Division 1A produces overreach.
- Part IV Division 1A suffers from underreach.
- Part IV Division 1A occasions uncertainty.
- The SLC test in s 45(1)(c) may occasion overreach because it is incapable of taking efficiencies adequately into account.
- There is no competition condition in the proposed prohibition against concerted practices.
- Underreach is likely to arise from the inclusion of a SLC test as a necessary element of the proposed prohibition against concerted practices.
- Uncertainty is likely to arise from the failure to define the concept of 'concerted practice'.

Cartel Exemptions (Section IV)

- The proposed s 44ZZRS exemption is important in the many situations where pro-competitive supply or acquisition agreements between competitors control a price or impose a restriction that amounts in law to a cartel provision.
- The proposed s 44ZZRS exemption is important in dual distribution arrangements where the principal and the agent are competitors under the decision of the High Court in the *Flight Centre* case.

- The High Court decision in *Flight Centre* extends the scope of per se liability for cartel-related conduct in the context of dual distribution arrangements
- The decision in *Flight Centre* will imperil MFC and price parity clauses in online dual distribution arrangements if an online platform is characterised as being a competitor of the supplier of services available to consumers directly from the supplier or on the online platform.
- In the wake of *Flight Centre*, existing or forthcoming dual distribution contracts, arrangements and understandings will need to be checked for compliance with cartel prohibitions under Part IV Division 1 and the prohibitions relating to exclusionary provisions under s 45.
- The exemption of supply/acquisition agreements under the Exposure Draft Bill (s 44ZZRS) would exclude cartel-related liability in many situations including the type of situation that arose in *Flight Centre*.
- The proposed s 44ZZRS exemption is narrower than the current s 44ZZRS exemption in some respects and should be broadened.
- The proposed s 44ZZRS exemption (and other Harper reform exemptions) should apply retrospectively.
- The term 'joint venture' remains uncertain.
- Australia should follow world best practice and adopt the concept of a 'collaborative activity' instead of that of a 'joint venture'.
- The proposed condition that the cartel provision be 'for the purposes' of a joint venture echoes the current law but remains obscure.
- The proposed alternative condition that the cartel provision be 'reasonably necessary for undertaking a joint venture' falls short in several significant respects.

Agreements Substantially Lessening Competition and Exclusive Dealing (Section V)

- Uncertainty arises starkly from the obscure meaning of 'substantial' in the SLC test.
- Various potentially significant questions are entailed by the SLC test but have rarely been discussed.
- There is no rule of reason test to take efficiencies adequately into account.

- The separate prohibition of exclusive dealing under s 47 is unnecessary and mischievous but has been retained.

Misuse of Market Power (Section VI)

- The proposed amendments to s 46 do not require *exclusionary conduct* that has the purpose, effect or likely effect of substantially lessening conduct in a market.
- The proposed effects test will make compliance with s 46 less certain partly because, unlike the current purpose test, an effects test requires information that a corporation with market power does not readily have.
- The main area of uncertainty in the proposed s 46 is the SLC test.
- The proposed SLC test in s 46 is fundamentally incapable of taking adequate account of efficiencies.
- The proposed effects test recognises efficiencies to the extent that they promote competitive rivalry but does not carve out cases where efficiencies have the effect (or likely effect) of substantially lessening competition yet promote consumer welfare.
- Efficiencies are relevant to the extent that they are likely to increase competition.
- Efficiencies do not negate liability under the proposed s 46 SLC test if the conduct has the net effect or net likely effect of substantially lessening competition in a relevant market.
- Useful guidelines on the proposed s 46 SLC test have yet to emerge.

90. Big pictures:

- **Many of the proposed changes to the CCA, if enacted, will be welcome, eg:**
 - repeal of the prohibitions relating to exclusionary provisions
 - repeal of Part IV Division 1A
 - repeal of the prohibitions against third line forcing
 - repeal of the Birdsville amendment (fake predatory pricing)
 - extension of authorisation to s 46 and revision of test to cover cases where there is no SLC but not necessarily an overriding public benefit

- amendment of s 83 (admissions of fact in certain proceedings as prima facie evidence)
- extension of s 155 to cover investigations of alleged contraventions of court enforceable undertakings).
- **Some proposed changes are troubling and may need correction:**
 - the concept of a 'concerted practice' is undefined
 - the proposed s 44ZZRS exemption and proposed changes to ss 44ZZRO and 44ZZRP are not retrospective
 - the requirement for the joint venture exemptions that the cartel provision be 'reasonably necessary for undertaking a joint venture' is not a necessary condition and is not clarified by guidelines
 - the unnecessary and mischievous s 47 (exclusive dealing) is retained
 - the effects test in the proposed s 46 (misuse of market power) is prone to overreach and uncertainty and is not clarified by useful guidelines.
- **There are questionable major omissions:**
 - lack of inquiry into why the cartel offences introduced in 2009 have been such a damp squib
 - no attempt to address the uncertainty of the core concept of 'substantial' in the SLC test
 - no development of a rule of reason for anticompetitive agreements and misuse of market power.