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# The Competition and Consumer Amendment Bill (No 1) 2011 (Exposure Draft): A problematic attempt to prohibit information disclosure

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*The Competition and Consumer Amendment Bill (No 1) 2011 (Exposure Draft) seeks to prohibit anticompetitive disclosure of information by one competitor to another. The proposed prohibition under s 44ZZW seeks to ban the private disclosure of price-related information. The proposed prohibition under s 44ZZX seeks to ban the public or private disclosure of price-related and certain other information for the purpose of substantially lessening competition in a market. Neither prohibition has a cogent rationale. As a result, both suffer from dire overreach and are likely to produce unintended consequences. The most fundamental flaw is that the proposed prohibitions focus on information disclosure whereas the relevant economic concern is not information disclosure of itself but the facilitation of coordinated conduct by competitors. Another serious flaw is that the proposed exceptions to the prohibitions are too limited in scope. There is also a potential loophole, namely the conceivable use of continuous disclosure by public-listed companies as an avenue for getting around the prohibition against public disclosure of information under s 44ZZX.*

## 1. INTRODUCTION – THE CHALLENGE OF FACILITATING PRACTICES AND THE FAILURE OF THE EXPOSURE DRAFT

Debates about the reform of Australian competition law are triggered often by popular or interest group concerns regarding a perceived lack of competition in a particular sector of the Australian economy. Recent proposals for amendment of the *Competition and Consumer Act 2010* (Cth) (CCA) are no exception. On 12 December 2010 the government published the *Competition and Consumer Amendment Bill (No 1) 2011* as an Exposure Draft (Exposure Draft) for comment by 14 January 2011. This followed the release by the Coalition of a private member's bill (the *Competition and Consumer (Price Signalling) Bill 2010* (Coalition Bill)) on 22 November 2010. These proposals have arisen in the context of and in large part are a response to conduct by Australia's major banks that has been seen as symptomatic of inadequate competition in the banking sector.<sup>1</sup>

Ostensibly, these proposals are intended to address a competition "problem", generally referred to as "facilitating practices". A "facilitating practice" is a strategic method used by competitors to coordinate pricing or non-price effects and thereby reduce the uncertainty of competition in a market without entering into a collusive agreement or even any explicit communication.<sup>2</sup> Information disclosure or exchange, including conduct referred to as "signalling", is one species of facilitating practice.

However, identifying and imposing liability for facilitating practices is easier said than done. Satisfactory legal approaches have yet to emerge anywhere in the world. The United States has battled

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<sup>1</sup> See Senate Economics References Committee, *Inquiry into Competition in the Australian Banking Sector*, December 2010, [http://www.aph.gov.au/senate/committee/economics\\_ctte/banking\\_comp\\_2010/index.htm](http://www.aph.gov.au/senate/committee/economics_ctte/banking_comp_2010/index.htm) viewed 17 January 2011.

<sup>2</sup> Hay GA, "Facilitating Practices" in ABA Section of Antitrust Law, *Issues in Competition Law and Policy* (ABA Book Publishing, Chicago, 2008) Vol 2, Ch 50, p 1189.

on with general prohibitions against “unreasonable restraint of trade” premised on proof of an agreement<sup>3</sup> and “unfair methods of competition”, the application of which is often contentious and the subject of litigation.<sup>4</sup> The European Union and the United Kingdom prohibit anticompetitive “concerted practices”, an opaque concept that needs to be fleshed out on a case-by-case basis and with the aid of detailed guidelines.<sup>5</sup> The Organization for Economic Cooperation and Development (OECD) has restated the issues without reaching convincing practical answers.<sup>6</sup> Many distinguished legal and economic commentators have grappled with the subject without being able to convert economic theory into readily applicable legal prohibitions.<sup>7</sup> The Australian Competition and Consumer Commission (ACCC) has expressed its concern about facilitating practices on numerous occasions without indicating workable legislative solutions.<sup>8</sup>

The main amendments to the CCA proposed by the Exposure Draft are to be contained in a new Div IA in Pt IV and may be summarised as follows:

- a civil per se prohibition against private disclosure of pricing information to a competitor (s 44ZZW);
- a civil prohibition against the disclosure of pricing information or other specified types of information for the purpose of substantially lessening competition in a market (s 44ZZX); and
- exceptions that apply to ss 44ZZW and 44ZZX (s 44ZZY) and additional exceptions that apply to s 44ZZW (s 44ZZZ).

The prohibitions are subject to severe pecuniary penalties, as provided under s 76 of the CCA, as well as declaratory, injunctive and other orders that may be made in connection with breaches of the prohibitions of Pt IV.

Significantly, the proposed amendments apply only to goods and services of classes prescribed by regulations (s 44ZZT) (Div 1A goods and services). According to the government’s *Competitive and*

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<sup>3</sup> See Kovacic WE, “The Identification and Proof of Horizontal Agreements under the Antitrust Laws” (1993) 38 *The Antitrust Bulletin* 5; Arqit KJ, “The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude” (1993) 61 *Antitrust Law Journal* 531; Klevorick A and Kohler-Hausmann I, *The Plausibility of Twombly: Proving Horizontal Agreements after Twombly* (2010) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1571632](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571632) viewed 17 January 2011.

<sup>4</sup> See eg, Reeves A, “Conduct-Specific Tests? How the Federal Trade Commission can Reframe the Section 5 Debate” (2010) 2 *The CPI Antitrust Journal* 2; Clark DS, “Price Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp” (1983) 4 *Wisconsin Law Review* 887.

<sup>5</sup> For a useful summary of the principles emerging from the cases, see Faull J and Nikpay A, *The EC Law of Competition* (2nd ed, OUP, Oxford, 2007) pp 210-217. For the most recent guidelines, see European Commission, *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, C(2010) 9274/2 (Brussels).

<sup>6</sup> See eg, Organization for Economic Cooperation and Development (OECD), *Prosecuting Cartels without Direct Evidence of Agreement* (Policy Brief, June 2007). In October 2010, the Competition Committee held a Roundtable to discuss divergent approaches around the world to facilitating practices. With the exception of the note by the delegation of the EU (see OECD, *Roundtable on Information Exchanges between Competitors under Competition Law, Note by the Delegation of the European Union*, DAF/COMP/WD(2010)118, 21 October 2010), the Roundtable discussion has yet to be published but is mentioned in *Department of Finance and Deregulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange*, pp 6 and 18, <http://www.ris.finance.gov.au/2010/12/21/competitive-and-sustainable-banking-system-%e2%80%93-anti-competitive-price-signalling-treasury> viewed 17 January 2011. It is unclear from the Regulation Impact Statement what, if any, specific proposals emerged from the 2010 Roundtable. See also OECD, *Transparency*, Document DAF/CLP(2001)22 (2001).

<sup>7</sup> See eg, Kattan J, “Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment” (1994) 63 *Antitrust Law Journal* 133; Salop SC, “Practices that (Credibly) Facilitate Oligopoly Coordination”, in Stiglitz JE and Mathewson GF (eds), *New Developments in the Analysis of Market Structure* (MIT Press, Cambridge, Massachusetts, 1986) p 271; Hay, n 2; Blechman MD, “Conscious Parallelism, Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws” (1979) 24 *New York Law School Law Review* 881.

<sup>8</sup> See eg, comments attributed to Chairman Graeme Samuel in Midalia A, “Cartels Thriving on Loopholes: ACCC”, *Australian Financial Review* (14 April 2009) p 8; Walker J, *Agreements, Communication and Facilitating Practices: Where is the Harm?* (Paper presented to the Law Council Trade Practices Workshop, Gold Coast, 21 August 2010).

*Sustainable Banking System* announcement, the amendments “will apply initially to banks, with the capacity for other sectors to be specified in future after further review and detailed consideration”.<sup>9</sup>

The Exposure Draft was published without an explanatory memorandum or prior discussion paper. Subsequently, on 24 December 2010, Treasury published a five-page Explanatory Note.<sup>10</sup> On 21 December 2010, the Department of Finance and Deregulation published a 19-page Regulation Impact Statement (RIS).<sup>11</sup> Consultations were said to be “targeted”<sup>12</sup> and a short period was given to the public to make submissions to Treasury (18 working days from the publication of the RIS, over the Christmas period). This is surprising and regrettable because the proposals are novel. They depart radically from the law in other jurisdictions.<sup>13</sup> The RIS emphasises that “comparable jurisdictions, including the UK, EU and US all have laws which are capable of dealing with anti-competitive price signalling and other information exchanges” and gives examples of cases from these jurisdictions to illustrate the point.<sup>14</sup> It fails to acknowledge that the laws in these jurisdictions deal with information exchanges between competitors in the context largely of prohibitions against collusion – an approach rejected in the RIS.<sup>15</sup> It also fails to acknowledge that the approach to regulating information exchange proposed in the Exposure Draft lacks the subtlety and sophistication of the approaches taken in the United States and the European Union, where the complex and often ambiguous competition effects of such conduct are well recognised.<sup>16</sup>

Further, the Exposure Draft focuses on one particular type of facilitating practice – information disclosure, particularly as to prices – and, at least initially, on one sector of the economy – the banking sector. This attempt to address a specific form of conduct in a highly prescriptive way is problematic for the same reasons that have been articulated in critiques of the Div 1 cartel prohibitions (as well as other Pt IV prohibitions – for example, ss 4D, 47 and 48).<sup>17</sup> Not only is there a risk that the real vice in the conduct will be missed (a risk that has materialised in this instance – see further Section 3 (“The Per Se Prohibition against Private Disclosure of Pricing Information to a Competitor”) and Section 4 (“The Prohibition Against Disclosure of Pricing Information or Other Specified Information for the Purpose of Substantially Lessening Competition”)), but there is a high likelihood that the prohibition will invite literal interpretation that focuses on the words rather than the legislative intent and that it will prove incapable of addressing new forms of conduct as they arise.

Furthermore, neither the government nor the ACCC has adequately explained the selectivity of the Exposure Draft as a matter of economic principle. Is information disclosure the most economically

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<sup>9</sup> Treasury, *Competitive and Sustainable Banking System*, December 2010, at [http://www.treasury.gov.au/banking/content/report/report\\_06.htm](http://www.treasury.gov.au/banking/content/report/report_06.htm) viewed 17 January 2011. See also Treasury, *Competition and Consumer Amendment Bill (No 1) 2011* Explanatory Note, pp 1 and 3, at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918> viewed 17 January 2011. Remarkably, this discriminatory approach and the wisdom or otherwise of resorting to delegated legislation are not discussed in the RIS.

<sup>10</sup> Treasury, *Competition and Consumer Amendment Bill (No 1) 2011*, n 9.

<sup>11</sup> *Department of Finance and Deregulation, Regulation Impact Statement* n 6. The RIS is relevant to understanding the Exposure Draft and is more detailed than the Explanatory Note but, as at 1 February 2011, is not referred to on the Treasury webpage where the Exposure Draft and the Explanatory Note are published. Moreover, the RIS does not entirely reflect the Exposure Draft (eg, the discussion at p 16 of exchanges of price information for the purposes of a proposed merger does not refer to or take account of s 44ZZZ(4) of the Exposure Draft).

<sup>12</sup> Treasury, *Competitive and Sustainable Banking System*, n 9.

<sup>13</sup> Contrary to suggestions otherwise: see eg, “ACCC Seeks Price Signal Crackdown”, *Australian Financial Review* (21 November 2010) pp 1 and 8. For a description of the approach taken to the definition and proof of collusion in the United States and the European Union, see Beaton-Wells C and Fisse B, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) Ch 3, section 3.4.1.

<sup>14</sup> Department of Finance and Deregulation, *Regulation Impact Statement*, n 6, pp 6-7.

<sup>15</sup> Department of Finance and Deregulation, *Regulation Impact Statement*, n 6, pp 10-11 (referring to Option 2).

<sup>16</sup> The departure from overseas approaches is a point of criticism in a significant number of submissions made to Treasury in relation to the Exposure Draft. See eg, the submissions of the Law Council of Australia (pp 12-15), Allan & Overy (pp 3-4), Gilbert + Tobin on behalf of the Australian Banking Association (pp 8-10) and Christopher Jose (pp 7-9). The submissions are available at <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037> viewed 1 February 2011.

<sup>17</sup> See generally OECD, *Competition Policy in Australia* (2010) p 59.

damaging of the various activities that can be characterised as a facilitating practice?<sup>18</sup> Is the banking sector more prone to such practices than other sectors?<sup>19</sup> Is information disclosure by bank executives responsible for (as distinct from symptomatic of) inadequate competition in the banking industry?<sup>20</sup> Why the rush to address issues that have been on Treasury's radar since at least 2007?<sup>21</sup> In the absence of answers to these questions, it is hard to avoid the impression that the Exposure Draft is motivated more by political than policy considerations.

In the aftermath of losses against petrol retailers for alleged price fixing in Victoria, in 2007 the ACCC proposed significant changes to the cartel prohibitions that would enable it to establish an "understanding" between competitors without having to prove an element of commitment.<sup>22</sup> This proposal was based in part on concern that information disclosure between competitors does not necessarily involve commitment to action and in part on a concern about the difficulties associated with proving an "understanding" based largely on circumstantial evidence. The ACCC subsequently raised related concerns about coordinated effects in relation to a proposed acquisition by Caltex of Mobil and a joint venture between BHP Billiton and Rio Tinto.<sup>23</sup> The ACCC's 2007 proposal led Treasury to instigate a consultation process in which a considerable number of submissions were received, most of which were critical of the proposal.<sup>24</sup> The government is yet to publish a satisfactory response to the proposal and the submissions. The Exposure Draft and the RIS are unsatisfactory in this regard. As the history attests, the issues raised by the ACCC are complex. The petrol cases highlighted the challenges involved in proving collusion while the Caltex/Mobil and BHP/Rio Tinto matters illustrate the point that, in some instances, the issue may be one of market structure rather than one of market behaviour. The Exposure Draft and the RIS will not assist the ACCC in proving collusion. Nor do they address the issue of market structures that are conducive to the coordinated behaviour with which the amendments purportedly are concerned.<sup>25</sup>

Moreover, the proposed amendments follow a period of extensive change to the CCA in recent years, including changes to the merger review system, s 46 and the cartel prohibitions consequent upon the Dawson review in 2003. Part IIIA also has been tinkered with and there has been a complete

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<sup>18</sup> Facilitating practices take many and varied forms. For a list of some common candidates, see Beaton-Wells and Fisse, n 13, Ch 3, p 42. The authors are not aware of any empirical studies that have compared the relative economic effects of such practices. However, there is literature to support the view that mechanisms such as Most Favoured Nation Clauses and Meeting Competition Clauses can be highly effective as facilitating practices: see eg, Salop, n 7, p 265. Cf the statement in the RIS that: "overseas experience and legal advice indicates that as a practical matter, disclosures and exchanges of information are the most prevalent and harmful form of anti-competitive price signalling." See Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 2.

<sup>19</sup> Cf the acknowledgment that anticompetitive signalling can occur in a range of industries in Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 2.

<sup>20</sup> Cf the submission by the Consumer Law Action Centre to the Senate inquiry into competition in the banking sector to the effect that greater competition in this sector should be driven by demand-side policy initiatives. See Submission of Consumer Law Action Centre, 6 December 2010, at [http://www.aph.gov.au/senate/committee/economics\\_ctte/banking\\_comp\\_2010/submissions.htm](http://www.aph.gov.au/senate/committee/economics_ctte/banking_comp_2010/submissions.htm), viewed 1 February 2011.

<sup>21</sup> Indeed, the Australian Competition and Consumer Commission (ACCC) first expressed concerns about "telegraphing" of interest rates by banks in 1999: see ACCC, *Bank Interest Rate "Telegraphing" Risks Breaching Trade Practices Act* (News Release, 23 December 1999). The government's announcement indicated that it had "been working with the ACCC since mid-2010". See Treasury, *Competitive and Sustainable Banking System*, n 9.

<sup>22</sup> ACCC, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the Price of Unleaded Petrol* (December 2007) pp 228-229.

<sup>23</sup> See ACCC, *ACCC to Oppose the Acquisition of Mobil Retail Assets by Caltex* (Press Release, 2 December 2009); ACCC, *Statement of Issues – BHP Billiton Limited and Rio Tinto Limited – Proposed Iron Ore Production Joint Venture in Western Australia* (25 March 2010) pp 8 at [52], 9 at [55].

<sup>24</sup> The submissions are available at Treasury, *Submissions: Discussion Paper – Meaning of "Understanding" in the Trade Practices Act* (8 January 2009). For a detailed critique, see Beaton-Wells C and Fisse B, "Broadening the Definition of Collusion: A Call for Caution" (2010) 38 *Federal Law Review* 71.

<sup>25</sup> Cf the recognition of the importance of market structure in assessing the extent to which information exchange or market transparency more generally are likely to affect coordination between competitors in OECD, *Price Transparency*, Document DAFFE/CLP(2001)22 (2001) pp 9-10 (and see the Australian contribution also to this effect at pp 95-96).

overhaul of the consumer protection provisions, including the introduction of new enforcement powers. Many of these amendments have been controversial and their scope and effect are yet to be tested. As with any amendment to the CCA, the further changes proposed in the Exposure Draft will impose compliance costs on business.<sup>26</sup> They will also tax further the resources of the ACCC, the increases in funding of which have not matched the increased range of its powers and responsibilities in recent years.<sup>27</sup>

Aside from these policy-related and practical concerns, the Exposure Draft is unsatisfactory in several major respects:

- The prohibitions are discriminatory. They do not apply to competitors in all sectors of the economy. See Section 2.
- The prohibition against private disclosure of pricing information to competitors lacks a cogent rationale and exhibits overreach. See Section 3.
- The prohibition against disclosure of pricing information or other specified information for the purpose of substantially lessening competition in a market lacks a cogent rationale and its efficacy is questionable. See Section 4.
- The exceptions are unjustifiably narrow in scope. Moreover, one of the exceptions creates a problematic loophole. See Section 5.

This commentary outlines the main flaws in the Exposure Draft. The article concludes that the Exposure Draft should not be enacted. A fresh start needs to be made by focussing squarely on whether there is a need to amend the current law and, if that need be demonstrated, on the particular types of conduct shown to warrant prohibition and the form such a prohibition should take, having regard to economic principles and with the benefit of learning from overseas approaches.

## **2. PIECEMEAL DISCRIMINATION AGAINST DIFFERENT SECTORS BY REGULATION**

A problematic and startling feature of the Exposure Draft is that the prohibitions against anticompetitive disclosure of information to a competitor do not apply generally but rather will apply to the particular goods and services that are prescribed by regulation as Div 1A goods and services (s 44ZZT). Remarkably, there is no explanation of this in the RIS.

The main objections to the proposed discriminatory approach are perhaps self-evident:

- As a general policy, competition laws should apply across all sectors of the economy and competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided. That policy, as adopted and applied by the Swanson Committee<sup>28</sup> and the Hilmer Committee,<sup>29</sup> and strongly endorsed by the Dawson Committee,<sup>30</sup> is reflected in all of the prohibitions under the existing provisions of Pt IV of the CCA.
- The proposed approach of prescribing goods and services to which the Div 1A prohibitions will apply is inconsistent with the imposition of per se liability under s 44ZZW. Per se liability is justified only when it can be said with a degree of certainty that the conduct in question will have anticompetitive effects and is devoid of any offsetting economic or social virtue.<sup>31</sup> Clearly the government does not hold the requisite degree of certainty in this regard; otherwise, it would not propose the application of s 44ZZW on a case-by-case basis.

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<sup>26</sup> See the submissions about the regulatory burden associated with the proposed reform in the submissions of the Law Council of Australia (p 22) and the Business Council of Australia (p 5) at <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037> viewed 1 February 2011.

<sup>27</sup> Cf the statement in the RIS that “It is not anticipated that [the amendment of the CCA] will impose additional costs on the ACCC as it will be incorporated into its general enforcement activities.” See Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 17.

<sup>28</sup> Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) p 84.

<sup>29</sup> National Competition Policy Review Committee, *National Competition Policy* (1993) pp 85 et seq.

<sup>30</sup> Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act* (2003) pp 35-37.

<sup>31</sup> Of facilitating practices generally, see the view that “an act can facilitate undesirable consequences without being an unalloyed evil ... [such an act] cannot be found unreasonable without considering the offsetting economic or social benefits of the practice.

- Regulations may be legislative in form but are executive in source and as such are not subject to the same degree of parliamentary scrutiny as statutes.<sup>32</sup> The legitimacy of delegating authority to the government to determine which sectors or suppliers will be subject to the proposed new prohibitions is highly questionable.<sup>33</sup> While review mechanisms exist, they are limited in the extent to which they can probe the underlying economic rationale for and potential extended implications of the regulations.<sup>34</sup> The Office of Best Practice Regulation (OBPR) attempts to impose standards with which Commonwealth agencies must comply in creating new regulations.<sup>35</sup> However, the RIS published on 21 December 2010 lacks rigour in several respects<sup>36</sup> and casts doubt on the claimed efficacy<sup>37</sup> of this safeguard.<sup>38</sup> Once in place, the regulations will apply for 10 years before a sunset occurs.<sup>39</sup>
- No criteria are specified for determining whether or not particular classes of goods and services are to be made the subject of the prohibitions against disclosure. Section 44ZZT(2) indicates that classes may be described by reference to kinds of supplier, industry, business or circumstances of supply. This paves the way for prescription that is either very broad or is highly specific – in concentrated markets, identifying kinds of suppliers could be tantamount to identifying specific firms. Such an approach is a recipe for piecemeal discrimination against particular sectors or suppliers – perhaps those against whom the ACCC is unable to prove a charge of collusion?
- Working out what rational economic criteria should be applied to determine which goods and services qualify for the application of the prohibitions against disclosure is a complex task. The difficulty and cost of undertaking such an exercise partly explain why it has not been adopted for

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Thus, the label ‘facilitating practice’ is only an invitation to further analysis, not a license for automatic condemnation”. See Areeda PE and Hovenkamp H, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen Law & Business, New York, 2003) pp 30-31 ¶1407.

<sup>32</sup> The provisions relating to consultation, tabling and disallowance of regulations under the *Legislative Instruments Act 2003* (Cth) are an insufficient substitute for the full glare of Parliamentary debate.

<sup>33</sup> The Administrative Review Council has recommended that certain matters should be contained in primary legislation rather than being delegated. Such matters include significant matters of policy; rules that have significant impact on rights of individuals; provision of offences with penalties of imprisonment or fines that exceed \$1,000 and administrative penalties for regulatory offences. See ARC, *Rule Making by Commonwealth Agencies* (1992) p 18.

<sup>34</sup> The regulations will be examined by the Senate Regulations and Ordinances Committee but only on limited grounds (see the Committee’s guidelines at [http://www.aph.gov.au/Senate/committee/regord\\_ctte/guidelines.htm](http://www.aph.gov.au/Senate/committee/regord_ctte/guidelines.htm) viewed 25 January 2011). They will also be subject to judicial review; however, the principal ground of challenge would be that the regulations are beyond the power of the authorising statute. This is a very narrow ground and potentially broader grounds, such as unreasonableness, are extremely difficult to establish. See eg, *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

<sup>35</sup> See the Office of Best Practice Regulation, *Best Regulation Practice Handbook*, at <http://www.finance.gov.au/obpr/proposal/gov-requirements.html#handbook> viewed 25 January 2011, explaining the requirements of sound analysis, informed decision-making and transparency to be addressed as part of a Regulation Impact Statement process that applies to every regulation “that is likely to have a regulatory impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements”.

<sup>36</sup> For example, it fails to address the justification for regulating on a sector-by-sector rather than an economy-wide basis. It does not address the important distinction between prohibitions against unilateral conduct (as are proposed in the Exposure Draft) and prohibitions against collusive or coordinated conduct (as applied in overseas jurisdictions, the practices of which are relied on in the RIS as support for the proposed prohibitions). It also is inconsistent in several respects with the form of the Exposure Draft. For example, it emphasises the particular harmfulness of private disclosures of future prices. Yet s 44ZZW has no such qualification – it applies to disclosures of past, present and future price information. Further, the RIS fails to provide worked examples which would illustrate how the Exposure Draft would achieve the balance that it claims to reach between prohibiting anticompetitive conduct and allowing pro-competitive or benign conduct.

<sup>37</sup> Contrast the assertion that the OBPR regulatory assessment process is “world class”: *Statement by the Minister for Finance and Deregulation, Senator the Hon Penny Wong, An Independent Office of Best Practice Regulation* (28 October 2010) <http://www.ris.finance.gov.au/2010/10/29/minister-makes-statement-on-government%E2%80%99s-comprehensive-regulatory-assessment-process-and-the-obpr%E2%80%99s-independence> viewed 1 February 2011.

<sup>38</sup> The attempt to articulate a rationale for the prohibitions under ss 44ZZW and 44ZZX is simplistic and unpersuasive. It is also questionable whether the RIS complies with the OBPR. For example, it is doubtful whether aspects of the analysis in the RIS qualify as “sound” as required under cl 2.2 of the OPBR’s Handbook.

<sup>39</sup> *Legislative Instruments Act 2003* (Cth), s 50.

any other prohibitions under Pt IV of the CCA. It may also explain the abandonment of the government's previous proposal that the Minister have power to "declare" a sector as one in which so-called "creeping acquisitions" are of concern, with the result that notification to the ACCC of any acquisition in the sector would have been compulsory.<sup>40</sup>

- The relationship between the proposed piecemeal approach and enforcement measures is potentially problematic and has not been addressed in the RIS or Explanatory Note. For example, in relation to the prohibition on private disclosures under s 44ZZW, if the disclosures are private then they will be difficult for the ACCC to detect. If they are undetectable then presumably there will be no basis on which to have the goods and services that are the subject of the disclosures prescribed for the purposes of the prohibition. Absent prescription, there will be no apprehended contravention to act as a trigger for the use of the s 155 or other powers under the ACCC and presumably also no basis on which an immunity application could be made. Further, if such disclosures are taking place, the required consultation process in relation to prescribing the relevant goods and services will alert the parties in question to the ACCC's suspicions and hence create a risk of evidence destruction.
- Finally, it must be asked why the banking sector has been made the guinea pig. The RIS itself acknowledges that "anti-competitive price signalling and other information exchanges can occur in a range of industries and have economy wide impacts". They are said in the RIS to "typically arise and have the greatest detriment in markets which exhibit oligopolistic features".<sup>41</sup> There are many such markets in Australia. In relation to the banking sector, what is the evidence that public statements by bank executives about interest rates are responsible, even in part, for the alleged competition crisis in the banking sector? As illustrated by the debate before the Senate inquiry into competition in the Australian banking sector in December 2010, the extent of and influences on competition in this sector are contested.<sup>42</sup> Most of the concern expressed publicly by the ACCC about price signalling in recent years has been aimed at the retail petrol sector.<sup>43</sup> Moreover, s 44ZZW will not apply to public statements by bank executives given that it is limited to private disclosure and s 44ZZX will only apply if a purpose of substantially lessening competition can be shown. For the reasons explained in Sections 3 and 4 below, the prospects of success are remote. Perhaps then it is anticipated that the mere passage of the legislation and a bank-related regulation under s 44ZZT and the consequent flexing by the ACCC of its investigatory muscles will be enough to bring the banks to heel, or be perceived as having that effect.

### **3. THE PER SE PROHIBITION AGAINST PRIVATE DISCLOSURE OF PRICING INFORMATION TO A COMPETITOR**

#### **3.1 The s 44ZZW prohibition – main elements**

The prohibition under s 44ZZW prohibits private disclosure of pricing information to competitors:

- (1) A person 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 person in a market (whether or not the information also relates to other matters); and
  - (b) the disclosure is a private disclosure to competitors.

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<sup>40</sup> The Law Council was critical of the government's failure to explain "whether there would be parameters within which the decision [to declare a sector] would be made, what defined factors would have to be considered prior to a declaration, what the period of declaration would be, whether all acquisitions would be required to be notified or whether a notification threshold would be required". See Law Council of Australia, Trade Practices Committee, *Submission to the Commonwealth Treasury in Response to Creeping Acquisition Discussion Paper* (12 June 2009) p 17.

<sup>41</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, pp 2-3.

<sup>42</sup> The submissions and transcripts of evidence before the Senate Economics Committee are available at [http://www.aph.gov.au/Senate/committee/economics\\_ctte/banking\\_comp\\_2010/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/banking_comp_2010/index.htm) viewed 25 January 2011.

<sup>43</sup> See Section 1 above in this article.

This is a per se prohibition. By contrast, the prohibition against private or public price signalling in the Coalition Bill requires that the purpose, effect or likely effect be to substantially lessen competition in a market.<sup>44</sup> The approach taken under the Coalition Bill forgoes the enforcement advantages of a per se prohibition. However, it could also be seen as a concession to the difficulties of crafting a prohibition that captures only those disclosures that are likely to be anticompetitive.

Under s 44ZZW, the prohibition is attracted if the disclosure is “a private disclosure to competitors” (as defined in s 44ZZV) and “relates to a price”. However, there is a wealth of economic literature that indicates that there may be significant differences in terms of the anticompetitive risks of information disclosure depending on the characteristics of the information.<sup>45</sup> Relevant characteristics in this regard relate to:<sup>46</sup>

- the information content (whether it relates to past/current/future behaviour);
- the target group for the disclosure (whether the disclosure is private or public);
- the degree of commitment in the disclosure (whether customer can trade on the information or whether it is mere “cheap talk”);
- the degree of verifiability (whether the information is hard/verifiable or soft/unverifiable);
- the level of aggregation of the information (whether it is firm or transaction specific or whether it is aggregate industry information);
- the timeliness of the information (whether it is new or old).

It is not possible to canvas the economic research on the significance of each of these characteristics for the purposes of this article. However, several implications of that research may be noted briefly. Private communication about future prices is generally regarded as more likely to facilitate anticompetitive coordination than private communication about prices that are current or historical.<sup>47</sup> That said, information about past behaviour may be important in maintaining a collusive arrangement in that it enables colluders to detect and therefore punish and deter deviations.<sup>48</sup> Exchange (whether private or public) of disaggregated information about past prices has significant potential to improve oligopolistic coordination, especially if the information is hard (verifiable) and new.<sup>49</sup> Exchange of aggregated and/or old data, by comparison, should be seen as largely “innocent”.<sup>50</sup> Economic insights such as these strongly suggest that a nuanced approach is required in dealing with information sharing between competitors. The law in both the United States and the European Union reflect this approach. Section 44ZZW, by comparison, is a crude instrument.

<sup>44</sup> Proposed s 45A(2)(c). For a useful summary of the key differences between the Exposure Draft and the Coalition Bill, see the submission of Mallesons Stephen Jaques (pp 16-18) at <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037> viewed 1 February 2011.

<sup>45</sup> See eg, Kuhn KU and Vives X, *Information Exchanges among Firms and their Impact on Competition* (Office of the Official Publications of the European Communities, Luxembourg, 1995); Carlton D, Gertner R and Rosenfield A, “Communication among Competitors: Game Theory and Antitrust” (1997) 5(3) *George Mason Law Review* 423; Kandori M and Matsushima H, “Private Observation, Communication and Collusion” (1998) 66(3) *Econometrica* 627; Kuhn K, “Fighting Collusion: Regulation of Communication between Firms” (2001) 32 *Economic Policy* 1; Nitsche R and von Hinten-Reed N, *Competitive Impacts of Information Exchange*, (2004) [http://www.iec.europa.eu/competition/antitrust/others/maritime/elaa\\_proposal?note\\_on\\_information\\_exchange\\_en.pdf](http://www.iec.europa.eu/competition/antitrust/others/maritime/elaa_proposal?note_on_information_exchange_en.pdf) viewed 2 February 2011; Vives X, “Information Sharing Among Firms” in Durlauf S and Blume L (eds), *The New Palgrave Dictionary of Economics* (2nd ed, Palgrave Macmillan, 2006).

<sup>46</sup> See Mollgaard P and Overgaard PB, “Transparency and Competition Policy” in Bergman M (ed), *The Pros and Cons of Information Sharing* (Swedish Competition Authority, November 2006) pp 101 and 122. For a useful framework, see further OECD, *Roundtable on Information Exchanges Between Competitors under Competition Law, Note by the Delegation of the European Union*, DAF/COMP/WD(2010)118 (21 October 2010).

<sup>47</sup> Kuhn, n 45 at 30. See the apparent acknowledgment of this in the RIS: “the potential shape of the Australian prohibition to address anti-competitive price signalling and information exchange draws upon European law where particularly harmful disclosures between competitors, such as the exchange of future prices, are dealt with quite strictly”. See Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 13.

<sup>48</sup> Mollgaard and Overgaard, n 46, pp 101 and 123.

<sup>49</sup> Kuhn, n 45 at 30.

<sup>50</sup> OECD, n 25, p 11 (for acknowledgment of this in the Australian contribution: see pp 96-97).



Section 44ZZW does not require the information to be likely to affect a pricing decision by the competitor/s to which disclosure is made. By contrast, the Coalition Bill requires a purpose to induce or encourage a competitor to vary its price and the definition of “price-related information” refers to information that “may have a bearing” on that price.<sup>51</sup> The approach in the Exposure Draft also contrasts starkly with the focus on competitively sensitive information in guidelines issued by overseas competition regulators about information exchanges between competitors.<sup>52</sup> This departure from orthodoxy is unexplained in the Explanatory Note and is inconsistent with the discussion in the RIS.<sup>53</sup>

The s 44ZZW prohibition does not apply unless the disclosure is made only to a competitor or potential competitor and not to any other person (s 44ZZV(1)). This requirement is subject to an anti-avoidance exception where the disclosure is made to another person for the purpose of avoiding the application of s 44ZZW (s 44ZZV(2)). Thus, if competitor A discloses pricing information to competitor B in the presence of a third party C who happens to be present and A is not making the disclosure to C for the purpose of avoiding the application of s 44ZZW, the per se prohibition under s 44ZZW will not apply. However, A will be liable under s 44ZZX if the disclosure was for the purpose of substantially lessening competition in a market. It is strange that competitor A should be spared the per se test of liability under s 44ZZW merely because a third party happens to be present when a disclosure of pricing information is made to competitor B.

Disclosure of pricing information to a competitor is prohibited by s 44ZZW whether or not the information is already in the possession of the recipient, available in the market or known to other persons (see s 44ZZV(3)). This is puzzling. The degree of anticompetitive harm where the pricing information disclosed is known already or is available in the market is likely to be ambiguous and warrants assessment on a case-by-case basis. It is hard to justify per se liability in such circumstances. Yet the RIS argues that it is the circumstance of disclosure in private that is of particular concern as it is this circumstance that creates the risk of collusion.<sup>54</sup> This reasoning is questionable. If the recipient of the information is already aware of it, arguably further disclosure (regardless of whether in private or public) is irrelevant to any prospect of collusion.<sup>55</sup> It may be different in situations where competitors receive relevant data faster than consumers. However, s 44ZZW does not allow account to be taken of the particular circumstances of the disclosure, such as asymmetry in the timing of its release to buyers and sellers in the market.

Disclosure of information to a recipient will occur where the disclosure is to an intermediary for the purpose of the intermediary disclosing (or arranging for the disclosure of) the information to the recipient and the information is in fact disclosed to the recipient (s 44ZZU(2)). It is unclear what this provision means for information hubs like Informed Sources.<sup>56</sup> Does a competitor who provides pricing information to an information hub do so for the substantial purpose of that hub disclosing the

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<sup>51</sup> Proposed s 45A(5). Curiously, the purpose must be to induce or encourage a competitor to vary a price and hence the proposed prohibition would not apply where the purpose is to induce or encourage a competitor to maintain a price (eg, not to enter into a price war).

<sup>52</sup> See Federal Trade Commission and the US Department of Justice, *Antitrust Guidelines for Collaborations among Competitors* (April 2000); European Commission, *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements* C(2010) 9274/2 (Brussels); Canada Competition Bureau, *Competitor Collaboration Guidelines* (23 December 2009). See also the approach previously supported by the ACCC in Trade Practices Commission Information Circular No 14 of 18 April 1976.

<sup>53</sup> See Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 13. The discussion of the per se prohibition under s 44ZZW at p 14 of the RIS is inconsistent with the discussion of competitively sensitive information at p 13.

<sup>54</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 14.

<sup>55</sup> However, it may be relevant to sustaining or strengthening a collusive arrangement that is already established. The RIS does not reflect such distinctions.

<sup>56</sup> For background, see Drummond M, “Bank, Petrol Chiefs Face ACCC Grilling”, *Australian Financial Review* (9 November 2011) pp 1 and 48. The position of Informed Sources and similar information hubs are discussed in the RIS only in the context of the possibility of authorisation: Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 17. There are a number of submissions to Treasury, including by motoring organisations, which emphasise the importance of information mechanisms that provide fuel price data for the benefit of consumers. These submissions oppose any legislative reform that

information to competitors or is the only substantial purpose that of receiving information from competitors that also subscribe to the hub or, in cases where the hub makes its information available more widely, the substantial purpose of informing customers?<sup>57</sup>

There is no competition condition comparable to that under s 44ZZRD(4). The requirement instead is that the private disclosure to a competitor be “in a particular market” (s 44ZZV(1)). This is a loose approach. Liability under s 44ZZRJ requires that the parties to the contract, arrangement or understanding be competitive with each other in relation to the supply or acquisition of the goods or services that are the subject of collusive restraint.<sup>58</sup> Given that liability can be imposed under s 44ZZW merely on the basis of disclosure of information as distinct from a contract, arrangement or understanding, the absence of a competition condition comparable to that under s 44ZZRD(4) is unsatisfactory.

Another contrast is that under s 44ZZW the recipient of privately disclosed information need be merely a “potential competitor” (see s 44ZZV) whereas the test under s 44ZZRD(4) is whether or not the other party is “likely” to be in competition.<sup>59</sup> It may also be noted that reliance on the concept of a “particular” market raises difficulties of interpretation and application akin to those experienced with the requirement of “particularity” in s 4D.<sup>60</sup> Those difficulties were eliminated by s 44ZZRD(7) for the definition of a cartel provision but their ghost has come back to haunt s 44ZZV(1).

### 3.2 The unjustified overreach of the s 44ZZW prohibition

A major concern about the s 44ZZW prohibition against private disclosure of pricing information to competitors is that the prohibition would result in unjustified overreach in many everyday situations.<sup>61</sup>

Consider the following examples:<sup>62</sup>

- (1) Bazza, the CEO of Fifth Column, a new Australian bank, phones Gale, the CEO of one of the big four banks, and says: “Have you seen our new 6% home loan rate? Beat that, you bastard!” Bazza’s competitive excess is not merely an offence against etiquette. It is contravention of s 44ZZW. It is irrelevant that Fifth Column’s 6% rate is information readily available to competitors in the market: see s 44ZZV(3).<sup>63</sup>
- (2) Bank A offers a “hot daily interest rate” to new customers (NC) upon request. NC asks Bank A for a quote in writing because Bank B has insisted upon that before discussing a competitive rate with NC any further. The quote by Bank A is disclosed to NC for the purpose of NC disclosing the

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might see transparency on the demand side of the petrol retail market diminished. See, eg, the submissions of the Australian Automotive Association and the National Roads and Motorists’ Association at <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037>, viewed 1 February 2011.

<sup>57</sup> On the standard of substantiality, see *Competition and Consumer Act 2010* (Cth), s 4F(1)(b).

<sup>58</sup> *Competition and Consumer Act 2010* (Cth), s 44ZZRD(4).

<sup>59</sup> The term “likely” in this context is not defined by s 44ZZRB. Query whether, as a matter of ordinary usage, a circumstance may arise “potentially” if various conditions are present yet not be “likely” to occur unless those conditions are likely to occur. Note that in the RIS it was suggested that the per se prohibition would apply to disclosures to actual or likely competitors: see Department of Finance and Deregulation, Regulation Impact Statement, n 6, pp 14 and 17.

<sup>60</sup> See *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563.

<sup>61</sup> In our view, the statement in Treasury, *Competition and Consumer Amendment Bill (No 1) 2011*, Explanatory Note, p 3, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918> viewed 25 January 2011, that “[t]he per se prohibition targets those information disclosures that are most readily distinguishable from benign or pro-competitive forms of conduct, namely the private disclosure of pricing information between competitors” is incorrect.

<sup>62</sup> For further examples, see the submissions of Gilbert + Tobin on behalf of the Australian Banking Association (pp 18-21), the Australian Payments Clearing Association, the National Australia Bank and Westpac. For examples of potential overreach in other sectors, should the proposed prohibitions be extended beyond the banking sector, see the submissions of the Insurance Australia Group and the Australian National Retailers Association. The submissions are available at <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037> viewed 1 February 2011.

<sup>63</sup> As explained in Section 3.1 above, the statement in Treasury, *Competition and Consumer Amendment Bill (No 1) 2011*, Explanatory Note, p 3, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918> viewed 25 January 2011, that “[i]t is the circumstance of private disclosure of prices which creates the high risk of anti-competitive behaviour, not the information disclosed” is misconceived.

information to Bank B.<sup>64</sup> There is no exception for private disclosure to a competitor via a customer for the purpose of enabling the customer to compare prices and choose the best price.

- (3) Bank C and Bank D have lent funds to a small corporation (SME) under separate loans. SME is about to go under. Bank C and Bank B meet to arrive at an agreed solution to allow SME to trade out of its difficulties. The solution agreed is a moratorium on SME's interest repayments for three months. The conduct of Bank C and Bank D in disclosing pricing information to each other in this situation is caught by s 44ZZW unless they obtain an authorisation.. The position is the same if Bank C and Bank B do not meet, but Bank C tells SME that it prepared to agree to a moratorium on SME's interest repayments for three months if Bank D agrees to do the same. In that situation there is a private disclosure of pricing information by Bank C to Bank D via SME as an intermediary.<sup>65</sup>
- (4) Bank E remits funds on behalf of a customer to Bank F for deposit in the account of a party who has supplied a product to the customer. The telegraphic transfer informs Bank F that Bank E has deducted a \$15 fee for the telegraphic transfer. Assuming that Bank E and Bank F are competitors in the "particular market", Bank E has contravened s 44ZZW (it has disclosed to Bank F the price at which it has supplied the telegraphic transfer service).
- (5) A customer of Bank H uses a debit card to obtain cash from an ATM operated by Bank G in the Sydney CBD. Bank H has ATM machines in the Sydney CBD. Details of the transaction including Bank G's ATM usage fee are transmitted to Bank H and details of that transaction and the usage fee are recorded on the customer's bank account. Bank G has privately disclosed pricing information (its ATM usage fee) to a competitor in the particular market. The ATM arrangements may be subject to an authorisation by the ACCC but there will be a contravention unless the terms of the authorisation cover the conduct subject to prohibition under s 44ZZW.<sup>66</sup>

The Note to s 44ZZW states that: "Conduct that would otherwise contravene this section can be authorised under subsection 88(6A)". However, authorisation is not a practical solution in many situations, including examples (1)-(4) above, where everyday conduct would be caught by a poorly drafted prohibition<sup>67</sup> and where, as discussed further in this article, the exceptions under s 44ZZY and s 44ZZZ are limited in scope.

The most fundamental problem with s 44ZZW is that there is no cogent rationale for the prohibition. The absence of a cogent rationale for the proposed reform has caused the problem of overreach. The RIS itself explains "the problem" targeted by the proposed amendments as being a problem arising from practices that facilitate coordination between competitors.<sup>68</sup> However, s 44ZZW (like s 44ZZX – see further Section 4.2 below) focuses on information disclosure. There is no element of actual or anticipated coordination in the definition of the conduct that is the subject of the prohibition. The RIS appears to proceed on the basis that private disclosures of pricing information between competitors (regardless of the characteristics of the information and largely regardless of the

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<sup>64</sup> As required by s 44ZU(2)(b).

<sup>65</sup> As required by s 44ZU(2)(b).

<sup>66</sup> See Section 5.3 in this article.

<sup>67</sup> Under s 88(6C), the ACCC would be empowered to make an authorisation covering "similar disclosures of information". The ACCC may also waive the application fee in some cases. These are palliatives; they do not justify prohibiting everyday conduct that is pro-competitive or unlikely to detract from consumer welfare. The discussion of the burdens of seeking authorisation in Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 17, is inconsistent with practical reality.

<sup>68</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 6.

circumstances of the disclosure) invariably will be intended to facilitate coordination.<sup>69</sup> However, the disclosure may not be made with that intention and/or may not have any coordinating effect. It may be innocuous.<sup>70</sup>

Alternatively, while coordination may be facilitated by the disclosure, it may be benign or beneficial from a competition perspective. Thus, if enacted, the s 44ZZW prohibition has the potential to inhibit or prevent behaviour that is beneficial to the competitive process and hence to consumer welfare. Examples (2)-(3) above illustrate the danger.<sup>71</sup> Information is the life-blood of an informed market.<sup>72</sup> The tourniquet of s 44ZZW applied by the Exposure Draft would constrict the flow of information in a way that is likely to undermine legitimate, and, in some instances, welfare-enhancing commercial discourse.<sup>73</sup>

The RIS asserts that “it is apparent from numerous judicial decisions that these existing cartel provisions do not effectively address anticompetitive exchanges that occur outside of a ‘contract, arrangement or understanding’”.<sup>74</sup> However, in three of the cases referred to (*Email, Apco* and *Leahy*)<sup>75</sup> the conduct arguably could have been characterised as either an attempt to arrive at an understanding that provides for the fixing of a price or an understanding to exchange information relating to price with the purpose, effect or likely effect of substantially lessening competition.<sup>76</sup>

These cases support an argument at most for a prohibition against conduct by a competitor that invites or encourages another competitor not to compete against it on price, or to exchange pricing

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<sup>69</sup> See the statement in Treasury, *Competition and Consumer Amendment Bill (No 1) 2011*, Explanatory Note, p 3, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918> viewed 25 January 2011, that “[i]t is difficult to ascertain a rationale for disclosing pricing information to competitors in a private manner, other than to seek to facilitate prices above a competitive level”. See also Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 14.

<sup>70</sup> A simple example makes the point: Assume during their regular social game of golf, Co X’s CEO says to the CEO of Co Y: “Gee, the wife might not get her Fiji holiday this year if we keep up this discounting”. The conversation then turns to cheaper holiday options in Queensland. Discounting continues by both companies. Nevertheless, the comment is subject to liability under s 44ZZW. No doubt, there are many more examples of this nature.

<sup>71</sup> Cf the assertion in *Competitive and Sustainable Banking System*, that “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”: Treasury, *Competitive and Sustainable Banking System*, n 9, p 11. That statement is incorrect.

<sup>72</sup> As recognised in the RIS: see also Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 9.

<sup>73</sup> See Whish R, *Competition Law*, (6th ed, Oxford University Press, Oxford, 2009) p 525; Swedish Competition Authority, *The Pros and Cons of Information Sharing* (November 2006); Teece D, “Competition, Cooperation, and Innovation Organizational Arrangements for Regimes of Rapid Technological Progress” (1992) 18 *Journal of Economic Behavior and Organization* 1; Evans L and Mellsoy J, *Exchanging Price Information can be Efficient: Per Se Offences should be Legislated Very Sparingly*, New Zealand Institute for the Study of Competition and Regulation Inc, 2003, at <http://www.iscr.org.nz/n10.html?filter=Research+Reports&year=2003>, viewed 1 February 2011.

<sup>74</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 2.

<sup>75</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 2, fn 2. The RIS refers to two other cases only. Neither supports the proposition for which they are cited. *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 26 ALR 609 was a case in which the Commission was successful in establishing an understanding between hotel retailers. *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 was a case in which the Commission pleaded an arrangement or understanding containing an exclusionary provision based on conversations between Amcor and Visy representatives regarding the purchase of a supplier business. It is difficult to discern its relevance in the present context.

<sup>76</sup> Liability for attempted price fixing was imposed in *Trade Practices Commission v Parkfield* (1985) 7 FCR 534 at 538-539, where the court held that conversations between two petrol retailers, in the course of which one sought to ascertain the other’s attitude to raising petrol prices, were sufficient to constitute attempts to contravene s 45(2), notwithstanding that the price-fixing proposal had not reached an advanced stage. See also *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2004) 210 ALR 486. The RIS and the Explanatory Note do not discuss the relevance of liability for attempt. Cf the discussion in the submission by Mallesons Stephen Jaques (pp 6-7) at <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037>, viewed 1 February 2011. In the United States, s 1 of the *Sherman Act* does not provide for liability for attempted conspiracy to restrain trade. However, in some possible cases attempted collusion may be subject to liability on the basis of attempted monopolisation under s 2 of the *Sherman Act*: *United States v American Airlines*, 743 F 2d 1114 (5th Cir 1984). But see *In re Delta/AirTran Baggage Fee Antitrust Litigation*, Order, 2 August 2010, pp 40-43, Civil Action File Number 1-09-md-2089-TCB (US District Court, Northern District of Georgia, Atlanta Division) (rejection of claim of attempted monopolisation by AirTran and Delta).

information in a way that is likely to result in the coordination of prices on some if not most future occasions. The focus of any such prohibition would be on the risk of coordination of market conduct, not information exchange per se. Having determined this as the focus, the next question would be how to distinguish between coordination that is substantially anticompetitive and coordination that does not meet this threshold. If there are gaps in the law, they need to be pinned down exactly and covered by well-tailored provisions that go no further than necessary.

The RIS asserts that the submissions made to the Treasury's consultation on the meaning of "understanding" support the view that "amending the meaning of "understanding was not a well targeted means of capturing anticompetitive conduct not presently captured by the TPA".<sup>77</sup> However, those submissions were in response to a specific proposal for amendment promulgated by the ACCC. Treasury did not conduct a consultation that canvassed the range of ways in which information exchanges between competitors could be captured by the cartel provisions, either in their existing form or with amendment.

Furthermore, the contention in the RIS that the s 44ZZW prohibition offers the advantage of the "absence of significant uncertainty" and that the avoidance and compliance costs "can consequently be expected to be low"<sup>78</sup> lacks credibility.<sup>79</sup> The RIS foreshadows the possible need to amend the defences set out in the Exposure Draft in light of consultation.<sup>80</sup> However, the starting point is to work out a cogent rationale for a new prohibition and to define the elements of the prohibition in terms based directly on its rationale.

#### **4. THE PROHIBITION AGAINST DISCLOSURE OF PRICING INFORMATION OR OTHER SPECIFIED INFORMATION FOR THE PURPOSE OF SUBSTANTIALLY LESSENING COMPETITION**

##### **4.1 The s 44ZZX prohibition – main elements**

The prohibition under s 44ZZX prohibits disclosure of pricing information and other specified information for the purpose of substantially lessening competition in a market (SLC purpose test).

- (1) A person 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 person;
    - (ii) the capacity, or likely capacity, of the person to supply or acquire Division 1A goods or services;
    - (iii) any aspect of the commercial strategy of the person that relates to Division 1A goods or services; and
  - (b) the person makes the disclosure for the purpose of substantially lessening competition in a market.

Subsection 44ZZX(2) sets out factors that may be taken into account when applying the SLC purpose test:

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

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<sup>77</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 12.

<sup>78</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 14.

<sup>79</sup> As does the assurance that uncertainty can be minimised through ACCC guidance (see Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 16). The ACCC has limited capacity to confine the scope of a prohibition expressed in such highly prescriptive terms. Nor is it of much assistance to businesses to be assured that the ACCC will exercise its discretion in enforcing the prohibition. On the limited assistance of such assurances in the context of the cartel prohibitions, see Beaton-Wells and Fisse, n 13, section 2.4.3.3. See further, Wylie I, "Cartel Output Restrictions – Construction and Common Sense Collide and Particularity of 'Persons' under the Trade Practices Act 1974" (2010) 38 ABLR 23 at 28.

<sup>80</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 16.

- (a) whether the disclosure was a private disclosure to competitors; and
- (b) the degree of specificity of the information; and
- (c) whether the information relates to past, current or future activities; and
- (d) how readily available the information is to the public; and
- (e) whether the disclosure is part of a pattern of similar disclosures by the person.

Subsection 44ZZX(3) provides that, after all the evidence has been considered, a SLC purpose may be taken to exist “if ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances”.

The Exposure Draft does not follow the purpose, effect or likely effect competition test adopted in the Coalition Bill.<sup>81</sup> The following explanation is given in the *Competitive and Sustainable Banking System* announcement:<sup>82</sup>

The Government has received independent legal advice that considers it would not be appropriate to ban the communication of pricing intentions that have the effect or likely effect of substantially lessening competition, as opposed to the purpose. Such a prohibition would create substantial uncertainty, because market participants could not know in advance how their competitors will react to their public statements, and therefore what the effect or likely effect would be.

The advice referred to has not been made public.<sup>83</sup>

A disclosure for the purposes of s 44ZZX may be made through an intermediary in the circumstances prescribed by s 44ZZU(2).

Unlike the s 44ZZW prohibition, the s 44ZZX prohibition is not limited to pricing information but extends to a wide range of further information, including “any aspect of the commercial strategy of a corporation” that relates to Div 1A goods and services. This is difficult to reconcile with the concerns that have been emphasised publicly by the ACCC or the government relating to *price* signalling by banks and petrol retailers.<sup>84</sup>

#### 4.2 The unjustified overreach of the s 44ZZX prohibition

A fundamental question leaps out of s 44ZZX. Why does s 44ZZX prohibit the *disclosure of information* for a SLC purpose but not *conduct* that has the purpose of substantially lessening competition in a market?<sup>85</sup> There is no apparent policy justification for making *talking* unlawful if actually *doing* what is talked about is lawful.

Assume that Macro, a technology company, devises revolutionary internet transmission technology that is likely to overtake existing technology soon. Macro publicly announces the new technology and that its strategy is to make existing internet transmission technology “obsolete and unusable” within a few years. Macro’s commercial strategy is to damage or eliminate its existing competitors and deter any new entrants, thereby attaining a monopoly or near-monopoly position. Macro’s intention in making the announcement is to signal that strategy to existing and potential competitors with a view to preventing their further investment in or entry to the market.<sup>86</sup> If internet technology goods and services are Div 1A goods and service, the s 44ZZX prohibition will apply to

<sup>81</sup> Proposed s 45A(2)(c).

<sup>82</sup> Treasury, *Competitive and Sustainable Banking System*, n 9, p 11.

<sup>83</sup> See the criticism of previous reliance on private legal advice as a substitute for transparent development of competition law reforms in Australia in Beaton-Wells and Fisse, n 13, p 581.

<sup>84</sup> See Section 1 above in this article. See further, *ACCC Push for Tougher Laws to Stop Banks’ Price Signalling; Samuel on Warpath*, The West Australian (30 October 2010). For an earlier expression of concern about price signalling by banks see ACCC, *Bank Interest Rate “Telegraphing” Risks Breaching Trade Practices Act* (News Release, 23 December 1999).

<sup>85</sup> This basic question is ignored in Treasury, *Competition and Consumer Amendment Bill (No 1) 2011*, Explanatory Note, p 4, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918>, where it is stated that the s 44ZZX prohibition is “consistent with the framework of the TPA”: the key question is one of underlying competition policy, not superficial appearances. See also Department of Finance and Deregulation, *Regulation Impact Statement*, n 6, p 15.

<sup>86</sup> An additional intention may be to signal to prospective investors and customers that Macro has made significant advances and hence should be preferred over its competitors.

this announcement: Macro has made a disclosure of information about its commercial strategy, and a substantial purpose of the making of the disclosure is to substantially lessen competition in the market for internet transmission systems in Australia. However, if Macro did not disclose that information but actually rolled out its new technology and thereby annihilated all competitors, Macro would (and should) not contravene s 46 (unless it had substantial market power and could be shown to have taken advantage of it) or any other prohibition under the CCA.

This example highlights the absence of a cogent rationale for the s 44ZZX prohibition. The starting point for s 44ZZX seems to have been a concern about corporations making announcements in a way intended to substantially reduce competition.<sup>87</sup> However, as the example shows, that starting point is misguided. The correct starting point, as highlighted above, is that corporations can act strategically in ways that bring about coordinated conduct without making a contract or arrangement or arriving at an understanding: that is the concern about facilitating practices.<sup>88</sup>

A prohibition against public price signalling or any other form of strategic non-collusive market coordination by competitors should focus on whether or not a competitor is acting strategically to coordinate market conduct with a competitor. Like the prohibition under s 44ZZW, the prohibition under s 44ZZX has no such focus; the concept of *disclosure of information* is not limited to and does not necessarily require *strategic market coordination* by a competitor. As a result, the s 44ZZX prohibition would result in unjustified overreach. The case of Macro discussed above is one of many examples. Another would be where several major companies that manufacture cars publish a series of advertisements stating that, if the government was to proceed with its proposal to remove tariffs on imported cars, the companies would close or substantially reduce their Australian operations. If the disclosure relates to Div 1A goods and services, there will be a breach of s 44ZZX. The information disclosed in the advertisements relates to an aspect of the companies' commercial strategy (s 44ZZX(1)(a)(iii)), namely their strategy with respect to continuing their Australian operations. The making of the disclosure has a substantial purpose of substantially lessening competition in a market (s 44ZZX(1)(b)), namely the market in which the companies compete with the importers in relation to the supply of cars. Political speech of the kind illustrated by this example has never previously been the subject of prohibition under Pt IV of the CCA. Nor should it be given that the companies concerned have not sought to coordinate prices, reduce output or allocate customers. Neither the Explanatory Note nor the RIS address the potential clash between s 44ZZX and freedom of speech.

One possible way of focussing on strategic market coordination would be to revisit the cartel provisions in Div 1 and, for the purposes of the civil prohibitions under ss 44ZZRJ and 44ZZRK, to re-define the element of an understanding in terms of a mutual expectation that the parties will act in accordance with each other's wishes.<sup>89</sup> It is unfortunate that Treasury has not published a discussion paper on this and other possibilities canvassed in or suggested by the submissions that were sought in January 2009 and received at the end of the first quarter of 2009.<sup>90</sup> The RIS refers to those submissions and, after a brief discussion, prematurely dismisses the possibility of amending the concept of an understanding under s 45 and ss 44ZZRJ and 44ZZRK.<sup>91</sup>

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<sup>87</sup> Ensuing perhaps from an uncritical acceptance of the sweeping proposition in Walker, n 8, para 34 that "any conduct which substantially lessens competition in a market should be unlawful unless authorised on public benefit grounds".

<sup>88</sup> See Hay, n 2, p 1189.

<sup>89</sup> The approach unsuccessfully put by the Trade Practices Commission in *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53; 43 FLR 383. See further Black O, *Conceptual Foundations of Antitrust* (Cambridge University Press, 2005) Ch 5. Similarly, in its 2007 proposal (see Section 1 above in this article) the ACCC proposed that one of the factors relevant to the establishment of an "understanding" be "the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding".

<sup>90</sup> The submissions are available at Treasury, *Submissions: Discussion Paper – Meaning of "Understanding" in the Trade Practices Act*, n 24.

<sup>91</sup> Department of Finance and Deregulation, Regulation Impact Statement, n 6, pp 7-8, 10-11. Yet in his evidence to the Senate inquiry into competition in the banking sector the ACCC Chairman reiterated that "the heart of the concern" on the part of the

### 4.3 The s 44ZZX prohibition – efficacy?

Putting aside the lack of a cogent rationale for the s 44ZZX prohibition, its efficacy is questionable.

First, corporations minded to side-step s 44ZZX will have little difficulty in doing so. It takes little imagination or skill to coat a facilitating practice with a thick layer of commercial justification.<sup>92</sup> For example, a corporation that wishes to deter competitors from lowering their prices may offer customers a 5% discount on any price offered by a competitor (on its face, a highly pro-competitive offer) and do so in accordance with a well-documented corporate strategy of maintaining market share or increasing business. If s 44ZZX were to be enacted in its present form, one likely outcome would be the assiduous roll out of self-protective commercial justifications for significant disclosures of information. That outcome would reflect a general axiom of commerce that, for every legislative action, there are corporate counteractions.<sup>93</sup>

Secondly, the SLC purpose test under s 44ZZX relates to the purpose of the *disclosure of information* as distinct from the purpose of the *conduct* of the defendant.<sup>94</sup> The disclosure of information does not necessarily have the same causative relevance as the taking of action and this distinction will be relied on by defendants to help deny an allegation that a disclosure of information, as such, was made for the purpose of substantially lessening competition.<sup>95</sup> In contrast, no distinction between the disclosure of information and action is drawn under US antitrust law in the context of the application of the rule of reason to facilitating practices under s 1 of the *Sherman Act* or s 5 of the *Federal Trade Commission Act*.<sup>96</sup>

Thirdly, many disclosures of information relating to “any aspect” of the “commercial strategy”<sup>97</sup> of corporations are huff, puff or bluff and often used as a dynamic positioning exercise rather than to reduce competition.<sup>98</sup> Moreover, the signals are often subtle and not easily read by those uninitiated in the art of corporate strategy.<sup>99</sup> These seem to be significant further impediments in the way of proving a SLC purpose.

Fourthly, s 44ZZX will apply to information hubs where the substantial purpose of disclosing information to an information hub is to inform customers, not competitors. However, arguably there is no need for s 44ZZX to deal with any issues associated with information hubs given that any such issues are likely to be covered by the prohibitions under s 45(2) relating to provisions that have the purpose, effect or likely effect of substantially lessening competition in a market.<sup>100</sup> Information hubs involve a series of contracts (or arrangements or understandings) between the hub operator and those who provide pricing or other information. It may also be noted that the aggregation provision under s 45(4) is defined more precisely than the factor of aggregation is under s 44ZZX(2)(c).

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ACCC was the requirement to prove commitment for the purposes of establishing an understanding under the cartel prohibitions”. See Commonwealth of Australia, Senate Economics References Committee, *Transcript of Evidence of ACCC Representatives* (Proof Committee Hansard, 25 January 2011) E27.

<sup>92</sup> An implication to be drawn from the discussion of US case law in Hay, n 2.

<sup>93</sup> On the practical importance of liability control to corporations when developing and using their internal controls against cartel conduct see Beaton-Wells and Fisse, n 13, Ch 12.

<sup>94</sup> The evidence of SLC purpose provision in s 44ZZX relates to disclosures of information as distinct from conduct associated with disclosures of information.

<sup>95</sup> In Department of Finance and Deregulation, Regulation Impact Statement, n 6, p 16, it is suggested that a purpose test avoids the difficulty that would arise under an effects test. A purpose test may be easier to establish in some cases but does not overcome the difficulty in many others where a defendant is astute enough to deny liability on the basis that the only purpose was to make a disclosure that, in the factual outcome intended, amounted only to “cheap talk” or posturing.

<sup>96</sup> See further Hay, n 2.

<sup>97</sup> Exposure Draft, s 44ZZX(1)(a)(iii).

<sup>98</sup> Porter M, *Competitive Strategy* (The Free Press, New York, 1980) Chs 2-3.

<sup>99</sup> Porter, n 98, Ch 4.

<sup>100</sup> This is not discussed in the RIS, either in relation to the case of Informed Sources or the US airline tariff publishing case: see Department of Finance and Deregulation, Regulation Impact Statement, n 6, pp 7 and 17.



## 5. EXCEPTIONS

### 5.1 The exceptions available to deny liability under s 44ZZW and s 44ZZX

Several exceptions apply to the prohibitions under s 44ZZW and s 44ZZX:

- Accidental disclosures are excepted under s 44ZZU(3). An accidental disclosure to a recipient is one that is: (a) due to an accident; (b) the default of a person other than the corporation; or (c) or some other cause beyond the control of the corporation.<sup>101</sup> The vicarious responsibility provisions under s 84 are preserved (s 44ZZU(4)).
- The prohibitions do not apply to the disclosure of information by a corporation if the disclosure is authorised by or under a law of the Commonwealth, a State or a Territory and the disclosure occurs before the end of 10 years after the day on which the *Competition and Consumer Amendment Act (No 1) 2011* receives the Royal Assent (s 44ZZY(1)).
- The prohibitions do not apply to the disclosure of information by a corporation if the disclosure is to one or more bodies corporate that are related to the corporation, and is not to any other person (s 44ZZY(2)).
- A disclosure of information to which s 44ZZW and s 44ZZX apply is subject to authorisation by the ACCC (s 88(6A) to s 88(6C), s 90(5C) and s 90(5D), and related provisions). Under s 88(6C) the ACCC is empowered to authorise multiple “similar” disclosures of information.

### 5.2 The additional exceptions available to deny liability under s 44ZZW

Several additional exceptions apply to the prohibition under s 44ZZW:

- There is an exception where the information disclosed by a corporation relates to the price of Div 1A goods or services supplied or likely to be supplied by the corporation to a recipient for the purpose of re-supply by the recipient; or acquired or likely to be acquired by the corporation from the recipient for the purpose of re-supply by the corporation (s 44ZZZ(1)).
- Disclosure by a competitor to a competitor is excepted from the application of s 44ZZW if the corporation did not know, and could not reasonably be expected to have known, that the person was a competitor or potential competitor (s 44ZZZ(2)).<sup>102</sup>
- The s 44ZZW prohibition does not apply to the disclosure of information by a corporation if: (a) the corporation is a participant in a joint venture for the production and/or supply of goods or services; (b) the disclosure is to one or more participants in the joint venture and not to any other person; and (c) the disclosure is made for the purposes of the joint venture (s 44ZZZ(3)).
- There is an exception in so far as the information is disclosed in connection with a contract, arrangement or understanding for the acquisition of shares or assets of a person (s 44ZZZ(4)).<sup>103</sup>

An evidential burden of proof lies on a defendant who relies on an exception under s 44ZZU(3) or s 44ZZY or s 44ZZZ (s 44ZZZA). This is in keeping with the evidential burden of proof that applies in the context of the cartel prohibitions under Div I where a defendant relies on a joint venture exception under s 44ZZRO or s 44ZZRP.

### 5.3 Inadequacies of the exceptions

The exceptions under ss 44ZZY and s 44ZZZ are unjustifiably narrow in a number of important respects:

- Under s 44ZZY(1) a disclosure of information is excepted if “authorised by, or under” a relevant law. Consider the position where disclosure is required by a law but the disclosure made exceeds the minimum required by the disclosure obligation in that law. That situation is often likely to occur in the context of continuous disclosure under the *Corporations Act 2001* (Cth) where more information than is necessary may be disclosed out of abundant caution. Is a disclosure of more information than is required to meet a disclosure obligation “authorised by or under” the law

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<sup>101</sup> Compare *Competition and Consumer Act 2010* (Cth), s 208.

<sup>102</sup> It is not clear why this exception should not also apply to s 44ZZX.

<sup>103</sup> It is not clear why a similar “anti-overlap” exception does not apply in respect of conduct that would be caught by the cartel prohibitions.

imposing that obligation? A much less oblique approach would be to except disclosures made for the purpose of complying with a disclosure obligation under a relevant law.

- The sunset provision in s 44ZZY(1)(b) seems inappropriate. The effect is to expose defendants to liability at the end of the sunset period whereas sunset provisions in other Commonwealth legislation (eg s 3UK of the *Crimes Act 1901* (Cth)) operate by curtailing exposure to a special power of investigation at the end of the sunset period.
- The joint venture exception under s 44ZZZ(3) is too narrow in three main respects.<sup>104</sup> First, the exception is limited to joint ventures whereas competitors often enter into collaborative pro-competitive ventures that are not joint ventures.<sup>105</sup> Secondly, the exception under s 44ZZW(3) is limited to participants in an existing joint venture. Assume that Bank Z and Bank W discuss a prospective joint venture for the supply of low-interest loans to disabled persons. They discuss how low the interest rates can go. Bank Z and Bank W contravene s 44ZZW. The joint venture exception under s 44ZZ(3) does not apply because the joint venture is prospective. Thirdly, a corporation will not qualify for the exception if the disclosure is for the purposes of a joint venture but happens to be made to someone in addition to other participants in the joint venture (eg, a bank that is lending money to the joint venture, or a customer of the joint venture).
- The exception under s 44ZZZ(1) is limited to re-supply and will not apply in many normal vertical dealings between competitors. For example, the goods supplied may be raw materials for manufacture by the competitor, or finished goods that the competitor wants to use to operate its facilities.
- Disclosures of pricing information will often occur in the context of commercial arrangements between competitors that have been authorised because of the danger of breaching the prohibitions against cartel conduct. Some authorisations are cast in terms that will cover disclosures of information of the kind defined under s 44ZZW and s 44ZZX.<sup>106</sup> However, others may not do so. There is no provision in the Exposure Draft that extends the protection of existing authorisations to disclosures of information made for the purpose of the conduct authorised.

The issues outlined above are not discussed in the Explanatory Note or the RIS.

The range of exceptions is too limited. For instance, the collective acquisition exception under s 44ZZRV in the context of cartel prohibitions does not apply to s 44ZZW or s 44ZZX. Nor is there an exception for disclosures for the purpose of collective bargaining that has been notified to the ACCC (contrast the exception under s 44ZZRL).

An obvious loophole is the potential use of continuous disclosure by listed companies as a mechanism for price signalling or disclosing other competitively sensitive information.<sup>107</sup> Surprisingly, the RIS does not address this problem.

<sup>104</sup> Another undue limitation is that the joint venture must be one for the production and/or supply of goods or services (although not necessarily Div 1A goods or services). For a critique of the equivalent limitation in ss 44ZZRO and 44ZZRP see Beaton-Wells and Fisse, n 13, section 8.3.2.2.

<sup>105</sup> See further Beaton-Wells and Fisse, n 13, sections 8.3.2.1 and 8.3.4.5.

<sup>106</sup> See eg, ACCC, *Gorgon Gas Project*, Authorisations A91139, A91140, A91160, A91161 (5 November 2009) (authorisation to “jointly discuss and negotiate common terms and conditions, including price, under which natural gas produced from the Gorgon project for sale to customers in Western Australia will be offered for sale by the Applicants”).

<sup>107</sup> As suggested by the cases under s 5 of the *Federal Trade Commission Act* where invitations to collude were made in analysts briefings in *Valassis Commc'ns*, 71 Fed Reg 13,976 (FTC March 20, 2006); *U-Haul Int'l, Inc.*, 75 Fed Reg 35,033 (FTC June 21, 2010). See also the claim under s 1 of the *Sherman Act* in *In re Delta/AirTran Baggage Fee Antitrust Litigation*, Order, 2 August 2010, Civil Action File Number 1-09-md-2089-TCB (US District Court, Northern District of Georgia, Atlanta Division). The test of liability under s 5 of the *Federal Trade Commission Act* or s 1 of the *Sherman Act* is very different from the prescriptive approach taken by the Exposure Draft. Query whether information disclosure of the blatantly anticompetitive kind illustrated by *Valassis Commc'ns*, 71 Fed Reg 13,976 (FTC March 20, 2006); and *U-Haul Int'l, Inc.*, 75 Fed Reg 35,033 (FTC June 21, 2010). would be “authorised by or under” ASX Listing Rule 3.1 and the *Corporations Act 2001* (Cth), s 674 (see s 44ZZY). However, more subtle uses of continuous disclosure to disclose corporate strategies could easily be used. Note further that a specific anti-avoidance provision would not necessarily work against the adroit use of continuous disclosure as a medium for signalling corporate strategy in a way calculated to help coordinate market conduct without necessarily having the purpose or likely effect of substantially lessening competition in a market.

## 6. CONCLUSION

Sound policy dictates that competition law be amended only where: there is a clear competition “problem” to be addressed; the amendments are capable of addressing the problem effectively and without unintended adverse consequences; and the reform will not undermine legitimate or beneficial business behaviour. The Exposure Draft largely fails to meet these criteria. Nor are they adequately met by the discussion in the Explanatory Note or the RIS.

The proposed approach of prescribing in a piecemeal fashion the types of goods or services, suppliers or industries to which the new prohibitions will apply is highly unsatisfactory.<sup>108</sup> It smacks of a reversion to industry-specific regulation that has been rejected by economic policy-makers in Australia for more than two decades. Moreover, there is little basis for confidence in the safeguards intended to constrain the regulation-making process. There is also considerable uncertainty as to how the regulation-making process will interact with the ACCC’s enforcement measures.

The rationales for the prohibitions proposed under s 44ZZW and s 44ZZX have not been explained adequately. The view expressed above is that neither prohibition as currently drafted has a cogent rationale. Both prohibitions are preoccupied with the *disclosure of information* and, in the case of s 44ZZX, a SLC purpose test, instead of focussing on the potential for competitors to *coordinate market conduct* in a way that is or is likely to be substantially anticompetitive.<sup>109</sup> Both prohibitions would result in overreach and inhibit legitimate and potentially beneficial behaviour. The exceptions to the prohibitions are unjustifiably limited in scope and need reconsideration and redrafting.<sup>110</sup>

The prohibition in s 44ZZW is apparently supposed to capture the type of conduct in *Apco* and *Leahy* that has been the subject of so much debate. Yet the Explanatory Note and the RIS fail to explain why such conduct is not caught by liability for attempt under the current prohibitions and do not explore various possible amendments to the element of an understanding to extend the capacity of the current prohibitions to capture information exchanges between competitors of the kind seen in those cases. Furthermore, the prohibition has been drafted in a way that goes far beyond any justification for imposing per se liability and fails to reflect the considerable economic learning and overseas experience on the question of the competition effects of different types of information.

If headway is to be made against facilitating practices in Australia, it is essential to identify and test the rationale for any proposed change in the law and to set out exactly how any proposed legislative amendments should and should not apply by using telling worked examples.<sup>111</sup> Inept attempts to prohibit facilitating practices are likely to arouse opposition from the business community and may become political booby-traps.

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<sup>108</sup> It does not appear to be supported by the ACCC. See the evidence of the ACCC representatives in the hearing held by the Senate Economics References Committee into banking competition: Commonwealth of Australia, Senate Economics References Committee, Transcript of evidence of ACCC representatives, Proof Committee Hansard, 25 January 2011, E30-E31.

<sup>109</sup> See Section 4.2 (“The Unjustified Overreach of the s 44ZZX Prohibition”) in this article.

<sup>110</sup> See Section 5.3 (“Inadequacies of the Exceptions”) in this article. For a detailed critique of the exceptions to the cartel prohibitions under Div 1 of the *Competition and Consumer Act 2010* (Cth) see Beaton-Wells and Fisse, n 13, Ch 8.

<sup>111</sup> Starting with situations that have been litigated in Australia or overseas (consider eg, *EI duPont de Nemours & Co v FTC* 729 F 2d 128 (2d Cir 1984); *Ahlström Oy v Commission* [1993] ECR I-1307). Some examples are given in Department of Finance and Deregulation, Regulation Impact Statement, n 6, pp 4-7, but the discussion of those examples does not address many issues, including the possibility of reliance on liability for attempt in cases such as *Email*, *Apco* and *Leahy*, or liability on the basis of an understanding to exchange information for the purpose or with the likely effect of substantially lessening competition in a market in overseas cases such as the US airline tariff publishing case, the independent fee-paying school case, or the Royal Bank of Scotland case.