

# THE COMPETITION AND CONSUMER AMENDMENT BILL (NO. 1) 2011

## SUBMISSION TO HOUSE OF REPRESENTATIVES ECONOMICS COMMITTEE

25 May 2011

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### 1. INTRODUCTION

- 1.1 We welcome the opportunity to make a submission to the Committee on the Competition and Consumer Amendment Bill (No. 1) 2011 (**CCA Bill**) introduced into Parliament on 24 March 2011. This submission complements our earlier submission to Treasury of 14 January 2011 relating to the Exposure Draft of the CCA Bill, which was provided to the Committee as a submission to its inquiry on 27 January 2011.<sup>1</sup>
- 1.2 The CCA Bill does not resolve the fundamental problems with the Exposure Draft. See Section 2.
- 1.3 The CCA Bill is highly unsatisfactory and should not be enacted. Our recommendations for resolving the major problems specified in Section 2 are set out in Section 3. We outline alternative amendments to the Competition and Consumer Act 2010 (Cth) (**CCA**) that would achieve the policy objective without inflicting the complexity, overreach and impracticality of the CCA Bill.
- 1.4 The Competition and Consumer (Price Signalling) Amendment Bill 2010 (**Coalition Bill**) is compared to the CCA Bill where relevant to the main points made in this submission.

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<sup>1</sup> Brent Fisse and Caron Beaton-Wells, The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft), Submission to Treasury, 14 January 2011.

## **2. MAJOR UNRESOLVED PROBLEMS WITH THE CCA BILL**

### **A. Liability is not defined in terms of collusion or coordination of conduct between competitors in a market**

2.1 In introducing the CCA Bill the objective of the Government is stated as being “to prohibit anti-competitive price signalling and information exchanges”.<sup>2</sup> As a matter of established economic principle, price signalling and information exchanges are anti-competitive insofar as they either evidence collusion or facilitate or sustain coordination of conduct by competitors in a market, thereby removing the necessity for competitors to collude explicitly. It is well recognised in economic theory that such ‘facilitating practices’ present a competition problem. Devising satisfactory legal approaches to regulating such practices is not straightforward. However, overseas approaches recognise that, in regulating such conduct, the focus must be on its relation to coordination between competitors, achieved either through explicit collusion or by other means that circumvent the need for explicit collusion. These other means are sometimes referred to as ‘tacit’ collusion. In the EU, they are captured by the concept of ‘concerted practices’. In the absence of some relation to collusion or coordination more generally, price signalling or information disclosure represents unilateral conduct. In accordance with economic theory, unilateral conduct is anti-competitive when it is undertaken by a firm with market power.

2.2 The CCA Bill prohibits the unilateral disclosure by a competitor of price-related information and some other 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:

- The economic literature on oligopolistic conduct, information exchanges between competitors or facilitating practices does not support the prohibition of unilateral disclosure of pricing or other information in the absence of market power.
- Focussing on information disclosure rather than collusion or facilitated coordination of market conduct inevitably results in overreach and forlorn attempts to avoid overreach by means of a thicket of exceptions. See the examples in [2.3] and [2.14]-[2.20].
- Collusion or facilitated coordination of market conduct is required for liability

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<sup>2</sup> Department of Finance and Deregulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, p 9.

in the US, the EU, the UK and other jurisdictions. The approach taken in the CCA Bill is novel and unprecedented. It is incorrect to suggest that enactment of the CCA Bill would bring Australian law into line with US and EU law in dealing with anti-competitive information disclosure.

- Information disclosure is only one type of facilitating practice. The CCA Bill fails to address the much wider important subject of facilitating practices.<sup>3</sup> It is widely recognised that facilitating practices can often be used instead of collusion to prevent or inhibit competition. The CCA Bill fails to see the wood for the trees. The explanation given in the RIS for focussing on price signalling is unpersuasive.<sup>4</sup>
- The current prohibitions on unilateral anti-competitive conduct in the CCA are the prohibitions against misuse of market power under s 46. The CCA Bill creates new prohibitions against unilateral market conduct without requiring market power or any of the other limitations on the scope of the prohibitions against misuse of market power. See the examples in [2.9]-[2.10].

**B. The s 44ZZW prohibition unjustifiably imposes per se liability**

2.3 The s 44ZZW prohibition against private disclosure of pricing information to competitors imposes per se liability. This approach is unjustified:

- Per se liability is warranted only where almost all of the cases to which the prohibition applies will have anti-competitive effects or likely effects. The s 44ZZW prohibition applies in many situations where the conduct is not anti-competitive. If per se liability is imposed, a requirement of collusion or facilitated coordination serves the important function of screening out conduct that is unlikely to be anti-competitive in most situations. The absence of any requirement of collusion or facilitated coordination in s 44ZZW inevitably results in overreach and in many instances the overreach is such as likely to defy any attempt to draft workable exceptions, as in these examples:

(1) The CEO of bank A phones the CEO of bank B and says: "We think that your interest rates generally are too high. We will undercut you and knock you for six." This criticism by the CEO of bank A is a manifestation of aggressive competition. Remarkably, however, it is a private disclosure

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<sup>3</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.

<sup>4</sup> Department of Finance and Deregulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, p 2.

about the price for services charged or to be charged by bank B and therefore is caught by s 44ZZW unless notified to the ACCC.

- (2) Bank A offers a 'hot daily interest rate' to new customers (**NC**) upon request. NC asks Bank A for a quote in writing because Bank B has insisted upon that before discussing a competitive rate with NC any further. The quote by Bank A is disclosed to NC for the purpose of NC disclosing the information to Bank B.<sup>5</sup> There is no exception for private disclosure to a competitor via a customer for the purpose of enabling the customer to compare prices and choose the best price. The Explanatory Memorandum (see para 1.43 and Example 1.3) evades this issue.
- (3) Bank C and Bank D have lent funds to a small corporation (**SME**) under separate loans. SME is about to go under. Bank C and Bank B meet to arrive at an agreed solution to allow SME to trade out of its difficulties. The solution agreed is a moratorium on SME's interest repayments for 3 months. The conduct of Bank C and Bank D in disclosing pricing information to each other in this situation is caught by s 44ZZW unless they obtain an authorisation or notify the ACCC under s 44ZZY(5) (on the problems with the notification procedure, see [2.19] below). The position is the same if Bank C and Bank B do not meet, but Bank C tells SME that it prepared to agree to a moratorium on SME's interest repayments for 3 months if Bank D agrees to do the same. In that situation there is a private disclosure of pricing information by Bank C to Bank D via SME as an intermediary.<sup>6</sup>
- (4) Assume that bank A notifies bank B that the rate of interest for funds offered by super fund C and super fund D are the result of price fixing between C and D and gives B the evidence it has of that price fixing. A and B are in the process of negotiating separate loans from C and are about to enter into loan agreements. In this situation A has disclosed price-related information to B, a competitor in relation to the acquisition of funds from C. There is no contract, arrangement or understanding between A and B and hence they are not liable for breach of s 44ZZRF or s 44ZZRJ. However, A would be liable under s 44ZZW for disclosing price-related information to a competitor unless it had previously made an effective notification to the ACCC under s 44ZZY(5) (on the problems with the notification procedure, see [2.19] below). The position would be

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<sup>5</sup> See s 44ZU(3).

<sup>6</sup> See s 44ZU(3).

the same if A had told the ACCC separately about the price fixing and its relevance to the interest rate about to be charged by C and D before disclosing that information to B: see s 44ZZU(3). The position would also be the same if A had informed the ACCC at the same time as the disclosure of the information to B in an attempt to get around the per se s 44ZZW prohibition by making a non-private disclosure: under s 44ZZU(2)(a) and s 4F(1) the disclosure to the ACCC would be disregarded because it was made for the substantial purpose of avoiding the application of s 44ZZW.

- The Coalition Bill proposes a prohibition on price signalling where a corporation communicates price-related information to a competitor and (1) the communication is for the purpose of inducing or encouraging the competitor to vary its price; and (2) the communication has or likely to have the effect of substantially lessening competition (s 45A(1)). The first requirement of the proposed prohibition recognises that, from a competition perspective, the ‘vice’ associated with communications between competitors lies in their capacity to facilitate coordination. The second requirement of the proposed prohibition assumes that facilitated coordination cannot or should not be subject to a per se test. In our view, it is possible to formulate a per se prohibition targeting practices that facilitate coordination between competitors. Further, any such prohibition should not be confined to communications. Nor, insofar as it includes communications, should it be confined to communications that are price-related. See further Section 3.
- In its report on competition within the banking sector, the Senate Economic References Committee recommended that the CCA be amended “to include a provision which states that a corporation engages in price signalling if it communicates future price-related information to a competitor, and the communication of that information has the purpose, or has or is likely to have the effect, of substantially lessening competition” (Recommendation 15).<sup>7</sup> It further recommended that the amendment be accompanied by ACCC guidelines providing examples of the types of communication that would fall foul of this provision, examples that would not fall foul of the provision and the protection offered by the exceptions (Recommendation 16).<sup>8</sup> We agree with the Committee’s assessment of the Government’s bill as “poorly

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<sup>7</sup> Senate Economic References Committee, *Competition within the Banking Sector*, Report, May 2011, Ch 8, para. 8.95, p172.

<sup>8</sup> Senate Economic References Committee, *Competition within the Banking Sector*, Report, May 2011, Ch 8, para. 8.96, pp172-173.

drafted”.<sup>9</sup> However, we do not agree with the Committee’s view that price signalling should be dealt with by a prohibition on unilateral conduct subject to a competition test. We propose an alternative approach that is more consistent with overseas models and with EU competition law in particular. See Section 3. With respect to the recommendation regarding ACCC guidelines, in our view well-drafted guidelines explaining how the ACCC is likely to approach the enforcement of any new prohibition are likely to be of value to the business community and its advisors. However, should the Government persist with its proposed form of prohibitions, guidelines by the ACCC should not be relied on as a means of ‘re-writing’ the prohibitions so as to ameliorate their overreach and address unintended consequences.

- The Senate Economic References Committee also requested that the Government release the independent legal advice on which it relied in formulating the CCA Bill including the per se prohibition under s 44ZZW. We support that position. Given the significance of the proposed amendments and the degree of criticism to which they have been subject, it is plainly a matter of public interest that the legal advices be disclosed and subjected to close scrutiny. Treasury has relied on legal professional privilege in deciding not to disclose the advice. Legal professional privilege exists to ensure that clients make full and frank disclosure to their lawyers so that lawyers can give advice which is more likely to be correct, because it is based on more complete facts. Fully informed advice reduces the prospect that people will engage in unlawful conduct or raise claims or defences that are unmeritorious. This is in the interests of justice. It is not readily apparent what such principles have to do with the duty of public servants advising government on the form of legislation which would best serve the public interest.

**C. The s 44ZZW prohibition is ill-defined**

2.4 The s 44ZZW prohibition is not subject to a competition condition corresponding to that under s 44ZZRD(4) or s 4D(2):

- In many situations, A and B will be competitors ‘in a particular market’ (see s 44ZZV(1)) but not in relation to the goods or services that are the subject of the private disclosure of information to a competitor alleged to contravene s 44ZZW. One such situation is that where lenders under a loan syndication agreement compete against each other in the market for loan funds but are not

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<sup>9</sup> Senate Economic References Committee, *Competition within the Banking Sector*, Report, May 2011, Ch 8, para. 8.93, p 172.

competitors (or potential competitors) in relation to the syndicated loan because none of them would participate in the loan except under the syndicated loan arrangement<sup>10</sup>. This means that A and B will have to lodge a notification to the ACCC unless the syndicated loan agreement and preliminary negotiations come within the joint venture exception under s 44ZZZ(3). The s 44ZZZ(3) exception will not apply where, as may often be the case, the loan syndication agreement is structured otherwise than as a joint venture. See further [2.15] below.

- The concept of a ‘potential competitor’ under s 44ZZV(1) is loose. There should be a test of likelihood corresponding to that under s 44ZZRD(7).

2.5 The s 44ZZW prohibition is not limited to information about future pricing but also applies to current and even historical pricing information. There is no 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. The focus of any prohibition should be, not on the nature or age of the information of itself, but on its potential to facilitate coordinated conduct amongst competitors in a market. Past, current and future information disclosure each have the potential to facilitate collusion or coordination, albeit in different ways. While communication of future intentions may be relevant in reaching a collusive arrangement, exchange of recent past or current data may be relevant as a tool for monitoring the conduct of competitors and detecting deviations from a collusive arrangement.

2.6 The line drawn between a private information disclosure subject to the per se prohibition under s 44ZZW and a disclosure subject only to the SLC purpose test under the s 44ZZX prohibition is unsatisfactory and prone to have undesired consequences, as illustrated by the following examples:

- (1) 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 observed by U, an ACCC undercover agent sitting at the next table. The disclosure here is not limited to competitor B but is made to another person who is not a competitor and hence is not a private disclosure as defined by s 44ZZV(1). The disclosure is not accidental etc under s 44ZZU(4) assuming that the CEO of A is aware of U's presence and that U is within earshot. Nor is the situation covered by the anti-avoidance provision in s 44ZZV(2) because the purpose of the CEO of A is not to avoid the

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<sup>10</sup> C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, p 322.

application of s 44ZZW. U's undercover work will thus turn off per se liability under s 44ZZW and require proof under s 44ZZX that Bank A had a SLC purpose.

- (2) As in the situation above, except that the disclosure of price-related information is overheard not by U but by Gerard, a passing waiter. The CEO of A is aware that Gerard is listening. Presumably s 44ZZX applies but not s 44ZZW.

2.7 No adequate attempt has been made to exclude routine banking transactions from the application of s 44ZZRW. These are two examples:

- Bank E remits funds on behalf of a customer to Bank F for deposit in the account of a party who has supplied a product to the customer. The telegraphic transfer informs Bank F that Bank E has deducted a \$15 fee for the telegraphic transfer. Assuming that Bank E and Bank F are competitors in the 'particular market', Bank E has contravened s 44ZZW (it has disclosed to Bank F the price at which it has supplied the telegraphic transfer service).
- A customer of Bank H uses a debit card to obtain cash from an ATM operated by Bank G in the Sydney CBD. Bank H has ATM machines in the Sydney CBD. Details of the transaction including Bank G's ATM usage fee are transmitted to Bank H and details of that transaction and the usage fee are recorded on the customer's bank account. Bank G has privately disclosed pricing information (its ATM usage fee) to a competitor in the particular market. The ATM arrangements may be subject to an authorisation by the ACCC but there will be a contravention unless the terms of the authorisation cover the conduct subject to prohibition under s 44ZZW.

The proposed notification procedure under s 44ZZY(5) is not a satisfactory response to such instances of overreach (see further [2.19] below).

**D. The s 44ZZX prohibition against public or private information disclosure for a SLC purpose is misconceived**

2.8 The s 44ZZX prohibition against disclosure of pricing information or other specified information for the purpose of substantially lessening competition in a market focuses, like s 44ZZW, on unilateral information disclosure. For the reasons set out in Section 2A above, this approach is misconceived. The problem that information disclosures pose for competition arises from their potential to facilitate collusion or coordination between competitors in a market that is anti-competitive. In addition,



information disclosure may involve a misuse of market power where, by engaging in the disclosure, a firm with substantial power takes advantage of that power for a purpose of damaging a competitor or preventing competition. Such a case would be covered by s 46(1) of the CCA. Thus, insofar as s 44ZZX intends to address unilateral conduct that does not affect collusion or other coordination between competitors, it is unnecessary.

2.9 As a result of the lack of any requirement of collusion or facilitated coordination of conduct between competitors in a market, the s 44ZZX prohibition can cause overreach:

(1) Assume that bank A announces in the media that it intends to offer a new rate on home loans in 4 weeks time and that it is able to do so because it has managed to secure large parcels of funds from offshore at very favourable rates. A's substantial purposes in making this announcement are: (1) to increase its market share by attracting new customers after giving them sufficient notice to be able to switch from their existing loans; and (2) to put pressure on its competitors and to drive as many as possible of them out of the home loan business. A has not discussed its plans in private with any competitors and there is no contract, arrangement or understanding between any of them. In this case A would be liable for disclosing price-related information for the purpose of substantially lessening competition in the market for home loans. Given purpose (1) and the fact that competition and consumer welfare are likely to be increased in the short term, there is no compelling economic rationale for subjecting A to liability in such a case. Note that notification is not an escape route here - to be valid, a notification must relate to conduct prohibited by s 44ZZW (s 93(3A)) and the conduct here is prohibited only under s 44ZZX. To get off the hook, A would need to apply for and be granted an authorisation.

(2) Assume that Macro, a technology company, devises revolutionary internet transmission technology that is likely to overtake existing technology soon. Macro publicly announces the new technology and that its strategy is make existing internet transmission technology 'obsolete and unusable' within a few years. Macro's commercial strategy is to damage or eliminate its existing competitors and deter any new entrants, thereby attaining a monopoly or near-monopoly position. Macro's intention in making the announcement is to signal that strategy to existing and potential competitors with a view to

preventing their further investment in or entry to the market.<sup>11</sup> If internet technology goods and services are Division 1A goods and services, the s 44ZZX prohibition will apply to this announcement: Macro has made a disclosure of information about its commercial strategy, and a substantial purpose of the making of the disclosure is to substantially lessen competition in the market for internet transmission systems in Australia. However, if Macro did not disclose that information but actually rolled out its new technology and thereby annihilated all competitors, Macro would (and should) not contravene s 46 (unless it had substantial market power and could be shown to have taken advantage of it) or any other prohibition under the CCA.

- (3) Safeair, an airline with a 25% market share, makes a strategic decision to focus on the safety of its new fleet of F459 planes and to publish print and television advertisements that aggressively highlight the safety issues experienced by its two larger main competitors. This strategy is branded 'Be Safe'. It is intended to damage one or both of Safeair's two main competitors. The advertisements relate to part of Safeair's commercial strategy (s 44ZZX(1)(a)(iii)) and are run for the purpose of substantially lessening competition in the market. If airline services are Division 1A services, Safeair has breached s 44ZZX. Yet conduct of this kind is the antithesis of coordinated market conduct: it is aggressive independent competition.

The question whether any of the conduct in these examples should be unlawful should be addressed under s 46(1) of the CCA. That section would require that the corporation concerned had a substantial degree of power in a market and had taken advantage of it for an anti-competitive purpose.

2.10 Neither the Explanatory Note nor the RIS address the potential clash between s 44ZZX and freedom of speech. Political speech of the kind illustrated by the example below has never previously been the subject of prohibition under Part IV of the CCA. Nor should it be where, as in this example, the companies concerned have not sought to coordinate prices, reduce output or allocate customers:

- Several major companies that manufacture cars publish a series of advertisements stating that, if the government was to proceed with its proposal to remove tariffs on imported cars, the companies would close or scale down their Australian operations. If the disclosure relates to Division 1A

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<sup>11</sup> An additional intention may be signal to prospective investors and customers that Macro has made significant advances and hence should be preferred over its competitors.

goods or services, there will be a breach of s 44ZZX. The information disclosed in the advertisements relates to an aspect of the companies' commercial strategy (s 44ZZX(1)(a)(iii)), namely their strategy with respect to continuing their Australian operations. The making of the disclosure has a substantial purpose of substantially lessening competition in a market (s 44ZZX(1)(b)), namely the market in which the companies compete with importers in relation to the supply of cars.

**E. The SLC purpose test in s 44ZZX is unlikely to work effectively**

2.11 The SLC purpose test under s 44ZZX will often be very difficult to establish in practice:

- Corporations minded to side-step s 44ZZX will have little difficulty in doing so. It takes little imagination or skill to coat a facilitating practice with a thick layer of commercial justification.<sup>12</sup> For example, a corporation that wishes to deter competitors from lowering their prices may offer customers a 5% discount on any price offered by a competitor (on its face, a highly pro-competitive offer) and do so in accordance with a well-documented corporate strategy of maintaining market share or increasing business. If s 44ZZX is enacted in its present form, one likely outcome will be the assiduous roll out of self-protective commercial justifications for significant disclosures of information. That outcome would reflect a general axiom of commerce that, for every legislative action, there are corporate counteractions.<sup>13</sup>
- The SLC purpose test under s 44ZZX relates to the purpose of the *disclosure of information* as distinct from the purpose of the *conduct* of the defendant.<sup>14</sup> The disclosure of information does not necessarily have the same causative relevance as the taking of action and this distinction will be relied on by defendants to help deny an allegation that a disclosure of information, as such, was made for the purpose of substantially lessening competition.<sup>15</sup> In

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<sup>12</sup> An implication to be drawn from the discussion of US case law in GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189.

<sup>13</sup> On the practical importance of liability control to corporations when developing and using their internal controls against cartel conduct see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 12.

<sup>14</sup> The evidence of SLC purpose provision in s 44ZZX relates to disclosures of information as distinct from conduct associated with disclosures of information.

<sup>15</sup> In Department of Finance and Deregulation, Regulation Impact Statement: [Anti-competitive Price Signalling and Information Exchange](http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury), p. 16, at <http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury>, it is suggested that a purpose test avoids the difficulty that would arise under an effects test. A purpose test may be easier to establish in some cases but does not overcome the difficulty in many others where a defendant is astute

contrast, no distinction between the disclosure of information and action is drawn under US antitrust law in the context of the application of the rule of reason to facilitating practices under s 1 of the Sherman Act or s 5 of the Federal Trade Commission Act.<sup>16</sup>

- Many disclosures of information relating to ‘any aspect’ of the ‘commercial strategy’<sup>17</sup> of corporations are huff, puff or bluff and often used as a dynamic positioning exercise rather than to reduce competition.<sup>18</sup> Moreover, the signals are often subtle and not easily read by those uninitiated in the art of corporate strategy.<sup>19</sup> These seem to be significant further impediments in the way of proving a SLC purpose.
- Section 44ZZX will apply to information hubs where the substantial purpose of disclosing information to an information hub is to inform customers, not competitors. However, there is no apparent need for s 44ZZX to deal with any issues associated with information hubs given that any such issues are covered effectively by the prohibitions under s 45(2) relating to provisions that have the purpose, effect or likely effect of substantially lessening competition in a market.<sup>20</sup> Information hubs involve a series of contracts (or arrangements or understandings) between the hub operator and those who provide pricing or other information. It may also be noted that the aggregation provision under s 45(4) is defined more precisely than the factor of aggregation is under s 44ZZX(2)(e).

2.12 The Coalition Bill avoids the difficulties presented by a SLC purpose test by adopting a SLC purpose, effect or likely effect test. However, the requirement that the communication be for ‘the purpose of inducing or encouraging a competitor to vary the price.. etc’ is likely to pose its own challenges of evidence and proof.

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enough to deny liability on the basis that the only purpose was to make a disclosure that, in the factual outcome intended, amounted only to ‘cheap talk’ or posturing.

<sup>16</sup> See further GA Hay, ‘Facilitating Practices’, ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189.

<sup>17</sup> Exposure Draft, s 44ZZX(1)(a)(iii).

<sup>18</sup> M Porter, *Competitive Strategy*, The Free Press, New York, 1980, chs. 2-3.

<sup>19</sup> M Porter, *Competitive Strategy*, The Free Press, New York, 1980, ch 4.

<sup>20</sup> This is not discussed in the RIS, either in relation to the case of Informed Sources or the US airline tariff publishing case: see Department of Finance and Deregulation, Regulation Impact Statement: [Anti-competitive Price Signalling and Information Exchange RIS, p. 17, p. 7, at http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93anti-competitive-price-signalling-treasury.](http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93anti-competitive-price-signalling-treasury)

F. **The s 44ZZW and s 44ZZX prohibitions do not apply to all sectors of the economy**

2.13 The CCA Bill will apply only to a sector prescribed by regulation. Initially, the Bill will apply only to the banking sector; other sectors may possibly be prescribed after 'further detailed consideration'.<sup>21</sup> This approach is unsatisfactory:

- 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. That policy, as adopted and applied by the Swanson Committee<sup>22</sup> and the Hilmer Committee,<sup>23</sup> and strongly endorsed by the Dawson Committee,<sup>24</sup> is reflected in all of the prohibitions under the existing provisions of Part IV of the CCA.
- The proposal that sectors be made subject to the new prohibitions by regulation is problematic. Regulations 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 relation to the proposal that Div 1A be extendable by regulation, the Senate Standing Committee for the Scrutiny of Bills has stated:

“... it is of concern that this scope of the prohibitions introduced by this bill are to be determined entirely through delegated legislation. Regrettably, the explanatory memorandum merely states the effect of the provisions rather than justifying the need to leave the scope of operation of these new provisions to be determined by the regulations. The Committee therefore **seeks the Treasurer’s advice about this approach and in particular whether consideration has been given to the possibility of defining the scope of operation of the laws (such as the intended areas of operation, guidance as to the types of industries to which it will apply or relevant considerations that**

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<sup>21</sup> Second reading speech, 24 March 2011.

<sup>22</sup> Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976), p. 84.

<sup>23</sup> National Competition Policy Review Committee, *National Competition Policy*, 1993, pp. 85 et seq.

<sup>24</sup> Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, 2003, pp. 35-37.

**will be examined before a decision is made) in the primary legislation.**<sup>25</sup> [emphasis in original]

In our view, incorporating the criteria for extension in the primary legislation should not be considered a satisfactory alternative to removing the sector-specific approach altogether and making any prohibitions applicable on an economy-wide basis. We note that the Coalition Bill does not discriminate between sectors and is consistent in that regard with the existing provisions of Part IV of the CCA.

**G. The exceptions to the prohibitions under ss 44ZZY and 44ZZZ are inadequate**

2.14 For the reasons previously given (see [2.1]-[2.2]), it makes no economic sense to base prohibitions on information disclosure instead of on collusion or facilitated coordination of market conduct. Prohibitions defined in terms of information disclosure inevitably are very far-reaching unless circumscribed by numerous exceptions. Defining an adequate array of exceptions is difficult because there are many situations where information disclosure is pro-competitive or harmless. By contrast, prohibitions defined in terms of collusion or facilitated coordination of market conduct automatically exclude information exchanges that do not involve the anti-competitive aspects of collusion or coordination.

2.15 The joint venture exception under s 44ZZZ(3) is too narrow.<sup>26</sup> The exception is limited to joint ventures whereas competitors often enter into collaborative pro-competitive ventures that are not joint ventures:<sup>27</sup>

- The EM, Example 1.9 at p 27, states that: "Banks A, B and C discuss pricing information for a joint commercial lending arrangement to a potential borrower. At the time of discussions, the borrower is not present. Disclosures made in the course of these discussions will attract the joint venture exception where they are made for the purposes of establishing a joint venture in the production of a service to the borrower." However, syndicated loan arrangements often are not structured as joint ventures, for various legal and commercial reasons. That was pointed out, for example, in the Westpac

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<sup>25</sup> Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 4 of 2011, 11 May 2011, pp 19-20.

<sup>26</sup> Another undue limitation is that the joint venture must be one for the production and/or supply of goods or services (although not necessarily Division IA goods or services). For a critique of the equivalent limitation in ss 44ZZRO and 44ZZRP see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, section 8.3.2.2.

<sup>27</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, sections 8.3.2.1, 8.3.4.5.

submission to Treasury on the Exposure Draft.<sup>28</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?<sup>29</sup> 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 evade per se 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 wording 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).

The issues set out above are too important in practice to leave unresolved. In our submission, the solution required is to replace the joint venture exceptions under s 44ZZZ(3) and ss 44ZZRO and 44ZZRP with exceptions for 'collaborative ventures' of the kind recommended in Section 3.

- 2.16 There is no exception relating to the collective acquisition or proposed collective acquisition of goods or services. Contrast s 44ZZRV. This is unsatisfactory. As in the context of s 44ZZRV, competing buyers may wish to reduce costs by collectively acquiring goods or services. To do so they will need to discuss the price to be paid for the acquisition of the goods or services and what they each want to pay. If they disclose price-related information to each other privately, as will typically be the case, they will breach s 44ZZW unless they file an effective notification under s 44ZZY(5). Notification of a proposed collective acquisition is not required in the context of the cartel prohibitions, including the cartel offence under s 44ZZRF. There is no cogent

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<sup>28</sup> See 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)." 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."

<sup>29</sup> The Court there referred to a joint venture as "an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill".

policy reason why notification should be required in the context of s 44ZZW but not s 44ZZRF or s 44ZZRJ.

2.17 The continuous disclosure exception under s 44ZZY(6) is unsatisfactory:

- The exception does not cover the disclosure of information for the purpose of complying with overseas continuous disclosure obligations (eg US SEC material disclosure obligations). Nor does it necessarily cover situations where corporations rely on ASX or other guidelines or principles relating to continuous disclosure (eg as promoted by the Australian Securities Exchange Corporate Governance Council) and, acting out of abundant caution, disclose more than is necessary for compliance with Chapter 6CA of the Corporations Act 2001.
- It is unclear what is meant by the wording 'for the purpose of' complying with Chapter 6CA of the Corporations Act 2001. This does not appear to mean 'solely for the purpose' of complying with Chapter 6CA of the Corporations Act 2001: under s 4F(1) presumably it is sufficient that compliance with Chapter 6CA of the Corporations Act 2001 is a 'substantial' purpose. If so, this creates a major loophole because it would be relatively easy for public companies to use continuous disclosure adroitly not only for the substantial purpose of complying with Chapter 6CA but also for the substantial purpose of price signalling.<sup>30</sup>

2.18 The exception for 'mere receipt of information' under s 44ZZB is unsatisfactory:

- The EM (see para 1.145) is vague about how this provision is to be interpreted. Assume that Competitor A tells Competitor B that he is going to give B information about A's future prices for Product X and Product Y. B does not stop A when A opens up the discussion but waits to hear the information about Product X. Is that a 'mere receipt of information' or is B knowingly concerned in a breach of s 44ZZW if he does not immediately tell A that he is not interested and that he will be making his own independent pricing decisions? What if B waits until A has given him pricing information about Product Y as well as about Product X before telling A that he is not interested etc. In this situation will B's failure to disengage before receiving A's pricing information about Product Y be more than the 'mere receipt of information' and amount to being knowingly concerned in the disclosure of

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<sup>30</sup> As suggested by the invitations to collude made in analysts briefings in *Valassis Commc'ns*, 71 Fed Reg. 13,976 (FTC Mar. 20, 2006); *U-Haul Int'l, Inc.*, 75 Fed. Reg. 35,033 (FTC June 21, 2010).



pricing information about Product Y?

- Under s 76(1)(c) B in the example above may be liable for aiding and abetting the disclosure of pricing information about Product Y. Arguably, by not expressly disengaging from the further receipt of information, he has encouraged A to disclose further pricing information, in particular pricing information about Product Y. The exception under s 44ZZZB should therefore be amended to apply to aiding and abetting s 76(1)(e) as well as to being knowingly concerned.

2.19 Notification has been made an exception (under s 44ZZY(5)) in an attempt to resolve the problem of overreach that arises acutely from the prohibition under s 44ZZW. This attempted solution is inept:

- Given the likely cost, delay, uncertainty and inconvenience associated with such a procedure, notification is impractical.
- No other jurisdiction has found it necessary to have a notification procedure in this context. For example, there is no such procedure in the US, the EU or the UK.
- In terms of allocation of scarce enforcement resources it is remarkable that any government should be trying to impose a significant additional burden on the ACCC. There is no apparent cost-benefit justification for such an approach. No justification has been given in the RIS (decision) or the RIS (implementation).<sup>31</sup>
- A valid notification can be made only in relation to conduct that is subject to the s 44ZZW prohibition (see s 93(1)). Situations may easily arise where it is unclear whether or not s 44ZZX will apply as well as s 44ZZW. If there is to be a notification procedure, the procedure should apply in relation to s 44ZZX as well as in relation to s 44ZZW.

2.20 Authorisation is not a satisfactory or practical solution to the problem of unjustified overreach. Authorisation is costly and inefficient and hence is not a practical solution in most situations.<sup>32</sup> The US, the EU and the UK have found no need for an

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<sup>31</sup> Competition and Consumer Amendment Bill (No. 1) 2011, Explanatory Memorandum, chs 2 and 3.

<sup>32</sup> Under s 88(6C) the ACCC would be empowered to make an authorisation covering 'similar disclosures of information'. The ACCC may also waive the application fee in some cases. These are palliatives; they do not justify prohibiting everyday conduct that is pro-competitive or unlikely to detract from consumer welfare. The discussion of the burdens of seeking authorisation in Department of Finance and Deregulation, Regulation Impact Statement: [Anti-competitive Price Signalling and Information](#)

authorisation process in this context. Extending the practical relevance of authorisation in Australia is contrary to world best practice.

### **3. RECOMMENDATIONS**

3.1 We recommend that the CCA Bill not be enacted. The policy objective of prohibiting practices that facilitate anti-competitive coordination between competitors is achievable by amendments that would avoid the complexity, overreach and impracticality of the provisions in the CCA Bill. Two main amendments are proposed:

- add a prohibition against engaging in a concerted practice as s 45(2)(c) (see A. below); and
- provide a collaborative venture exception that applies to the prohibitions under s 45(2) (and to the prohibitions relating to cartel provisions under Part IV Division 1A) (see B. below).

This approach offers major advantages over that taken by the CCA Bill or the Coalition Bill (see C. below).

#### **A. Amend s 45(2) by adding a prohibition against engaging in a concerted practice**

3.2 We propose that s 45(2) be amended by adding a prohibition against engaging in a 'concerted practice' as s 45(2)(c) and by defining 'concerted practice' along these lines:

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.

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[Exchange, p. 17, at <http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury>](http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury), is inconsistent with practical reality.

3.3 This approach seeks to adapt the EU concept of a concerted practice under Art 101(1) of the EU Treaty. The concept of a concerted practice is broader than the concept of an understanding but requires the facilitation of coordinated conduct by competitors.<sup>33</sup> The indicative wording given above seeks to define the concept more closely than Art 101(1) while to the familiar CCA precepts of 'purpose', 'substantial', 'lessening' and 'competition'. The competition test is not a SLC test but focuses on whether or not there is a reduction of competition between two or more competitors. The concept of 'coordination' is new to the CCA but is a commonplace term that has been used and applied in numerous cases on the meaning and application of the term 'concerted practice' in Art 101(1).<sup>34</sup> It should also be noted that the approach proposed would not adopt the efficiencies defence under Art 101(3). Instead, reliance would be placed on the exceptions that apply to prohibitions under s 45(2), a new collaborative venture exception (see [3.4] below, and ultimately the avenue of authorisation).

**B. Provide a collaborative venture exception**

3.4 The second main amendment proposed is to provide a collaborative venture exception that applies to the prohibitions under s 45(2) (and to the prohibitions relating to cartel provision under Part IV Division 1A). The joint venture exception under s 44ZZZ(3) of the CCA Bill, the joint venture exceptions under ss 44ZZRO and 44ZZRP, and the joint venture defence under s 76C require that there be a joint venture and do not apply to contractual collaborations between competitors that are not structured or documented as joint ventures.<sup>35</sup> Consider, for example, syndicated loan arrangements, as discussed in [2.14] above. The best solution, we submit, is to provide an exception that applies not only to joint ventures but also to collaborative ventures. Detailed proposals are set out in Beaton-Wells and Fisse, *Australian Cartel Regulation* for a collaborative venture exception that would replace ss 44ZZRO, 44ZZRP and s 76C.<sup>36</sup> Such an exception should also apply to the prohibition against engaging in a concerted practice that is proposed in A. above.

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<sup>33</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011), pp 48-52.

<sup>34</sup> For references see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011), pp 49-50.

<sup>35</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011), pp 270-273.

<sup>36</sup> At pp 293-296.

**C. Advantages of the approach proposed above**

3.5 The approach proposed in A. and B. above offers these major advantages:<sup>37</sup>

- Unlike the prohibitions proposed under the CCA Bill and the Coalition Bill, a prohibition against engaging in a concerted practice would be consistent with established economic principle. See [2.1]-[2.2] above.
- Unlike the prohibitions proposed under the CCA Bill and the Coalition Bill, a prohibition against engaging in a concerted practice would be consistent with EU competition law, and closely comparable in effect to US competition law. See [ 2.1] above.
- Unlike the prohibitions proposed under the CCA Bill and the Coalition Bill (which are limited to price signalling and, in the case of the CCA, a limited range of other types of information disclosure), a prohibition against engaging in a concerted practice would apply to facilitating practices generally. See [2.2] above.
- The extent of the amendments to the CCA that would be necessary would be much more limited than those proposed in the CCA Bill or the Coalition Bill. The amendments proposed would also be much less complex. For example, the amendments proposed would avoid the need to enact a large array of new exceptions.
- The amendments proposed would avoid the problem of overreach that would be created by the prohibitions against information disclosure under the CCA Bill (see [2.3] and [2.9]-[2.10] above) and by the inadequate exceptions provided by that Bill (see [2.14]-[2.20]] above).

3.6 Amendments of the kind proposed above, and especially the possible adaptation of the concept of a concerted practice, do not appear to have been considered closely enough in the development of the CCA Bill. The Options set out in the *Regulation Impact Statement – Anti-competitive price signalling and information exchange (decision)* and the *Regulation Impact Statement – Anti-competitive price signalling and information exchange (implementation)*<sup>38</sup> are:

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<sup>37</sup> For further discussion of these points, see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011), sections 3.2-3.4.

<sup>38</sup> Competition and Consumer Amendment Bill (No. 1) 2011, Explanatory Memorandum, chs 2 and 3.

- (1) the status quo;
- (2) amend the definition of an 'understanding';
- (3) prohibit specified types of information disclosure as per the Exposure Draft;  
and
- (3A) prohibit specified types of information disclosure as per the Exposure Draft  
but amend the Exposure Draft in light of submissions made to Treasury about  
that Draft.

Those options are too limited. They do not squarely address the possibility of adopting an approach based on the EU concept of a concerted practice. No adequate explanation has been given in the *Regulation Impact Statements*, or elsewhere.

- 3.7 In our submission, the CCA Bill should therefore be abandoned. We have indicated above how relatively straight-forward amendments to the CCA would achieve the desired policy objective in a way that is consistent with economic principle and with tried and tested overseas competition law models.