

**THE COMPETITION AND CONSUMER AMENDMENT BILL (NO. 1) 2011 (EXPOSURE DRAFT)**

**SUBMISSION TO TREASURY**

**14 January 2011**

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**1. THIS SUBMISSION**

- 1.1 We welcome the opportunity to make a submission on the Competition and Consumer Amendment Bill (No. 1) 2011 released by Treasury on 12 December 2010 as an Exposure Draft (**Exposure Draft**) and related documents, namely the Explanatory Note published by Treasury on 24 December 2010 (**Explanatory Note**)<sup>1</sup> and the Regulation Impact Statement published by the Department of Finance and Deregulation on 21 December 2010 (**RIS**).<sup>2</sup>
- 1.2 This submission is based largely on a forthcoming article in the Australian Business Law Review – Fisse and Beaton-Wells, ‘The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure (2011) 39(1) Australian Business Law Review. That article is set out in Attachment 1. That Attachment, as distinct from this Executive Summary, is confidential until the article is published by the Australian Business Law Review in February 2011.
- 1.3 Extreme care is needed in this difficult area of competition law and policy. The prohibitions in the Exposure Draft are novel. They depart radically from the law in other jurisdictions. Moreover, the Exposure Draft focuses on only one particular type of facilitating practice – information disclosure, particularly as to prices – and, at least initially, on only one sector of the economy – the banking sector. This

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<sup>1</sup> Treasury, Competition and Consumer Amendment Bill (No.1) 2011 Explanatory Note, at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918>.

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

attempt to address a specific form of conduct in a highly prescriptive way is problematic for the same reasons that have been articulated regularly in critiques of other prohibitions under the CCA.<sup>3</sup> Not only is there is a risk that the real vice in the conduct will be missed (a risk that has materialised in this instance), but there is a high likelihood that the prohibition will invite literal interpretation that focuses on the words rather than the legislative intent and that it will prove incapable of addressing new forms of conduct as they arise.

- 1.4 Furthermore, neither the government nor the ACCC has adequately explained the selectivity of the approach proposed in the Exposure Draft as a matter of economic principle. Is information disclosure of the kind to be prohibited the most economically damaging of the various activities that can be characterised as a facilitating practice?<sup>4</sup> Is the banking sector more prone to such practices than other sectors?<sup>5</sup> Is information disclosure by bank executives responsible for (as distinct from symptomatic of) inadequate competition in the banking industry? Why the rush to address issues that have been on Treasury's radar since at least 2007?<sup>6</sup> No answers have been given to these important questions in the Explanatory Note, the RIS or elsewhere.
- 1.5 Equally, it is important to acknowledge that identifying and imposing liability for facilitating practices is easier said than done. Satisfactory legal approaches have yet to emerge anywhere in the world. The US and EU approaches, while very different to the approach proposed in the Exposure Draft, are not without their difficulties. The OECD has restated the issues without reaching convincing practical answers.<sup>7</sup> Many

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<sup>3</sup> See generally Organisation for Economic Co-operation and Development, *Competition Policy in Australia*, 2010, p.59.

<sup>4</sup> Facilitating practices take many and varied forms. For a list of some common candidates, see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 3, p. 42. We are not aware of any empirical studies that have compared the relative economic effects of such practices. Cf the statement in the RIS that: 'overseas experience and legal advice indicates that as a practical matter, disclosures and exchanges of information are the most prevalent and harmful form of anti-competitive price signalling...' See Department of Finance and Deregulation, [Anti-competitive Price Signalling and Information Exchange RIS](http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury), at <http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury>, p. 2.

<sup>5</sup> Cf the acknowledgement that anti-competitive signalling can occur in a range of industries in Department of Finance and Deregulation, [Anti-competitive Price Signalling and Information Exchange RIS](http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury), at <http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury>, p.2.

<sup>6</sup> Indeed, the ACCC first expressed concerns about 'telegraphing' of interest rates by banks in 1999: see ACCC News Release, 'Bank interest rate 'Telegraphing' risks breaching Trade Practices Act', 23 December 1999. The government's announcement indicated that it had 'been working with the ACCC since mid-2010'. See Treasury, *Competitive and Sustainable Banking System*, December 2010, at [http://www.treasury.gov.au/banking/content/report/report\\_06.htm](http://www.treasury.gov.au/banking/content/report/report_06.htm).

<sup>7</sup> See, eg, OECD, *Prosecuting Cartels Without Direct Evidence of Agreement*, Policy Brief, June 2007. In October 2010, the Competition Committee held a Roundtable to discuss divergent approaches around the world to facilitating practices. The Roundtable discussion is yet to be published but is mentioned 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. 6, p. 18, at <http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury>.

distinguished legal and economic commentators have grappled with the subject without being able to convert economic theory into readily applicable legal prohibitions.<sup>8</sup> We hope that the debate provoked by the Exposure Draft will assist in highlighting the complexity of the issues and we encourage the government to continue to engage with stakeholders on the formulation of appropriate and effective responses.

1.6 The rest of our submission is in three parts:

- main criticisms of the Exposure Draft (see 2. below);
- examples of unjustified overreach (see 3. below); and
- recommendations (see 4. below).

## 2. MAIN CRITICISMS OF EXPOSURE DRAFT

2.1 In our view, the amendments proposed to the *Competition and Consumer Act 2010* (Cth) (**CCA**) under the Exposure Draft are unsatisfactory and should not be enacted.

2.2 The main criticisms of the Exposure Draft made in this submission are:

- The prohibitions are discriminatory. They do not apply to competitors in all sectors of the economy. 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>9</sup> and the Hilmer Committee,<sup>10</sup> and strongly

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[and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury](#). It is unclear from the Regulation Impact Statement what, if any, specific proposals emerged from the 2010 Roundtable. See also OECD, *Price Transparency*, Document DAF/CLP(2001)22 (2001).

<sup>8</sup> See, eg, J Kattan, 'Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment', *Antitrust Law Journal*, vol. 63, 1994, p. 133; SC Salop, 'Practices that (Credibly) Facilitate Oligopoly Coordination', in JE Stiglitz and GF Mathewson (eds), *New Developments in the Analysis of Market Structure*, MIT Press, Cambridge, Massachusetts, 1986, p. 271; 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; MD Blechman, 'Conscious Parallelism, Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws', *New York Law School Law Review*, vol. 24, 1979, p. 881.

<sup>9</sup> Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976), p. 84.

<sup>10</sup> National Competition Policy Review Committee, *National Competition Policy*, 1993, pp. 85 et seq.

endorsed by the Dawson Committee,<sup>11</sup> is reflected in all of the prohibitions under the existing provisions of Part IV of the CCA. See Attachment 1, Section 2.

- 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. There are also likely to be problems with the interaction between the regulation-making process and enforcement measures by the ACCC. See Attachment 1, Section 2.
- The s 44ZZW prohibition against private disclosure of pricing information to competitors lacks a cogent rationale and would result in unjustified overreach. Focussing on *information disclosure or exchange* rather than *facilitated coordination* invariably results in overreach, capturing disclosure or exchanges in the course of legitimate and ordinary commercial activity that may well be innocuous as well as exchanges that may generate beneficial coordination between competitors. See the examples set out in para 3.1 below and Attachment 1, Section 3.2. The economic literature makes it clear that laws regulating information sharing or disclosure between competitors must be sensitive to the nature of the information and circumstances of disclosure. The law must allow for distinctions to be drawn depending on whether the information relates to past, current or future behaviour, whether it is confidential, whether it involves commitment (eg to the price disclosed), whether it is verifiable, whether it involves aggregated or disaggregated data and the like. Section 44ZZW makes none of these distinctions. See Attachment 1, Section 3.1.
- The s 44ZZX prohibition against disclosure of pricing information or other specified information for the purpose of substantially lessening competition in a market also lacks a cogent rationale and suffers from unjustified overreach. Again, the focus should be on whether or not a competitor is acting strategically to coordinate market conduct with a competitor. Like the prohibition under s 44ZZW, the prohibition under s 44ZZX has no such focus; the concept of *disclosure of information* is not limited to and does not necessarily involve or lead to *strategic market coordination* by a competitor. As a result, the s 44ZZX prohibition would result in unjustified overreach.

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<sup>11</sup> Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act, 2003*, pp. 35-37.

See the examples set out in para 3.2 below and Attachment 1, Section 4.2.

- Unlike the prohibitions in the Exposure Draft, the law in the US and EU responds to information disclosure and exchange between competitors, including behaviour referred to as signalling, as relevant to determining the existence of collusion between competitors. Collusion is defined more broadly in the EU than in the US for this purpose. Information exchange (and market transparency more generally) is also relevant to determining the prospects of collusion in the future (in the context of examining coordinated effects for the purposes of merger review). Neither of these jurisdictions has a free-standing prohibition against information disclosure of the kind contemplated in the Exposure Draft. Moreover, consistent with economic learning, the law in both of these jurisdictions recognises that the competition effects of information sharing between competitors are complex and may be ambiguous; in some circumstances, such conduct may be efficiency enhancing. For these reasons, it is not correct to suggest that, upon enactment of the Exposure Draft, Australian law would be comparable with US and EU law in dealing with anti-competitive information disclosure.
  
- The s 44ZZX prohibition is unlikely to work effectively. The ‘substantial lessening of competition’ purpose test is likely to be very difficult to establish in practice. Commercial justifications for information disclosures that negate such a purpose will not be difficult to conjure. It will be open to defendants to draw distinctions between the purpose of the disclosure and the purpose of the conduct to which it related. Inevitably, there will be attempts to characterise disclosures as mere ‘huff and puff’, lacking any substantive strategic purpose. See Attachment 1, Section 4.3.
  
- The exceptions under ss 44ZZY and 44ZZZ are unjustifiably narrow in scope and limited in range. See further Attachment 1, Section 5.2. The main issues are as follows:
  - ⇒ The joint venture exception under s 44ZZZ(3) is too narrow in three main respects.<sup>12</sup> First, the exception is limited to joint ventures whereas competitors often enter into collaborative pro-competitive ventures that

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<sup>12</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.

are not joint ventures.<sup>13</sup> Secondly, the exception under s 44ZZW(3) is limited to participants in an existing joint venture. Assume that Bank Z and Bank W discuss a prospective joint venture for the supply of low-interest loans to disabled persons. They discuss how low the interest rates can go. Bank Z and Bank W contravene s 44ZZW. The joint venture exception under s 44ZZ(3) does not apply because the joint venture is prospective. Thirdly, a corporation will not qualify for the exception if the disclosure is for the purposes of a joint venture but happens to be made to someone in addition to other participants in the joint venture (eg, a bank that is lending money to the joint venture, or a customer of the joint venture).

⇒ The exception under s 44ZZZ(1) is limited to re-supply and will not apply in many normal vertical dealings between competitors. For instance, the goods supplied may be raw materials for manufacture by the competitor, or finished goods that the competitor wants to use to operate its facilities.

- 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 many situations, including examples (1)-(4) in para 3.1 below, where everyday conduct would be caught by s 44ZZW, and examples (1)-(3) in para 3.2 below, where prevalent types of acceptable conduct would be caught by s 44ZZX.<sup>14</sup>
- The Exposure Draft would create a major loophole. The exception under s 44ZZY(1) would enable continuous disclosure to be used by public companies as an avenue for making anti-competitive disclosures.<sup>15</sup>

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<sup>13</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.

<sup>14</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 Exchange](http://ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury), p. 17, at <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.

<sup>15</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). The test of liability for unfair competition under s 5 of the Federal Trade Commission Act is very different from the prescriptive approach taken by the Exposure Draft. Query whether information disclosure of the blatantly anti-competitive kind illustrated by those cases would be 'authorised by or under' ASX Listing Rule 3.1 and the *Corporations Act 2001* (Cth) s 674 (see s 44ZZY). Note that far more subtle yet effective uses of continuous disclosure to disclose corporate strategies could easily be used. Note further that a specific anti-avoidance provision would not necessarily work against the adroit use of

### 3. EXAMPLES OF UNJUSTIFIED OVERREACH

3.1 These are examples of unjustified overreach that would result from the prohibition under s 44ZZW if enacted:

(1) Bazza, the CEO of Fifth Column, a new Australian bank, phones Gale, the CEO of one of the big four banks, and says: ‘Have you seen our new 6% home loan rate? Beat that, you bastard!’ Bazza’s competitive excess is not merely an offence against etiquette. It is contravention of s 44ZZW. It is irrelevant that Fifth Column’s 6% rate is information readily available to competitors in the market: see s 44ZZV(3).<sup>16</sup>

(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>17</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.

(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.. 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>18</sup>

(4) 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.

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continuous disclosure as a medium for signalling corporate strategy in a way calculated to help coordinate market conduct without necessarily having the purpose or likely effect of substantially lessening competition in a market.

<sup>16</sup> As explained in section 3.1, the statement in Treasury, Competition and Consumer Amendment Bill (No.1) 2011 Explanatory Note, p. 3, at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918>, that ‘[i]t is the circumstance of private disclosure of prices which creates the high risk of anti-competitive behaviour, not the information disclosed’ is misconceived.

<sup>17</sup> As required by s 44ZU(2)(b).

<sup>18</sup> As required by s 44ZU(2)(b).

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).

- (5) 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.<sup>19</sup>

3.2 These are examples of unjustified overreach that would result from the prohibition under s 44ZZX if enacted:

- (1) 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>20</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.
- (2) 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

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<sup>19</sup> See further Section 5.3.

<sup>20</sup> An additional intention may be to signal to prospective investors and customers that Macro has made significant advances and hence should be preferred over its competitors.

on imported cars, the companies would close or scale down their Australian operations. If the disclosure relates to Division 1A 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. Political speech of the kind illustrated by this example has never previously been the subject of prohibition under Part IV of the CCA. Nor should it be given that the companies concerned have not sought to coordinate prices, reduce output or allocate customers. Neither the Explanatory Note nor the RIS address the potential clash between s 44ZZX and freedom of speech.

- (3) Safair, 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 Safair's two main competitors. The advertisements relate to part of Safair'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, Safair has breached s 44ZZX. Yet conduct of this kind is the antithesis of coordinated market conduct: it is aggressive independent competition.

#### **4. RECOMMENDATIONS**

##### **4.1 We make the following recommendations:**

- The Exposure Draft requires extensive reconsideration.
- Any new prohibitions in this area should apply to all goods and services and should not be capable of extension by regulation. See Attachment 1, Section 2.
- Neither s 44ZZW nor s 44ZZX should be enacted. The concern underpinning both of these prohibitions is with information disclosure or exchange between competitors that facilitates anti-competitive and unjustifiable coordination between competitors in a market. This is a legitimate concern. However, neither prohibition is apt to address this concern. See Attachment 1, Sections 3 and 4.

- Proper consideration first should be given to whether conduct of the kind intended to be addressed by the proposed new prohibitions is already covered by the cartel prohibitions under the CCA. In particular, consideration should be given to whether, in circumstances of the kind that arose in the cases of *Email*, *Apco* and *Leahy*, there is a need to do more than rely on liability for attempting to commit a cartel offence under s 44ZZRF or attempting to contravene s 44ZZRJ or on liability under ss 45(2)(a)(ii) / 45(2)(b)(ii) for arriving at an understanding to exchange information with the purpose, effect or likely effect of substantially lessening competition. See Attachment 1, Section 3.
  
- To the extent that the current prohibitions are considered inadequate, possible ways of amending the concept of an ‘understanding’ under s 44ZZRJ should be examined further. One possibility would be to replace the current element of commitment with a requirement of mutual expectation. Dealing with information exchanges between competitors in the context of prohibitions against collusion would be consistent with and take advantage of experience in overseas jurisdictions.<sup>21</sup> See Attachment 1, Sections 3 and 4.
  
- If s 44ZZW and/or s 44ZZX are to be enacted, they should be formulated quite differently to the form currently proposed. One possibility would be to limit any new prohibition/s to cases where a competitor invites, encourages or induces another competitor not to compete against it on price, or to exchange pricing information in a way that is likely to result in the coordination of prices on some if not most future occasions and in a way that is shown to have a substantially anti-competitive purpose or effect. The definition and scope of the prohibition/s would then focus on the risk of anti-competitive coordination (in which lies the potential harm to competition), rather than on merely the exchange or disclosure of information. See Attachment 1, Sections 3.1, 4.1.
  
- If s 44ZZW and/or s 44ZZX are to be enacted in any form, the following additional amendments should be made to delimit their scope:
  - ⇒ The information that is subject to prohibition against disclosure should be limited to competitively sensitive information and should not include information that is in the public domain or known already. See Attachment 1, Section 3.1.

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<sup>21</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 3.

⇒ There should be a competition condition comparable to that under s 44ZZRD(4). The concept of a ‘potential competitor’ under s 44ZZV should be replaced by a test of likelihood as under s 44ZZRD(7). See Attachment 1, Section 3.1.

- If s 44ZZW and/or s 44ZZX are to be enacted, the following main amendments to the exceptions should be made:

⇒ The joint venture exception under s 44ZZZ(3) should be extended to cover: (a) collaborations between competitors that are pro-competitive but do not necessarily involve a joint venture;<sup>22</sup> (b) prospective joint ventures; and (c) disclosures for the purposes of a joint venture or collaborative venture to a party who is not participant in the venture where that non-participating party is not a competitor.

⇒ The exception under s 44ZZZ(1) should be extended to apply where a disclosure is for the purpose of acquisition or supply of goods or services and the corporation making the disclosure is not acting for the purpose of lessening competition between itself and a competitor.<sup>23</sup>

⇒ There should be a collective acquisition exception as under s 44ZZRV. There should also be an exception for disclosures made for the purpose of collective bargaining that has been notified to the ACCC (comparable to that under s 44ZZRL).

⇒ The protection of existing authorisations should be extended to disclosures of information made for the purpose of conduct that has been authorised.

⇒ The loophole arising from the potential use of continuous disclosure by listed companies as a mechanism for price or other signalling needs to be addressed, possibly by a specific anti-avoidance provision. This is a difficult issue but, given the significance of the loophole, one that needs to be tackled.

See further the discussion of exceptions in Attachment 1, Section 5.2.

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<sup>22</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 8, section 8.3.4.5.

<sup>23</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 8, section 8.6.5.

**ATTACHMENT 1**

**B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No. 1)  
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[Note: Attachment 1 is confidential pending publication in the Australian Business Law Review in February 2011]