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I. INTRODUCTION

Regulating information disclosure and exchange by competitors is widely seen as one of the most challenging aspects of competition law. The economic theory is complex and, as highlighted by a recent OECD Policy Roundtable,[2] legislators continue to search for satisfactory legal approaches. The Australian government has proposed amendments to the *Competition and Consumer Act 2010* (Cth) ("CCA") that aim to regulate information disclosure. The amendments have passed the House of Representatives and are likely to pass the Senate soon. If enacted, the proposal could be said to represent international worst practice. The genesis of the proposal is outlined below. Each of the major flaws in the proposal is then canvassed. They are: the piecemeal sector-specific coverage of the new scheme; the ill conceived and overreaching nature of the prohibitions; and the inadequacy and unworkability of the exceptions.

II. THE GENESIS OF THE PROPOSED INFORMATION DISCLOSURE BILL

In late 2010, both the government and the opposition published draft legislation ostensibly aimed at addressing so-called "price signaling" in the banking sector. Prompted by statements in the press by bank executives concerning interest rate adjustments, the proposals were intended as part of a package of reforms to deal with a perceived lack of competition among the four large banks in the aftermath of the global financial crisis.

The focus on information exchange can be traced back to high profile failures by the Australian Competition and Consumer Commission ("ACCC") in price-fixing proceedings against petrol retailers and a subsequent petrol pricing report by the Commission in 2007. The Commission advocated an amendment to the definition of a "contract, arrangement or understanding" (the Australian equivalent of an agreement under §1 of the Sherman Act) in the cartel prohibitions of the CCA. The proposed amendment was to remove the requirement to prove a commitment, additional to communication, among colluding competitors. The petrol retailers had had a system for exchanging price information but the ACCC had been unable to prove that they were committed to setting prices in accordance with the information exchanged.

The ACCC's proposal was heavily criticized and ultimately abandoned. Instead, from 2009 the ACCC has publicly supported law reform adopting the European concept of "concerted practices" to enable information disclosure and exchange among competitors to be

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[2] OECD Policy Roundtable, Information Exchanges between Competitors 2010, July 11, 2011.

addressed as a watered-down form of agreement. However, that idea did not prevail and the legislative drafters have opted instead for a "direct" approach to tackling "anti-competitive price signalling and information exchanges."[3]

The Competition and Consumer Amendment Bill (No 1) 2011 ("CCA Bill)" will insert two new prohibitions into the CCA:

- a civil *per se* prohibition against private disclosure of pricing information to a competitor (§44ZZW) ("the *per se* prohibition"); and
- a civil prohibition against the disclosure of pricing, capacity, or commercially strategic information for the purpose of substantially lessening of competition in a market (§44ZZX) ("the SLC purpose prohibition").

In the prescriptive style typical of Australian trade practices legislation, there are ancillary provisions that delineate the notions of "disclosure" and "private disclosure." For example, disclosure through an intermediary is covered, while disclosure to an agent and accidental disclosure are excluded. To be private, disclosure does not have to be of information that is confidential. While there is no qualification on the type of pricing information relevant to §44ZZW, there is a list of factors to which a court may have regard in determining whether a disclosure has an anticompetitive purpose under §44ZZX (including the specificity and the age of the information).

The *per se* prohibition does not apply if the disclosure was "in the ordinary course of business"—a vague and misconceived carve out negotiated by the opposition at the eleventh hour before the Bill passed the lower house. The prohibitions are subject to no less than 13 exceptions, seven of which apply only to the *per s*e prohibition. Conduct subject to this prohibition may be notified and receive exemption within 14 days of notification, subject to objection by the ACCC. Conduct subject to either prohibition may also be authorized provided a public benefit test is satisfied.

III. PIECE-MEAL SECTOR-SPECIFIC COVERAGE

The prohibitions against information disclosure will apply only to goods and services that are prescribed by regulation for this purpose. The government has said that, initially, only banking services will be prescribed. Other sectors (of which petrol has been mooted by commentators as a possible candidate) will be prescribed only after "further detailed consideration."[4]

The piecemeal discriminatory approach taken under the Information Disclosure Bill is highly unsatisfactory. One of the hallmarks of Australian competition law to date has been its general application across the economy. Since the 1970s, by and large it has been accepted that competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided.

Further, making selected goods or services subject to the proposed prohibitions by regulation is problematic. Regulations are made by the executive and are not subject to the same

[3] Department of Finance and Deregulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, p. 9.

[4] CCA Bill, Second reading speech, March 24, 2011.

Parliamentary scrutiny to which legislation is subject. The criteria for determining which sectors should be prescribed have not been articulated and are likely to be difficult to formulate in practice. In response to criticism, the government has indicated that the regulations will prescribe a process for determining the future application of the prohibitions. This is political window dressing.

IV. ILL-CONCEIVED OVERREACHING PROHIBITIONS

The CCA Bill prohibits the unilateral disclosure by a competitor of price-related information and other specified types of information. Liability is not defined in terms of collusion or the facilitation of coordination between competitors in a market. This approach is fundamentally unsatisfactory for the following reasons.

Focusing on information disclosure rather than collusion or facilitated coordination of market conduct inevitably results in overreach and forlorn attempts to avoid overreach by means of a thicket of exceptions. The CCA Bill creates new prohibitions against unilateral market conduct. However, the prohibitions do not require market power or any of the other limitations on the scope of the prohibitions against misuse of market power under §46 of the CCA (Australia's abuse of dominance prohibition).

Moreover, information disclosure is only one type of facilitating practice. The CCA Bill does not squarely address the much wider and important subject of facilitating practices.[5] It is widely recognized that facilitating practices can often be used instead of collusion to prevent or inhibit competition. Facilitating practices do not always take the form of information exchange or information disclosure. The Bill fails to see the wood for the trees and the explanation given for focusing on price signaling is unpersuasive.[6]

Collusion or facilitated coordination of market conduct is required for liability for information disclosure or exchange in the United States,[7] the EU, Canada, the United Kingdom and other jurisdictions. The approach taken in the CCA Bill is novel and unprecedented. Australian politicians have been incorrect to suggest that enactment of the CCA Bill would bring Australian law into line with overseas approaches in dealing with anticompetitive information disclosure. A *per se* approach to information disclosure is particularly problematic, especially where the prohibition is unqualified as to the nature of the information disclosed.

From an economic perspective, information disclosure and exchange cover a wide spectrum of practices that may have anticompetitive, pro-competitive, or neutral effects depending on the economic context. This supports an effects-based approach to regulating such practices.[8] Such an approach would have regard to the structure of the market and the nature of the products or services affected, as well as to the nature of the information and the manner and scope of its disclosure. Consistently with economic principle, in the United States a rule of reason

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[5] *See* further C. BEATON-WELLS & B. FISSE, AUSTRALIAN CARTEL REGULATION: LAW, POLICY AND PRACTICE IN AN INTERNATIONAL CONTEXT, §3.2 (2011).

[6] *See* Department of Finance and Deregulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, December 21, 2010, page 2.

[7] Unless §5 of the *Federal Trade Commission Act* is invoked and often this is contentious.

[8] The economic literature to this effect is voluminous. *See*, e.g., L. Evans & J. Mellsop, *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).

approach is taken to information exchange,[9] and, in the EU, only exchanges of information relating to future prices or quantities are treated as "object" infringements and then are subject to the generous efficiency exemption in article 101(3) of the Treaty on the Functioning of the European Union.[10]

The requirement of a SLC purpose does significantly limit the potential scope of liability under §44ZZX. However, this requirement has limitations. First, the test is not one of purpose to reduce consumer welfare; the purpose test relates to competition and efficiencies are relevant to a SLC purpose test only to a limited extent. Second, the SLC purpose need not be the sole or dominant purpose; it is sufficient if information is disclosed for a SLC purpose that is a "substantial" purpose. Third, purpose may be inferred from all the circumstances and a corporation is liable for the conduct and state of mind of an employee or agent acting within the scope of their authority. Fourth, what amounts to a substantial lessening of competition is notoriously uncertain; a difficulty highlighted by the view expressed by the Australian High Court in another context that the substantiality test requires merely a lessening of competition that is "meaningful or relevant to the competitive process."[11] Finally, the SLC purpose test does not necessarily exclude cases of publicity used for the purpose of aggressive competition calculated to wipe out one or more competitors.

V. INADEQUATE UNWORKABLE EXCEPTIONS

Both the *per se* prohibition (private disclosure of price-related information) and the SLC purpose prohibition (disclosure of price-related and other information for the purpose of substantially lessening competition) are subject to exceptions for:

- disclosure authorized by or under a law of the Commonwealth, a State, or Territory if the disclosure occurs before the end of 10 years after the day on which the Act receives the Royal Assent;
- disclosure to a related body corporate;
- disclosure in connection with a contract or proposed contract that is subject to a collective bargaining notice;
- disclosure authorized by the ACCC or disclosure in the course of conduct that has been authorized; and
- disclosure made for the purpose of complying with the continuous disclosure obligations under Chapter 6CA of the Corporations Act 2001.

Another set of exceptions applies only to the *per se* prohibition against private disclosure of price-related information to competitors:

- disclosure of information to acquirer or supplier of goods or services;
- disclosure to an unknown competitor;

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[9] *See*, e.g., *U.S. v United States Gypsum Co et al 438 US 422 (1978)*; Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations among Competitors* (April 2000).

[10] *See* most recently 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).

[11] *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 (Gummow, Hayne and Heydon JJ).

- disclosure to participants in a joint venture;
- disclosure relating to the acquisition of shares or assets;
- disclosure relating to an insolvent borrower ;
- disclosure relating to the provision of loans to the same person;
- disclosure between a credit provider and a provider of credit service; and
- disclosure covered by a valid notification to the ACCC.

These exceptions have been provided because the prohibitions are very broadly defined and are not limited to information disclosure geared to achieving collusion or coordination of market conduct with a competitor or information disclosure involving misuse of market power.

For the following reasons, the exceptions are cumbersome and are too narrow or impractical:[12]

1. The notification procedure is limited to the prohibition against private information disclosure and does not extend to the *per se* prohibition. If there is to be a notification procedure (it is a bureaucratic solution) then it should apply to both prohibitions.
2. The continuous disclosure exception is limited to a disclosure made for the purpose of complying with Chapter 6CA of the *Corporations Act*. It does not extend to disclosures made for the purpose of complying with continuous disclosure obligations overseas or disclosure made in connection with other disclosure or reporting laws. Remarkably, the exception does not even cover publication of a continuous disclosure announcement after that announcement has been made to the ASX in compliance with the *Corporations Act*.
3. Authorization by the ACCC is available and is allowed in relation to not only a particular disclosure of information but also "other similar disclosures of information." However, in many situations timing constraints alone will make the authorization process impractical and a highly theoretical option. Moreover, the authorization tests have not been relaxed. The persuasive burden of satisfying those tests rests on the applicant, and that burden will be difficult to meet unless the disclosures of information covered by an umbrella application are described with sufficient particularity to make an informed assessment of their public benefit or public detriment. Further disincentives to reliance on the authorization process include the need to give public notice of one's plans and the lack of control over the possible imposition of unduly onerous conditions by the ACCC. In these, as well as in other respects, the CCA Bill is out of touch with international best practice. For instance, the United States, the EU, and the United Kingdom have no authorization process and rely on self-assessment or, in the case of the EU, block exemptions.
4. Several of the exceptions relate to the banking sector. If and when the prohibitions are extended to other sectors, a further set of sector-specific exceptions would probably be needed. Instead of following leading overseas models such as article 101 of the EU

[12] *See* further B. Fisse & C. Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, May 25, 2011, [3.1]-[3.7], at: http://www.brentfisse.com/publications.html; B. Fisse & C. Beaton-Wells, *The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure (2011)* 39 ABLR 28.

Treaty, Australia has fallen into a prescriptive approach that requires a proliferation of particular exceptions.

VI. OVERALL REFLECTIONS

The ACCC has had longstanding concerns about the difficulties in proving collusion under the Australian cartel prohibitions. Those concerns have not been addressed by the proposed information disclosure legislation. Nor has the government grasped the opportunity to tackle the broader challenge presented by facilitating practices notwithstanding that such practices are potentially as anticompetitive, in effect, as cartel activity. Instead, the government is poised to introduce new prohibitions that contradict both economic principles and overseas precedents and are likely to increase the workload of the ACCC with no countervailing benefit.