Competition and Consumer Amendment Bill (No. 1) 2011

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Law and Bills Digest Section

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Competition and Consumer Amendment Bill (No. 1) 2011

Date introduced: 24 March 2011
House: House of Representatives
Portfolio: Treasury

Commencement: Schedule 1 on the day after the end of the period of six months beginning on the day of Royal Assent; all other provisions on the day of Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Competition and Consumer Amendment Bill (No. 1) 2011 (the Bill) is to amend the Competition and Consumer Act 2010 (CCA) to:

- prohibit a business from making a private disclosure of pricing information to a competitor
- prohibit a business from making a disclosure for the purpose of substantially lessening competition in a market
- limit the scope of those prohibitions to classes of goods and services that are prescribed by regulations
- provide appropriate exceptions to the prohibitions, and
- extend the existing authorisation and notification regimes within the CCA to enable the Australian Competition and Consumer Commission (ACCC) to grant immunity from the prohibitions to businesses where a net public benefit would result.

Background

At present, Division 1 of Part IV of the CCA prohibits a corporation from making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision.¹

Division 2 of Part IV contains a number of provisions about contracts, arrangements or understandings which restrict dealings or affect competition. In particular section 45, prohibits a corporation from making a contract or arrangement, or arriving at an understanding, if the proposed

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¹. A cartel provision—contained in section 44ZZRD—is a provision relating to price-fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories or bid-rigging by parties that are, or would otherwise be, in competition with one another.

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contract, arrangement or understanding contains an ‘exclusionary’ provision;\(^2\) or if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition.

The term ‘contract’ is well established in the law. It involves consensual dealing, offer, acceptance, consideration, certainty, formality and enforceability. Courts have interpreted the term ‘arrangement’ to mean a less formal form of consensual dealing, lacking some of the essential elements that would otherwise make it a contract.\(^3\)

**Petrol cases**

Most recently in *Apco*\(^4\) and *Leahy*,\(^5\) the Court considered the meaning of the term ‘understanding’.

In *Apco* (known as the Ballarat petrol case) the case involved an allegation by the ACCC against a number of corporate and individual respondents that they were involved in a price fixing understanding constituted by the continuation of pre-existing arrangements which had commenced in about 1999. The arrangements involved a series of steps comprising telephone calls, followed by price increases, reinforced by follow up calls where necessary. The major area of contest was whether the ACCC had established that there was the requisite meeting of minds in relation to a price fixing understanding involving the contesting respondents, and in particular, whether there was a consensus at any time as to what was to be done by any of them in relation to the fixing or controlling of petrol prices in Ballarat.\(^6\)

In *Leahy* (known as the Geelong petrol case) a number of the respondents to the Ballarat case were also the subject of proceedings by the ACCC in relation to allegations of price fixing in the Geelong petrol market. According to Justice Gray

> ... there can be no such thing as an understanding that leaves each party to it free to do whatever it wishes. Whatever word may be chosen to represent the essential element of an understanding for the purposes of the relevant statutory provisions, it is clear that element

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2. Section 4D of the CCA defines an ‘exclusionary’ provision as a provision of a contract, arrangement or understanding between competitors that has the purpose of preventing, restricting or limiting supply, or acquisition, of goods or services by any of the participants.


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involves the assumption of an obligation, unenforceable in any court of law, but merely morally binding or binding in honour.\[^7\]

That being the case, the petrol cases firmly established that **commitment** by a party to a particular course of action, or inaction, is necessary to establish an ‘understanding’.

**Petrol report and Treasury response**

On 18 December 2007, the ACCC released the *Report of the ACCC inquiry into the price of unleaded petrol* (Petrol Report).\[^8\] One of the issues canvassed in the Petrol Report was the role of the *Trade Practices Act 1974* (now the CCA) in general in addressing impediments to competition, and in particular whether the terms of section 45 operated effectively.

In the Petrol Report, the ACCC expressed concerns that court decisions had, over time, narrowed the conduct that is caught by the term ‘understanding’. In addition, the ACCC also expressed its concern that:

> In many investigations concerning alleged cartels, in the absence of one of the participants coming to the ACCC and confessing (either pursuant to the ACCC’s immunity/leniency policy or for other reasons), the ACCC will not have direct evidence of the making of an arrangement or understanding. [In that case], it must ask the court to infer from all the surrounding circumstances that such an arrangement or understanding existed. In the Leahy Petroleum case in particular, the Federal Court showed a reluctance to accept inferential evidence.\[^9\]

With that in mind, the ACCC recommended an amendment to section 45 for the purpose of broadening the meaning of the term ‘understanding’. The ACCC’s proposed amendment retained the expression ‘contract, arrangement or understanding’ in section 45 but

> ... intended to enable the court to determine that an understanding had been arrived at notwithstanding that its existence was ascertainable only by inference, and that some or all of the parties were not committed to giving effect to it, and would enable the court to consider a list of nine factual matters in making this determination.\[^10\]

On 15 March 2008, in response to recommendations made by the ACCC in the Petrol Report, the Government announced that it would give careful consideration to the ACCC’s proposed amendments to section 45 of the TPA, and published a discussion paper for public comment.\[^11\]

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9. Ibid., pp. 24 and 228.

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There were fourteen responses to the discussion paper. However, having received the submissions in response to its discussion paper, the Treasury took no further action.

The reasons for this may only be speculated upon. However, it should be noted that there was little support from the submitters in relation to the proposed amendment. For example, the Business Council of Australia was of the view that ‘the existing legislation promotes robust competition whilst ensuring that business is also provided with a regime that is workable and certain’. Similarly, the Law Council of Australia considered that:

> there is no need to clarify the meaning of ‘understanding’ in the Trade Practices Act (Cth) to address recent judicial interpretation of this term... Although there will always be difficulties of proof in marginal cases, the recent case law has not created any ‘loophole’.

In addition, the submission by Ian Tonking SC expressed concern that if the term ‘understanding’ was to be amended in section 45 as suggested, ‘there is every reason to expect that the amendment will apply to the same term in the cartel provisions’ which had been introduced into the Parliament in December 2008, and which now contain significant criminal and financial penalties.

### Basis of policy commitment

The matter returned to the news in the context of a statement by the Chair of the ACCC, Graeme Samuel, that comments by banks about the need to increase their rates above official interest rates bordered on ‘price signalling’ and he would welcome new powers to deal with it.

It was subsequently reported that ‘the Australian Competition and Consumer Commission has asked federal Treasury to draft a new law to prohibit price signalling’.

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27 April 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FT8JS6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FT8JS6%22)


This Bill is part of the Government’s reform of the banking system. On 12 December 2010, the Treasurer Wayne Swan, announced a suite of reforms to ‘empower consumers to get a better deal’ including giving the ACCC the power to prosecute anti-competitive price signalling.18

Mr Swan stated:

I’ve been advised by the ACCC that they have seen evidence of price signalling but they have not had the power to deal with it. This package will deliver that power to them, to crack down on price signalling. The content of the legislation will be subject to consultation with the industry but where statements are made which have the purpose of lessening competition in the sector, the ACCC will have the power to deal with that.19

On the same day, Treasury issued an exposure draft of the proposed legislation for public comment by 14 January 2011.20 Twenty-five submissions were received.21 Comments about the contents of the submissions are contained under the heading Main issues in this Bills Digest.

Private Member’s Bill

Also in apparent response to Mr Samuel’s comments, Bruce Billson MP, introduced a Private Members’ Bill—the Competition and Consumer (Price Signalling) Bill 2010 (Private Member’s Bill).22 The Private Member’s Bill was referred to the House of Representatives Standing Committee on Economics (House of Representatives Committee) for inquiry and report.23

On 12 May 2011, the House of Representatives Committee extended its inquiry to include the terms of this Bill.

At the time of writing this Bills Digest, the House of Representatives Committee had not published its report.


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**Committee consideration**

At its meeting on 12 May 2011, the Senate Selection of Bills Committee determined that the Bill not be referred to a Senate Committee for inquiry and report.  

However, previously, on 28 October 2010, the Senate referred the topic of competition in the banking sector to the Senate Economics Committee for inquiry and report. The Senate Economics References Committee (the Senate Committee) published its final report on 6 May 2011. The Senate Committee, whose membership comprised four Coalition senators, two Australian Labor Party (ALP) senators and one independent senator, amongst other things, examined and reported on both the exposure draft of this Bill and the text of Mr Billson’s Private Member’s Bill.

The Senate Committee devised the following definition of ‘price signalling’ stating:

> In broad terms, it refers to one competitor relaying its future pricing information to another competitor. For example, Bank A announces on its website that effective from a future date, it may increase its interest rate for home mortgage loans by one per cent. This is price signalling. Should Bank B note this information and announce in response that it will either change its rate or keep it unchanged, this is also price signalling.

The Senate Committee noted that price signalling is a form of ‘tacit collusion’ which involves no oral or written communication between competitors but does involve deliberate behaviour intended to coordinate the decision-making of competitors. Price signalling can include the following conduct:

- providing information that enables consumers to make better choices, thereby increasing consumer welfare and encouraging competition
- deliberately limiting the information available to consumers thereby raising consumers’ search costs and reducing competition
- deliberately restricting output or allocating market shares, thereby increasing firms’ capacity to raise prices and narrow competition, and
- coordinating a move from one consensus price to another by signalling planned price increases on the internet or in press statements, and thereby lessening competitive tension in the market.

The majority of the Senate Committee concluded that there is a need to address price signalling through an amendment to the CCA. However, the Committee was of the view that ‘the

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27. Economics References Committee, op. cit., p. 147.

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Government's Draft Exposure Bill is poorly drafted and should not contain *per se* prohibitions’. It recommended that a new provision addressing price signalling in the banking sector must contain a competition test in language that is familiar to the CCA—that is, in similar terms to the terms of the Private Member’s Bill.

On the other hand, the minority report of the Government Senators rejected such an amendment, instead supporting ‘the Government’s amendments to the CCA as the only rational measure in tackling price signalling’.

**Policy position of non-government parties/independents**

The position of the Coalition is reflected in the report of the Senate Committee into Competition in the Banking Sector. Essentially the Coalition takes the view that there is a need to amend the CCA in order to remedy problems in the banking sector caused by price signalling.

Similarly, Senator Xenophon, an Independent Senator who was a member of the Senate Committee appears to have agreed with the majority submission.

**Position of major interest groups**

**Australian Competition and Consumer Commission**

Graeme Samuel, Australian Competition and Consumer Commission (ACCC) chairman has been reported as stating that:

> the ACCC did not have enough powers to stop bank chief executives flagging plans to lift their mortgage rates beyond the Reserve Bank of Australia’s official cash rate ... this type of comment gave comfort to competitors that they would not lose market share by lifting rates ... [such] inappropriate conduct was not exclusive to the banking industry and ACCC powers should be extended to cover a range of industries.

**Banks and business**

Steven Münchenberg, Chief Executive of the Australian Bankers’ Association, commenting on the Government’s banking reform package stated that:

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29. Ibid., p. 172.
30. Ibid., recommendation 15.
31. Ibid., p. 310.

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... the industry rejects unfounded claims that there is any price signalling in banking and is concerned that price signalling laws will make it more difficult for banks to explain to their customers what may happen with the direction of interest rates on mortgages and savings.33

It has been reported that ‘big business has rejected the government’s proposed crackdown on price signalling’, on the grounds that ‘it could stifle business competition and hurt consumers’.34

Other groups, including the Australian National Retailers Association, have raised fears that more industry sectors will unnecessarily be subjected to the price-signalling law.35

**Financial implications**

According to the Explanatory Memorandum, the Bill has no significant financial impact on Commonwealth expenditure or revenue.36

**Main issues**

It is in the numerous submissions to both Treasury, in respect of the exposure draft of this Bill, and the Senate Committee inquiry into competition in the banking sector, that a number of concerns in relation to the Bill are articulated.

Importantly, some minor amendments were made to the text of the Exposure Draft of the Bill to address issues raised and to create this Bill, in its final form.

The comments below are relevant to this Bill, even though they were made in response to the Exposure Draft.

**Application to the banking sector**

Whilst the second reading speech by the Treasurer Wayne Swan, makes clear that the Bill is directed toward ‘banks who signal their prices to competitors to undermine competition’37 the Bill actually

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35. Ibid.
36. Explanatory Memorandum, *Competition and Consumer Amendment Bill (No. 1) 2011*, p. 3.

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creates prohibitions which will ‘apply to classes of goods or services that are prescribed by regulations’.  

This has raised concerns amongst the submitters for three reasons. First, no such regulations have been published and it is unclear how broadly they will define the ‘banking sector’. For example it is unclear to the Australian Payments Clearing Association, whose core purpose is to improve the safety, reliability, equity, convenience and efficiency of the Australian payments system, whether it will be captured by the regulation. In this regard the ABA has stated that

the proposed regulation has not been published for consultation in conjunction with the Exposure Draft. This means that for the ABA and other banking sector representatives there is no opportunity to fully evaluate the package of legislation and to conduct a proper assessment of the scope and application of the proposed new law.

Secondly, the regulation may, at any time, be expanded to include other business sectors. In that case, there is a risk that, in considering the Bill as presented, the Parliament will not have fully considered and debated the application of the laws across all industry sectors. Thirdly, there is no process to be followed, and no specific criteria or issues to be considered, by the Government before extending the coverage of the price signalling provisions to additional goods and services.

Whether there is a need for the law

It is intended that the Bill is directed, at this time, solely at the banking sector—despite the history of litigation in the petrol industry. That being the case, there have been concerns about whether this direction is the most appropriate one. For example, the Australian Industry Group has stated that the ‘Bill has been released without a developed argument supporting the directions taken in relation to the sector targeted’. That concern is echoed in the submission by Fisse and Beaton-Wells who allege that ‘neither the government nor the ACCC has adequately explained the selectivity of the approach proposed ... as a matter of economic principle’, posing the following questions:

Is information disclosure of the kind to be prohibited the most economically damaging of the various activities that can be characterised as a facilitating practice? Is the banking sector more

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38. Explanatory Memorandum, p. 3.
40. Australian Banker’s Association Inc, op. cit., p. 3.

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prone to such practices than other sectors? Is information disclosure by bank executives responsible for (as distinct from symptomatic of) inadequate competition in the banking industry? ... Is price signalling the real reason for lack of competition in the banking sector?44

Similarly, the Business Council of Australia states:

While we have carefully noted and followed the government’s statements in relation to claims of market failure in the banking industry, we are not convinced that a case has been made publicly. Moreover it is not clear that recent decisions by banks in relation to movements in interest rates on mortgages has actually resulted in anti-competitive behaviour or had any anti-competitive effect.45

Comparison with overseas jurisdictions

The Bill seeks to ‘prevent banks from discussing their prices with each other behind closed doors’.46 The Bill prevents one person from disclosing price related information to a competitor, regardless of whether the competitor takes action in relation to that disclosure, and regardless of any effect on the market. According to the Regulation Impact Statement which is contained in the Explanatory Memorandum to the Bill the prohibition ‘draws upon European competition law where particularly harmful disclosures between competitors, such as the exchange of future prices, are dealt with quite strictly’.47

In the European Union (EU), Article 101 (formerly Article 81) of the Treaty on the Functioning of the European Union (European Treaty) prohibits, amongst other things, agreements between undertakings, decisions by associations and concerted practices.48 The focus of Article 101 is on contracts, arrangements and undertakings which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

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47. Explanatory Memorandum, p. 53.

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Chris Jose of Freehills argues that the European Treaty diverges from the law proposed in this Bill in that the European Treaty does not capture and prohibit unilateral communication.49

Similarly, in the United States (US) section 1 of the Sherman Act, provides that ‘every contract, combination ... or conspiracy in restraint of trade or commerce’ is illegal.50 On its face, some agreement must be shown in order to establish a contravention.51 It is well established in US law that section 1 of the Sherman Act does not reach conduct which is wholly unilateral—such as that proposed by the Bill.52

The Law Council of Australia agrees that the Bill goes further than either the European or the United States laws do, stating that:

It is inaccurate and misleading to suggest that the prohibitions proposed in the Exposure Draft reflect prohibitions that exist in the United States, Europe or the United Kingdom. In fact, none of these jurisdictions have equivalent prohibitions on unilateral information disclosure. The Exposure Draft prohibitions apply to conduct even where there is no coordinated or concerted action, or any element of mutuality, between competitors. Accordingly, it reaches far beyond the conduct that is prohibited by the competition and antitrust laws in these jurisdictions.53

Per se prohibition

Proposed section 44ZZW provides that it will be per se unlawful for a corporation to privately disclose, directly or indirectly, to an actual or likely competitor, information that relates to a price for, or a discount, allowance, rebate or credit in relation to, goods or services acquired or to be acquired, or supplied or to be supplied, by the corporation in a market in which it competes with the recipient—that is, the conduct is prohibited without any examination of its effect on competition in the market. The Explanatory Memorandum sets out the rationale for the prohibition as follows:

The per se prohibition is targeted towards the information disclosures that are the most clearly anticompetitive, namely private disclosures of pricing information.

50. The text of the Sherman Act can be viewed at: http://www.stolaf.edu/people/becker/antitrust/statutes/sherman.html

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Private disclosure of price information between competitors is only likely to occur in circumstances where one or other of the competitors is seeking to facilitate prices above the competitive level, and the disclosure gives rise to an increased probability of such an outcome occurring. This conduct is suitable for prohibition, even if the competitors are otherwise able to ascertain each other’s prices from the market. That is, it is the circumstance of private disclosure which creates the high risk of collusion, and it is therefore considered appropriate that it be prohibited per se.54

Such a prohibition has been strongly criticised by some submitters as ‘overreach’.55 For example, Luke Woodward states:

On its face, it seems reasonable. But the breadth of the price-related information concept; the many accepted legitimate cases where businesses share information; and anti-avoidance extensions to intermediary disclosures, have resulted in substantial overreach.56

Similarly Chris Jose argues:

A per se prohibition such as that proposed … for private disclosures is highly undesirable. The per se approach should continue to be reserved for those categories of conduct that are so egregious from a competition perspective that they should be prohibited outright without consideration of the anticompetitive motives or effects in a market. Private price related disclosures are not necessarily of such a character. 57

The Law Council of Australia does not believe that a case has been made out to justify the introduction of the per se prohibition as it would ‘prohibit and discourage legitimate and often pro-competitive conduct’.58

Authorisation regime

According to the Explanatory Memorandum, ‘businesses who wish to continue engaging in conduct in contravention of the new prohibitions, and can demonstrate that doing so provides a net public benefit can seek authorisation from the ACCC’.59 The ACCC then has a limited period of 14 days to respond if it has any concerns.

The Law Council of Australia considers that:

It is quite inappropriate to suggest that businesses rely on ACCC authorisation to ensure that legitimate information disclosures do not breach the proposed prohibitions. Authorisation is a

54. Explanatory Memorandum, pp. 54–55.
55. B Fisse and C Beaton-Wells, op. cit., p. 20,
   http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F638993%22
57. C Jose (Freehills), op. cit., p. 2.
58. Law Council of Australia, op. cit., p. 2.
59. Explanatory Memorandum, p. 58.
valuable mechanism, but is also difficult, costly, time-consuming, public and hence impractical for all but the largest transactions.\textsuperscript{60}

Smith, Duke and Round had this to say about authorisation:

Authorisation can be a costly process.\textsuperscript{61} Further, the time it takes to process authorisation applications means that it is unlikely to be a sensible option for a firm seeking to make a particular announcement or disclosure. It must be remembered that the authorisation process is designed to permit a party to engage in conduct that harms competition where that conduct brings about offsetting public benefits. It is not intended to permit policy makers to adopt overly broad laws knowing that a party who is inappropriately caught by such a law is able to escape the imposition of unreasonable penalties by lodging a costly authorisation application with the ACCC.\textsuperscript{62}

The Australian Payments Clearing Association also expressed concerns about authorisation as follows:

... such a process would cause a significant burden on the time and resources of all parties involved if this had to be proven on every occasion there was a questionable disclosure. APCA is concerned that members would be likely to err on the side of caution and be reluctant to engage in any form of discussion with APCA and fellow members if there was a threat of action under the proposed provision.\textsuperscript{63}

Competition test

The second prohibition contained in the Bill is that a business must not make a disclosure (on a wide range of matters) if the purpose of the disclosure is to substantially lessen competition \textbf{in a market}. It should be noted that the \textit{per se} prohibition refers to private disclosure of pricing information to competitors \textbf{in that market}. Section 4E of the CCA defines the term \textit{‘market’} as a ‘market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services’.

Competition tests are not new in Part IV of the CCA. For example, section 45 renders unenforceable an exclusionary provision of a contract which has the \textbf{purpose, or} has or is likely to have the \textbf{effect}, of substantially lessening competition. Similarly section 47 prohibits a corporation from engaging in the practice of exclusive dealing where engaging in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition.

\textsuperscript{60} Law Council of Australia, op. cit., p. 1.
\textsuperscript{61} The current fee for lodging an authorisation application with the Australian Competition and Consumer Commission is $7500.
\textsuperscript{63} Australian Payments Clearing Association, op. cit., p. 4.

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The competition test in this Bill is different from these as it prohibits disclosures only on the basis of a **purpose** test. Subsection 4F(1)(b) of the CCA applies so that where the question to be determined is whether or not a person engaged in particular conduct for a specific purpose, he or she will be deemed to have done so if the purpose includes the relevant purpose and that purpose was a substantial purpose.  

Fisse supports the prohibition being qualified by a competition test but considers that:  

> While a competition test may make sense in theory, it raises major practical concerns. One is the complexity and difficulty of proving that a pricing signal (or a number of them) was likely to substantially lessen competition in a market ... Another concern is uncertainty: the substantial lessening of competition test is notoriously vague.  

**Comparison with Private Member’s Bill**

By comparison, the Private Member’s Bill prohibits price signalling for the **purpose** of inducing a competitor to vary the price at which it supplies or acquires, offers to supply or acquire, or proposes to supply or acquire, goods or services, and the communication has, or is likely to have, the **effect** of substantially lessening competition in the market for those goods or services, or in another market.

This provision is different from both the existing provisions of the CCA and those of the Bill in that the prescribed test is both a purpose and effect test. This was a matter of some discussion during the public hearings by the House of Representatives Committee. Brian Cassidy, Chief Executive Officer of the ACCC had this to say:

> ... we worry that the bill as it stands would require us to prove not only the purpose of substantially lessening competition ... but we would also have to prove the effect of substantially lessening competition. In other words it is both purpose and effect, whereas the more normal competition provisions formulation in what is now the Competition and Consumer Act are couched in terms of purpose and/or effect. We would normally proceed on one or the other. Establishing one can be difficult enough without having to establish both. So we think the bill has a fairly high burden of proof.  

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Key provisions

The Bill contains two prohibitions within proposed Division 1A which relates to anti-competitive disclosure of pricing and other information. The prohibitions relate to two different types of information disclosure.

Disclosure of information

For the purposes of the new Division, proposed section 44ZZU sets out what constitutes a ‘disclosure of information’:

- **by a corporation to a body corporate**—where the corporation makes a disclosure of information to a person in the person’s capacity as a director, employee or agent of another body corporate
- **by a corporation to a person**—where a corporation makes a disclosure of information to a person in the person’s capacity as an employee or agent of another person (not being a body corporate)\(^{67}\)
- **by a corporation to a recipient**—where the corporation makes the disclosure to an ‘intermediary’ for the purpose of the intermediary disclosing (or arranging for the disclosure of) the information to one or more other persons (the ‘recipients’). In that case the disclosure of the information to the recipients is taken to have been made by the corporation.\(^{68}\)

A disclosure of information by a corporation to a recipient is disregarded where the disclosure is due to an accident, the default of a person other than the corporation, or some other cause beyond the control of the corporation.\(^{69}\)

Private disclosure of information

Proposed section 44ZZV takes the concept of ‘disclosure of information’ one step further by introducing the concept of a ‘private disclosure to competitors’. A disclosure of information by a corporation is a private disclosure to competitors, in relation to a particular market, if the disclosure is to one or more competitors, or potential competitors, of the corporation in that market, and is not to any other person. The key to this provision is that the disclosure is in private.

Based on these two concepts—a disclosure of information and a private disclosure to competitors—proposed Division 1A contains two prohibitions.

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\(^{67}\) Under proposed subsection 44ZZU(2) a disclosure of information by a corporation to a person is disregarded if the disclosure is made to the person in the person’s capacity as an agent of the corporation, provided that the disclosure was not made through an intermediary to the agent.

\(^{68}\) Under proposed paragraph 44ZZU(3)(e) the disclosure of information by a corporation to the intermediary is disregarded unless the intermediary is a competitor, or potential competitor, of the corporation in a market.

\(^{69}\) Proposed subsection 44ZZU(4).
Per se prohibition

**Proposed section 44ZZW** prohibits a corporation from making a disclosure of information if the information relates to a price for, or a discount, allowance, rebate or credit in relation to goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation in a market and the disclosure is a ‘private disclosure to competitors’ in relation to that market. This is a *per se* prohibition—that is, the conduct of itself is a breach of the CCA, regardless of its actual effect on competition. Concern has been expressed about the phrase ‘relates to a price’. In particular, that it is ‘extremely broad and could potentially cover, in addition to actual pricing, cost data (relevant to pricing) and output data’ as well as ‘current and historic pricing, publicly available pricing data and aggregated pricing data’.

The prohibition applies to goods and services to which proposed Division 1A applies. **Proposed section 44ZZT** provides that the division only applies to goods and services that are prescribed by regulations. The Treasurer, Wayne Swan, has stated that the ‘laws will initially be targeted at the banking sector’ ... and that they would only extend to other sectors of the economy after further detailed consideration. Any regulation which is made, pursuant to proposed section 44ZZT, will be disallowable.

There are, however exceptions to this general rule. These are contained in **proposed section 44ZZZ**. The *per se* prohibition does not apply to the following disclosures of information:

- by a *corporation to a recipient*—if the information is about goods or services supplied, or likely to be supplied, by the corporation to the recipient; or conversely, is about goods or services acquired, or likely to be acquired, by the corporation from the recipient
- by a *corporation to a person*—if the person is a competitor, or potential competitor, of the corporation in the relevant market and the corporation did not know, and could not reasonably be expected to know, that the person was a competitor or potential competitor
- by a *corporation to participants in a joint venture* (or proposed joint venture)—where the disclosure is not to any other person, and the disclosure is made for the purposes of the joint venture or in the course of negotiations for the joint venture
- by a *corporation*—where the disclosure is in connection with a contract, arrangement or understanding which relates to the acquisition of any shares in the capital of a body corporate, or any assets of a person, either by, or from, the corporation that makes the disclosure.

Substantial lessening of competition prohibition

The second prohibition, under **proposed section 44ZZX**, is that a corporation must not make a disclosure of information that relates to Division 1A goods and services, for the purpose of substantially lessening competition in a market, in relation to:

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• a price for, or a discount, allowance, rebate or credit in relation to, goods or services which are supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation
• the capacity, or likely capacity, of the corporation to supply or acquire the goods or services, and
• any aspect of the commercial strategy of the corporation for those goods or services.

Proposed subsection 44ZZX(2) sets out matters which the Court may consider in determining whether a disclosure was for the purpose of substantially lessening competition in a market, being:

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

According to proposed subsection 44ZZX(3), a conclusion that a corporation has made a disclosure of information for the purpose of substantially lessening competition in a market may, after all the evidence has been considered, be inferred from the conduct of the corporation or of any other person or from other relevant circumstances. It would appear that this proposed subsection, which allows the Court to infer that the purpose of the disclosure was to substantially lessen competition, is a response to the ACCC’s complaints about the Geelong petrol case and the reluctance of the Federal Court to accept inferential evidence.72

Exceptions to both prohibitions

Proposed section 44ZZY contains exceptions to both of the prohibitions contained in the Bill. Neither proposed section 44ZZW, nor proposed section 44ZZX, applies to the disclosure of information by a corporation in the following circumstances:

• the disclosure is authorised by or under a law of the Commonwealth, a State or a Territory and occurs before the end of 10 years after the day of Royal Assent to the Bill
• the disclosure is to one or more bodies corporate that are related to the corporation, and is not to any other person
• the disclosing corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) or (1) setting out particulars of a contract or proposed contract, the notice is in force, the disclosure is to one or more of the other contracting parties, and the disclosure of the information is required by the contract, or is made in the course of negotiations for the proposed contract
• an authorisation under section 88 (other than subsection 88(6A)) applies to, or in relation to, the corporation, the authorisation is in force, and the disclosure of the information is conduct that is covered by the authorisation
• the corporation has given the ACCC a notice under subsection 93(1) describing conduct, the disclosure is conduct described in the notice, and the notice is in force under section 93, and

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72. See comments under the heading Petrol report and Treasury response.

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• the disclosure is made for the purpose of complying with Chapter 6CA of the Corporations Act 2001.

Items 5–14 amend Part VII of the CCA to give effect to the provisions in new Division 1A—that is, to ensure that the anti-competitive disclosure of pricing and other information provisions will be subject to the existing authorisation and notification procedures.

Items 15–16 amend Part IX of the CCA to ensure that decisions made in respect of new Division 1A are subject to review by the Australian Competition Tribunal.

On 11 April 1995 the governments of Australia entered into an agreement—the Competition Principles Agreement—under which the States and Territories of Australia agreed to submit, to their respective legislatures, legislation to implement the version of Part IV of the TPA (now CCA) contained in the Schedule. The intention was to extend the operation of the restrictive trade practices provisions of the TPA to all sectors of the community through the enactment of complementary State and Territory legislation. To this end, section 150C of the CCA provides that the Competition Code consists of, amongst other things, a schedule version of Part IV of the CCA.

The amendments in item 17 of the Bill are in the same terms as the amendments in item 2 of the Bill except that they apply to natural persons rather than to corporations. This is so that the schedule version of Part IV in the Competition Code is in the same terms as Part IV of the CCA.

Power to obtain information, documents and evidence

The provisions of this Bill will be subject to the existing terms of section 155 of the CCA. As a result the wide powers which have been conferred on the ACCC to investigate possible breaches of the CCA will apply to the provisions of this Bill when enacted.

It is not necessary for the Chairperson or Deputy Chairperson of the ACCC to have reason to believe that a breach of the CCA has occurred. All that is required is that the Chairperson or Deputy Chairperson has a reason to believe that a person is capable of providing information about a possible contravention. In that case, the Chairperson or Deputy Chairperson is authorised to issue a notice, in writing, to that person requiring him or her to furnish information, to produce documents or to appear before the Commission to give evidence.

Corporations do not have any immunity against self-incrimination and so they cannot decline to respond to a section 155 notice on that basis. Although individuals would otherwise be entitled to privilege against self incrimination, subsection 155(7) specifically abrogates that privilege.

It is difficult to imagine how the ACCC will learn of contraventions of the per se prohibition—given that the prohibition relates to conversations which occur in private. However, the terms of


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section 155 provide significant information gathering power. It remains to be seen in what circumstances it is exercised.

Concluding comments

This Bill introduces a per se prohibition against the private disclosure of a range of pricing information to a competitor (or likely competitor). The conduct which is prohibited is unilateral—that is, it requires no intent on the part of the person to whom the disclosure is made to use it. In addition, the prohibition exists without any reference to the market place. In addition the Bill contains a prohibition against certain public disclosures of information which have the effect of substantially lessening competition.

Whilst the ACCC is firmly of the view that there is a gap in the existing law which the provisions of this Bill will be able to fill, there are many opposing views. A per se prohibition is generally reserved for those categories of conduct that are so egregious from a competition perspective that they should be prohibited outright without consideration of the anticompetitive motives or effects in a market. That being the case, it is legitimate to question whether the provisions of the Bill are an appropriate remedy to the perceived lack of competition in the banking sector.

Although the Treasurer has stated that the Bill is to be directed only at the banking sector, it is possible, given the drafting of the Bill for other business sectors to be included in the regulations at a later date.
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