

**MISLEADING, DECEPTIVE AND BANKRUPT:  
THE SECOND READING SPEECH ON THE COMPETITION AND CONSUMER  
AMENDMENT BILL (NO 1) 2011**

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**24 September 2011**

*The Second Reading Speech on the Competition and Consumer Amendment Bill (No 1) 2011 ('CCA Bill') in the Senate on 18 August 2011 by Senator Jacinta Collins repeats the Second Reading Speech in the House of Representatives on 24 March 2011 by the Treasurer, Wayne Swan, MP.<sup>1</sup> This Second Reading Speech is pervaded by misrepresentations and half-truths, as documented in the annotations below. Such attempts by the Government to justify this widely-criticised legislation are propaganda and should fool no one. The CCA Bill represents international worst practice in the area of collusion and facilitating practices.<sup>2</sup> It should be withdrawn.*

COMPETITION AND CONSUMER AMENDMENT BILL (NO. 1) 2011<sup>3</sup>

The Gillard Government has been working since Day 1 to build up competition in the banking system and get a better deal for consumers.

In December, I announced a comprehensive package of new reforms to empower families, support smaller lenders and secure the flow of credit to our economy.

These build on the decisive actions we took during the global financial crisis to preserve the competitive foundations of the banking system.

Our bank guarantees supported deposit funding for smaller lenders and enabled non-major banks to raise some \$65 billion in wholesale funding.

Our \$20 billion investment in Triple-A rated RMBS continues to support this critical funding market which many smaller lenders rely heavily on.

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<sup>1</sup> The Second Reading Speech in the House of Representatives does not reflect the amendments made on 7 July 2011 nor the extensive criticism and debate occurred after 25 March 2011 and continues today. This information gap is not plugged by the revised Explanatory Memorandum which merely add a recital of the amendments made in the House of Representatives on 7 July 2011.

<sup>2</sup> C Beaton-Wells and B Fisse, 'Australia's Proposed Information Disclosure Legislation: International Worst Practice', Competition Policy International, Antitrust Chronicle, 30 August 2011. See also B Fisse and C Beaton-Wells, The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>; Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>; B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28; Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 20 January 2011, at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>.

<sup>3</sup> House of Representatives Hansard, 24 March 2011, 3133.

All of this means loans are there when families need to buy a home, and credit is available when a small business wants to grow.

Competition means getting these loans at fair price - that's our objective.

Today I introduce amendments to the Competition and Consumer Act 2010 to crack down on anti-competitive price signalling and get a better deal for consumers in the banking system.

1. The CCA Bill prohibits the unilateral disclosure by a competitor of price-related information and other specified types of information. Liability is not defined in terms of collusion or the facilitation of coordination between competitors in a market. This approach is fundamentally unsatisfactory:
  - Focusing on information disclosure rather than on collusion or facilitated coordination of market conduct inevitably results in overreach and forlorn attempts to avoid overreach by means of a thicket of exceptions.
  - The CCA Bill creates new prohibitions against unilateral market conduct. However, the prohibitions do not require market power or any of the other limitations on the scope of the prohibitions against misuse of market power under s 46 of the CCA.
  - Collusion or facilitated coordination of market conduct is required for liability for information disclosure or exchange in the United States, the EU, Canada, the United Kingdom and other jurisdictions.<sup>4</sup> The approach taken in the CCA Bill is novel, unprecedented and untested.
  
2. The contention that the CCA Bill will result in a better deal for consumers is highly unpersuasive:<sup>5</sup>
  - A better deal for consumers is likely to happen only if there are more competitors. The CCA Bill does not address that structural problem.
  - Coordination of interest rates by banks is readily possible by watching and following the rates charged by other banks. The CCA Bill does not address the underlying and pervasive effect of oligopolistic interdependence.<sup>6</sup> It

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<sup>4</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 3; Global Competition Review, *Cartel Regulation* (2011); M Dabbah and B Hawk, *Anti-Cartel Enforcement Worldwide*, Cambridge University Press, Cambridge, 2009. The departure from overseas approaches was a point of criticism in a significant number of submissions made to Treasury in relation to the Exposure Draft Bill. See eg, the submissions of the Law Council of Australia (pp 12-15), Allan & Overy (pp 3-4), Gilbert + Tobin on behalf of the Australian Banking Association (pp 8-10) and Christopher Jose (pp 7-9). The submissions are available at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037>.

<sup>5</sup> See further E Knight, 'Price signalling ban just a sideshow', SMH, 6 July 2011.

<sup>6</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, section 3.2; GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 748.

also fails to recognise that corporations can signal their intentions in many subtle ways that are most unlikely to be caught by s 44ZZW or s 44ZZX.<sup>7</sup>

- If so minded, banks could readily use the continuous disclosure exception under s 44ZZY(6) as a loophole for signalling projected rate increases.<sup>8</sup>

These laws will be initially targeted at the banking sector, because the ACCC has told us there is strong evidence of banks signalling their pricing intentions to each other in a bid to undermine competition.

3. This statement fails to disclose that the main focus of the ACCC in the area of price signalling for several years before the CCA Bill was price signalling in the retail petrol sector.<sup>9</sup> Nor does it disclose that the ACCC's previous proposals for reform in this area were profoundly unsatisfactory<sup>10</sup> and were abandoned. The CCA Bill reflects the effort of the previous Chairman of the Commission to make up for that fiasco, but the Bill is another bungle. It must be wondered whether or not it is supported by the new Chairman. If it is not supported by the new Chairman then that should be made public.

We've been very clear all along that we would only extend these laws to other sectors of the economy after further detailed consideration.

4. The approach of selectively targeting the banking sector and other possible sectors by regulation under s 44ZZT is highly unsatisfactory:
  - One of the hallmarks of Australian competition law to date has been its general application across the economy.<sup>11</sup> Since the 1970s, by and large it has been accepted that competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided.
  - The gap in the present law asserted by the ACCC is not peculiar to the banking sector but, if it exists,<sup>12</sup> arises generally across the economy. The decided cases upon which the ACCC has relied to support its position that there is a gap in the law were not cases in the banking sector, but arose in the contexts of equipment manufacturing and wholesaling<sup>13</sup> and retail petrol.<sup>14</sup>

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<sup>7</sup> Consider M Porter, *Competitive Strategy* (The Free Press, New York, 1980), chs 2-4; R Smith and D Round, 'A Strategic Behaviour Approach to Evaluating Competitive Conduct', *Agenda*, Vol 5, No 1, 1998.

<sup>8</sup> See B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October).

<sup>9</sup> See ACCC, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the Price of Unleaded Petrol* (December 2007) pp 228-230.

<sup>10</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) section 3.5.

<sup>11</sup> An approach endorsed in Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) p 84; National Competition Policy Review Committee, *National Competition Policy* (1993) pp 85 et seq; 30 Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act* (2003) pp 35-37.

<sup>12</sup> See annotation 11 below.

<sup>13</sup> *TPC v Email Ltd* (1980) 43 FLR 383.

<sup>14</sup> *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321.

- Making selected goods or services subject to the proposed prohibitions by regulation is problematic. Regulations are made by the executive and are not subject to the same Parliamentary scrutiny to which legislation is subject. The criteria for determining which sectors should be prescribed have not been articulated and are likely to be difficult to formulate in practice. In response to criticism, a regulation under s 44ZZT will prescribe a process for determining the future application of the prohibitions.<sup>15</sup> This is political window dressing.

The ACCC advised me last year that it was concerned about the behaviour of 'some of the banks in signalling in advance what their response will be to a change in interest rates by the Reserve Bank'.

In the Senate Economics References Committee's banking competition inquiry, due to report this month, the ACCC gave testimony that:

'The problem with that sort of comment - the evil of it, if you like - is that it says to the competitors, "If you increase your interest rates I will follow", which means you are signalling to the competitor that if they increase their interest rates they would not need to worry about being stuck out there on their own and losing market share'.

This type of anti-competitive price signalling can be just as harmful to Australian consumers as an explicit price fixing cartel.

However, there's a gap in our competition law which has allowed the banks to escape the full force and discipline of competition.

The ACCC provided very strong advice that banks were giving each other a 'nod and a wink' that they would raise their rates together.

However, because they weren't actually writing it all down and signing in blood, or even agreeing verbally how they'd act they'd get away with it.

This kind of conduct by the big end of town should never be allowed to continue when designed to dud Australian families.

5. The previous seven paragraphs are an attempt to camouflage lack of substance:

- If the anti-competitive conduct of the banks was that obvious, why didn't the ACCC bring enforcement proceedings on the basis that the banks had arrived at an understanding or at that at least one of the banks had attempted to arrive at an understanding? The present law does not require that competitors 'write it all down, 'sign it in blood', or agree verbally. An understanding may be inferred from circumstances; a written or verbal agreement is unnecessary.

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<sup>15</sup> See s 44ZZT(3).

- As noted in annotation 2, banks so minded could readily use the continuous disclosure exception under s 44ZZY(6) as a loophole for signalling projected rate increases in terms having the same effect as those quoted from the ACCC's description of 'evil' price signalling.<sup>16</sup>
- Banks can readily signal their pricing intentions for legitimate purposes (eg to keep customers duly informed of anticipated rate increases) that would make it difficult or impossible for the ACCC to prove that the purpose was to substantially lessen competition in a market.<sup>17</sup>

That's why we're closing this gap in our competition law which is already dealt with in other major jurisdictions like the US, the UK and the EU.

6. This is misleading. The approach taken in the CCA Bill is novel and unprecedented. No other jurisdiction tries to prohibit unilateral information disclosure in such a way.<sup>18</sup> They focus on collusion or facilitation of coordination of market conduct. No adequate explanation has been given why Australia should not adopt the EU and UK concept of a concerted practice.<sup>19</sup>

That's why we're building on our 2009 reforms to strengthen Australia's cartel laws, by banning signalling designed to keep interest rates higher.

7. It is misleading to assert that the CCA Bill builds upon the 2009 cartel reforms:
  - The CCA Bill focuses on unilateral information disclosure instead of collusion. This approach is radically different from the collusion-based 2009 cartel reforms.
  - The issues raised by the concept of an understanding under s 45 were already well known several years before the cartel reforms.<sup>20</sup> If those issues are significant they should have been addressed at that time and

<sup>16</sup> See further B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October).

<sup>17</sup> See further B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28 at 43.

<sup>18</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 3; Global Competition Review, *Cartel Regulation* (2011); M Dabbah and B Hawk, *Anti-Cartel Enforcement Worldwide*, Cambridge University Press, Cambridge, 2009. For example, the approach of the CCA Bill is very different from the invitation to collude basis of liability under s 5 of the Federal Trade Commission Act (US); see eg, *In re Stone Container Corporation*, F.T.C. No. C-3806, at <http://www.ftc.gov/os/caselist/c3806.shtm>; WE Kovacic and M Winerman, 'Competition Policy and Section 5 of the *Federal Trade Commission Act*' (2010) 76 Antitrust Law Journal 929; L Fullerton, 'FTC Challenges "Invitations to Collude"' (2011) Antitrust 30.

<sup>19</sup> See B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>; Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, [3.6] at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.

<sup>20</sup> See eg *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321; ACCC, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the Price of Unleaded Petrol* (December 2007) pp 228-230.

dealt with in the 2009 amendments. The CCA Bill is knee-jerk legislation that adds a complex layer of regulation to the 2009 regime.<sup>21</sup>

Our tough new laws will give ACCC the power to take action against banks who signal their prices to competitors to undermine competition.

8. This assertion is ill-founded:

- Banks minded to engage in price signalling are unlikely to play into the hands of the ACCC but could and would use more subtle approaches that are unlikely to be caught by s 44ZZW or s 44ZZX. Such approaches include notifying customers by an advertisement of a projected interest rate increase, or giving customer a price-matching guarantee (ie to match any lower rate given by another major bank).<sup>22</sup>
- A perverse feature of the CCA Bill is that the distinction between private and public disclosure of information: the former is subject to *per se* prohibition whereas the latter is subject to liability only if the disclosure is made for the purpose of substantially lessening competition in a market. Yet a public announcement may more indicative of a serious intention on the part of a corporation than cheap talk during a private discussion. Moreover, by making a public announcement, it is possible for corporations to get around s 44ZZW. Public announcements made skillfully for a legitimate reason (eg informing customers about likely interest rate increases; informing customers about a price-matching offer) will be highly resistant to challenge by the ACCC.
- Various loopholes are open under the CCA Bill. One is the continuous disclosure exception under s 44ZZY(6).<sup>23</sup>
- The Government has erected an obstacle against reliance by the ACCC on s 44ZZW. To succeed in an action for contravention of s 44ZZX, the ACCC must prove that the disclosure of price-related information was not in the 'ordinary course of business'.<sup>24</sup>
- It is possible that the CCA Bill will be counterproductive. The Bill highlights the anti-competitive potential use of facilitating practices but addresses only a limited range of them.<sup>25</sup> Now that the cat has been let so noisily and so carelessly out of the bag by the Government, the predictable reaction of at least some corporations will be to explore the potential use of facilitating practices, including facilitating practices that are not caught

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<sup>21</sup> The prohibitions are subject to no less than 13 exceptions, seven of which apply only to the *per se* prohibition under s 44ZZW. Some of the exceptions relate to the banking sector, which is to be the first guinea pig subject to the CCA Bill; doubtless more exceptions would be required if the CCA Bill were extended to other sectors.

<sup>22</sup> Price-matching guarantees are not necessarily anti-competitive and, if they are anti-competitive, proof is usually difficult. See eg J Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favoured-Customer" Clauses' (1995) 64 Antitrust Law Journal 517 J Simons, 'Fixing Price with your Victim: Efficiency and Collusion with Competitor-Based Formula Pricing Clauses' (1989) 17 Hofstra Law Review 599.

<sup>23</sup> See further B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October).

<sup>24</sup> See s 44ZZW(c); cf s 44ZZZA.

<sup>25</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) section 3.2.

or are unlikely to be caught by s 44ZZW or s 44ZZX (or by ss 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, and 45).

## Policy development process

The Government has been carefully developing competition policy in this area for some time, and monitoring global comparisons.

### 9 The policy development process has not been satisfactory:

- There has been no adequate consideration of the option of adopting the EU and UK concept of a concerted practice.<sup>26</sup> Instead, the Government has concocted an approach that is unprecedented and represents international worst practice.<sup>27</sup>
- Treasury has never published a discussion paper on the major subject of facilitating practices.<sup>28</sup> The four Regulation Impact Statements that have been issued are lightweight attempted bureaucratic self-justifications.<sup>29</sup>
- The ACCC consulted with Treasury but that consultation was not transparent.<sup>30</sup> The new Chairman of the ACCC has said that future submissions by the ACCC to Treasury should be public.<sup>31</sup>

<sup>26</sup> See B Fisse and C Beaton-Wells, The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>; Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, [3.6] at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.

<sup>27</sup> See C Beaton-Wells and B Fisse, 'Australia's Proposed Information Disclosure Legislation: International Worst Practice', Competition Policy International, Antitrust Chronicle, 30 August 2011.

<sup>28</sup> The only contribution seems to have been a cursory four-page discussion paper on the meaning of the 'understanding' under the Trade Practices Act (8 January 2009). That discussion paper did not refer to facilitating practices nor did it discuss the EU and UK concept of a concerted practice.

<sup>29</sup> The first RIS was published on 21 December 2010; see Department of Finance and Regulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, 21 December 2010. Two further RIS were published on 24 March 2010 as part of the Explanatory Memorandum for the CCA Bill. A fourth RIS was published on 4 April 2011 (<http://ris.finance.gov.au/2011/04/04/non-compliance-with-best-practice-regulation-requirements-%E2%80%93-anti-competitive-price-signalling-treasury/>). The covering statement to the fourth RIS gives this explanation: 'On 24 March 2011, the Treasurer introduced legislation to Parliament to address anti-competitive price signalling and information exchange. ... A regulation impact statement (RIS) was prepared for this legislation and was assessed as adequate. The RIS published here, however, excludes information that was contained in the RIS considered by the decision-maker, and we have assessed Treasury as not being compliant with the best practice regulation requirements at the transparency stage. This RIS follows on from the [policy RIS](#), which was published on 21 December 2010.' None of the RIS discusses the EU and UK concept of a concerted practice with sufficient care and attention.

<sup>30</sup> Recommendations made by the ACCC remain secret. Some other information, including a copy of an advice by an economic consultant to Treasury, was obtained by the media by means of FOI applications. Access was refused to two legal advices on which Treasury purportedly relied.

<sup>31</sup> R Sims, 'ACCC: Future Directions', LCA, Competition Law Workshop, 28 August 2011, p 8, at: <http://www.accc.gov.au/content/index.phtml/itemId/1004650/fromItemId/8973>:

"... I believe the ACCC must go public when appropriate with its views on where the law needs improvement, based on its enforcement experience and expertise. The key point, however, is to do this in the full understanding that we are one voice among many, and that we should not be the loudest.

- The problem sought to be addressed by the CCA Bill should have been addressed and resolved as part of the 2009 cartel reforms – see annotation 7.
- The Exposure Draft Bill released in December 2010 was a rough and obviously rushed job.<sup>32</sup> Moreover, limited time was given for making submissions.<sup>33</sup>
- The CCA Bill was referred to the House of Representatives Standing Committee on Economics at the eleventh hour and a very little time was allowed for submissions to that Committee.<sup>34</sup>

The OECD's Roundtables on Facilitating Practices and Information Exchanges, in 2007 and 2010, have clearly highlighted the harm to consumers that can arise from anticompetitive price signalling.

10. This fails to disclose that the OECD Roundtables did not recommend that the potential anti-competitive harm of facilitating practices be addressed by prohibitions against unilateral information disclosure.<sup>35</sup> It also fails to exemplify international best practice. For example, the CCA Bill compares unfavorably with Article 101 of the EU Treaty, as elaborated in the EC *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011).<sup>36</sup> Unlike the CCA Bill and related documents, those Guidelines are based on clear and cogent economic analysis and offer detailed practical guidance.

Many stakeholders in Australia strongly agree that anticompetitive price signalling is not prevented by our existing competition law.

They've told us that this conduct is best targeted by providing new, specific prohibitions which prevent price signalling occurring.

11. The previous two paragraphs of the Second Reading Speech give a false picture:

- Many think that there is a gap in the law but many also think that the present law is adequate and has not been tested sufficiently. For example,

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The ACCC could simply put its views to Treasury behind closed doors. To do only this, I believe, deprives others of the ACCC's views and lowers the quality of the public debate.'

<sup>32</sup> See B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28; Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 20 January 2011, at:

<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>.

<sup>33</sup> The Exposure Draft Bill was released on 12 December 2010 and the deadline for submissions was 14 January 2011.

<sup>34</sup> This author received an invitation on 18 May 2011 to make a submission by 27 May 2011. The Report of the Committee was due on 31 May 2011. Hearings on the CCA Bill by the HR Standing Committee on Economics were requested by several stakeholders but did not occur.

<sup>35</sup> See eg OECD Policy Roundtable, Information Exchanges between Competitors 2010, 11 July 2011, at: [www.oecd.org/dataoecd/12/52/48379006.pdf](http://www.oecd.org/dataoecd/12/52/48379006.pdf).

<sup>36</sup> Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114%2804%29:EN:NOT>.



considerable doubt has been expressed about the ACCC's theory of the case in the petrol service station cases and/or the way that it presented the evidence.<sup>37</sup>

- Many stakeholders have told the Government that the approach of providing specific prohibitions against unilateral information disclosure is highly problematic.<sup>38</sup> It is difficult to think of a competition law reform in Australia that has generated as much opposition in submissions. The House of Representatives Standing Committee on Economics split 4-4 as to whether the Bill should be supported (the Bill being one introduced by the Government, the recommendation of the Government members of the Committee prevailed).<sup>39</sup>
- It is far from clear that the prohibitions under the CCA Bill would be contravened in cases such as the petrol service station cases that have been relied on to show that there is a gap in the present law.<sup>40</sup>

This is precisely the approach we have taken to provide certainty to the business community whilst ensuring robust protection for consumers.

## 12. The contention that the CCA Bill provides 'certainty to the business community' is bunkum:

- The distinction between private and public disclosure of information is critical when working out how to comply with ss 44ZZW and 44ZZX but is far from clear-cut where, as is often the case, intermediaries are involved.<sup>41</sup>
- The 'ordinary course of business' exclusion under s 44ZZW raises difficult and unresolved issues of interpretation.<sup>42</sup>
- The SLC purpose test under s 44ZZX creates the uncertainties of market definition and what counts as a 'substantial' lessening of competition.<sup>43</sup>
- The exceptions are numerous and some, including the continuous disclosure exception under s 44ZZY(6), are far-from quick and easy to apply.

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<sup>37</sup> Two alternative possible bases of liability were open in the petrol service station cases: (1) an attempt to arrive at an understanding to fix prices; and (2) arriving at an understanding to exchange information of a kind likely to control the price to be charged by one or more parties to the understanding..

<sup>38</sup> See the submissions at:

<http://www.apf.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>;

<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>.

<sup>39</sup> House of Representatives, Standing Committee on Economics, *Advisory Report on the Competition and Consumer (Price Signalling) Bill 2010 and the Competition and Consumer Amendment Bill (No 1) 2011*, June 2011, at:

<http://www.apf.gov.au/house/committee/economics/1BillPriceSignalling/report.htm>.

<sup>40</sup> The s 44ZZW prohibition applies to a competitor who makes a price-related disclosure. Under s 44ZZZB, the mere recipient of the information disclosed is not liable for being knowingly concerned in a contravention.

<sup>41</sup> See s 44ZZU(3).

<sup>42</sup> See 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) 39 ABLR (October).

<sup>43</sup> See *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 (Gummow, Hayne and Heydon JJ).

- If the CCA Bill did in fact provide certainty to business, the notification procedure under s 44ZZY(5) would be unnecessary.
- It is uncertain how the notification process and the authorisation process will operate in this new context.<sup>44</sup>
- It is uncertain what goods and services will be subjected to prohibition under s 44ZZW and s 44ZZX by regulation under s 44ZZT.<sup>45</sup>

13. The CCA Bill is most unlikely to provide 'robust protection for consumers' – see annotations 2, 4, 5, 8 and 11 above.

#### Amendments to Competition and Consumer Act 2010

This Bill is fundamentally about stamping out conspiratorial behaviour by the big banks which isn't caught by our competition laws.

14. This statement is false and misleading. The CCA Bill is not about conspiracy – the prohibitions are not against conspiracy or collusion but unilateral disclosure of certain information to competitors.

These tough new laws have two limbs.

First, the Bill gives ACCC the power to take action against any bank which signals its pricing intentions to a competitor for the purpose of substantially lessening competition.

We're cracking down on banks who purposefully signal to their competitors that they should all raise their mortgage rates together.

It's inherently damaging to consumers for any bank to essentially say to its competitors "don't worry - if you raise your mortgage rates then I won't undercut you and take your customers".

It allows banks to move their interest rates higher without the full discipline of competition and at the expense of the consumer.

This anti-competitive behaviour is an unambiguously bad result for Australian families and small businesses.

The Bill allows a court to infer the real purpose a bank has in making such a statement — so there is no need for a 'smoking gun'.

15. The last six paragraphs are unduly optimistic about the likely effect of the s 44ZZX prohibition against the disclosure of price related and certain other

<sup>44</sup> In the case of notification, one major uncertainty is the extent to which the details of the conduct notified will be confidential; see annotation 26 below. In the case of authorisation, one major uncertainty is the extent to which an umbrella application can be made without prejudicing the chance of success by failing to give the ACCC sufficient information to enable the applications to be assessed in accordance with the statutory test of authorisation.

<sup>45</sup> See B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October), section 4.3.

information for the purpose of substantially lessening competition in a market - see annotations 2, 4, 5, 8 and 11 above.

Of course, we are not talking here about ordinary commercial communications.

Every Australian bank will be able to communicate with its customers, shareholders, market analysts, employees and other stakeholders in the ordinary course of business - just like they have always been able to.

16. This statement is misleading:

- The CCA Bill introduced on 24 March 2011 unduly restricted legitimate banking activities. As a result, several further exceptions were provided in amendments made by the House of Representatives on 7 July 2011.<sup>46</sup>
- The s 44ZZW prohibition was amended on 7 July 2011 to carve out disclosures made in the 'ordinary course of business'.<sup>47</sup> That amendment would not have been considered necessary if the statement made in the Second Reading Speech were true.
- The prohibition under s 44ZZX requires that banks making a public announcement to their customers will need to comply with s 44ZZX by making sure that they do not have a SLC purpose. That is an additional compliance burden.<sup>48</sup> It is false to claim that banks can communicate with shareholders and market analysts 'just like they have always been able to'.
- Continuous disclosure is subject to a new layer of regulation under the CCA Bill.<sup>49</sup> It is false to claim that banks can communicate with shareholders and market analysts 'just like they have always been able to'.
- Notification under s 44ZZY(5) was introduced in an attempt to reduce the overreach of s 44ZZW. There was no need previously to have to rely on a notification procedure in order to avoid liability.

What we are doing here is cracking down on the insidious practice of signalling between banks which is designed to undermine competition and which inevitably hurts consumers.

17. See annotations 2, 4, 8 and 11 above.

The second limb of the law will prevent banks from discussing their prices with each other behind closed doors.

This prohibition is automatic because there can only ever be a limited range of situations where it's legitimate for competitors to discuss prices.

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<sup>46</sup> See s 44ZZZ(3A)(3B)(5)(6).

<sup>47</sup> See s 44ZZW(c); 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) 39 ABLR (October).

<sup>48</sup> See B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October), sections 3.1.2, 4.1, 4.2, 4.4.

<sup>49</sup> See B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October).

This prohibition is targeted at those disclosures which are the most clearly anti-competitive and which are most damaging to consumers.

18. This statement is false and misleading. The s 44ZZW prohibition is not limited to disclosures that are most clearly anti-competition. The prohibition applies to price-related information whether or not the information has any competitive significance. There is no apparent justification for imposing per se liability in relation to the disclosure of current or historical pricing information, except where it is shown to facilitate collusion or coordination.<sup>50</sup>

For example, ACCC could take action if one bank phones another bank privately to tell them about a planned mortgage interest rate rise.

19. A much more likely scenario is a public announcement, in which event s 44ZZW will not apply. Moreover, the s 44ZZX prohibition will apply only if the disclosure is made for the purpose of substantially lessening competition in a market. If a public announcement is made by a bank about interest rate increases, it is highly likely that the bank will have a legitimate reason for the disclosure (eg to give consumers information they need in order to prepare themselves for the increase) that will make it difficult or impossible for the ACCC to take action successfully under s 44ZZX.

Of course, the Bill recognises there will be situations where banks need to discuss pricing with their competitors in a private context.

#### Exceptions and defences

We recognise that businesses need certainty and appropriate guidance so that they can conduct legitimate activities on commercial timeframes - and keep providing services to customers.

That's why we have worked closely with the ACCC since mid-2010 to carefully design these amendments, and have consulted extensively on draft legislation with the industry, legal experts and other stakeholders.

20. This does not give a true picture:

- The legislative development process has been far from satisfactory – see annotation 9 above.
- The involvement of the ACCC in working with Treasury has not been transparent. The unsatisfactory proposals advanced by the ACCC for amending s 45 in relation to the concept of an understanding indicate that reform proposals advanced by the ACCC are far from infallible and need public scrutiny.<sup>51</sup>

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<sup>50</sup> See further B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October), section 3.1.1.

<sup>51</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) section 3.5.

- If due care had been taken to design the CCA Bill, why the need for the flurry of last minute amendments by the House of Representatives on 7 July 2011?
- Many stakeholders have made detailed submissions criticising the Exposure Draft Bill and the CCA Bill. While some criticisms have been heeded, the consultation process has been difficult and protracted and numerous criticisms have gone unheeded.

Of course, all banks will be able to fully comply with any continuous disclosure obligations they have, such as discussing their funding costs.

21. This statement fails to recognize the practical difficulties that arise from the continuous disclosure exception under s 44ZZY(6):<sup>52</sup>

- The exception will not protect a public announcement that merely repeats and announcement made to the ASX for the purpose of complying with Chapter 6CA of the Corporations Act 2001 (Cth).
- The exception will not protect disclosure made for the purpose of complying with off-shore continuous disclosure requirements.
- The exception creates a glaring loophole for listed entities to engage in price signaling via continuous disclosure announcements.

And they'll be able to fully comply with their broader legal or regulatory obligations. The Bill contains explicit exemptions for all of this.

22. This statement is misleading. It fails to recognise the limited scope of the exception under s 44ZZY(1). The exception is limited to disclosures 'authorised by or under' certain laws. A disclosure that provides more information than is necessary in order to achieve compliance because the corporation is acting out of abundant caution is not 'authorised by' the relevant law nor does it appear to be 'under' the relevant law.

After consulting closely with the business community, we've also made amendments to ensure private disclosures of prices can continue for legitimate business activities.

23. This claim is unfounded:

- It is inconsistent with the flurry of last minute amendments by the House of Representatives on 7 July 2011.<sup>53</sup>
- The s 44ZZW prohibition was amended on 7 July 2011 to carve out disclosures made in the 'ordinary course of business'. The scope of that carve-out is limited; the carve-out does not amount to a defence of 'legitimate business activity'.<sup>54</sup>

<sup>52</sup> See B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (2011) 19 CCLJ (October).

<sup>53</sup> See House of Representatives Hansard, 7 July 2011, pp 26-36.

<sup>54</sup> See 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) 39 ABLR (October).

This has been done largely by clarifying exceptions that were contained in the exposure draft legislation or by providing clear new exceptions.

For example, we have a clear exception for banks who are considering forming a joint venture and need to discuss prices first to decide whether they should in fact enter a commercial arrangement.

Depending on the circumstances, an arrangement like a syndicated loan - when banks get together to lend to a business customer - would likely fit the definition of a joint venture.

That means that banks will be able to go ahead and get on with the business of lending provided they aren't being anticompetitive.

24. The last three paragraphs try to paint over real difficulties with the joint venture exception under s 44ZZZ(3):

- Syndicated loan arrangements typically are not structured as joint ventures, for various legal and commercial reasons. That was pointed out in eg the Westpac submission to Treasury on the Exposure Draft Bill at pp 1-2: “Syndicated Lending Communications regularly occur between banks in the context of commercial lending arrangements (eg, negotiating club or syndicated loans). These arrangements require members of the syndicate (or potential syndicate), to discuss potential pricing terms and volume information of the proposed Facility. Banking syndicates or clubs are not Joint Ventures and therefore are not entitled to the joint venture exemption offered by section 44ZZZ(3).”<sup>55</sup>

Where the parties to a syndicated loan disavow that they are entering into a joint venture (as they commonly do) does s 4J operate to create a joint venture on the basis that there is an 'activity in trade or commerce' that is 'carried on jointly'? Or must the joint activity also have the features of a joint venture in the sense discussed by the High Court in *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10? If the joint venture exception under s 44ZZZ(3) and those under ss 44ZZRO and 44ZZRP were applicable where there is merely an activity in trade or commerce that is carried on jointly, the exceptions would be so broad as to create a glaring loophole: competitors could get off the hook of per liability merely by deciding to act jointly in a way that avoided competition between them. In any event, from a commercial standpoint, banks understandably would be reluctant to be put in the position of not having a joint venture under the terms of a syndicated loan agreement and yet simultaneously trying to maintain that there is a joint venture under s 44ZZZ(3) (or ss 44ZZRO and 44ZZRP). These complications would be avoided if the joint venture exceptions under s 44ZZZ(3) and ss 44ZZRO and 44ZZRP were replaced by exceptions for 'collaborative ventures' as

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<sup>55</sup> Note also L Gutcho, 'Syndicated Lending' (1994) 22 International Business Lawyer 131 at 135: '... it is clear under most participation agreements that the relationship established is not a joint venture, although this argument can be made under some clumsily drafted or archaic participation agreements.'

recommended in Beaton-Wells & Fisse, *Australian Cartel Regulation* (2011) pp 292-295.

- If the statement about syndicated loans being covered by the joint venture exception were valid, why the need for the syndicated loan amendment made by the House of Representatives on 7 July 2011?

We've got clear carve outs in the Bill so banks can distribute their products through financial planners or mortgage brokers.

There are then further exceptions so banks can keep talking to each other about trading financial market products such as bonds or currency.

The Bill contains arrangements for banks to seek immunity where their conduct provides a net public benefit to the community.

This allows legitimate conduct to occur where it's not covered by one of the other explicit exemptions - some of which I've just mentioned.

Following consultation with the business community, the Bill now includes a 'notification' regime to meet shorter commercial timeframes.

Where a bank can demonstrate a net public benefit, they can obtain immunity by describing the conduct to the ACCC in a notice.

The ACCC then has a limited period of 14 days to respond if it has any concerns about the proposed behaviour.

This is significantly faster and more cost effective than the 'authorisation' process that we had originally discussed with the business community.

25. The previous four paragraphs assume without question that a notification process is desirable and ignores the objections:

- A notification process does not exist in the US, the EU, the UK or other jurisdictions. The only justification for the notification exception under the CCA Bill is the poor design of this legislation.
- Notification is an impractical and inadequate solution to the overreach of s 44ZZW.<sup>56</sup>
- Contrary to the misleading suggestion of the heading to s 44ZZY, the s 93 notification procedure is limited to conduct referred to in s 44ZZW – public disclosure of information as referred to in s 44ZZX is not the valid

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<sup>56</sup> For an extensive criticism of the impracticalities and risks of notification in this context, see Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, [6.1]-[6.38], at: <http://www.apf.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>. However, that submission did not address the problem under s 93 that a valid notification cannot be made to in relation to conduct referred to in s 44ZZX.

subject matter of a notification (except to the extent that it falls within s 44ZZW).<sup>57</sup>

Lenders could use this process to exempt a corporate 'workout' scenario - where they get together to resolve the finances of a troubled business.

26. The impracticality of notification in the context of work-outs led eventually to the specific exception for work-outs created by amendments by the House of Representatives on 7 July 2011.<sup>58</sup> The specific exception has been criticised as unduly narrow.<sup>59</sup>

Of course, robust confidentiality arrangements will be available for parties concerned about the commercial sensitivity of proposed conduct.

27. No such robust confidentiality arrangements are provided for under the CCA Bill or elsewhere. The assumption that notifications made to the ACCC can be assessed properly if the conduct notified is confidential is highly dubious.<sup>60</sup>

## Conclusion

The Bill I introduce today strikes an appropriate balance between allowing legitimate or pro-competitive conduct, and cracking down on anti-competitive price signalling which harms consumers.

This important reform will help to ensure that banks can no longer avoid the full forces of competition in the marketplace.

The Gillard Government is absolutely committed to getting a better deal for Australian families and small businesses in the banking system.

The laws I introduce today are an important part of that.

28. The Second Reading Speech is misleading, deceptive and bankrupt and the CCA Bill is misconceived, ill-designed and unbalanced:

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<sup>57</sup> Cf paragraph [1.95] of the Explanatory Memorandum which lists notification under s 93 as one of the 'exceptions from both the private disclosure of pricing information prohibition and the substantial lessening of competition prohibition.'

<sup>58</sup> See s 44ZZZ(5)(6).

<sup>59</sup> Clayton Utz, 'Government softens Price Signalling Bill for the banking sector' 1 August 2011, at: [http://www.claytonutz.com/publications/news/201108/01/government\\_softens\\_price\\_signalling\\_bill\\_for\\_the\\_banking\\_sector.page](http://www.claytonutz.com/publications/news/201108/01/government_softens_price_signalling_bill_for_the_banking_sector.page):

"... the work out exception is very narrow – it will only be available where a borrower is prepared to notify its lenders that there are reasonable grounds for suspecting that the borrower is or may become insolvent. We expect many borrowers considering work out discussions with their lenders may be reluctant to accept or state that they are or may become insolvent in the near future.'

<sup>60</sup> For criticism of the notification process see Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, [6.1]-[6.38], at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.



- The need for such legislation has yet to be convincingly explained. If there is a need for reform, the best option would be to adopt the EU and UK concept of a concerted practice under s 45.<sup>61</sup>
- The CCA Bill departs radically from the present law and from overseas models by prohibiting unilateral information disclosure. For example, the prohibitions do not require collusion or coordination of market conduct or even an invitation to another competitor to collude.<sup>62</sup> As a result, the prohibitions are overreaching. A complex array of exceptions has been created under the Bill but those exceptions do not overcome the problem of overreach.
- The CCA Bill is unlikely to be effective. Banks and other corporations are likely to be able to get around the prohibitions with ease. It does not apply across the economy. It is riddled with escape routes and loopholes. See annotations 2, 4, 5, 8 and 11 above.
- The CCA Bill has major defects and should be withdrawn.

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<sup>61</sup> B Fisse and C Beaton-Wells, The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>; Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, section 3, at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>

<sup>62</sup> See eg, *In re Stone Container Corporation*, F.T.C. No. C-3806, at <http://www.ftc.gov/os/caselist/c3806.shtm>; WE Kovacic and M Winerman, 'Competition Policy and Section 5 of the *Federal Trade Commission Act*' (2010) 76 *Antitrust Law Journal* 929; L Fullerton, 'FTC Challenges "Invitations to Collude"' (2011) *Antitrust* 30.