CALTEX
Caltex Australia

Level 24, 2 Market Street
Sydney NSW 2000
GPO Box 3916, Sydney NSW 2001

Tel: +61 9250 5000
Fax: +61 9250 5742

20 May 2011

The Secretary
House of Representatives Standing Committee on Economics
Parliament House
Canberra ACT 2600

economics.reps@aph.gov.au

Re: Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010 and the Competition and Consumer Amendment Bill (No. 1) 2011

Caltex welcomes the opportunity to make a submission to the committee on the *Competition and Consumer Amendment Bill (No. 1) 2011.*

Caltex made a substantial submission on the exposure draft of the bill on 14 January 2011 (see Attachment B). Key points were:

- the case has not been made there is anti-competitive price signalling that justifies radical regulation of banking or potentially other sectors
- there are legitimate business reasons for private disclosure of pricing information and regulation of the oil industry would have serious unintended consequences
- regulation of petrol retailing could put the price discount cycle at risk and increase costs to consumers.

In particular, Caltex argued the bill should be amended to:

- remove the “private price disclosure” provision (44ZZW), so that both private and public disclosures are subject to the anti-competitive purpose test ie “substantial lessening of competition” (44ZZX)
- limit the price disclosure provision to information related to future prices, not historical prices, and not prices which are already in the public domain
- remove the provisions on disclosure of supply/acquisition capacity or commercial strategy in 44ZZX.

We were pleased to see a number of amendments in the bill that was introduced to Parliament that would be relevant if the oil industry was regulated. These would be important to avoid unintended commercial consequences:

- disclosures of pricing information by companies to agents are to be disregarded (but not from agents to companies – the bill needs to allow disclosures by agents to companies) (44ZZU(2))
- disclosures relating to purchases or sale of goods are excepted (previously this exemption apply only to resale) (44ZZZ(1))
- the explanatory memorandum states that public statements about pricing issues, normal advertising activities or price displays are not intended to be captured by the private disclosure provision

- the explanatory memorandum also states that submissions to government or parliamentary inquiries are not intended to be captured
- disclosures relating to proposed joint ventures are excepted (not just disclosures relating to existing joint ventures) (44ZZZ(3))
- disclosures relating to continuous disclosure obligations are excepted (44ZZY(6)).

However, the bill still contains many of the deficiencies outlined in our January submission on the exposure draft. We have prepared a supplementary submission (Attachment A) which looks at possible amendments that would address our remaining concerns, without the more extensive changes to the legislation proposed in our earlier submission. The key points are:

- a test of "legitimate business justification" would ameliorate the effects of the proposed per se prohibition (44ZZW) and the limited reach of the exceptions (44ZZY and 44ZZZ)
- failing this, administrative guidance could be used to exempt legitimate business practices from the operation of the legislation
- the authorisation and notification regimes are not practical ways of mitigating the "overreach" of the proposed legislation (ie the excessive stringency and scope of the competition tests)
- section 44ZZY could be amended to exempt information already in the public domain.

We understand the Government is focussed on regulating the banking sector and has not announced any plans to regulate petrol retailing. However, the Treasurer has also said there is "the capacity for other sectors to be specified in the future after further review and detailed consideration" and such regulation would "capture anti-competitive behaviours ... where there is strong evidence they exist, without creating unintended consequences for other sectors of the economy". (Statement on 12 December 2010 announcing the Competitive and Sustainable Banking System Package.)

We are concerned petrol retailing could be regulated by a future government without these important tests laid down by the Treasurer. For this reason, we believe the bill could be amended to lay down certain open, consultative processes the responsible minister must undertake before regulating a sector of the economy. This would not prevent a government from taking such action as it believed necessary but would provide some form of protection against arbitrary and unwarranted regulation.

Yours sincerely

Frank Topham

Manager Government Affairs & Media

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ATTACHMENT A

Caltex supplementary submission on exposure draft of the *Competition and Consumer Amendment Bill (No.1) 2011* in relation to "price signalling"

20 May 2011

Contact:

Frank Topham
Manager Government Affairs & Media
ftopham@caltex.com.au
0411 406 379

Caltex supplementary submission on exposure draft of the *Competition and Consumer Amendment Bill (No.1) 2011* in relation to "price signalling"

At a glance

- A test of "legitimate business justification" would help to mitigate the adverse impacts of the exposure draft on business and consumers
- Failing this, administrative guidance could be an alternative to a *general* legitimate business justification provision
- Authorisation and possible notification regimes in the Proposed Legislation do not mitigate the overreach of the proposed legislation

Summary of submission

- On 12 December 2010, the Commonwealth Government released an Exposure Draft of the *Competition and Consumer Amendment Bill (No 1) 2011* proposing to amend the *Competition and Consumer Act 2010* (CCA) and introduce civil prohibitions against anticompetitive price signalling and information exchanges ("Proposed Legislation").
- Caltex made a submission on the exposure draft on 14 January 2011. Various issues have been raised in other submissions, in the media and in Caltex meetings. The proposals in this submission seek to.
- **Allow for "legitimate business justification"**: a requirement for the ACCC to show an absence of a legitimate business justification to assert an offence, or the availability of an exception for a legitimate business justification, would ameliorate some of the overreaching effects of the Proposed Legislation. In particular, it would ameliorate the effects of the proposed *per se* prohibition (44ZZW) and the limited reach of the exceptions (44ZZY and 44ZZZ).
- **"Legitimate business justification" is well established in law.** The principles that underlie the concept of a legitimate business justification requirement or defence are well developed under existing provisions of the CCA, other areas of Australian law and in the other major antitrust jurisdictions, and may equally be applied here.
- **Other models of administrative guidance are suggested as an alternative to a *general* legitimate business justification requirement or defence**. These may be used to exempt legitimate business practices from the operation of the Proposed Legislation. These models include the administration of Class Orders by the Australian Securities and Investments Commission and Ministerial Determinations under the Telecommunications Access Regime.
- **A narrower formulation for legitimate information exchanges is also considered** as an alternative to incorporating a legitimate business justification requirement or defence to the prohibitions in the Proposed Legislation.
- **Authorisation and possible notification regimes in the Proposed Legislation do not mitigate the overreach of the Proposed Legislation. I**n particular, they are inadequate because:
  - the heavy regulatory burden imposed by the authorisation and notification processes, requiring the applicant to positively prove its case before conduct may be engaged in, cannot be justified in light of the pro-competitive or benign nature of many legitimate business practices that would otherwise be prohibited;
  - prospective authorisation or notification is often not practical or possible and it may be difficult to substantiate public benefits to certain disclosures that nevertheless are not anticompetitive;
  - at a minimum, the authorisation and notification processes must be retrospective in effect, thereby functioning more as defence;
  - it is inappropriate to rely on a notification regime when designing a new legislative scheme as notification schemes have been generally used to mitigate the overreach of a prohibition which, over time, has been characterised as generally benign.
  - lack of certainty as to outcomes without ACCC guidelines.

- **Other drafting suggestions** are proposed, including:
  - amending section 44ZZT to require the prescription of the application of the Proposed Legislation to also specify the type of information that would be subject to the prohibitions
  - amending section 44ZZV to define competitor and potential competitor consistently with other provisions in the CCA
  - amending section 44ZZY to exempt information already in the public domain
  - incorporating a “concerted practices” offence in section 45 of the CCA instead of introducing a new regime.

1. Background

Caltex made a submission on 14 January 2011 to The Treasury on the exposure draft of the *Competition and Consumer Amendment Bill (No.1) 2011* in relation to "price signalling". Since then, there have been some media reports on possible Government amendments to the exposure draft; Caltex has also considered various amendments to the legislation that could at least partially remove some of the problems we believe it would create.
Our preferred approach to the legislation is set out in our January submission; the proposals in this supplementary submission are alternatives if our original proposals are not accepted. We also wish to comment on some of the possible government amendments. The new proposals and comments have been developed at our instruction by our legal advisers Gilbert + Tobin.

This submission is supported by some detailed supplementary information on our proposals. In order to keep the submission succinct, this information is not included but is available on request.

2. Amendment of proposed legislation to allow for "legitimate business justification"

2.1 Scope of the prohibitions and exceptions under the Proposed Legislation

The Proposed Legislation, as it currently stands, includes two prohibitions:

Private disclosures (*Per se* Prohibition)	A corporation is prohibited from disclosing pricing information to its competitors (including discounts, allowances, rebates or credits) in relation to prescribed goods and services that the corporation supplies or acquires. This includes disclosure to competitors through third-party intermediaries.
Disclosures for the purpose of substantially lessening competition (General Prohibition)	A corporation is prohibited from disclosing information with the purpose of substantially lessen competition in a market. The scope of information caught is broader than the private disclosure prohibition by including information relating to: • prices (including discounts, allowances, rebates or credits); • the capacity of the corporation to supply or acquire goods or services; and • the commercial strategy in relation to such goods or services.

Given the potential overreach of these prohibitions, as discussed in Caltex's submission to Treasury, the Proposed Legislation includes a number of exceptions for conduct that is clearly legitimate, as indicated in the table below.

	***Per se* Prohibition**	**General Prohibition**
Exceptions	Disclosures: • authorised by law; • to related bodies corporate; • for the purpose of re-supply; • to unknown competitors; • to participants in joint ventures; and • relating to acquisitions of shares or assets.	Disclosures: • authorised by law; and • to related bodies corporate.

In addition, media speculation indicates that the Government intends to amend the list of exceptions to include disclosures made by companies in compliance with ASX disclosure obligations, syndicated lending and workouts/restructuring.[1]

[1] Matthew Drummond, "Banks for face price-signalling bans," *Australian Financial Review*, 7 March 2011.

2.2 Listed exceptions are inadequate to address all circumstances involving information disclosure based on legitimate business justification

Notwithstanding the number of exceptions enumerated in the Proposed Legislation, they are insufficient to address a wide range of legitimate, pro-competitive or benign reasons for disclosures that would be prohibited under the Proposed Legislation, as widely described in the submissions to Treasury in relation to the Proposed Legislation.[2] Amongst others, legitimate disclosures not covered by the exceptions include disclosures for the purpose of:

- advertising to customers and competing for their business on the basis of price, volume and innovation (which may include details of proposed commercial strategy for product development, for example);
- informing investors;
- informing the community on matters of public interest, including by responding to media enquiries;
- benchmarking against competitors, based on aggregated historic or current data, to enable improvement of internal processes for the purpose of attaining more efficient production, which may result in benefits to the consumer, in terms of lower prices, and more and better products.

Indeed, the Explanatory Note and Regulatory Impact Statement (**RIS**) to the Proposed Legislation recognise that many information disclosures are pro-competitive and legitimate:

> *Information disclosures play a vital role in the economy; they increase transparency in the market to the benefit of consumers and the competitive process… In general, such communications are perfectly legitimate, pro-competitive and efficiency-enhancing.*[3]

The Explanatory Note and RIS go on to state that given such pro-competitive effects, any prohibitions on disclosure would need to "*carefully balance*" prohibited conduct with "*legitimate information exchanges*".[4]

2.3 Principles of legitimate business justification is widely accepted under Australian law

Rather than attempting to prospectively and exhaustively define all legitimate circumstances of disclosure, a requirement or exception for a "legitimate business justification*"* would enable the *"*careful balancing" of disclosures, consistent with the Government's goals.

Principles underlying a general legitimate business justification requirement or defence are well accepted in other contexts, including under other provisions of the CCA, elsewhere under Australian law, as well as competition laws in the EU and US. In each case, the justification recognises the need to carefully assess, on a case-by-case basis, the effects of particular conduct, and the many legitimate commercial reasons for disclosure, which must be balanced against each other.

(a) Principles of legitimate business justification applied under existing provisions of the CCA

Consideration of a legitimate business justification or another rationale for conduct is not foreign to the CCA. In particular, in assessing the relevant "purpose" elements under section 46, and to some extent section 47, the courts will consider whether the conduct may have been based on a rationale other than a purpose of substantially lessening competition. In doing so, a court will consider whether the conduct was motivated by a legitimate business purpose. We can provide detailed advice on this point.

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[2] See, eg, Submissions to Treasury in relation to the Proposed Legislation by Caltex (pp 6-9); by Australian Bankers' Association (pp 15-17); by Law Council of Australia (pp 27-28).

[3] Australian Government, *Competition and Consumer Amendment Bill (No 1) 2011 Explanatory Note* (24 December 2010), p 2; Australian Government, *Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange* (21 December 2010), p 9.

[4] Australian Government, *Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange* (21 December 2010), pp 1. *See*, *also*, Australian Government, *Competition and Consumer Amendment Bill (No 1) 2011 Explanatory Note* (24 December 2010), p 2.

(b) Common law restraint of trade doctrine

Courts have long assessed legitimate business justifications in the context of analysing the lawfulness of a restraint of trade at common law. Under the general principles of the restraint of trade doctrine, the starting presumption is that every restraint of trade is void and unenforceable as contrary to public policy,[5] but may be rebutted if the restraint is considered reasonable by reference to the interests of the parties to the restraint as well as the public interest.[6]

(c) The Corps Act

Both the business judgment rule under section 180(2) and section 1318 of the Corps Act provide further examples of situations where Parliament has delegated to the courts discretion to assess the motivations and validity of commercial decisions on a case-by-case basis. Further information is available from Caltex on this point.

2.4 Application of legitimate business justification in other antitrust jurisdictions

2.4.1 Relevant principles in European competition law

Certain information disclosures are prohibited under Article 101(1) of the Treaty of the Functioning of the European (**EU Treaty**), prohibiting anticompetitive conduct between competitors, including agreements and concerted practices, subject to a general exception or defence.[7] These general prohibitions and exceptions are elaborated upon in guidelines (**EC Guidelines**) published by the European Commission (**EC**),[8] and as interpreted by the courts, allowing sufficient flexibility to address the circumstances of a particular case, including where practices are legitimate business conduct.

Most relevantly, the EC Guidelines consider circumstances when information exchanges will and will not be considered legitimate.

The EC Guidelines examine the general principles relevant to the competitive assessment of information exchanges.[9] Significantly, while noting that information exchanges in certain circumstances may lead to restrictions on competition, the EC Guidelines note that:

> *information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand, etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.*[10]

Legitimate business justifications are recognised by the EC with respect to information exchanges that result in efficiencies, including information exchanges for the following purposes:

- **performance benchmarking**, to enable companies to benchmark their performance against industry best practices and design internal incentive schemes accordingly, competitor cost benchmarking is considered a potential justification under the terms of Article 101(3) of the EU Treaty;[11]

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[5] See, eg, *West Harbour Football Club Ltd v New South Wales Union Ltd* [2001] NSWSC 757, Young CJ at [19].

[6] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535, Lord Macnaghten at 565.

[7] The United Kingdom (**UK**) mirrors the provisions of the EU Treaty under section 2 of the *Competition Act 1998* as administered by the UK Office of Fair Trading.

[8] European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, C11/1 (with effect from 24 January 2011).

[9] European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, C11/13-23 (section 2).

[10] Ibid, C11/13 (para 57).

[11] European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European union to horizontal co-operation agreements*, C11/21 (para 95).

- **production allocation**, to assist companies allocate production towards low-cost companies, and high-demand markets, exchanges of competitor cost and demand information are considered potentially legitimate;[12]

- **risk assessment**, to help detect which consumers carry a lower risk and should benefit from lower prices, exchanges of consumer data such as accident or credit default history, particularly relevant in the insurance and banking sectors, which also reduces consumer lock-in since the data is not specific to one competitor;[13] and

- **promote and understand product quality**, whereby companies can promote products to consumers and consumers obtain indirect knowledge of product quality by disclosure of past and present market share data (eg, best seller lists). [14]

The EC Guidelines provide the following examples of information exchanges which it considers would be legitimate business conduct under Article 101 of the EU Treaty:

- **Website posts current prices and terms of all competitor tickets.** A national tourist office together with the major coach companies in the state agree to disseminate current price information through a freely accessible website. The information exchange results in price transparency. The EC notes that the website could be used as an efficient method to monitor deviations from a collusive outcome, and therefore could give rise to restrictive effects on competition. However, the EC considers that the efficiency gains to be passed on to consumers would likely outweigh the restrictive effects on competition, since consumers can actually purchase tickets at the published prices. The exchange therefore has the effect of reducing consumer search costs and improving choice, therefore also price competition;[15] and

- **Publication of competitors' aggregated unsold juice by location.** Five fresh bottled juice companies agree to establish a company that collects current information about unsold juice at each point of sale. The data is published in aggregated form – per point of sale. As the juice has a short shelf life (must be consumed within one day of production), the data allows producers and retailers to forecast demand and better position the product to minimise wasted product, and better forecast oversupply and undersupply, significantly reducing unmet demand and increasing the quantity sold. The EC considers that in such an unstable market a collusive outcome would be unlikely, particularly as the data is published in aggregated form and made public, but that it in any event the exchange is necessary to correct a market failure, resulting from the inability to accurately forecast market demand.[16]

In contrast, the EC Guidelines also provide the following examples of information exchanges that it considers illegitimate:

- **Trade association exchange of competitor members' future pricing and terms**. A trade association for coach companies disseminates individualised information on intended fares and terms for each route. As the EC considers that the exchange of this information is a "*very efficient tool for reaching a collusive outcome*", by allowing competitors to adjust their actual prices based on knowledge of future pricing by competitors, and the information is not available to customers, the exchange is considered a restriction on competition by object, without justification under Article 101(3); [17]

- **Exchange of current occupancy rates and revenues between small group of luxury hotels in a city.** A small number of hotels with similar cost structures directly exchange commercially sensitive, non-public current occupancy rates and revenues allowing parties to directly deduce current prices of each participant (applying to sales of rooms in the future). Although the EC does not consider exchanges of current information constitute a restriction by object, it considers that the exchange of the non-public individualised information is likely to facilitate a collusive outcome by

[12] Ibid (para 96).
[13] Ibid, (para 97).
[14] Ibid, C11/22 (para 98).
[15] Ibid, C11/23 (para 106).
[16] Ibid, C11/25 (para 110).
[17] Ibid, C11/23 (para 105).

enabling competitors to coordinate and monitor deviations, without any efficiency gains flowing to the consumer;[18] and

- **Exchanges between competitors of current and published prices by telephone.** Four companies that own all petrol stations in the country exchange petrol prices displayed on their stations by phone. The EC considers that the information is not genuinely public, since the costs of obtaining the information via public means are potentially high, requiring substantial time and transport costs travelling between petrol stations. The information is therefore likely to give rise to restrictive effects on competition.[19]

Further, under UK law in the matter of *Exchange of school fee information*,[20] the Office of Fair Trading (**OFT**) decided that a number of independent fee-paying schools had engaged in the exchange of specific information regarding future pricing intentions on a regular and systematic basis, including the schools' intended fees and fee increases for both boarding and day pupils. Although no application for exemption was made under section 4 of the *Competition Act 1998* (UK) (the equivalent to Article 101(3) of the EU Treaty), the OFT suggested it was "*most unlikely that [it] would have found [an application] to have met the requirements*" because:

- "*it is extremely hard, if not impossible, to see how the exchange of school's future pricing intentions might contribute to improving the provision of educational services*"; and

- "*it is equally difficult to see how the agreement could be said to allow parents a share of the resulting benefit, if any, where price competition between the schools was distorted*."[21]

Also notable is the discussion in the EC Guidelines on unilateral statements, which note that generally, public unilateral statements are not unlawful unless there is additional evidence that the statement was part of a concerted practice.[22]

2.4.2 Legitimate business purpose in United States antitrust law

General principles

A legitimate business justification is considered in US antitrust law under section 1 of the *Sherman Act*[23] in two ways:

- in determining whether an agreement should be characterised as illegal *per se*; and

- in determining whether an agreement is reasonable analysed under the rule of reason. If anticompetitive effects of particular conduct are established, then a legitimate business justification may be established, to negate the anticompetitive effects.

Under US antitrust law, agreements between competitors to exchange information are generally considered under a rule of reason analysis (in recognition of the fact that there are significant pro-competitive benefits that may arise from information exchanges, including exchanges of price information. Under a rule of reason analysis, an exchange of price information (that is not part of a price fixing scheme) will be considered lawful if:

- it is unlikely to have an anticompetitive effect on price; or

- if a legitimate business reason for the exchange offsets any likely anticompetitive effect in a rule of reason analysis.

Notably, the Federal Trade Commission has also attempted to prosecute conduct involving information disclosures considered to be "invitations to collude" under section 5 of the *Federal Trade Commission*

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[18] Ibid, C11/24 (para 107).

[19] Ibid, C11/25 (para 109).

[20] Decision of the Office of Fair Trading (UK) No. CA98/05/2006 (Case CE/2890-03).

[21] Ibid, at 431 (para 1383).

[22] Ibid, C11/14 (para 63).

[23] 15 USCA §1 (1890).

Act[24] (**FTC Act**) which proscribes "unfair methods of competition". In *E I Du Pont De Nemours & Co v FTC*, (***Ethyl Corp Case***),[25] manufacturers of lead antiknock gasoline additives were alleged to have engaged price signalling practices by way of advance public announcements of pricing information to customers beyond contractual requirements and through Most Favoured Nation clauses. On appeal to the Federal Court of the Second Circuit, the Court found that the conduct did not breach the FTC Act as it found that the firms had adopted the relevant practices independently and for legitimate business reasons.

Significantly, the Court in the *Ethyl Corp Case* especially highlighted the necessity of the availability of a business justification defence in light of the following reasons:

- **Risk of indeterminate application of the relevant provisions.** The Court recognised that the absence of a business justification defence would leave the door open to "*arbitrary or capricious administration*"[26] of the relevant provisions stating that, "*the Federal Trade Commission could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition*";[27] and

- **Difficulty devising legitimate business standards prospectively.** The Court considered that a legitimate business justification defence was necessary because it is "*difficult to devise standards that are certain enough to allow companies to predict government intervention, and narrow enough to encompass clearly desirable conduct*".[28]

Relevant examples of legitimate business justifications in US case law

There are numerous examples of conduct involving some form of information exchange that have been upheld as a legitimate business practice.

- **Exchanges of interest rate data to maintain competitive interest rates and facilitate participation loans**

  In *Wilcox v. First Interstate Bank of Oregon NA*,[29] the US Court of Appeals examined "*the bank's explanations of their practices*" to determine whether an inference of conspiracy was reasonable.[30] The plaintiffs in that case were commercial borrowers of business loans from the defendant, the First Interstate Bank of Oregon (**FIOR**), and alleged that FIOR conspired with other banks to fix FIOR's prime rate at a uniform, non-competitive level. FIOR did not deny its parallel movement of prime rates but contended that its practice of following other banks' prime rate setting was rational conduct motivated by legitimate business concerns. The Court acknowledged the practice as lawful because "*[r]eliance on other banks' prime rate changes is a convenient and accurate way for FIOR to maintain its prime rate at the level set by the national market*".[31]

  In relation to prime rate information disseminated in public over wire services, the Court held that "*[a]n exchange of price information which constitutes reasonable business behaviour is not an illegal agreement*".[32] It found that the prime rate is more indicative of an average cost because most loans are negotiated at interest rates either at a certain percentage above or below prime. The Court also accepted that meetings to discuss interest rates on participation loans was a necessary business practice "*because lenders must agree on participation loan terms including interest rates*"[33] and because "*cooperation is a necessary incident to participation loans*".[34]

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[24] 15 USCA § 45 (1914).

[25] 729 F.2d 128 (2d Cir. 1984).

[26] Ibid, 138.

[27] Ibid.

[28] Ibid, 143.

[29] 815 F.2d 522 (1987).

[30] Ibid, 526.

[31] Ibid, citing *United States v. International Harvester Co.,* 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927) at 754: "The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

[32] 815 F.2d 522 (1987), 527.

[33] Ibid.

[34] Ibid.

- **Pre-merger due diligence**

  In a recent case with respect to information exchanges during a pre-merger due diligence process, the Court stated that:

  > *[C]ourts should not allow plaintiffs to pursue Sherman Act claims merely because conversations concerning business took place between competitors during merger talks; such a standard could chill business activity by companies that would merge but for a concern over potential litigation*.[35]

- **Prevention of customer fraud**

  The practice of exchanging current sales prices and quantities between competing trade association members at association meetings was found necessary "*to prevent fraud by customers who purchased cement under a specific job contract*" at a designated price but then used the cement delivered for a different job. It was held that these "*controlling circumstances*" justified the exchange of company-specific, current sales and customer data despite the stabilising effect on price that such conduct engendered.[36]

- **Benchmarking**

  An industry association which collated and distributed detailed business information to its members in aggregated form (including average production costs, freight rates, sales data, and discussions of market conditions) at monthly association meetings was found to be legitimate business conduct:

  > *It was not the purpose or the intent of the Sherman Antitrust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce for the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated.*[37]

  In another case, information exchanges between competing railroad car couple manufacturers on all aspects of their operations (including input costs and methods of production) to standardise their product was fully endorsed as legitimate business conduct. The exchange of cost data and reciprocal plant visitations were found to be pro-competitive and designed to enhance efficiency and lower costs of production. The Court stated:

  > *I don't believe or find that these defendants reciprocated cost information to get prices up, as part of an illegal combination at all. I* ***think they did it to check costs with each other so that they could get their costs down****…*
  >
  > *I find that plant visitation was all for the same ultimate purpose, to improve their work, to observe new machinery, to observe new methods. All done ultimately to reduce costs, because these defendants must compete with each other even in efficiency, because labor and material was increasing costs so much in one direction that it behoved them to cut costs in every other direction, if they could.*
  >
  > *I find getting costs down by either of these methods of imitating the other fellow to cut costs or* ***learning more efficient methods to better compete with him ultimately keeps prices down, to cut costs or learning more efficient methods to better compete with him ultimately keeps prices down, too****.*[38]

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[35] *Omnicare Inc v. UnitedHealth Group Inc.* (2011 U.S. App Lexis 3540), No 09-1152 (decision published without opinion).

[36] *Cement Manufacturers Protective Association et al v. United States,* 268 U.S. 588 (1925).

[37] *Maple Flooring Manufacturers Association et al v. United States*, 268 U.S. 563 (1925), 583-584.

[38] *United States v. National Malleable & Steel Castings Co.,* 1957 Trade Cas. 6 68,890 (N.D. Ohio 1957), *aff'd per curiam,* 358 U.S. 38 (1958).

In contrast, proffered business justifications have been rejected as illegitimate in other cases. For example, in *In re Petroleum Products Antitrust Litigation*,[39] the Court did not accept the business justifications put forward by major oil companies in relation to the exchange of price information. Company officers asserted that the signalling of wholesale price increases amongst the oil companies through press releases as well as postings of prices and discounts for public inspection at company offices and plants was legitimate because:

> *It was our desire to be open and straightforward in the matter of our product pricing and to make available for any customer the ability to look and see what our posted price was.... I guess one might say that it was for the logic of being open and above board on what our prices were to our customers. We had nothing to conceal and it was just a mechanism to accommodate that openness*.[40]

Other officers justified the conduct as "*[f]or the customer's benefit, to inform the customer what the applicable prices were*"[41] and to allow an individual dealer to come in and check "*that he wasn't being discriminated against*".[42] These "*business motivations*" were not found to be a legitimate rationale for the conduct as the information would have only been of interest to oil companies and their franchisees and the information posted was unusually detailed (by including listing tank wagons and dealer discounts for each individual price zone).

[39] 906 F.2d 432 (9th Cir. 1990).

[40] Ibid, 449.

[41] Ibid.

[42] Ibid.

2.5 Options for implementing legitimate business justification requirement or exception

As these other contexts demonstrate, the ability of legitimate business justifications for conduct to be considered in assessing a prohibition allows for a careful balancing of the circumstances in a particular case. Far from simply allowing firms "carte blanche" to fabricate a business justification, the legitimate business justification analysis requires an analysis of the purposes and efficiencies of the conduct in question.

Accordingly, we consider there are two options for introducing a legitimate business justification principle in the Proposed Legislation.

Option 1

Incorporate an additional element of "absence of business justification" in the substantive prohibitions under the proposed sections 44ZZW and 44ZZX of the Proposed Legislation such that a court must be satisfied that there is no legitimate business rationale for the impugned conduct before it finds the relevant conduct to have breached the relevant prohibition. Thus, the onus would be on the applicant to show an absence of a legitimate business justification.

The proposed element that would be incorporated into the Proposed Legislation is indicated in the boxes below (additions and deletions are highlighted in blue text and underlined):

(1) Proposed element under the *Per se* Prohibition

44ZZW Corporation must not make private disclosure of pricing information etc. to competitors

A corporation must not make a disclosure of information if:

(a) the information relates to a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation in a market (whether or not the information also relates to other matters); ~~and~~

(b) the disclosure is a private disclosure to competitors; and

(c) the disclosure is made without a legitimate business justification.

(2) Proposed element under the General Prohibition

44ZZX Corporation must not make private disclosure of pricing information etc. for purpose of substantially lessening competition

(1) A corporation must not make a disclosure of information if:

(a) the information relates to one or more of the following (whether or not it also relates to other matters):

(i) a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation;

(ii) the capacity, or likely capacity, of the corporation to supply or acquire Division 1A goods or services;

(iii) any aspect of the commercial strategy of the corporation that relates to Division 1A goods or services; ~~and~~

(b) the corporation makes the disclosure for the purpose of substantially lessening competition in a market; and

(c) the corporation makes the disclosure without a legitimate business justification.

Notably, section 44ZZX(2) lists factors that the court may have regard to in determining whether the disclosure was for the purpose of substantially lessening competition (including whether the disclosure was a private disclosure to competitors, the degree of specificity of the information, whether the information relates to past, current or future activities, how readily available the information is to the public, and whether the disclosure is part of a pattern of similar disclosures). Further, sub-section (3) provides that purpose may be ascertainable only by inference from the conduct of the corporation or from other relevant circumstances.

As per section 4F of the CCA, "purpose" means substantial purpose and may be one of several purposes.

Although it may appear that an additional element or defence of legitimate business justification is not necessary in light of the purpose element in the proposed legislation, there remains a risk that a court could fail to consider legitimate business justifications, since the court need not have regard to any legitimate business justification in determining purpose on an ex post basis under sub-section (2) and (3). Incorporating the element of a legitimate business justification under the General Prohibition would provide some additional comfort against a court arbitrarily determining purpose and on an ex post basis.

Option 2

Alternatively, incorporate a general "business justification defence/exception" to adjoin the exceptions listed in the proposed section 44ZZY such that a corporation may invoke the defence where it is found to have contravened sections 44ZZW and 44ZZX. Thus, the onus would be on the corporation to positively prove a legitimate business justification.

The proposed exception would read as follows:

44ZZY Exceptions that apply to section 44ZZW and 44ZZX
[…]
Disclosure made for legitimate business purpose
(3) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a person or a body corporate if the disclosure is for a legitimate business purpose.

2.6. Alternative options to *general* legitimate business justification requirement or exception

If the Government is not minded to consider a legitimate business justification requirement or defence, other alternatives are suggested below.

(a) Exception in relation to "legitimate information disclosures"

An alternative to incorporating a legitimate business justification defence in the Proposed Legislation is an exception for "legitimate information disclosures" under the proposed section 44ZZY which would be subject to satisfying certain conditions in relation to the characteristics of the information being exchanged. The provision itself would enumerate the characteristics of the information that would need be satisfied in order to qualify for the exception.

Accordingly the exception could be added to section 44ZZY as indicated in the box below.

44ZZY Exceptions that apply to section 44ZZW and 44ZZX

Disclosure of legitimate information exchanges

(3) Sections 44ZZW and 44ZZX do not apply to legitimate information exchanges between corporations if the information:

- [list of information characteristics]

(b) Exception in relation to "disclosures made in the ordinary course of business"

Another option would be to amend the proposed section 44ZZZ to include an exception in relation to information disclosed "in the ordinary course of business," subject however to the respondent person or corporation being able to establish that the relevant disclosure did not have an anticompetitive purpose or effect. The phrase "ordinary course of business" is a well understood legal concept, so use of the phrase would provide sufficient certainty to corporations in relation to their day-to-day business practices.

An amendment would insert into the proposed section 44ZZZ a new sub-section as indicated in the box below

44ZZZ Additional exceptions that only apply to section 44ZZW

[…]

Ordinary business disclosure

(5) Section 44ZZW does not apply to the disclosure of information by a corporation if information is disclosed:

(a) in the ordinary course of business; and

(b) not for the purpose, or with the effect or likely effect of substantially lessening competition in a market.

44ZZX Corporation must not make disclosure of pricing information etc. for purpose of substantially lessening competition

[…]

Determining whether disclosure made for purpose of substantially lessening competition

(2) In determining, for the purpose of this section, if a corporation had made a disclosure for the purpose of substantially lessening competition in a market, the matters to which the court may regard include (but are not limited to):

[…]

(f) whether the disclosure is part of the ordinary course of business.

In addition, to further supplement the proper consideration of disclosures made in the ordinary course of business, “whether the disclosure is part of the ordinary course of business” of the relevant corporation should be listed as a matter a court should have regard to under the proposed section 44ZZX(2) in determining whether a disclosure was made for the purpose of substantially lessening competition.

3. Alternative models for delegating consideration of legitimate business conduct

If the Government is not minded to introduce the concept of a legitimate business justification into the Proposed Legislation, another option might be to provide the ability for ministerial decision-making to exempt classes of legitimate business conduct, similar to the models in other contexts described below.

Certain benchmarking activities between competitors provide one example of a class of conduct that would be appropriately subject to a Class Order or ministerial determination. If the benchmarking practice involved the sharing of aggregated historic or current information, disseminated through a third party, there would appear to be no likely anticompetitive effects. A Class Order or Ministerial Pricing Determination could provide parameters on what would constitute legitimate benchmarking activities.

3.1 Class Order exemptions administered by ASIC

The Proposed Legislation could include a process to enable classes of conduct to be exempt from the Proposed Legislation where there was a legitimate business justification or efficiency which outweighed any anticompetitive effects. ASIC has specified powers to issue Class Orders, or specific orders to a company, to give relief from certain requirements of the Corps Act.[43] Further detailed information on this point is available from Caltex.

3.2 Ministerial determinations under the Telecommunications Access Regime (TAR)

Another possible model to provide determinations on legitimate business justifications would be the Ministerial determination model found under the TAR. That is, the Minister should be granted the power to make a written determination setting out the principles by which legitimate business conduct might be exempted from the application of the prohibitions. Further detailed information on this point is available from Caltex.

[43] ASIC may also grant relief in respect of the *Superannuation Industry (Supervision) Act 1933*; *National Consumer Credit Protection Act 2009*; or *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

4. Proposed authorisation and notification procedures do not mitigate the overreach of the Proposed Legislation

In an attempt to mitigate the overbroad scope of the prohibitions under the Proposed Legislation, the Government has proposed the use of authorisation and notification procedures. However, for the reasons set out below, we consider these processes inadequate to address concerns that legitimate business practices will risk breaching the prohibitions of the Proposed Legislation.

4.1 Authorisation

The proposed terms of the Proposed Legislation provides that conduct that would otherwise contravene the Proposed Legislation may be authorised by the ACCC, on a prospective basis only.[44] In particular, the ACCC may not make a determination to authorise:

- a proposed private disclosure that would or might otherwise be prohibited by section 44ZZW unless it is satisfied "*in all the circumstances that the proposed disclosure would result, or be likely to result, in such a benefit to the public that the proposed disclosure should be allowed to be made*"[45]; and

- a proposed disclosure that would or might otherwise be prohibited by section 44ZZX unless it is satisfied "*in all the circumstances that the proposed disclosure would result, or be likely to result, in such a benefit to the public*" and "*that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result or be likely to result if the corporation so disclosed the information*".[46]

We do not consider that the authorisation process is a sufficient or practical mechanism to address price-related disclosures or proposed disclosures for the reasons set out below.

(a) The authorisation process is an expensive and time consuming process.

The authorisation process generally takes 6 months, and involves a public consultation process, and may be extended by a further 6 months. There is also scope for an appeal to the Australian Competition Tribunal by a third party whose interests are affected.

Authorisation imposes a heavy regulatory burden on applicants before they are able to engage in the subject conduct, requiring them by detailed written submissions to show that there are public benefits that flow from the disclosure and that these will outweigh any potentially anticompetitive detriment that may arise from the disclosure, and frequently requiring support by detailed expert evidence. To require applicants to substantiate public benefits in such a way, where the disclosures are either pro-competitive or benign is unduly burdensome.

(b) In many cases the authorisation process is not practical or possible.

In many cases, it will not be practical, and in some cases not possible, to obtain an authorisation prospectively before conduct is engaged in, in each instance where an otherwise legitimate business practice may risk being alleged as a breach of the new prohibitions. Many disclosure decisions are immediate in nature and must be made on a frequent basis. For example, disclosures necessary to comply with continuous disclosure obligations, or even simply to respond to community or political questions. Moreover, substantiating public benefits can be a difficult and onerous requirement in many cases.

If authorisation is the only avenue to address an overbroad per se prohibition, then at a minimum it should apply retrospectively, in which case it will function similarly to a defence.

[44] Proposed Legislation s 5.

[45] Proposed Legislation s 6.

[46] Proposed Legislation s 6.

(c) The very nature of the authorisation process, requiring public disclosure, is incongruous with the prohibitions against disclosure.

The authorisation process is a very public one, involving the public disclosure of the authorisation application and supporting submissions, and the opportunity for third party submissions in response to the application. Thus, if a corporation applies for authorisation for a disclosure to be made, it will need to make the nature of the proposed disclosure public in its application. The corporation therefore risks breaching the Proposed Legislation through the authorisation process.

(d) The outcomes of authorisation will remain uncertain until significant precedents are set.

As a new process, the relative weight that the ACCC will attach to public benefits and detriments is unclear.

To assist parties in assessing the prospects of authorisation in circumstances where obtaining authorisation is practical, it is submitted that the ACCC should issue guidelines outlining relevant principles to be applied in their assessments.

(e) Authorisation should also be available retrospectively.

The prospective nature of authorisation leaves conduct that is engaged in prior to obtaining authorisation exposed to a risk of violation. While authorisation may be available to immunise disclosures that might otherwise breach either of the prohibitions in the Proposed Legislation, or indeed other provisions of the CCA, there is a risk that conduct engaged in prior to obtaining authorisation would breach the prohibitions of the Proposed Legislation.

For example, consider a proposed collaboration between competitors to provide a new product jointly at a particular price. While the collaborative development in bringing a new product to market may have public benefits that would merit authorisation of the joint activity, and disclosures made in that context, which would otherwise be prohibited may be authorised, disclosures relating to price are likely to be required to be made. Even if authorisation is subsequently obtained, discussions prior to obtaining authorisation are exposed to a breach of the prohibitions.

Accordingly, we would suggest revision of section 88(6B) under the Proposed Legislation as follows:

After subsection 88(6)

Insert:

[…]

(6B) The Commission ~~does not have power to~~ may grant an authorisation under sub-section (6A) to a corporation to make a particular disclosure of information if the disclosure occurred before the Commission makes a determination in respect of the application.

In addition, sections 90(5C) and (5D) would require amendment, as shown in mark-up below:

> After subsection 90(5B)
>
> Insert:
>
> (5C) The Commission must not make a determination granting an authorisation under sub-section 88(6A) in respect of a ~~proposed~~ disclosure of information to which section 44ZZW would or might apply, unless the Commission is satisfied in all the circumstances that the ~~proposed~~ disclosure would result, or be likely to result, in such a benefit to the public that the ~~proposed~~ disclosure should be allowed to be made.
>
> (5D) The Commission must not make a determination granting an authorisation under sub-section 88(6A) in respect of a ~~proposed~~ disclosure of information to which section 44ZZX would or might apply, unless the Commission is satisfied in all the circumstances:
>
> (a) that the ~~proposed~~ disclosure would result, or be likely to result, in a benefit to the public; and
>
> (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the corporation so disclosed the information.

4.2 Notification

We understand that the Government may intend to introduce a notification regime with respect to conduct that may otherwise breach the *Per se* Prohibition under the Proposed Legislation, similar to the notification regime in place with respect to exclusive dealing and third line forcing conduct under section 93 of the CCA.

Media speculation suggests that under such a notification framework, the ACCC would have a two-week period to consider and raise any issues in relation to an application for notification. Notification will be granted by default if the two-week period elapses without objection from the Government.[47]

Part VII of Division 2 of the CCA outlines the mechanism by which corporations can notify the ACCC of conduct which amounts to third line forcing, exclusive dealing, and collective bargaining. Further information on this point is available from Caltex.

While the exact terms of any proposed notification regime under the Proposed Legislation have not been disclosed at this time[48], as a matter of general principle, we consider that such a notification regime is inadequate to address the overbroad *Per se* Prohibition for the following reasons:

- it would require the proposed disclosing entity to positively prove whatever test is adopted to qualify for notification, in relation to legitimate business conduct, imposing significant and unjustified costs on the applicant in respect of the notification, as well as imposing resource costs on the ACCC to consider the application;[49]

- the exclusive dealing and in particular third line forcing notification process is designed to address regulatory overreach of an overbroad per se prohibition against third line forcing, where there is no evidence of anticompetitive effect and in light of the fact that antitrust rules in other jurisdictions around the world have since changed so they no longer generally consider the conduct to be *per se* illegal. In this context, notification affords an applicant some comfort that they may engage in conduct without fear that the ACCC will prosecute. However, it would seem inappropriate to rely on a notification regime when designing a new legislative scheme, rather than initially seeking to design a law with an appropriate scope; and

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[47] Matthew Drummond, "Banks for face price-signalling bans," *Australian Financial Review*, 7 March 2011.

[48] While the terms of the proposed notification process are not yet known, it is submitted that, for reasons similar to those made with respect to the authorisation process above, the notification process should also allow corporations to notify conduct retrospectively.

[49] In the context of third line forcing notifications under section 93 of the CCA, the ACCC may allow a notification to stand with respect to conduct that is otherwise per se illegal, where the person notifying establishes that the public benefit resulting from the conduct outweighs any public detriment resulting from a substantial lessening of competition.

- it provides business with no upfront certainty in relation to pro-competitive or competitively benign conduct, which, unless a notification is allowed to stand, will be considered *per se* illegal. Notably also, the ACCC may revoke a notification at any time and therefore provides no continuing certainty in relation to legitimate conduct that may involve significant investment.

5. Other drafting recommendations

5.1 Reference to type of information subject to Proposed Legislation should be required to be prescribed – amendment to section 44ZZT

While section 44ZZT provides for the goods and services to which the Proposed Legislation applies to be prescribed, the type of information to which the prohibition would be applied in respect of those goods and services is not clear.

If the type of information subject to the provisions could also be prescribed, there would be some certainty as to the parameters of prohibited disclosures, which would assist businesses in managing compliance with the prohibitions, without unnecessarily restricting pro-competitive disclosures.

Accordingly, section 44ZZT(2) should be amended to include an additional sub-section.[50]

> 44ZZT Goods and services to which this Division applies
>
> […]
>
> (2) Without limiting sub-section (1), the regulations may limit the description of a class of goods or services by reference to any matters including (for example) any one or more of the following:
>
> (a) a kind of supplier of goods or services;
>
> (b) a kind of industry or business in which goods or services are supplied;
>
> (c) the circumstances in which goods or services are supplied;
>
> (d) the type of information with respect to the goods or services to which this Division applies.

5.2 Meaning of competitors and potential competitors – amendment to section 44ZZV

As has been noted elsewhere, the meaning of competitor and potential competitor in the Proposed Legislation is unclear and inconsistent with other provisions in of the CCA, such as sections 4D and 44ZZRD of the CCA, which refers to a person who "*is, or is likely to be in competition with each other*" with respect to the supply or acquisition of particular goods or services.

The following sub-section should be added to section 44ZZV to clarify the meaning of competitor and potential competitor.

> 44ZZV Meaning of private disclosure to competitors
>
> […]
>
> *Competitors and potential competitors*
>
> (4) For the purposes of this Division, a corporation is considered to be a competitor or a potential competitor where the corporation is or is or is likely to be in competition with another person in respect of the supply or acquisition of goods or services to which the information disclosed relates.

[50] It should be noted that this amendment would not proceed if the Caltex submission that the law should apply generally is successful. If the Proposed Legislation is applied generally, then s 44ZZT would most likely be deleted.

5.3 Exemption for information already in the public domain – amendment to section 44ZZY

On its face, the prohibitions under the Proposed Legislation, as currently drafted, would extend to disclosures of information already in the public domain. However, where information is already in the public domain, and therefore not competitively sensitive, there is no reason why repeating that information should attract liability under the Proposed Legislation.

The EC Guidelines also recognise this principle, stating that exchanges of "*genuinely public information*" are unlikely to breach Article 101 of the EU Treaty. Under the EC Guidelines, information is considered "*genuinely public information*" if it is:

> *generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information*.[51]

Nevertheless, under the current terms of the Proposed Legislation, such disclosures, although condoned by the EC, would be prohibited in Australia.

We would suggest the inclusion of an exemption for disclosures of information already in the public domain, to be included as a new sub-section of section 44ZZY, as indicated in the box below:

44ZZY Exceptions that apply to section 44ZZW and 44ZZX
[…]
Disclosure of information in the public domain
(3) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if the information is already in the public domain [or generally available to the public.][52]

5.4 Incorporate a "concerted practices" offence in section 45 instead of introducing a new regime

As noted by many of the submissions to Treasury, including the Caltex submission, the unilateral nature of the prohibitions contained in the Proposed Legislation reaches far beyond the prohibitions in the EU and US. In any event, the far-reaching scope of the prohibitions would still fail to address the perceived "gap in the law" identified by the ACCC based on the high-profile petrol cases.[53]

In addition, the Proposed Legislation would introduce an entirely new regime into the CCA, at odds with many other sections of the CCA.

As an alternative, the existing section 45 could be amended to incorporate a broad catch-all provision that includes but extends beyond information disclosures. The recommended amendment is underlined in blue text in the box below.

CCA – Section 45
[…]
(2) A corporation shall not:
(a) make a contract or arrangement, or arrive at an understanding, if:
(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or

[51] European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European union to horizontal co-operation agreements*, C11/21 (para 94)

[52] Note that the reason for including the additional option "or generally available to the public" in s44ZZY is to distinguish this proposal from the language of the Coalition Bill, but we would consider the language without the additional optional phrase to be otherwise appropriate.

[53] See, *Apco Service Stations Pty Limited v ACCC* [2005] FCAFC 161; *ACCC v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183.

arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(c) in concert with a second person, engage in conduct for the purpose or with the effect or likely effect of substantially lessening competition in the acquisition or supply of goods or services in respect of which it is in competition with the second person.

The concept of "in concert with a second person" is a well understood legal concept under section 45D of the CCA, thus creating consistency and removing uncertainty in relation to introducing foreign concepts into the CCA as is the case with the Proposed Legislation.

The proposed sub-section above would apply directly to a person:

- who is an active information recipient;[54] and
- who proposes a "price for profit campaign"[55].

Under this scenario, information exchanges by services such as *Informed Sources* could be defended on the basis that:

- the exchange was not engaged in for any anticompetitive purpose; and
- the exchange did not have the effect or likely effect of substantially lessening competition.

[54] See, eg, *Apco Service Stations Pty Limited v ACCC* [2005] FCAFC 161.

[55] See, eg, *Trade Practices Commission v Service Station Association Ltd* (1993) 116 ALR 643.

CALTEX

Caltex Australia

ATTACHMENT B

CALTEX

Caltex Australia

Caltex submission to The Treasury on exposure draft of the *Competition and Consumer Amendment Bill (No.1) 2011* in relation to "price signalling"

Note: a number of points made in this submission, particularly in relation to commercial impacts, were addressed in the bill tabled in Parliament – see cover letter to this submission dated 20 May 2011.

14 January 2011

Contact:

Frank Topham
Manager Government Affairs & Media
ftopham@caltex.com.au
0411 406 379

Caltex submission to The Treasury on exposure draft of the *Competition and Consumer Amendment Bill (No.1) 2011* in relation to "price signalling"

At a glance

- The case has not been made that there is anti-competitive price signalling that justifies radical regulation of banking or potentially other sectors
- There are legitimate business reasons for private disclosure of pricing information and regulation of oil industry would have serious unintended consequences
- Regulation of petrol retailing could put price discount cycle at risk and increase costs to consumers.

Summary of submission

- Caltex does not believe the legislation is necessary as the case has not been made there is anti-competitive "price signalling" that substantially lessens competition in banking or any other sector.
- If legislation is pursued, it should be applied generally to business not just banking.
- If legislation is pursued, the following changes should be made:
    - remove the 44ZZW private price disclosure provision, so that such disclosure falls under the 44ZZX general disclosure provision (both private and public) and is subject to the anti-competitive purpose test
    - limit the price disclosure provision to information related to future prices not historical prices and not prices which are already in the public domain
    - limit the general disclosure provision to prices and not supply/acquisition capacity or commercial strategy.
- Alternatively, if the 44ZZW private price disclosure provision were retained (which is not Caltex's preference) without an anti-competitive purpose test:
    - there should be a defence that the disclosure had a reasonable business justification, similar to that which exists in the overseas concerted practice laws
    - the reference to "potential competitor" in the definition of "private disclosure to competitors" should be deleted, due to the breadth and uncertainty of the term, or made consistent with the well established language of the *Competition and Consumer Act* (eg in s4D where it applies to arrangements between competitors, or firms *likely* to be in competition with each other).
- If the legislation is applied on a sector by sector basis, clear criteria and consultative processes should be established and applied before regulation is applied more widely. The Government has undertaken to regulate only "after further review and detailed consideration" and "where there is strong evidence" that anti-competitive behaviours exist.
- While the ACCC has indicated two areas of concern the legislation could address in relation to petrol retailing (namely "price signalling" through Informed Sources and the way in which "understanding" has been interpreted by the Courts in the *Geelong* and *Ballarat* cases), it has not made any public case for regulation and Caltex does not believe such a case can be made.
- Caltex rejects the assertion that retailers engage in "price signalling" through Informed Sources. The purpose of the disclosure of information to Informed Sources is to enable public price information to be efficiently collated so that Caltex is better able to remain competitive on price including the provision of further discounts.
- In Caltex's view, petrol price cycles are indicative of strong competition and motorists benefit. Price cycles enable more price-sensitive motorists to purchase petrol at heavily discounted prices by observation of past price cycles, which provides a good guide to when price cycles are likely to occur in the future. They are examples of "Edgeworth cycles", which also occur overseas and are described in the ACCC's 2007 petrol price report. That report concluded "the existence of price cycles alone does not seem to provide evidence of a lack of retail competition".

- If petrol retailing (or the oil industry more generally) were regulated, there would be a number of impacts:
  - The disclosure of pricing information to Informed Sources would be prohibited because it would be a private disclosure of pricing information to competitors via Informed Sources as an intermediary - such disclosure would be prohibited even though it is does not relate to future prices (the legislation does not distinguish between historical and future prices) and publicly available, for example through price boards
  - There is some risk the changes could eliminate or modify the price discount cycle to the detriment of consumers, which would not only deprive many motorists of the opportunity of buying petrol at a deep discount but could increase the average price level by reducing competition - there would need to be considerable confidence by government that such effects would not occur as a result of regulating petrol retailing
  - If retailers had to use manual observation of price boards to collect competitive price information, rather than using the more efficient Informed Sources service, the industry-wide cost to consumers could be of the order of $40 million per year.
  - There would be some serious impacts on commercial arrangements that are not anti-competitive and have a legitimate business purpose:
    - Provision of pricing information by franchisees to Caltex (a retail competitor and fuel wholesale) to enable provision of rebates on the wholesale price of fuel (known as “price support”) based on prevailing local competitor prices – this provision of information would be prohibited
    - Provision of competitor price information by a Caltex commission agent to Caltex central pricing managers to enable Caltex to set the retail price of fuel at the Caltex site – this provision of information would be prohibited if the commission agent was also an independent operator at another competing site or was considered a “potential competitor”
    - Caltex offers a range of fuel cards to enable customers to purchase fuel and manage their vehicle fleets. In a fuel card transaction, Caltex purchases fuel at point of sale from the competitor site at a price related to the prevailing pump price and resells it to the fuel card holder at a discount to the pump price. The transmission to Caltex of the card sale and the transaction sale price risks contravening the private price disclosure provisions.
  - There would be impacts on public pricing information:
    - MotorMouth (part of the Informed Sources group) provides information online to the public on petrol, diesel and LPG prices, partially based on electronic data from fuel retailers. MotorMouth could continue legally but might not be viable if fuel retailers ceased providing electronic data to Informed Sources, because the cost of independent data collection would be too high.
    - myPriceboard is a service operated by MotorMouth. It allows fuel retailers to upload data on board prices to post on MotorMouth. myPriceboard would not be viable without MotorMouth as a means of posting information.
    - Pricing information may be given to a competitor which is publicly available and is of no competitive value (eg copy of ABS data of petrol prices as part of CPI). This might be done when discussing public policy matters so participants don’t have to duplicate collection of public data. The proposal would make such disclosure illegal.
    - Information on historical prices is provided to the Australian Institute of Petroleum (AIP) and its consultants for public reporting purposes. AIP members would not share historical price information if there was a risk that the information would be passed on privately to other competitor members.

1. Background to legislation

1.1 Banking industry

On 12 December 2010, the Deputy Prime Minister announced the Competitive and Sustainable Banking System Package. The exposure draft legislation is part of this package, and sets out the proposed amendments to the Competition and Consumer Act 2010 to address anti-competitive price signalling and information exchanges. The Government will introduce amendments to the Trade Practices Act in the first sitting of the Parliament in 2011.

The Government says the legislation "will capture anti-competitive behaviours ... where there is strong evidence they exist, without creating unintended consequences for other sectors of the economy. The Government will give the ACCC the power to take action against businesses in specified sectors like banking who signal their prices to their competitors in order to undermine competition. These tough new reforms will apply initially to banks, with the capacity for other sectors to be specified in the future after further review and detailed consideration. Of course, all publicly listed companies will be able to fully comply with their continuous disclosure obligations.

Anti-competitive price signalling technically falls short of collusion because it does not involve a commitment to act in a certain way — but it can be just as harmful to competition as a price cartel. Laws prohibiting these 'facilitating' or 'concerted' practices already exist in the US, the UK and in Europe — and now the ACCC's new powers will close a gap in the Trade Practices Act, which is used by businesses like banks to avoid the full impact of genuine competition.

The Government's exposure draft legislation gives the ACCC the power to prosecute where it concludes that a bank has communicated its pricing intentions and other strategic information to a competitor for the purpose of substantially lessening competition.

Importantly, the proposed law will be clear that a court can make up its own mind as to what it thinks the real purpose was, based on the surrounding circumstances — so there is no need for a 'smoking gun'. For example, the law designed as proposed would prohibit any bank executive from purposefully signalling to its competitors through the media or investment community that if other banks raise their mortgage rates it will follow them.

... Further, any private communications between two banks about their prices would be automatically prohibited under the proposed design, as these sorts of private tip-offs are invariably harmful for competition.

Of course, in limited circumstances where price signalling may be legitimately providing overall net public benefits, the ACCC would be able to provide an exemption for the parties under the existing authorisation provisions." (*Competitive and sustainable banking system*, Australian Government, December 2010, pages 11-12)

Caltex supports a strong Competition and Consumer Act and does not in any way support anti-competitive behaviour. However, the legislative proposals are contentious and Caltex seriously questions some of the assertions on which the Government bases the need for the proposals:

- the statement that private communications on price are invariably harmful to competition.
- the implication that because "price signalling" can be as harmful as a price cartel, it should be subject to a similarly stringent prohibition ie not subject to a test of anti-competitive purpose
- the implication that similar laws apply in the US, UK and EU when in fact there are crucial differences including that unilateral pricing disclosures are not prohibited outright in those jurisdictions
- the implication that banks and other businesses exploit a "loophole" in current legislation for anti-competitive purposes when this is merely a matter of assertion without substantive evidence

1.2 Oil industry

As discussed above, the government's intention is that legislation will only apply to banking initially (through regulation of so-called "Division 1A goods or services") and that any extension to other sectors would be "after further review and detailed consideration". In addition, regulation "will capture anti-competitive behaviours ... where there is strong evidence they exist". No legislative or policy criteria are laid down for such an extension of regulated goods and services.

It seems likely the ACCC will seek to demonstrate to the Treasurer the need for petrol (and possibly other petroleum products) to be regulated. This relates to two issues:

(1) The first issue is the exchange of publicly available pricing information through third-party intermediaries. This is likely to impact on the operations of Informed Sources Pty Ltd since disclosure of price-related information to an intermediary will be taken to be a disclosure to a competitor where the information is provided to the intermediary for the purpose of disclosing it to a competitor. In addition, re-transmission of information already in the public domain does not avoid breach of the prohibitions.

(2) The second issue is previous ACCC concerns in relation to "gaps in the law" emanating from the *Ballarat* and *Geelong* petrol cases where the court found it necessary that there be some form of commitment by the parties to an alleged "understanding" and where the court was reluctant to draw inferences from the evidence in establishing an "arrangement" or "understanding".

2. Outline of legislation and general impacts

2.1 Outline of legislation

Coverage

Application of the measures is industry-specific. Although the bill theoretically applies "across the economy" – that is, application of the bill is not limited to specific industries – it does not have general application and practically only applies to goods or services of classes that are prescribed by regulations ("Division 1A" goods or services).

The description of a class of goods or services may be limited to the following matters:

- the kind of supplier of goods or services (eg limiting application to the big four banks)
- the kind of industry or business in which goods or services are supplied (eg limiting application to the banking or petrol industries)
- the circumstances in which goods or services are supplied.

Prohibitions

The bill contains two prohibitions in relation to price signalling which may broadly be distinguished on the basis of whether the disclosure is a private disclosure (price information disclosed to competitors only) or public disclosure (price and non-price related disclosures generally).

Private disclosure

A corporation would be prevented from making disclosures to competitors of information relating to prices (including discounts, allowances, rebates or credits) in relation to prescribed goods and services that the corporation supplies or acquires. The bill also prevents a corporation from making any indirect disclosures via an "intermediary" whereby the information is disclosed to a person with the purpose of that person disclosing it to others. The disclosure to others will be taken to have been made by the corporation.

Public disclosure

A corporation would be prevented from disclosing information where the purpose of the disclosure is to substantially lessen competition in a market and the information relates to:

- price (including discounts, allowances, rebates or credits) in relation to prescribed goods or services that the corporation supplies or acquires;
- the capacity of the corporation to supply or acquire such goods or services; or
- the commercial strategy of the corporation in relation to such goods or services.

Determination of purpose

In determining whether disclosure was for the purpose of substantially lessening competition, the bill sets out some factors a court may have regard to. This includes, but is not limited to:

- whether disclosure was a private disclosure to competitors
- the degree of specificity of the information
- whether the information relates to past, current or future activities
- how readily available the information is to the public
- whether the disclosure is part of a pattern of similar disclosures by the corporation.

A court may infer from the conduct or any other relevant circumstances that the disclosure of information was for the purpose of substantially lessening competition.

Exceptions

Two exceptions apply to both prohibitions in relation to private disclosures and other disclosures:

- disclosures authorised by law where disclosure is authorised by law or occurs before the end of 10 years after the *Competition and Consumer Amendment Act (No 1) 2011* receives Royal Assent

- disclosures to related bodies corporate, where disclosure is made to one or more bodies that are related to the corporation.

Additional exceptions that apply only to the prohibition in relation to private disclosures are:

- disclosures for the purpose of re-supply: where a corporation discloses information to a recipient relating to prices, discounts, allowances, rebates or credits in relation to goods and services supplied by the corporation to the recipient for the purpose of re-supply by the recipient, or acquired by the corporation from the recipient for the purpose of re-supply by the corporation
- disclosures to unknown competitors: where a corporation did not know, or could not have reasonably known, that a recipient was a competitor or potential competitor
- disclosures to participants in joint ventures: where a corporation and the recipient are participants in a joint venture and disclosure is made for the purpose of the joint venture
- disclosures relating to acquisitions of shares or assets: where a corporation discloses information in connection with a contract, arrangement or understanding for the acquisition of any shares or any assets.

Authorisation

Conduct that would otherwise contravene the prohibitions may be authorised under subsection 88(6A).

Penalties

Breaches of the price signalling prohibitions may attract maximum civil penalties of (whichever is greatest):

- $10 million;
- where the court can determine the total value of the benefits that have been obtained from the contravention, three times the benefit from the contravention; or
- where the court cannot determine the total value of those benefits, 10% of the annual turnover of the body corporate and its related bodies.

2.2 General issues arising from legislation

Potential issues arising from the provisions of the exposure draft are as follows:

1. No criteria or consultation process are set out in relation to determining the classes of goods and services to be prescribed in the regulations and which are to be subject to the prohibitions

2. The scope of information caught by the prohibitions is too broad because:

a. it includes historical price information (in addition to current and future price information)

b. in relation to the general disclosure provision, it extends beyond price signalling to include any aspect of a corporation's commercial strategies and supply/acquisition capacity

3. "Information" is not defined, so it is unclear to what extent information disclosed by an intermediary in modified form is captured by the disclosure prohibition - this creates considerable uncertainty in the interpretation of the proposed legislation

4. "Potential competitor" is not defined, which creates considerable uncertainty in the interpretation of the proposed legislation

5. Given the extensive scope of the prohibitions, additional defences such as a reasonable business justification should be

6. There is no justification for a per se offence, particularly as it is not apparent that all private price disclosures are anti-competitive

7. A communication remains a private disclosure even where the information is otherwise "being or becoming" available in the market

8. The inclusion of intermediaries (who are not competitors) extends the reach of the prohibitions beyond private disclosures by potentially capturing the disclosure of information to, for example, industry information providers and analysts

9. The exception in relation to information supplied by a corporation to a competitor where those parties are in a supplier/customer relationship is significantly limited by applying only to situations where the customer acquires goods or services for the purpose of re-supply

10. Authorisation places a heavy and costly burden on both applicants and the ACCC and given the large number of legitimate cases of private disclosure for which authorisation would be necessary, could overwhelm the capacities of business and the ACCC to deal with them, particularly in a timely way. Authorisation is unlikely to be practical for most legitimate business disclosures that would otherwise contravene the new prohibitions.

2.3 Recommended changes to legislation

- Caltex does not believe the legislation is necessary as the case has not been made there is anti-competitive "price signalling" that substantially lessens competition in banking or any other sector. Caltex therefore recommends the proposed legislation should not proceed.
- If legislation is pursued, it should be applied generally to business not just banking. However, if a sectoral approach is pursued, clear criteria and consultative processes should be established and applied before regulation is applied more widely.
- If legislation is pursued, the following changes should be made:
    - remove the 44ZZW private price disclosure provision, so that such disclosure falls under the 44ZZX general disclosure provision (both private and public) and is subject to the anti-competitive purpose test
    - limit the price disclosure provision to information related to future prices not historical prices and not prices which are already in the public domain
    - limit the general disclosure provision to prices and not supply/acquisition capacity or commercial strategy.
- Alternatively, if the 44ZZW private price disclosure provision were retained (which is not Caltex's preference) without an anti-competitive purpose test:
    - there should be a defence that the disclosure had a reasonable business justification, similar to that which exists in the overseas concerted practice laws
    - the reference to "potential competitor" in the definition of "private disclosure to competitors" should be deleted, due to the breadth and uncertainty of the term, or made consistent with the well established language of the *Competition and Consumer Act* (eg in s4D where it applies to arrangements between competitors, or firms *likely* to be in competition with each other).

3. Oil industry issues

3.1 Potential petrol regulation of concern to Caltex

The government has said the legislation will apply to banking but could be extended by regulation to other sectors. As stated above, Caltex believes the legislation should apply generally and not just to the banking sector and other declared sectors.

However, if a sectoral approach is retained, Caltex is concerned regulation could be extended to petrol retailing (or the oil industry more generally) even though the ACCC has not demonstrated such regulation is necessary. Although the ACCC has expressed concern over two issues in its recent petroleum industry monitoring reports and some other public statements, it has not justified those concerns with sound econometric analysis or robust economic theory. There is a risk the Government could regulate sectors based on assertion rather than sound evidence.

In Caltex's view, there would be no net benefit in imposing the proposed regulation on petrol retailing or the oil industry more generally. On the contrary, there could be significant negative effects for consumers and business. If regulation were sought, this should be assessed against clear criteria laid down for such regulation (which would apply to any sector being considered for regulation) and the government should meet its commitment to "further review and detailed consideration", which should involve public demonstration of the need for regulation. Any proposed regulation should meet the government's commitment that regulation will be applied to anti-competitive behaviour in sectors "where there is strong evidence they exist". Without such strong evidence there should be no regulation of a sector.

The treatment of the banking sector does not give cause for confidence. The sector is to be regulated on the basis of assertions that certain senior executives engaged in "price signalling" to competitors through public statements about factors influencing future pricing decisions. While the statements were asserted to have an anti-competitive purpose, it is also quite reasonable to interpret them as part of a legitimate public debate about factors affecting funding costs.

Ironically, it seems unlikely the statements made would have been captured by the proposed legislation as they were not private disclosures of pricing information and their public disclosure was arguably not for the purpose of substantially lessening competition. Despite this, regulation will be imposed on banking and potentially other sectors that will increase compliance costs, create business uncertainty and stifle legitimate and productive public debate on important business issues for fear of any references to price, strategy or capacity being interpreted as being illegal.. There could also be a wide range of other unintended consequences for business operations, as discussed in this submission.

3.2 ACCC assertion of "price signalling" by Informed Sources

Informed Sources Pty Ltd is an Australian company that provides information to subscribers on recent prices in the retail market for petrol, diesel and LPG. Subscribers include Caltex, BP, Coles Express, Woolworths and 7 Eleven and information is provided on a site by site basis every 15 to 30 minutes. This information helps to drive discounting as the highly competitive nature of petrol retailing means it is important to stay competitive on price to maintain fuel sales and attract customers to service station convenience stores.

Caltex understands Informed Sources has other subscribers who buy information from them including several independent retail and distributor chains carrying Caltex, BP and Mobil branding. The information is also provided to the ACCC and motoring organisations so they can provide information to consumers.

The data is largely sourced from records of historical fuel purchases (there is some manual spotting of price boards by Informed Sources) and is comprised of prices already in the public domain. As such there is no signalling of future prices. Without Informed Sources or a similar information service, competitors would have to collect competitor price information in another way. If sharing of historical information were prohibited under the proposed legislation, data would have to be acquired unilaterally.

If manual observation of competitor prices were carried out (ie spotting of price boards) for the Caltex network of 700 sites, Caltex has estimated the cost as approximately $8 million per year. This is many times the cost of data collection by means of Informed Sources. If competitors faced similar costs, competitive forces would most likely result in higher prices to consumers in order to recover the increased costs of data collection. Based on Caltex's market share, the industry-wide increased cost to consumers could be of the order of $40 million per year.

While the ACCC presumably has no problem with Informed Sources data being used to enhance discounting (typically six days of the week), it sees an issue when prices increase (one day of the week):

> Informed Sources provides subscribers with regular and timely information on retail prices for all subscribers' retail sites as well as many sites owned by companies that do not subscribe to the service. This allows market participants to have near real time data on prices that other participants are changing. When any market player moves its price, that move is quickly communicated to other competitors who can see how the rest of market reacts to the price move. *(Monitoring of the Australian petroleum industry* 2010, page 190)

Caltex sees the information provided by Informed Sources as pro-competitive but the ACCC sees it as anti-competitive, at least on one day of the week:

> Price cycles are a source of concern for many motorists. As noted in the 2009 petrol monitoring report they are also a concern for the ACCC because of the degree of coordination exhibited in the price cycle.
>
> Retail petrol markets in Australia are conducive to coordinated conduct because of the combination of features which characterise them: homogeneous products; numerous small sales; the historically stable market structure; repeated nature of competitive interaction; and barriers to entry, combined with the high degree of communication of retail prices between major players in the market. In these circumstances less competitive outcomes can result.
>
> The high level of transparency in retail petrol pricing, mainly through the Oil Pricewatch system provided by Informed Sources, assists retailers to quickly signal price moves, monitor competitors' responses and quickly react to them. *(Monitoring of the Australian petroleum industry* 2010, page 190)

Caltex rejects the assertion that retailers "quickly signal price moves" through Informed Sources. There is no "price signalling" as the information does not relate to future prices and is publicly available. The purpose of the disclosure of information to Informed Sources is to enable public price information to be efficiently collated so that Caltex is better able to remain competitive on price.

Petrol price cycles are indicative of strong competition that benefits motorists. Price cycles enable more price-sensitive motorists to purchase petrol at heavily discounting prices by observing past price cycles, which provides a good guide to when price cycles are likely to occur in the future. They are examples of so-called "Edgeworth cycles", which also occur overseas and are described in the ACCC's 2007 petrol price report, which concluded "the existence of price cycles alone does not seem to provide evidence of a lack of retail competition". That petrol price cycling is pro-competitive and benefits motorists is supported by a number of international studies that conclude petrol prices are typically lower in markets where petrol price cycling occurs

Cycles occur because petrol is a fairly homogenous product, brand loyalty is weak and consumers are price sensitive and switch between retailers for very small price differences. It is this price sensitivity which drives retailers to undercut competitors to gain market share. Retailers play a war of attrition until the bottom of the cycle, when one of them eventually increases its price. It is unprofitable and therefore unsustainable for retailers to remain at the bottom of the cycle, so other retailers follow over time with their own price increases. There are no anti-competitive elements in this process. On the contrary, the process is driven by strong competition.

3.3 ACCC assertion of legal loophole in relation to anti-competitive conduct

Section 44ZZRD of the Competition and Consumer Act (equivalent to Section 45 of the former Trade Practices Act) requires that in order for illegal price fixing to be proven, there must be a "contract, arrangement or understanding" between two or more parties. This involves some communication between the parties, a "meeting of the minds" and a commitment by at least one of the parties. The ACCC failed the *Geelong* and *Ballarat* cases to achieve convictions based on the previous price fixing provisions because there was no commitment by parties receiving the price information to act in any particular way. In addition, courts were reluctant to infer an arrangement or understanding from mere parallel conduct.

The ACCC in 2007 urged the government to consider changes to the law to allow an "understanding" to be inferred from conduct but this extension of the then Trade Practices Act was strongly opposed as unnecessary, including by the Law Council and the Business Council of Australia.

The proposed legislation removes the need for any "meeting of the minds" as a private disclosure of pricing information to competitors would be illegal regardless of purpose or competitive impact. Further,

the disclosure of any information relating to price or supply capacity for “Division 1A” goods or services or any aspect of commercial strategy would be illegal, whether private or public, if the purpose was to substantially lessen competition. This purpose could be inferred solely from the conduct of a person or company.

It is clear these new provisions would remove the barriers perceived by the ACCC as blocking successful prosecutions in the *Geelong* and *Ballarat* cases. For this reason, the ACCC could seek to have fuel prescribed as a “good” under the new regulations to avoid a repeat of its prosecution failures in the *Geelong* and *Ballarat* cases.

4. Key impacts if legislation applied to the disclosure of petroleum product pricing and other information

The appendix provides details of a number of impacts in relation to commercial arrangements and the provision of public information. Key impacts are discussed in this section, although all of the potential impacts are of concern to Caltex.

4.1 Petrol price cycles/Informed Sources

The disclosure of pricing information to Informed Sources would be prohibited if the proposed legislation were applied to petrol or other petroleum products. This is because it would be a private disclosure of pricing information to competitors via Informed Sources as an intermediary. Such disclosure would be prohibited even though it does not relate to future prices (the legislation does not distinguish between historical and future prices) and is publicly available, for example through price boards. It could be authorised by the ACCC but it seems clear this would not occur unless the information was modified in such a way that would most likely make it of little commercial value.

If Caltex is correct and price cycles are the result of a high level of competition – this is supported by academic theory and empirical evidence – the elimination of Informed Sources would not affect price cycles longer term. It is possible there would be in interim period of cycle disruption as competitors arranged alternative sources of information but once this occurred there would be no change except for high prices due to higher industry-wide costs of data collection.

However, there is some risk the changes could eliminate or modify the price cycle to the detriment of consumers. This would not only deprive many motorists of the opportunity of buying petrol at a deep discount but could increase to average price level by reducing competition. There would need to be considerable confidence by government that such effects would not occur as a result of regulating petrol retailing. To date, the ACCC has not provided any analysis of the market that would support regulation but has merely expressed a "concern" based on its theory of coordinated conduct in the industry.

4.2 Other public pricing information

- MotorMouth (part of the Informed Sources group) provides information online to the public on petrol, diesel and LPG prices, partially based on electronic data from fuel retailers. MotorMouth could continue legally but might not be viable if fuel retailers ceased providing electronic data to Informed Sources, because the cost of independent data collection would be too high.
- myPriceboard is a service operated by MotorMouth. It allows fuel retailers to upload data on board prices to post on MotorMouth. myPriceboard would not be viable without MotorMouth as a means of posting information.
- Pricing information may be given to a competitor which is publicly available and is of no competitive value (eg copy of ABS data of petrol prices as part of CPI). This might be done when discussing public policy matters so participants don't have to duplicate collection of public data. The proposal would make such disclosure illegal.
- Information on historical prices is provided to the Australian Institute of Petroleum (AIP) and its consultants (eg Orima) for public reporting purposes, including information that is both public (eg terminal gate prices) and possibly private (eg historical prices at retail sites). This information is not to be provided to other AIP members in original form, only in aggregate (eg average prices). AIP participants would not share historical price information if there was a risk that the information would be passed on privately to other competitor members. In some instances, such as industry submissions, there might be a legitimate commercial need to share historical pricing information to competitor members.

4.3 Commercial price-related arrangements

There is a range of situations where private disclosure is not anti-competitive and required for legitimate business reasons yet would be prohibited by the proposed legislation. A full discussion of all these situations is in the appendix. A number of key examples are as follows:

- Franchisees purchase petrol from Caltex at the ruling wholesale price. During the course of a price cycle, franchisees may request a rebate on the price of fuel (known as "price support") based on

prevailing local competitor prices. These rebates may be provided by Caltex but are contingent on the rebate effectively being passed on to consumers through the retail price of petrol. This requires Caltex to know the price of petrol being sold by competitors (to assess the request for price support) and the price at which petrol is sold (to ensure the price support is being passed on). It seems likely the price support arrangement would need to be authorised by the ACCC. This would require the ACCC to be satisfied there was a public benefit from the disclosure. If authorisation was not granted, it would make the current price support system very difficult if not impossible to operate. This would be highly damaging to Caltex and its franchisees, who are small business people, as they would find it difficult to be competitive on price.

- Caltex commission agents) retail fuel that is owned by Caltex and receive a commission in cents per litre. Agents provide competitor price information to Caltex central pricing managers to enable them to set the retail price at the Caltex site. The fuel sale is made by Caltex, unlike a “direct purchase” where the fuel sale is by the independent site operator. This provision of information would be prohibited if the commission agent was also an independent operator at another competing site or was considered a “potential competitor”. It would be an unintended outcome if a commission agent was unable to exchange retail price information with Caltex relating to a Caltex site. This problem should be fixed through legislative amendment, not through an authorisation process.
- A person may be a commission agent at one site and also an independent operator at another competing site. It would be an unintended outcome if a commission agent was unable to exchange retail price information with Caltex relating to the CA site. This problem should be fixed through legislative amendment, not through requiring authorisation.
- Caltex offers a range of fuel cards to enable customers to purchase fuel and manage their vehicle fleets. Most of the sites at which these cards are accepted are operated by franchisees (other than commission agents), Woolworths and independently owned and operated sites selling Caltex fuel. In a fuel card transaction, Caltex purchases fuel from the competitor at a price related to the prevailing pump price and resells it to the fuel card holder at a discount to the pump price. The transmission to Caltex of the card sale and the transaction sale price risks contravening the private price disclosure provisions. It is not clear whether the exemption for re-supply is available. Caltex may need to seek authorisation on the grounds of a public benefit if the operation of the exemption is unclear. If not authorised, Caltex’s card products could probably not be provided, reducing competition. The provision of competing card products clearly provides a benefit to consumers

APPENDIX A. Impacts if legislation applied to oil industry

A.1 Public pricing information

Activity	Description	44ZZW - Must not disclose private pricing information: • can't disclose to competitors or potential competitors (or via intermediary - see 44ZZU) and not any other person • disclosure is deemed private even if competitors or others could obtain it in another way • provision to non-competitors can't be used for avoidance	44ZZX - Must not disclose information (price, capacity to supply/acquire goods, commercial strategy) for purpose of substantially lessening competition: • court may take account of specific criteria to determine purpose • purpose may be inferred from conduct	44ZZY - Exceptions to both 44ZZW and 44ZZX: • disclosure authorised by Cth or State law • made to related company Exceptions to 44ZZW only: • goods supplied or acquired for re-supply • did not reasonably know person a competitor • joint venture • acquisition of shares/assets	Impact
Informed Sources	Informed Sources Pty Limited collects price data electronically from fuel retailers and supplies collated information to subscribers every 15 to 30 minutes. All data is public, based on historical transactions and some manual observation of price boards.	Disclosure of price information to Informed Sources is deemed supply to competitors under 44ZZU. Price must not be disclosed under 44ZZW.	Disclosure is for purpose of enabling Caltex to compete better with other retailers, not lessening competition. However, ACCC could assert disclosure is illegal.	ACCC may authorise if benefit from disclosure and benefits exceeds (alleged) lessening of competition (net public benefit).	Based on ACCC statement to date, authorisation of the current model is unlikely. As a result, disclosure of retail price data to Informed Sources is likely to become illegal and retailers will need to obtain competitor pricing information in other (less efficient) ways such as manual price spotting. Informed Sources also provides data to the ACCC and motoring clubs which is partially based on electronic data from fuel retailers. If the exchange of historical data through Informed Sources was made illegal, this data would not be available.
MotorMouth	MotorMouth is operated by Informed Sources and provides information to the public on petrol, diesel and LPG prices to the public online, partially based on electronic data from fuel retailers	Informed Sources is not a competitor of fuel retailers so may collect and publish its own data. Fuel retailers could provide some of this data on the basis that it is used for public information and not communicated privately to competitors.	The purpose of the disclosure is to inform potential customers and not for purpose of lessening competition.		MotorMouth could continue but may not be viable if fuel retailers cease providing electronic data to Informed Sources, because the cost of independent data collection would be too high.
myPriceboard	MotorMouth operates this service which allows fuel retailers to upload data on board prices to post	This is a disclosure by fuel retailers to the public at large and not privately to	The purpose of the disclosure is to inform potential customers and not for purpose of lessening		myPriceboard would not be viable without MotorMouth as a means of posting information. See above point.

Activity	Description	44ZZW - Must not disclose <u>private</u> pricing information: • can't disclose to competitors or potential competitors (or via intermediary - see 44ZZU) and not any other person • disclosure is deemed private even if competitors or others could obtain it in another way • provision to non-competitors can't be used for avoidance	44ZZX - Must not disclose information (price, capacity to supply/acquire goods, commercial strategy) for purpose of substantially lessening competition: • court may take account of specific criteria to determine purpose • purpose may be inferred from conduct	44ZZY - Exceptions to both 44ZZW and 44ZZX: • disclosure authorised by Cth or State law • made to related company Exceptions to 44ZZW only: • goods supplied or acquired for re-supply • did not reasonably know person a competitor • joint venture • acquisition of shares/assets	Impact
	on MotorMouth	competitors.	competition.		
Price boards	Caltex posts prices on sign boards at the sites it operates. This is required by law in NSW and WA.	The disclosure is not private as it is made to "other persons" and not made to these persons for the purpose of avoidance.	The purpose of the disclosure is to inform potential customers and not for purpose of lessening competition.	Legislation in NSW and WA requires price boards.	Commonsense suggests displaying price boards would remain legal.
Public information given to competitor	Pricing information could theoretically be given to a competitor which is publicly available and is of no competitive value (eg copy of ABS data of petrol prices as part of CPI). This might be done when discussing public policy matters so participants don't have to duplicate collection of public data.	The disclosure is not legal as it is private, even though a competitor could obtain it another way	The information provided would not be for the purpose of substantially lessen competition		Caltex's internal policies already forbid the provision of commercial pricing information to competitors.
Price data to AIP for public information purposes	Information on historical prices is provided to the Australian Institute of Petroleum (AIP) and its consultants (eg Orima) for public reporting purposes, including information that is both public (eg terminal gate prices) and may be private (eg historical prices at retail sites). This information is not to be provided to other AIP members in original form, only in aggregate (eg average prices).	It is not clear that aggregating price information would be legal under the proposed legislation. In addition, the legislation does not distinguish between historical and future price information.	The information is disclosed but not for the purpose of substantially lessening competition.		AIP participants would not share historical price information if there was a risk that the information would be passed on privately to other competitor members. In some instances, such as industry submissions, there might be a legitimate commercial need to share historical pricing information to competitor members.

A.2 Commercial pricing information

Activity	Description	44ZZW - Must not disclose <u>private</u> pricing information: • can't disclose to competitors or potential competitors (or via intermediary - see 44ZZU) and not any other person • disclosure is deemed private even if competitors or others could obtain it in another way • provision to non-competitors can't be used for avoidance	44ZZX - Must not disclose information (price, capacity to supply/acquire goods, commercial strategy) for purpose of substantially lessening competition: • court may take account of specific criteria to determine purpose • purpose may be inferred from conduct	44ZZY - Exceptions to both 44ZZW and 44ZZX: • disclosure authorised by Cth or State law • made to related company Exceptions to 44ZZW only: • goods supplied or acquired for re-supply • did not reasonably know person a competitor • joint venture • acquisition of shares/assets	Impact
Competitor price spotting by franchisees	Franchisees purchase petrol from Caltex at the ruling wholesale price. During the course of a price cycle, franchisees may request a rebate on the price of fuel ("price support") based on prevailing local competitor prices. These rebates may be provided by Caltex but are contingent on the rebate effectively being passed on to consumers through the retail price of petrol. This requires Caltex to know the price of petrol being sold by competitors (to assess the request for price support) and the price at which petrol is sold (to ensure the price support is being passed on).	A franchisee is likely to be a competitor or potential competitor of a Caltex commission agent or company-operated site so the private disclosure of information is prohibited, even though Caltex could have obtained the information in another way and the disclosure is for a legitimate business purpose.	The disclosure of information is not for the purpose of substantially lessening competition. On the contrary, it is to keep the franchisee competitive.	It is arguable that the information relates to a discount provided for goods for re-supply. However, the onus is on Caltex to establish this defence and the technical aspects of the price support arrangement could mean the communication is still illegal.	It seems likely the price support arrangement would need to be authorised by the ACCC. This would require the ACCC to be satisfied there was a public benefit from the disclosure. If authorisation was not granted, it would make the current price support system very difficult if not impossible to operate. This would be highly damaging to Caltex and its franchisees, who are small business people, as they would find it difficult to be competitive on price.
"Meter plan" discounts	Independently operated Caltex resellers (wholesale distributors) may ask Caltex for a wholesale price discount to help them meet retail competition at the sites they operate. This involves resellers providing information on competitors' retail prices to Caltex.	A reseller is a competitor of Caltex so the private disclosure of information is illegal, even though Caltex could have obtained the information in another way and the disclosure is for a legitimate business purpose	The disclosure of information is not for the purpose of substantially lessening competition. On the contrary, it is to keep the retailer (who is also the reseller) competitive.	It is arguable that the information relates to a discount provided for goods for re-supply. However, the onus is on Caltex to establish this defence and the technical aspects of the price support arrangement could mean the communication is still illegal.	It seems likely the meter plan arrangement would need to be authorised by the ACCC. This would require the ACCC to be satisfied there was a public benefit from the disclosure. If authorisation was not granted, it would make the current meter plan system very difficult if not impossible to operate. This would be highly damaging to Caltex and its resellers, as they would find it difficult to be competitive on price

Activity	Description	44ZZW - Must not disclose <u>private</u> pricing information: • can't disclose to competitors or potential competitors (or via intermediary - see 44ZZU) and not any other person • disclosure is deemed private even if competitors or others could obtain it in another way • provision to non-competitors can't be used for avoidance	44ZZX - Must not disclose information (price, capacity to supply/acquire goods, commercial strategy) for purpose of substantially lessening competition: • court may take account of specific criteria to determine purpose • purpose may be inferred from conduct	44ZZY - Exceptions to both 44ZZW and 44ZZX: • disclosure authorised by Cth or State law • made to related company Exceptions to 44ZZW only: • goods supplied or acquired for re-supply • did not reasonably know person a competitor • joint venture • acquisition of shares/assets	Impact
Price spotting by commission agents	Commission agents (CAs) retail fuel that is owned by Caltex and receive a commission in cents per litre. Agents provide competitor price information to Caltex central pricing managers to enable them to set the retail price at the Caltex site. The fuel sale is by Caltex, unlike a "direct purchase" where the fuel sale is by the independent site operator. Caltex has some independently owned sites that are CAs and not franchised	Whilst the CA is not a competitor of Caltex for the sale of fuel at the site, the commission agent might be an independent operator at another competing site or may be considered a "potential competitor". The phrase "potential competitor" is not used in the Competition and Consumer Act and not defined in the exposure draft. There is therefore some risk that this price disclosure contravenes this provision. .	The information is not for the purpose of substantially lessening competition. On the contrary, it is to keep the Caltex site competitive.		It would be an unintended outcome if a commission agent was unable to exchange retail price information with Caltex. This problem should be fixed through legislative amendment, not through requiring authorisation.
Franchisee royalty payments	Caltex charges franchisees a rental and royalty charge based on convenience store sales. To enable this to be calculated, franchisees disclose historical sales information to Caltex.	As a franchisee is a competitor this would be a breach.	The information is not for the purpose of substantially lessening competition.		The franchise model would no longer be viable unless authorised. The franchise model depends on this type of information being made available between franchisees and franchisors. This problem should be fixed through legislative amendment, not through requiring authorisation..
Woolworths price instruction to Caltex employee as CA	Caltex operates some sites with company employees as a commission agent for Woolworths. These sites are within the Caltex Woolworths co-branded network. Woolworths sets the prices at these sites.	Caltex and Woolworths are competitors so the provision of price information by Woolworths to Caltex, in the form of commission agent retail price directions, would	Purpose is not to substantially lessen competition.		Woolworths would need to seek authorisation of the price directions on the grounds of a public benefit. If this was not granted, it would make the operation of the sites impossible under the current commercial arrangements.

Activity	Description	44ZZW - Must not disclose <u>private</u> pricing information: • can't disclose to competitors or potential competitors (or via intermediary - see 44ZZU) and not any other person • disclosure is deemed private even if competitors or others could obtain it in another way • provision to non-competitors can't be used for avoidance	44ZZX - Must not disclose information (price, capacity to supply/acquire goods, commercial strategy) for purpose of substantially lessening competition: • court may take account of specific criteria to determine purpose • purpose may be inferred from conduct	44ZZY - Exceptions to both 44ZZW and 44ZZX: • disclosure authorised by Cth or State law • made to related company Exceptions to 44ZZW only: • goods supplied or acquired for re-supply • did not reasonably know person a competitor • joint venture • acquisition of shares/assets	Impact
		be prohibited.			
Woolworths price instruction to Caltex franchisee as commission agent	Caltex franchisees operate some sites as commission agents for Woolworths. These sites are within the Caltex Woolworths co-branded network. Woolworths sets the prices at these sites.	Franchisees and Woolworths might be competitors or potential competitors (depending on whether franchisees operate other competing sites) so the provision of price information by Woolworths to franchisees, in the form of commission agent retail price directions, would be prohibited.	Purpose is not to substantially lessen competition.		As above, Woolworths would need to seek authorisation of the price directions on the grounds of a public benefit.
StarCard	Caltex offers a range of fuel cards to enable customers to purchase fuel and manage their vehicle fleets. Most of the sites at which these cards are accepted are operated by franchisees (other than commission agents), Woolworths and independently owned and operated sites selling Caltex fuel. In a fuel card transaction, Caltex purchases fuel from the competitor at a price related to the prevailing pump price and resells it to the fuel card holder at a discount to the pump price.	The transmission to Caltex of the card sale and the transaction sale price is a private pricing disclosure and is therefore prohibited. The disclosure is necessary as the pump price is needed to bill the StarCard customer.	Purpose is not to substantially lessen competition.	Although unclear, it is possible that the price is acquired by Caltex for the purpose of re-supply	Caltex may need to seek authorisation on the grounds of a public benefit if the operation of the exemption is unclear. . If not authorised, Caltex's card products could probably not be provided, reducing competition. The provision of competing card products clearly provides a benefit to consumers

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Motorpass and Motorcharge cards	Motorpass and Motorcharge work in a similar way to StarCard. In a Motorpass/Motorcharge transaction at a Caltex site, Caltex sells the fuel to card issuer at the point of sale. For that purpose, Caltex gives to the card issuer details of the fuel transaction and the pump price. Caltex is then reimbursed at a discount to the pump price. The card issuer might also resell the historical price information to others who could include Caltex competitors.	The transmission by Caltex of the card sale and the transaction sale price is a private pricing disclosure and is therefore prohibited. The disclosure is necessary as the pump price is needed to invoice the card issuer and in turn, the card holder. If the card issuer resells historical price information to Caltex competitors, this would also render the initial price disclosure illegal.		Although unclear, it is possible that the disclosure relates to goods to be re-supplied	Caltex company operated stores might need to seek authorisation on the grounds of a public benefit to continue to accept competitor fuel cards. If not authorised, Caltex could not accept competitor fuel cards, reducing competition. The provision of competing card products to clearly provides a benefit to consumers.
Purchase and sale of crude oil between refiners	A refiner may purchase crude oil from, or sell it to, another refiner.	The private disclosure of pricing information (the purchase or sale price) is prohibited - if crude oil is regulated as a Division 1A good.	Purpose is not to substantially lessen competition.	The transaction might not qualify as being for the purpose of re-supply since crude oil is converted to fuel before sale.	If crude oil were regulated, authorisation could be required. If not authorised, this would limit crude supply options (and increase costs) for Caltex.
Joint purchases of crude oil	A refiner may purchase crude oil jointly with another refiner to increase the size of a cargo and thereby reduce supply costs.	Refiners are competitors so may not disclose information to each other on crude oil supply prices or arguably shipping prices.	Purpose is not to substantially lessen competition but to reduce business costs.	The arrangement is not a joint venture	If crude oil were regulated, authorisation could be required. If not authorised, this would limit crude supply options (and increase costs) for Caltex.