

**PRIVATE DISCLOSURE OF PRICE-RELATED INFORMATION TO A COMPETITOR  
'IN THE ORDINARY COURSE OF BUSINESS':  
A NEW SLIPPERY DIP IN THE POLITICAL PLAYGROUND OF AUSTRALIAN  
COMPETITION LAW**

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**1. Price signalling and the s 44ZZW(c) slippery dip**

1.1 The Competition and Consumer Amendment Bill (No 1) (**CCA Bill**) was passed by the House of Representatives on 7 July 2011 and is expected to be passed by the Senate in the current sittings (16-25 August 2011). One controversial feature of the Bill is the per se prohibition against the private disclosure of price-related information to competitors under s 44ZZW. The s 44ZZW prohibition has been widely criticised, mainly on the ground that it catches pro-competitive or normal conduct and that the exceptions provided under the Bill are too limited in scope to avoid that overreach or, in the case of authorisation and notification, impractical.<sup>1</sup> As a result of last-minute negotiation by the Coalition in response to such criticism, s 44ZZW was amended to exclude a disclosure made 'in the ordinary course of business' (s 44ZZW(c)).<sup>2</sup> The purpose of this commentary is to analyse the s 44ZZW(c) exclusion.

1.2 Section 44ZZW prohibits the private disclosure of price-related information to competitors:

A corporation must not make a disclosure of information if:

- (a) the information relates to a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation in a market (whether or not the information also relates to other matters);
- (b) the disclosure is a private disclosure to competitors in relation to that

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<sup>1</sup> For critiques, see B Fisse and C Beaton-Wells, The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>; Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>. For critiques of the Exposure Draft Bill released in December 2010, see B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No. 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 ABLR 28; Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 20 January 2011, at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>

<sup>2</sup> *House of Representatives Hansard*, 7 July 2011, pp 26-38.

- market; and
- (c) the disclosure is not in the ordinary course of business.

1.3 The s 44ZZW prohibition is far-reaching in several respects:

- The prohibition imposes per se liability. It is irrelevant to liability whether or not the defendant makes a disclosure for the purpose of collusion or coordinating prices with a competitor.<sup>3</sup>
- A private disclosure of information is caught whether or not the information otherwise is or becomes available to competitors or potential competitors in the market, or to other persons (s 44ZZV(3)). Yet where the pricing information disclosed is known already or is available in the market, the degree of anticompetitive harm is likely to be ambiguous and hence does not warrant per se prohibition.<sup>4</sup>
- The prohibition is not limited to information about future pricing but also applies to current and even historical pricing information. There is no apparent justification for imposing per se liability in relation to the disclosure of current or historical pricing information, except where it is shown to facilitate collusion or coordination.<sup>5</sup>

1.4 The s 44ZZW(c) exclusion affords an additional possible way of avoiding liability under s 44ZZW and thereby mitigates the overreach of the prohibition. Potentially many situations may be caught by s 44ZZW and not be covered by an exception (other than authorisation or notification, which are rarely realistic).<sup>6</sup> Some of those situations may come within the s 44ZZW(c) exclusion but examples have not been given by the law makers.<sup>7</sup> In the absence of examples it is difficult to say what s 44ZZW(c) is meant to exclude. Worked examples are needed to come to grips with

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<sup>3</sup> See further B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, [2.1]-[2.3], at: <http://www.brentfisse.com/publications.html>.

<sup>4</sup> See further B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, [2.3], at: <http://www.brentfisse.com/publications.html>.

<sup>5</sup> See further B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, [2.5], at: <http://www.brentfisse.com/publications.html>.

<sup>6</sup> For criticisms of the impracticality of authorisation in this context, see Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 20 January 2011, [5.4], at:

<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>. For criticisms of the impracticality of the notification exception see Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, [6.1]-[6.38], at:

<http://www.apf.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.

<sup>7</sup> *House of Representatives Hansard*, 7 July 2011, pp 26-38.

the provision. See Section 3.

1.5 The ACCC or any other party seeking to establish a breach of s 44ZZW carries both the evidential and persuasive burden of proving that a disclosure was not made in the ordinary course of business. By contrast, defendants carry the evidential burden of proof in the context of s 44ZZU(2) or (4) and the exceptions under ss 44ZZY and 44ZZZ.<sup>8</sup> It is difficult to understand why the position is or should be different under s 44ZZW(c).

1.6 While potentially taking some of the venom out of s 44ZZW, the s 44ZZW(c) exclusion is fundamentally unsatisfactory:

- The exclusion has no cogent policy foundation. It is a last-minute political compromise and a sop to those who criticised s 44ZZW for overreach and the exceptions to s 44ZZW for being too limited or impractical. See Section 2.
- The exclusion raises major unresolved issues of statutory interpretation and does not achieve commercial certainty. The wording 'ordinary course of business' appears in many different statutory contexts and the case law does not indicate any satisfactory answers as to how this slogan is to be interpreted in the context of s 44ZZW(c). Nor does purposive interpretation yield any workable solutions, the underlying problem being that s 44ZZW(c) is rudderless because it lacks a cogent policy foundation. See Section 3 and, on the lack of a cogent policy foundation, Section 2.

## **2. The s 44ZZW(c) exclusion has no cogent policy foundation**

### **Policy aspirations of s 44ZZW(c)**

2.1 The s 44ZZW(c) exclusion surfaced as an amendment to the CCA Bill on 7 July 2011 shortly before the Bill was passed by the House of Representatives.<sup>9</sup> It is a political compromise and a sop to the many stakeholders who criticised s 44ZZW and the exceptions thereto as being too far-reaching or impractical.<sup>10</sup> As explained in paragraphs 2.2 – 2.9 below, s 44ZZW(c) has no cogent policy foundation.

2.2 The reason given for the s 44ZZW(c) exclusion by Mr David Bradbury when moving

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<sup>8</sup> Contrast s 44ZZZA. See further D Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 Cambridge LJ 142, 159-161.

<sup>9</sup> *House of Representatives Hansard*, 7 July 2011, pp 26-38.

<sup>10</sup> See eg, the submissions made to the House of Representatives Economics Committee, at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.

the amendment was the promotion of commercial certainty.<sup>11</sup>

... today I will move amendments so that further exceptions are provided that give clear guidance to business around what conduct is and is not subject to the prohibitions. More specifically, disclosures made in the ordinary course of business will not be subject to the outright prohibition. ...

[The s 44W(c) amendment] confirms that disclosures made in the ordinary course of business will not be subject to the outright prohibition on the private disclosure of pricing information to competitors. ...

We believe that [the amendments including the s 44ZZW(c) amendment] maintain the integrity of the provisions that we have brought before the House and strengthen them to ensure that there are sufficient exceptions provided to provide businesses with the certainty that they need but at the same time to ensure that these provisions continue to have full effect.

This explanation is unconvincing. As discussed in paragraphs 2.3 – 2.9 below, the s 44ZZW(c) exception lacks a cogent policy foundation. Moreover, as discussed in Section 3, s 44ZZW(c) does not give clear guidance to business but creates additional uncertainty.

- 2.3 The main Coalition spokesperson, Mr Bruce Billson, gave another reason for s 44ZZW(c), namely that the exclusion is needed as a safeguard against overreach if the s 44ZZW prohibition is extended by regulation under s 44ZZT to apply beyond the banking sector:<sup>12</sup>

... Above all, the ordinary-course-of-business exception is extraordinarily important. Whilst the government has publicly said and has just confirmed now that it is intending only to apply this competition regulatory framework to the banking sector, the machinery is in place for it to be expanded across any markets. The utility of the bill provides for that, yet the exceptions are overwhelmingly banking centric. They would mean basically nothing to other markets and to other areas of goods and services. So, without having some ordinary-course-of-business exception, if other markets were to be captured and prescribed under this bill, where would they go? They would not have any responsive exceptions for their particular industry. We would need to amend the law every time a new market was prescribed under the bill. That is not tidy, that is not reasonable and that brings no comfort to anybody wondering just how these new provisions might be applied.

This afterglow is too rosy. The Coalition had strenuously opposed sector-specific

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<sup>11</sup> *House of Representatives Hansard*, 7 July 2011, p 33.

<sup>12</sup> *House of Representatives Hansard*, 7 July 2011, p 36.

prohibition under the s 44ZZT regulation-making power before abandoning that position at the last moment.<sup>13</sup> The claim that s 44ZZW(c) is capable of curing the overreach of s 44ZZW ignores the limits of the ordinary course of business exclusion; see paragraph 2.7 and Section 3 below.

2.4 The Supplementary Explanatory Memorandum merely paraphrases the provision in s 44ZZW(c).<sup>14</sup> No Regulation Impact Statement has been made in relation to the amendment.<sup>15</sup>

2.5 The Competition and Consumer Committee of the Law Council of Australia had previously advocated an ordinary course of business exception in a submission to the House of Representatives Economics Committee.<sup>16</sup>

7.1 As outlined in the Committee's Exposure Draft Submission in response to the earlier Bill, and as the examples above highlight, there are numerous circumstances in which the broad reach of the proposed per se prohibition in proposed section 44ZZW would have the unintended consequence of prohibiting conduct with a legitimate business purpose, or in the ordinary course of business, that is pro-competitive or competitively benign. The concerns outlined above demonstrate that in many cases the notification process is an inadequate and impractical remedy for such unintended consequences.

7.2 The Committee submits that such a disclosure should be subject to an exception to the application of proposed section 44ZZW, provided that the disclosure would not have an anticompetitive purpose or effect. The Committee's Exposure Draft Submission (at 2, 32) addressed this concern by suggesting a legitimate business justification exception. Another approach would be to provide for an exception for conduct "in the ordinary course of business," provided such conduct had no purpose, effect or likely effect of substantially lessening competition. The phrase "ordinary course of business" is a familiar concept under the CCA. See CCA subsection 4(4)(b).

The LCA recommendation that the ordinary course of business exception proposed be limited to disclosures that do not have an anticompetitive purpose or effect is

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<sup>13</sup> See eg, *House of Representatives Hansard*, 23 June 2011, pp 85-87.

<sup>14</sup> Competition and Consumer Amendment Bill (No 1) 2011, Supplementary Explanatory Memorandum.

<sup>15</sup> The suitability or otherwise of an ordinary course of business exclusion is not discussed in any of the four Regulation Impact Statements published to date.

<sup>16</sup> Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, at: <http://www.apf.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.

not reflected in s 44ZZW(c);<sup>17</sup> see paragraph 2.8 below. The ordinary course of business is a familiar concept under the *Competition and Consumer Act* but lacks clear definition;<sup>18</sup> see Section 3. The suggestion that subsection 4(4)(b) provides a relevant precedent in the setting of s 44ZZW wrenches that subsection out of its s 50 context; see paragraph 2.8 below.

## Policy analysis

- 2.6 The s 44ZZW(c) exclusion is needed because the s 44ZZW prohibition itself lacks a defensible economic rationale and is ill-designed. The design of s 44ZZW depends on the assumption that the private disclosure of price-related information to a competitor is likely to be anti-competitive.<sup>19</sup> Having erected a per se prohibition on the basis of that loose assumption,<sup>20</sup> the law makers have created a thicket of exceptions in an attempt to reflect the many situations where the private disclosure of pricing information to a competitor is not in fact anti-competitive.<sup>21</sup> A far more sensible approach would have been to prohibit the private or public disclosure of information to a competitor only where the disclosure is an invitation to collude or is intended to coordinate pricing or other market conduct with a competitor.<sup>22</sup> On that approach, the prohibitions under the Bill would apply to all sectors, relatively few exceptions would be needed, and s 44ZZW(c) would be unnecessary.
- 2.7 The usefulness or otherwise of the s 44ZZW(c) exclusion as a safety net much depends on how the wording 'ordinary course of business' is to be interpreted. On one

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<sup>17</sup> See also L Woodward, 'Price signalling bill must strike right balance', *Australian Financial Review*, 22 March 2011, 55 (advocating the inclusion of 'a defence where information is provided in the ordinary course of business and the provider can establish that it is for a legitimate, and not an anti-competitive, purpose').

<sup>18</sup> Difficulties of interpretation and application have arisen in the context of s 50; see *Competition and Consumer Legislation Amendment Bill 2011 (Cth)*, Explanatory Memorandum, pp 38-39; J Lipton, 'The Meaning of "Acquire" in Section 50 of the Trade Practices Act and its Impact on Secured Financing Transactions' (1993) 21 *ABLR* 353, 357-359.

<sup>19</sup> Department of Finance and Deregulation, *Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange*, 21 December 2010, p 14. See also the remarkable assertion in *Competition and Consumer Amendment Bill (No 1) 2011*, Explanatory Memorandum, [2.71]: 'Private disclosures 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*.'

<sup>20</sup> The assumption is spurious given that the information may be historical or otherwise not competitively significant. The absence of a requirement of a contract, arrangement or understanding, or an invitation to collude, also reduces the risk of anti-competitive effect.

<sup>21</sup> See ss 44ZZY and 44ZZZ.

<sup>22</sup> See B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>.

orthodox interpretation, a disclosure will not be in the ordinary course of business unless it is of a regular or frequent kind in businesses generally and not unusual or special.<sup>23</sup> If that interpretation applies, reliance on s 44ZZW(c) is precluded where a disclosure is not anti-competitive but happens to be one-off or unusual. Such a limitation is perverse but may be dictated by the statutory wording. The supporters of s 44ZZW(c) do not seem to have grappled with that question.<sup>24</sup> As discussed in Section 3, the s 44ZZW(c) exclusion is most unlikely to provide a de facto exception for conduct that has a legitimate business justification.<sup>25</sup> See in particular paragraph 3.9.

- 2.8 The ordinary course of business exclusion under subsection 4(4)(b) that applies to the acquisition of assets under s 50 of the *Competition and Consumer Act* reflects the particular context of s 50. The exclusion of acquisitions of assets in the ordinary course of business is intended to filter out acquisitions of assets that are unlikely to substantially lessen competition in a market.<sup>26</sup> By contrast, there is no SLC test for liability under s 44ZZW and hence the role of the s 44ZZW(c) exclusion is not to act as a filter for the purpose of limiting the application of a SLC test.
- 2.9 The s 44ZZW(c) exclusion has no precedent in the anti-cartel laws of other countries.<sup>27</sup> For example, under s 5 of the Federal Trade Commission Act (US) communications outside the ordinary course of business have been relied on as evidence of an invitation to collude but liability requires an invitation to collude.<sup>28</sup>

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<sup>23</sup> See paragraphs 3.4 – 3.5 below.

<sup>24</sup> Consider eg, the high hope expressed by Mr Adam Bandt when supporting the s 44ZZW(c) amendment: *House of Representatives Hansard*, 7 July 2011, p 36 ('I should place on the record .. that I have been assured that the amendments relating to ordinary-course-of-business exemptions will not substantially lessen competition and will allow legitimate business activities that otherwise might have been hindered by the bill').

<sup>25</sup> See especially paragraph 3.10 below.

<sup>26</sup> See GFK Santow, 'Mergers and the Commonwealth Trade Practices Act 1974' (1975) 49 ALJ 52, 60; Competition and Consumer Legislation Amendment Bill 2010 (Cth), Explanatory Memorandum, [3.50]-[3.54]. For the criticism that s 4(4)(b) filters out some acquisitions of plant or equipment that create market power, see GQ Taperell, RB Vermeesch and DJ Harland, *Trade Practices and Consumer Protection* (3rd ed, 1983) 464. Note also that the s 4(4)(b) filter does not apply to an acquisition of shares .

<sup>27</sup> See eg Sherman Act (US) s 1; Federal Trade Commission Act (US) s 5; EC Treaty, article 101; Competition Act 1985 (Can) s 45.

<sup>28</sup> See eg, *In re Stone Container Corporation*, F.T.C. No. C-3806, at <http://www.ftc.gov/os/caselist/c3806.shtm>.

### 3. The s 44ZZW(c) exclusion raises major unresolved issues of interpretation

#### The slipperiness of s 44ZZW(c)

3.1 The rationale advanced by the Government for the s 44ZZW(c) amendment is that the provision will give 'clear guidance' to business 'around' what conduct is and is not subject to prohibition.<sup>29</sup> However, as discussed in paragraphs 3.3 – 3.11 below, the s 44ZZW(c) exclusion raises major unresolved issues of statutory interpretation and does not give clear guidance to business.

3.2 The wording 'in the ordinary course of business' in s 44ZZW(c) has various possible meanings.<sup>30</sup> The main possibilities are as follows:

#### **Type A interpretations of s 44ZZW(c)**

A1 A disclosure will be in the ordinary course of business if it is of a kind that regularly or frequently occurs in businesses generally

A2 ... regularly or frequently occurs in businesses in the same market as that to which the disclosure relates

A3 ... regularly or frequently occurs in businesses supplying or acquiring Division IA goods or services of the type covered by a regulation under s 44ZZT that applies to the defendant

A4 ... regularly or frequently occurs in the defendant's business.

#### **Type B interpretations of s 44ZZW(c)**

B1 A disclosure will be in the ordinary course of business if it has a legitimate business justification

B2 A disclosure will be in the ordinary course of business if it is consistent with acceptable business practice in the sense that it is not anti-competitive, unlawful (putting s 44ZZW aside) or unethical.

The difference between Type A and Type B is that Type A relates to the regularity or frequency of the type of disclosure made whereas Type B is concerned with the commercial justification for the particular disclosure (Interpretation B1) or the economic, legal and ethical acceptability of the disclosure (Interpretation B2).

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<sup>29</sup> *House of Representatives Hansard*, 7 July 2011, p 33.

<sup>30</sup> As discussed in relation to s 50 in J Lipton. 'The Meaning of "Acquire" in Section 50 of the Trade Practices Act and its Impact on Secured Financing Transactions' (1993) 21 ABLR 353. 357-359 and, in relation to other statutory contexts, in CH Bright, 'The Ordinary Course of Business' (1960) 1 Adelaide LR 138.

3.3 The varying interpretations set out in paragraph 3.2 may produce different results in practice. Consider these examples:

- Assume that pricing information is exchanged by competitors X and Y in a market where such exchanges are a frequent and standard feature of business and where such exchanges have the purpose or likely effect of controlling the prices charged by those competitors.<sup>31</sup> Assume further that there is no legitimate business reason for the information exchanges. In this situation the s 44ZZW(c) exclusion would apply to X and Y under interpretation A2 (the disclosure is of a kind that regularly or frequently occurs in businesses in the same market), might apply under interpretation A3 if the disclosure is of a kind that regularly or frequently occurs in businesses supplying or acquiring Division IA goods or services of the type covered by a regulation under s 44ZZT that applies to X and Y) and would apply under interpretation A4 if the disclosures in issue are of the kind that regularly or frequently occur in the businesses of X and Y). However, s 44ZZW(c) would not apply under interpretation A1 assuming that such disclosures do not occur regularly or frequently in businesses generally. Nor would s 44ZZW(c) apply under interpretation B1 (the disclosure has no legitimate business justification) or interpretation B2 (the disclosure is anti-competitive and inconsistent with acceptable business practice).
- Assume that A and B compete against each other for a construction project for a major energy company. The company tries to negotiate a lower price than that offered by A and B by lying to A about the amount bid by B and by lying to B about the amount bid by A. A and B hear about this lying from a disgruntled employee of the energy company. They swap notes about the amount of their respective bids before complaining to the police about the attempt to obtain money by a false pretence. In this situation the s 44ZZW(c) exclusion would apply under interpretations B1 or B2 (the disclosure has a legitimate business justification and is consistent with acceptable business practice because it is not anti-competitive, unlawful or unethical). However, the s 44ZZW(c) exclusion would not apply under interpretations A1 – A4 (the situation is special or particular and not regular or usual for businesses generally, for businesses in the same market, for businesses subject to the same regulation under s 44ZZRT, or for the businesses run by A and B).

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<sup>31</sup> As suggested by eg, the prevalent cover pricing in the construction industry in the UK that unfolded in the civil enforcement proceedings brought by OFT against over 100 companies; see: <http://www.of.gov.uk/news/press/2009/114-09>. Cover pricing had been prevalent in the UK building industry for over 50 years: see GF Carter, “The Building Industry” in D Burn, *The Structure of British Industry: A Symposium, Volume 1* (1958, Cambridge University Press) ch 2 at p 62.

## Type A interpretations of s 44ZZW(c) – Interpretation A1

3.4 Interpretation A1 stems from interpretations by the High Court of the term 'ordinary course of business' in the context of avoidance of preferences under bankruptcy legislation.<sup>32</sup> In *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liquidation)*,<sup>33</sup> the wording 'ordinary course of business' under s 95 of the *Bankruptcy Act 1924* (Cth) was interpreted by the majority in these terms:<sup>34</sup>

As was pointed out in *Burns v. McFarlane* the issues in sub-s. 2 (6) of s. 95 of the *Bankruptcy Act 1924-1933* are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor." It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation.

In *Taylor v White*<sup>35</sup> Dixon CJ interpreted the same provision in slightly more accessible terms:<sup>36</sup>

I do not doubt that "in the ordinary course of business" refers to "business" as a general conception and is not restricted to the conduct of any particular business

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<sup>32</sup> There are other possible expressions of the test including formulation in terms of whether or not a transaction is of a kind requiring management by exception; see *Re Bradford Roofing Industries Pty Ltd (in liq) and Companies Act* [1966] 1 NSWLR 674, 681 (Street J) ('one of the ordinary day-to-day business activities, having no unusual or special features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities'); LR Bittel, *Management by Exception: Systematizing and Simplifying the Managerial Job*, McGraw-Hill, New York, 1964; H Mintzberg, *The Structuring of Organizations: A Synthesis of the Research*, Prentice-Hall, Englewood Cliffs, New Jersey, 1979, ch 21.

<sup>33</sup> (1948) 76 CLR 463.

<sup>34</sup> (1948) 76 CLR 463, 476-477 (Rich J).

<sup>35</sup> (1964) 110 CLR 129. The case law on the question of ordinary course of business in the context of bankruptcy and insolvency is extensive. The more recent cases include: *National Australia Bank Ltd v KDS Construction Services Pty Ltd (in Liq)* (1988) 163 CLR 668; *Countrywide Banking Corporation Ltd v Dean* [1998] 1 NZLR 385 (PC); *Harkness and Anor v Partnership Pacific Ltd* [1997] NSWSC 32.

<sup>36</sup> (1964) 110 CLR 129, 136.

such as the business carried on in a shop or merchant's office or the like, but is referring to the transaction of business as a known and recognized activity pursued by anybody engaged in an attempt to win or earn or "make" money or a living in a systematic or regular way. ...

The time-honoured phrase "in the ordinary course of business" is meant to refer to transactions regularly taking place in a sustained course of activity or some usual process naturally passing without examination.

- 3.5 Interpretation A1 does not give clear guidance to business. The test to be applied is high level and does not require or involve inquiry into actual practices in any particular industry or industry sector. There is a lack of realism about such an inquiry in this context<sup>37</sup> and the abstract nature of the inquiry creates uncertainty. What price-related information exchanges will be regarded as regular or frequent in businesses generally in all markets? Will decisions of the High Court be needed to answer that question?<sup>38</sup> Consider the following example:<sup>39</sup>

Bank A offers a 'hot daily interest rate' to new customers upon request. A new customer (**NC**) asks Bank A for a quote in writing because Bank B has insisted upon that before discussing a competitive rate with NC any further. The quote by Bank A is disclosed to NC for the purpose of NC disclosing the information to Bank B.<sup>40</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.<sup>41</sup>

Is the disclosure in this example of a kind that regularly or frequently occurs in businesses generally? Is it 'part of the undistinguished common flow of business done' and 'calling for no remark and arising out of no special or particular occasion'? Is it 'a known and recognized activity pursued by anybody engaged in an attempt to win or earn or "make" money or a living in a systematic or regular way'? Is it conduct 'regularly taking place in a sustained course of activity or some usual process naturally passing without examination'? The answer in this example may be 'Yes'. A quintessential feature of this example is that information about price is disclosed to a

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<sup>37</sup> By contrast, in the context of bankruptcy and insolvency law the ordinary course of business exclusion relates to an essential, universal and relatively familiar feature of commerce, namely the making of payment for goods and services.

<sup>38</sup> A propensity of the phrase 'ordinary course of business'; see the cases referenced in paragraph 3.4 and, in the context of partnership, *National Commercial Banking Corporation of Australia v Batty* (1986) 160 CLR 251.

<sup>39</sup> As given in B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, p 4, at: <http://www.brentfisse.com/publications.html>.

<sup>40</sup> See s 44ZU(3).

<sup>41</sup> The issue is evaded in *Competition and Consumer Amendment Bill (No 1) 2011*, Explanatory Memorandum, [1.43] and Example 1.3.

competitor for the purpose of guarding against misleading conduct by a customer. If the description of the disclosure is abstracted in such a way, then the disclosure may be of a kind that can be said by a court to occur regularly or frequently in businesses generally in all markets. However, different industries have different actual procedures and practices and some information disclosure practices may have distinctive industry features that do not lend themselves readily to an abstract description that holds true for businesses in all markets. Consider this example of a routine banking transaction:<sup>42</sup>

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).

Is the disclosure of a kind that occurs regularly and frequently in businesses generally? Or is it a disclosure of a kind that reflects a particular kind of banking transaction but not transactions in all other markets?

Trying to answer such questions is far removed from any focus on the anti-competitive effects of price signalling. Liability under s 44ZZW should depend on whether or not the disclosure in issue has an anti-competitive purpose or likely effect, not on the regular or irregular, frequent or infrequent or usual or unusual nature of the disclosure. In policy terms, the latter considerations are hopelessly off track. The regularity or frequency or usualness of a transaction makes sense in the context of avoidance of preferences under bankruptcy and insolvency law but has no bearing on what kinds of information disclosure should be subject to prohibition under s 44ZZW.

### **Type A interpretations of s 44ZZW(c) – Interpretation A2**

- 3.6 Interpretation A2 (the disclosure must be of a kind that regularly or frequently occurs in businesses in the same market as that to which the disclosure relates) arises from the suggestion in the context of s 50 that the wording 'ordinary course of business' refers to the ordinary course of business in the same market.<sup>43</sup> However, interpretation A2 is inconsistent with the interpretation of 'ordinary course of business' by the High Court in the context of bankruptcy legislation (see paragraph 3.4) and may not be

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<sup>42</sup> As given in B Fisse and C Beaton-Wells, The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, p 8, at: <http://www.brentfisse.com/publications.html>.

<sup>43</sup> The context of s 50 is different; see paragraph 2.8 above. The aim of s 4(4)(b) is to filter out acquisitions of assets that are likely to substantially lessen competition in a market, and hence the exclusion of ordinary acquisitions of assets relates to in each particular market likely to be affected by the acquisition in question.

followed in the context of s 44ZZW(c). It is also difficult to accept that interpretation A2 reflects the legislative intention of s 44ZZW:

- Interpretation A2 potentially would exclude liability on the part of those who should be prime targets of the s 44ZZW prohibition. One aim of s 44ZZW is to clamp down on competitors exchanging price-related information including those competitors who have exchanged price-related information regularly or frequently in the past.<sup>44</sup> Plainly it would be bizarre to allow regular or frequent anti-competitive industry practices to prevail over a law that is intended to change those practices. That is why the exception proposed by the LCA (see paragraph 2.5 above) included a requirement that the disclosure not have an anticompetitive purpose or effect.<sup>45</sup> It should also be noted that in other statutory contexts ordinary course of business exceptions are often complemented by specific anti-avoidance provisions.<sup>46</sup>
- A market-specific interpretation of the ordinary course of business under s 44ZZW(c) would be discriminatory and perversely so. On a market-specific interpretation, the laxer the approach taken towards information exchanges between competitors in a given market, the stronger the prospect of being able to rely on the s 44ZZW(c) exclusion in that market. Conversely, the more stringent the compliance controls normally adopted in relation to information exchanges in a market, the lower the chance of being able to rely on s 44ZZW(c) in that market.
- Assessing evidence of actual practices in businesses in the same market seems inconsistent with the per se nature of the s 44ZZW prohibition. On one possible view, per se liability is meant to avoid the cost and delay involved in making factual inquiries of the kind that may be necessary to determine whether a given practice is normal or unusual in a particular market.<sup>47</sup>

### **Type A interpretations of s 44ZZW(c) – Interpretation A3**

3.7 Interpretation A3 is a variation of interpretation A2. It stems from the power of prohibition by regulation under s 44ZZT. Arguably, s 44ZZT implies a legislative

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<sup>44</sup> Competition and Consumer Amendment Bill (No 1) 2011, Explanatory Memorandum, ch 1.

<sup>45</sup> Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, [7.2], at:

<http://www.apf.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>.

<sup>46</sup> See eg Australian Consumer Law ss 209(c), 251(2)(c) (requirement that the defendant did not know and had no reason to suspect that publication of an advertisement would amount to a contravention of a provision of Chapter 4 of the ACL); *Bankruptcy Act 1966* (Cth) s 124(1)(good faith requirement).

<sup>47</sup> See further PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, ¶1509a.

intention to gear the assessment of the ordinary course of business to businesses that supply or acquire Division 1A goods or services of the type specified by each particular regulation under s 44ZZT. If so, the ordinary course of business will be governed by a test that will vary according to the practices of the particular class of businesses targeted by each particular regulation. That approach is discriminatory but the unequal application of s 44ZZW is inherent in s 44ZZT. Unsatisfactory as that discrimination is, interpretation A3 gives rise to a much more basic problem. Assume that the exchange of price-related information between competitors is a standard operating procedure in one sector of the economy (the X sector) and has the effect of keeping prices above a competitive level in that sector. The response is to clamp down on the X sector by a regulation applying s 44ZZW (and 44ZZX) to the X sector. But if the ordinary course of business is assessed by reference to the standard information exchange practices in sector X then the competitors in sector X will be able to avoid liability under s 44ZZW by relying on s 44ZZW(c). Presumably courts will therefore reject interpretation A3 and be strongly inclined to adopt interpretation A1 or, if they are able to do so,<sup>48</sup> interpretation B1 or B2.

#### **Type A interpretations of s 44ZZW(c) – Interpretation A4**

3.8 Interpretation A4 reflects the view that a corporation should be entitled to be judged by reference to its own business practices.<sup>49</sup> However, this interpretation has no apparent chance of adoption. It is inconsistent with the meaning given to 'ordinary course of business' in the High Court decisions discussed in paragraph 3.4. It is also impossible to reconcile with the legislative aim of s 44ZZW. That aim is to deter disclosures of price-related information by competitors to other competitors, and competitors whose regular or frequent practice has been to make such disclosures are major targets.

#### **Type B interpretations of s 44ZZW(c) – Interpretation B1**

3.9 Interpretation B1 (a disclosure will be in the ordinary course of business if it has a legitimate business justification) reflects the hope of some supporters of s

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<sup>48</sup> There are obstacles, as discussed in paragraphs 3.9 and 3.10 below.

<sup>49</sup> See GQ Taperell, RB Vermeesch and DJ Harland, *Trade Practices and Consumer Protection* (3rd ed, 1983) 465 (tentative suggestion in relation to s 50). Such an interpretation has been rejected in the context of s 50; see *TPC v The Gillette Company* (1993) ATPR ¶41-267, 41,610 (Burchett J), as discussed in JD Heydon, *Trade Practices Law* [9.300]. See also J Lipton, 'The Meaning of "Acquire" in Section 50 of the Trade Practices Act and its Impact on Secured Financing Transactions' (1993) 21 ABLR 353. 359.

44ZZW(c).<sup>50</sup> However, interpretation B1 is implausible:

- There is no basis in the wording of s 44ZZW(c) for morphing the provision into a test of 'legitimate business justification'. In common language, the words 'ordinary course of business' relate to a course of business and to what is ordinary in that course of business. Unlike the concept of taking advantage of market power under s 46, the concept of ordinary course of business does not imply inquiry into whether or not the disclosure in issue would have been likely to occur in a workably competitive market.<sup>51</sup>
- In terms of purposive interpretation, there is no apparent legislative intention that s 44ZZW(c) create a legitimate business justification exception. Several submissions on the CCA Bill and the earlier Exposure Draft advocated that there should be a legitimate business justification exception<sup>52</sup> but those submissions were not followed. Moreover, conduct prohibited by s 44ZZW is subject to the various exceptions including authorisation and notification,<sup>53</sup> and the legislative intention is that legitimate business justification is relevant to liability only where those exceptions apply.<sup>54</sup>

#### **Type B interpretations of s 44ZZW(c) – Interpretation B2**

3.10 Interpretation B2 (a disclosure is made in the ordinary course of business if it is consistent with acceptable business practice in the sense that it is not anti-competitive, unlawful (putting s 44ZZW aside) or unethical) reflects the time-honoured idea of good and evil courses of action.<sup>55</sup> In policy terms, interpretation B1 would produce far more satisfactory outcomes than interpretations A1 – A4.<sup>56</sup> However, interpretation B2 seems unlikely to be adopted:

- The interpretation is not supported by the meaning of 'ordinary course of business' expressed by the High Court in *Downs Distributing Co Pty Ltd v*

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<sup>50</sup> See eg, *House of Representatives Hansard*, 7 July 2011, p 36, Mr Adam Bandt ('I have been assured that the amendments relating to ordinary-course-of-business exemptions .. will allow legitimate business activities that otherwise might have been hindered by the bill').

<sup>51</sup> On the explanatory function of legitimate business justification in the context of s 46 see D Robertson, 'Causal Concepts in Competition Law and Economics' (2001) 29 ABLR 382, 406-408.

<sup>52</sup> See eg, Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 20 January 2011, p 24, at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014> .

<sup>53</sup> Competition and Consumer Amendment Bill (No 1) 2011, Explanatory Memorandum, p 75.

<sup>54</sup> Under s 44ZZY(1) and (5).

<sup>55</sup> A cornerstone of medieval and renaissance ethics; see P Singer, *A Companion to Ethics*, Blackwell, 1993, ch 11.

<sup>56</sup> Consider eg, the second example discussed in paragraph 3.3 above.

*Associated Blue Star Stores Pty Ltd (in liquidation)*<sup>57</sup> and *Taylor v White*.<sup>58</sup>

- The interpretation requires definition of what is an acceptable or unacceptable course of conduct, and the legislative background to s 44ZZW is devoid of any suggestion that the courts are expected to make so policy-oriented a decision.<sup>59</sup>
- Interpreted in terms of 'acceptability', the wording 'ordinary course of conduct' relates not only to whether the conduct is anti-competitive but also to whether the conduct is acceptable as a matter of law and ethics. However, the subject matter of s 44ZZW is price signalling and there is no apparent legislative intention to extend the scope of s 44ZZW beyond that particular subject matter.<sup>60</sup>
- An approach that requires a factual inquiry into whether or not a disclosure of information is anti-competitive is inconsistent with the explicit legislative intention that the s 44ZZW prohibition imposes per se liability.<sup>61</sup>

#### **Exceptions v s 44ZZW(c) – *expressio unius est exclusio alterius*?**

3.11 A further and distinct issue of interpretation is whether or not the s 44ZZW(c) exception applies where the type of disclosure made to a competitor is subject to an exception under the CCA Bill but does not meet all the requirements of that exception. For example, the insolvency work-out exception under s 44ZZZ(5) requires notification of a borrower insolvency situation. In some cases, it is commercially unrealistic to expect such a notification to be given but a work-out nonetheless needs to be arranged.<sup>62</sup> In such a case the s 44ZZZ(5) exception does not apply because there is no notification. However, assuming that the work-out is in the ordinary course of business, does s 44ZZW(c) save the day? As a matter of statutory interpretation, is the operation of s 44ZZW(c) excluded by the expression of

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<sup>57</sup> (1948) 76 CLR 463, 476-477 (Rich J).

<sup>58</sup> *Taylor v White* (1964) 110 CLR 129, 136 (Dixon CJ).

<sup>59</sup> For one blank see Competition and Consumer Amendment Bill (No 1) 2011, Supplementary Explanatory Memorandum, and for another, *House of Representatives Hansard*, 7 July 2011, pp 26-38.

<sup>60</sup> See Competition and Consumer Amendment Bill (No 1) 2011, Explanatory Memorandum, ch 1. For a critique of the unsatisfactory concept of 'innocence' in the context of the *Proudman v Dayman* defence of reasonable mistaken belief see B Fisse, *Howard's Criminal Law*, 5th edn, Lawbook Co, Sydney, 1990, 518-22.

<sup>61</sup> See s 44ZZW and contrast s 44ZZX.

<sup>62</sup> See Claton Utz, 'Government softens Price Signalling Bill for the banking sector ', 1 August 2011, at: [http://www.claytonutz.com/publications/news/201108/01/government\\_softens\\_price\\_signalling\\_bill\\_for\\_the\\_banking\\_sector.page](http://www.claytonutz.com/publications/news/201108/01/government_softens_price_signalling_bill_for_the_banking_sector.page) ('We expect many borrowers considering work out discussions with their lenders may be reluctant to accept or state that they are or may become insolvent in the near future.')

particular rules for insolvency work-outs in s 44ZZZ(5)?<sup>63</sup>

#### **The s 44ZZW(c) exclusion does not give clear guidance to business**

3.12 The s 44ZZW(c) exclusion thus raises unresolved issues of interpretation. Clear guidance has not been given to business. To give clear guidance to business, and to put s 44ZZW(c) on a solid policy footing, the provision should be replaced by an exclusion that applies to disclosures made without the purpose or likely effect of lessening competition between the defendant and one or more competitors or likely competitors.<sup>64</sup> That approach would focus on the question of whether or not a private disclosure of price-related information is anti-competitive and would avoid the uncertainty and mindless distractions of an ordinary course of business test in this particular statutory context.

#### **4. Conclusion: coursing in the political playground of price signalling**

4.1 The s 44ZZW(c) ordinary course of business exclusion lacks cogent policy direction and increases rather than reduces commercial uncertainty. See Sections 2 and 3 above.

4.2 A much better safety net would be to replace the ordinary course of business exclusion with an exception for disclosures that are made without the purpose or likely effect of lessening competition between the defendant and one or more competitors or likely competitors. See paragraphs 2.7 and 3.12 above.

4.3 The regulation-making power under s 44ZZT may affect the interpretation of 'ordinary course of business' under s 44ZZW(c), a question discussed in paragraph 3.7 above. Conversely, the s 44ZZW(c) exclusion may have implications under s 44ZZT. If the s 44ZZW(c) exclusion is as important as the Government and Coalition have claimed,<sup>65</sup> perhaps that factor may be relied upon by the Government as a partial excuse for using the regulation-making power under s 44ZZT to extend the application of s 44ZZW beyond the banking sector. However, since the s 44ZZW(c) exclusion is a political sop and not an effective solution to the problems of overreach and uncertainty created by s 44ZZW and related provisions, that excuse would be phoney.

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<sup>63</sup> For a discussion of the 'expressio unius est exclusio alterius' canon of statutory interpretation and its limits see DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 6th ed, 2006, 139-144.

<sup>64</sup> This assumes that the CCA Bill is enacted. Our preference remains to drop the CCA Bill and reform the law in the particular ways recommended in B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, at: <http://www.brentfisse.com/publications.html>.

<sup>65</sup> See paragraphs 2.2 and 2.3 above.

- 4.4 The s 44ZZW(c) exclusion is a further example of the problems occasioned by the CCA Bill.<sup>66</sup> The problems stem from the use of the Bill by the Government as an opportunistic way of puffing up its reforms in the banking sector.<sup>67</sup> Moreover, the Coalition and the Greens have failed to insist upon clear and principled changes to the law relating to price signalling and facilitating practices. Australian competition law has become a political playground.
- 4.5 Given the limits of the s 44ZZW(c) exclusion, corporations will look for other ways of avoiding liability under s 44ZZW.<sup>68</sup> One possible escape route is to shift the game away from per se liability under s 44ZZW to the relatively benign SLC purpose test under s 44ZZX. That is achievable by making sure that any disclosure to competitors of price-related information is: (a) not a private disclosure as defined by s 44ZZV(1); and (b) not caught by the anti-avoidance provisions under s 44ZZV(2). Care is needed, but not necessarily an MBA.<sup>69</sup> Adaptive behaviour of that kind is in the ordinary course of business.

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<sup>66</sup> See B Fisse and C Beaton-Wells, The Competition and Consumer Amendment Bill (No 1) 2011, Submission to the House of Representatives Economics Committee, 25 May 2011, [2.3], at: <http://www.brentfisse.com/publications.html>; Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, at: <http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>; B Fisse and C Beaton-Wells, 'The Continual Regulation of Continuous Disclosure: The Competition and Consumer Amendment Bill (No 1) 2011' (submitted for publication, 7 August 2011).

<sup>67</sup> The package is presented in Treasury, *Competitive and Sustainable Banking System*, December 2010, at [http://www.treasury.gov.au/banking/content/report/report\\_06.htm](http://www.treasury.gov.au/banking/content/report/report_06.htm).

<sup>68</sup> On liability control as a driver of corporate behaviour see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011), ch 12.

<sup>69</sup> See further VH Fried and BM Oviatt, 'Michael Porter's Missing Chapter: The Risk of Antitrust Violations' (1989) III(1) *The Academy of Management EXECUTIVE*, 49.