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The Intriguing Concept of "Give Effect to" – *Ketki Kotwal*

The concept of "giving effect" to a provision in a contract, arrangement or understanding as seen in s 45(2)(b) of the Competition and Consumer Act 2010 (Cth) (CCA) has been discussed extensively in case law and is the next logical step which flows from parties entering into a contract, arrangement or understanding in s 45(2)(a). Although a contravention of the CCA can occur without parties giving effect to a provision, showing that a party has "given effect" to a provision will strengthen the case in establishing a contravention of s 45. While the concept of "giving effect" appears straightforward and is suggestive of positive steps taken to further an agreement, there are various facets to this concept which make it an interesting point of analysis especially when one considers its interpretation by the courts. This discussion is also relevant to the cartel provisions contained in ss 44ZZRG and 44ZZRK of the CCA. 251

Most Favoured Nations: When a Clause Falls Out of Favour – *Carolyn Oddie and Amanda Richman*

Most favoured nation clauses (sometimes referred to as price parity clauses) have received a mixed reception from competition law regulators around the world. In a number of jurisdictions they have been found to be anti-competitive. The Australian Competition and Consumer Commission (ACCC) has raised concerns that these clauses have the potential to substantially lessen competition and have investigated the use of Most Favoured Nation (MFN) clauses by online travel agents Booking.com and Expedia. Further, the ACCC brought proceedings against Flight Centre Travel Centre Ltd for the travel agent's attempt to obtain commitments from certain airlines that would have been to similar effect as an MFN clause. The ACCC alleged, and the High Court found, that the conduct constituted an attempted price fixing arrangement. This article considers "wide" and "narrow" MFN clauses, the competition law concerns to which they can give rise, and the approach of the Australian regulator compared to the various approaches taken by regulators in the European Union. 259

Proving Corporations Are Agents: Problems and Solutions – *David Godwin*

A line of authority has emerged in Australia which recognises a form of agency by which a court can attribute the actions and liabilities of a subsidiary to the parent holding company. The most recent consideration of the relevant factors to establish agency has been in the context

of regulatory enforcement proceedings under the Competition and Consumer Act 2010 (Cth). This article examines the circumstances where the courts have implied agency. The review of authority reveals that it is essentially a factual inquiry as to whether the subsidiary is in truth independent of the holding company. The article proposes that where the question of agency arises in the context of determining liability for a breach of a regulatory rule, the fact finding process should be framed against the particular conduct in issue – including who received the benefit of that conduct. Further the fact that the corporate group is well placed to rebut the inference that a subsidiary is acting as the holding company's agent ought to be a weighty matter when drawing inferences in such cases..... 270

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