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Law Council
OF AUSTRALIA
Business Law Section

Competition and Markets Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TandApricingconsultation@treasury.gov.au

Dear Sir/Madam,

Online bookings—restrictions on tourism and accommodation providers setting prices

The Competition and Consumer Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on Treasury's consultation paper on 'Online bookings—restrictions on tourism and accommodation providers setting prices'.

EXECUTIVE SUMMARY

The Committee makes the following key points.

- Price-parity clauses are not unique or specific to the tourism and accommodation sector and are likely to be used in many other sectors, including by other online platforms. Before adopting any additional regulation, Treasury should consider whether sector specific regulation is appropriate and warranted, having regard to the extent of any consumer and competitive harm in the tourism and accommodation sector, and whether existing regulation is inadequate to constrain such harm.
- For the reasons discussed below, online booking platform price-parity clauses can, depending on the circumstances, promote or harm consumer welfare, which suggests that further detailed consideration is warranted before proposing any regulation on their use, whether on a sector- or economy-wide basis.
- Treasury should consider how price-parity clauses are currently regulated under Australian competition law, and whether the existing regulatory framework under the *Competition and Consumer Act 2010* (Cth) (**CCA**) is unclear or deficient in

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regulating such clauses, noting that this does not seem to be considered in Treasury's consultation paper. Any sector-specific regulation, if adopted, should not create legal uncertainty for operators in other sectors with respect to the status of any price-parity arrangements.

- If regulation is considered necessary, it may be appropriate for Treasury to have regard to how online booking platform price-parity clauses are regulated in other jurisdictions, where regulation has tended to be economy-wide (rather than sector-specific) and has focussed more on regulating so-called "wide MFNs", with varying approaches to whether this extends to offline as well as online markets, for firms that meet market share or other thresholds.

The Committee would welcome the opportunity to comment on any proposed legislative changes with respect to price-parity clauses.

Sector specific regulation

1. Price-parity clauses are not unique to the tourism and accommodation sector and are likely to be used in many other sectors, including by other online platforms. Further, as Treasury notes in its Consultation Paper, the largest online accommodation platforms, Booking.com and Expedia, have already agreed with the ACCC not to use certain price-parity arrangements.[1] Given this, if regulation is considered to be necessary, Treasury should then consider whether sector-specific regulation is appropriate, including whether there is evidence demonstrating identified and significant consumer and competitive harm arising from price-parity arrangements, and whether existing regulation of such clauses under the CCA is inadequate or deficient.

The pros and cons of online booking platform price-parity clauses

2. To assist Treasury in understanding the potential scope for consumer or competitive harm arising from the use of price-parity clauses—and potential benefits—this section summarises the theoretical and empirical literature on whether and when platform price-parity clauses are likely to benefit or harm consumer welfare.[2] The theories focus on price-parity clauses (sometimes also referred to as most favoured nation clauses or MFNs) that restrict the price not only on the seller's own website but also on rival platforms (so called "wide MFNs"). Price-parity agreements that restrict the price on the seller's own website only (so called "narrow MFNs") are discussed further below.

[1] 'Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels', 2 September 2016, available at https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels.

[2] For a discussion of the theoretical reasons why platform price-parity clauses may benefit or harm consumer welfare, see Lear, 'Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements', September 2012, A report prepared for the OFT by Lear, OFT 1438, paras 0.2, 0.34-0.37, 6.47, 6.49, 6.54-6.61, 6.66-6.75, and Jonathan B. Baker and Fiona Scott Morton, 'Antitrust Enforcement Against Platform MFNs', *The Yale Law Journal,* Vol. 127, No. 7, May 2018, pp 2,176-2,202. Sean Ennis, Marc Ivaldi and Vicente Lagos, 'Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change', Journal of Law and Economics (forthcoming) also summarises the theoretical and empirical literature.

3. There are several theories as to why platforms may use price-parity clauses in a way that is likely to enhance consumer welfare. The potential benefits of cross-platform parity agreements include the following.

    a. A platform may use a price-parity clause to signal to consumers that it has low prices. This can be used to signal to consumers that the platform has the lowest price and so they do not need to shop around. They can also be used by a platform that provides additional features or a better service to signal that these do not come at the cost of higher prices to consumers.

    b. As recognised at page 4 of the Treasury's consultation paper, an online booking platform may use a price-parity clause to prevent a hotel or another online booking platform free riding on its investment. This can occur when the platform invests in providing a superior customer experience or other features that consumers value when finding a hotel, and a consumer uses the superior platform to find a hotel room and then books through the hotel's own website or an inferior online booking platform to take advantage of a lower price. Absent the price-parity clause, the superior platform may be unable to recoup its investment in providing a superior service, which would diminish its incentive to invest in the first place.

4. There are also several theories as to how across platform price-parity clauses can harm consumer welfare.

    a. Platform price-parity clauses can potentially reduce competition on commissions, which can lead to higher prices to consumers. A platform may ordinarily lower the commission it charges hotels in the expectation that the hotel would lower the prices for hotel rooms it lists on the online booking platform and thereby increase its sales. However, if the hotel has agreed to a price-parity clause with another platform, then to lower its price for hotel rooms on the platform that is offering lower commissions, it would have to lower prices on the other platform as well. This would reduce the benefit to the platform offering lower commissions and thereby reduce its incentive to cut commissions in the first place. Platforms charging higher commissions than they otherwise would to hotels can then also feed through into higher prices for consumers for hotel rooms.

    b. Platform price-parity clauses can potentially make it harder for a new entrant to compete. A new entrant may typically try to charge low commissions in the expectation hotels would then offer low prices on its platform to establish a customer base. If hotels either do not pass on a reduction in commissions (or do not reduce prices of the entrant relative to rival platforms), this may reduce the effectiveness of the entrant cutting commissions. In turn, this may make new platform entry more difficult, and lead to less competition and higher prices for consumers.

5. While narrow MFNs can have more limited benefits to platforms, they also have potential for consumer harm.

    a. Narrow MFNs can be used by the platform to signal that it has low prices by indicating that the consumer would not be able to book a hotel room more cheaply through the hotel's own website. They can also be used to prevent free riding by the hotel on investments made by the platform.

    b. A potential for harm to consumer welfare comes from eliminating the constraint from the hotel on prices charged by the platform, to the extent that the hotel may have been likely to charge lower prices than the platform absent the price-parity agreement.

    c. Further, a series of overlapping narrow MFNs can replicate the effect of wide MFNs. If one hotel has a price-parity clause with booking platform A and a price-parity clause with booking platform B, this may lower its incentive to offer lower prices in response to a reduction in commission by platform A. Absent the price-parity clause with platform B, the hotel may have lowered its prices on platform A in response to reduced commission by platform A, as well as on its own website to avoid platform A cannibalising its sales. However, the price-parity clause with platform B would mean that the hotel would not be able to lower its prices on its own website without also reducing prices listed on platform B. This may thereby reduce the incentive of the hotel to respond to reduced commission on platform A by lowering its prices on platform A.

6. Given the potential for price-parity clauses to give rise to **both** pro- and anti-competitive effects, the particular effects in particular circumstances are likely to be fact-specific. This makes it important to examine empirical evidence of whether consumer or competitive harm is in fact likely, or that such harm has occurred.

7. The empirical evidence to date of the effects of wide and narrow MFNs, respectively, on consumers remains inconclusive. There is limited evidence that overall prices to consumers have fallen following moves to prohibit wide and narrow MFNs—in other words, banning price-parity clauses has not necessarily led to lower prices.

    a. The European Competition Network (**ECN**) examined the impact of moving from wide to narrow MFNs by Booking.com and Expedia in July and August 2015 respectively in ten European countries. The ECN examined hotel prices in Europe compared to those in Canada where MFNs were not banned. The ECN found that price dispersion for hotel rooms increased for eight out of the ten countries but could not rule out that this may have been due to product differentiation across the platforms. The results were seemingly driven by changes for chain hotels rather than independent hotels. Online booking

platform commission rates were also reported to have remained relatively stable.[3]

b. Hunold et al examined trends in hotel prices across different countries. They found that the removal of Booking.com's narrow MFN in Germany was associated with the direct channel of chain hotels having the lowest price more often, but did not find this for independent hotels.[4]

c. In a 2022 study, Ennis et al examined the move from wide to narrow MFNs for some EU countries by comparing hotel prices in the EU countries to hotel prices in other countries worldwide that were unaffected by MFN changes. They found that hotel direct sales became relatively cheaper than online hotel booking platforms for mid-level and luxury hotels, and more expensive for budget hotels.[5]

d. Mantovani et al (2021) also examine the effect of the French move to outlaw all MFNs in 2015. They compared hotel prices in the neighbouring islands of Corsica (France) and Sardinia (Italy), with the latter unaffected by the change. They found some evidence that prices on Booking.com were lower in the first two and a half months immediately following the change but the results were inconclusive over a longer one-year time period.[6]

e. A Bundeskartellamt study reports that online booking platforms did not change their commission rates following the Bundeskartellamt's decisions to ban wide and narrow MFNs respectively in Germany.[7]

f. Outside the online hotel booking sector, the UK Competition and Markets Authority (**CMA**) analysed the move from wide to narrow MFNs for price comparison websites for private motor insurance in the UK. Based on data from the four providers for 2010–16, the CMA found that commissions charged by price comparison websites were 3–4% higher with MFNs than they would have been, albeit the CMA did not examine the effects on retail prices charged to consumers.[8]

Regulation of price-parity clauses currently under Australian competition law

8. Treasury's consultation paper seeks to identify any action, including legislative change, that may be necessary to regulate the use of price-parity clauses by online booking

[3] Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden and UK competition authorities and EU Commission, 'Report on the monitoring exercise carried out in the online hotel booking sector by EU competition in 2016', 6 April 2017. See, in particular, paragraphs 11, 13 and 22, and Appendix 1.
[4] Matthias Hunold, Reinhold Kesler, Ulrich Laitenberger and Frank Schlutter, 'Evaluation of Best Price Clauses in Online Hotel Bookings', 2018, 61 International Journal of Industrial Organisation, pp 542-571.
[5] Sean Ennis, Marc Ivaldi and Vicente Lagos, 'Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change', Journal of Law and Economics (forthcoming).
[6] Andrea Mantovani, Claudio Piga and Carlo Reggiani, 'Online Platform Price Parity Clauses: Evidence from the EU Booking.com Case', 2021, 131 European Economic Review 103625.
[7] Bundeskartellamt, 'The effects of narrow price parity clauses on online sales – Investigation results from the Bundeskartellamt's Booking proceeding', August 2020, para 191.
[8] CMA, 'Digital comparison tools market study, Final report, Paper E: Competitive landscape and effectiveness of competition', 26 September 2017. See, in particular, Appendix 2.

platforms. The Committee considers it important to note that price-parity clauses are already regulated by the CCA, under:

a. the prohibition on contracts, arrangements or understandings, or concerted practices, in section 45;

b. the prohibition on misuse of market power in section 46; and

c. where the parties to the price-parity arrangements are, or are likely to be, in competition with each other with respect to the supply or acquisition of relevant goods/services—the offences and prohibitions against cartel conduct.

9. With respect to (c), whether parties are in competition with each other (and therefore subject to the cartel conduct offences and prohibitions) is a broad concept and, relevantly, can extend to agency models, including those that may be used by online platforms. The High Court majority decision in *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd,*[9] established that dual distribution models—including, for example, an accommodation provider supplying directly through its own website and via agency arrangements with an online booking platform—can attract the operation of the cartel provisions of the CCA. More specifically, the decision established that actual or purported restrictions on price in the context of dual distribution models (including agency) can constitute cartel conduct. In the *Flight Centre* case, the majority of the High Court concluded that Flight Centre had engaged in attempted price fixing (in contravention of s 45(2)(a)(ii) of the then *Trade Practices Act 1974* (Cth)),[10] on the basis that Flight Centre:

a. while an agent for the airlines, competed with the airlines in the market "for supply of contractual rights to international air carriage via the sale of airline tickets". The presence of an agency relationship between Flight Centre and the airlines did not necessarily preclude the existence of competition, in circumstances where Flight Centre had discretion in setting its own prices and was not obliged to act in the airline's interests;[11] and

[9] (2016) 261 CLR 203 (***Flight Centre***). In this case, Flight Centre acted as a ticket sales agent for certain airlines. Under the agency arrangements, airlines would make seats available via its electronic reservation system (known as the Global Distribution System or (**GDS**)) to Flight Centre for a 'nett' fare. While Flight Centre was free to sell tickets to customers at any price, it was obliged to remit the 'nett' fare to the airline less an agreed commission (Flight Centre, 214). Separately, airlines were offering direct ticket sales for seats that were not available to Flight Centre via the GDS, and at prices below the 'nett' fare published to Flight Centre. (Flight Centre, 236 and 255.) The ACCC alleged that Flight Centre engaged in attempted price fixing in correspondence with the airlines complaining about this issue, and requesting it was able to access all seats via the GDS so Flight Centre could avoid making a loss on sales, on account of its 'price beat guarantee'. The primary question on appeal to the High Court concerned whether a principal and its agent could be regarded as being in competition for the supply of goods or services sold by the agent on behalf of the principal, if the principal deploys a dual distributional mode. (Flight Centre, 206.)

[10] While *Flight Centre* was decided under the TPA, the decision remains relevant to the cartel provisions of the CCA, which prohibit (amongst other things) terms that have the purpose or effect of fixing, controlling or maintaining the price of goods or services supplied by parties that are, or would otherwise be, in competition with one another in supplying those goods or services: CCA, s 45AD. It is an offence to enter into a contract, arrangement or understanding that contains a cartel provision, or to give effect to a cartel provision: CCA, ss 45AF and 45AG.

[11] Flight Centre, 232 (Kiefel and Gageler JJ), 247 (Nettle J) and 260 (Gordon J).

b. had attempted to induce the airlines to agree not to sell tickets directly to customers below the 'nett' fare published to Flight Centre.[12]

10. Noting the above, the Committee considers that any proposal for specific legislative change regarding price-parity clauses—whether sector-specific or economy-wide—should take into account:

    a. the extent to which price-parity clauses are permissible in dual distribution (including those involving agency arrangements) following the *Flight Centre* decision;

    b. whether price-parity clauses should be regulated within the broader set of commercial agreements covered by legislation governing vertical supply arrangements;[13] and

    c. the interaction with existing cartel and misuse of market power provisions under the CCA, including whether any legislative exceptions may be required to ensure harmonious operation of the respective provisions, and avoid uncertainty.

11. A further consideration in evaluating any proposed legislative reform will be whether any such change is in fact necessary, given that, as noted above, the ACCC successfully relied on the existing regulatory framework, including its existing investigation powers, in 2016 to secure agreements from Booking.com and Expedia to remove certain price-parity clauses from their contracts with Australian accommodation providers.[14]

12. The Committee would welcome the opportunity to comment on any proposed legislative changes with respect to price-parity clauses.

How different jurisdictions deal with online booking platform price-parity clauses

13. To assist Treasury, this section discusses how different jurisdictions have approached and sought to regulate price-parity clauses used by online booking platforms. In particular, the section discusses the approaches taken in the EU, country-specific regulations in EU jurisdictions, and the approaches in the UK and the US. As set out below, other jurisdictions have tended to adopt economy wide approaches to regulating price-parity clauses, rather than a sector-specific approach.

14. At the EU wide level, the vertical block exemption regulations (**VBER**) and the Digital Markets Act (**DMA**) apply market share and size thresholds to help determine the permissibility of platform MFNs.

    a. VBER does not allow wide retail MFNs used by "online intermediation services" (**OIS**) to benefit from the safe harbour under VBER; they require individual

[12] At the time, s 45A(1) of the TPA provided that a provision was deemed to have the purpose, effect or likely effect of substantially lessening competition if it had the purpose, effect or likely effect of fixing, controlling or maintaining the price for services supplied by the parties or any of them in competition with the other. This deeming provision has since been repealed.
[13] In relation to vertical supply arrangements, we note the observations and model drafting prepared by the Harper Committee in the 'Competition Policy Review Final Report', March 2015. Arguably, price-parity clauses may be appropriately regulated under a revised form of the section 47 of the CCA (see Appendix A and pages 364-365 of the Final Report).
[14] ACCC, 'Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels', 2 September 2016.

assessment. Vertical agreements with narrow MFNs (or wide MFNs used by providers other than OIS) can benefit from the safe harbour if the share of both parties to the MFN is less than 30 per cent and there are no "hardcore" restrictions.[15]

b. The DMA prohibits all MFNs used by so-called "gatekeepers" that meet various revenue and user-base size thresholds, including EUR 7.5 billion EU turnover in each of the last three financial years or an average market capitalisation of EUR 75 billion in the last financial year, and 45 million monthly active users and at least 10,000 yearly active business users in the EU.[16]

15. Within EU countries, the approach to platform MFNs, including within the accommodation sector, has changed over time and varies across countries.

a. Following competition law investigations, the French, Italian and Swedish competition authorities accepted five-year commitments from Booking.com to replace wide MFNs with narrow MFNs in April 2015.[17] Booking.com applied this EU-wide from July 2015 and Expedia did the same in August 2015.[18]

b. Also in 2015, the Bundeskartellamt concluded that all Booking.com's MFNs were anti-competitive (including narrow MFNs), and its ban came into effect in February 2016; and the French government banned all MFNs (including narrow MFNs) in August 2015.[19]

c. In 2019, a German court overturned a ban on narrow MFNs, but this was subsequently reversed by the highest German court in 2021 to reinstate the ban.[20]

d. Between 2016 and 2018, the Austrian, Italian and Belgian governments banned all MFNs (including narrow MFNs).[21]

16. In the UK, the Vertical Agreements Block Exemption Order (**VABEO**) treats wide retail MFNs (online and offline) as a hardcore restriction, whereas narrow MFNs can be exempt from the Chapter 1 prohibition of the Competition Act 1998 on agreements which prevent, restrict or distort competition if the market shares of the parties are below 30 per

[15] Commission Regulation (EU) 2022/720 of 10 May 2022 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, and EC, 'Guidelines on vertical restraints' 30 June 2022, 2022/C 248/01.
[16] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
[17] Autorité de la Concurrence, Decision 15-D-06, 21 April 2015, Autorità Garante della Concorrenza e del Mercato, Decision of 21 April 2015, and Swedish Competition Authority Decision 596/2013, 15 April 2015.
[18] Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden and UK competition authorities and EU Commission, 'Report on the monitoring exercise carried out in the online hotel booking sector by EU competition in 2016', 6 April 2017, para 4.
[19] Bundeskartellamt, decision B 9 – 121/13, 22 December 2015, and Law No. 2015-990 of 6 August 2015 for economic growth, activity and equal economic opportunities (known as the "Macron Law").
[20] Dusseldorf Higher Regional Court Decision of 4 June 2019, case number VI (Kart) 2/(16) (V), and German Federal Court of Justice, case number KVR 54/20, 18 May 2021.
[21] Supra at fn 15, para 4, and Hotrec press release, 'Italy prohibits rate parity clauses of online booking platforms by law', 3 August 2017, and Hotrec press release, 'Belgium the 5th country in Europe allowing for price setting freedom for hoteliers', 20 July 2018.

cent.[22] Prior to the VABEO, the UK CMA investigated the use of wide MFNs in a number of sectors or contexts: for example, ebooks (2011),[23] Amazon marketplace (2013),[24] and in the online hotel bookings sector (2015).[25] Notably:

a. The CMA banned the use of wide MFNs between private motor insurers and price comparison websites in 2015 following a market investigation into the private motor insurance sector.[26]

b. The CMA found that Compare The Market's use of wide MFNs in the private home insurance sector infringed Chapter 1 of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union, and imposed a £17.9 million fine. However, the Competition Appeal Tribunal recently overturned the CMA's decision, including because the CMA's market definition was flawed, the coverage of wide MFNs was less than the CMA claimed, and that the CMA failed to show to an appropriate standard that the wide MFNs had anti-competitive effects.[27]

17. The US approach to platform MFNs has been led by antitrust litigation rather than outright bans, and has not to date focussed on the use of MFNs by online hotel booking platforms. While the Department of Justice successfully challenged Apple's use of MFNs in the eBook sector, which were associated with price increases,[28] the District of Columbia has to date failed in its challenge to Amazon's MFNs in the online commerce sector. The District of Columbia's case has focussed on Amazon's "fair pricing policy", which provides incentives for third party merchants to provide lowest prices on Amazon's website and otherwise lose access to Amazon's "best buy box" where most sales take place or be delisted from Amazon's website. The District of Columbia claims Amazon's practices have harmed competition and led to increased prices across all online marketplaces; Amazon claims they are pro-competitive and associated with lower prices.[29]

18. The Committee would be pleased to discuss any aspect of this submission. Please contact the Chair of the Committee, Lisa Huett at lisa.huett@au.kwm.com if you would like to do so.

[22] The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 and CMA, Vertical Agreements Block Exemption Order, CMA guidance, 12 July 2022, CMA166.
[23] CMA, ' e-books: investigation into anti-competitive arrangements between some publishers and retailers,' 1 December 2011, available at https://www.gov.uk/cma-cases/e-books-investigation-into-anti-competitive-arrangements-between-some-publishers-and-retailers.
[24] CMA, 'Amazon online retailer: investigation into anti-competitive practices,' 1 October 2013, available at https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices.
[25] CMA, 'CMA closes hotel online booking investigation,' 16 September 2015, available at https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.
[26] CMA, 'Private motor insurance market investigation', 18 March 2015.
[27] 1380/1/12/21 BGL (Holdings) Limited & Others v Competition and Markets Authority, 2022, CAT 36, published. 08/08/2022.
[28] United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015).
[29] Superior Court of the District of Columbia, District of Columbia v Amazon.com, Inc, Case Number: 2021 CA 001775, 1 August 2022. The District of Columbia filed a complaint on 25 May 2021 and an amended complaint on 10 September 2021. Amazon filed motions to dismiss the District of Columbia's allegations on 20 July 2021 and 25 October 2021. On 25 August 2022, the District of Columbia appealed the 1 August 2022 dismissal of its suit.

Yours faithfully



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