
# Submission to The Treasury

# on
# Exposure Draft of the
# Competition and Consumer Amendment Bill (No 1) 2011

**14 January 2011**

## ABOUT AIP

The Australian Institute of Petroleum (AIP) was established in 1976 as a non-profit making industry association. AIP's mission is to promote and assist in the development of a sustainable, internationally competitive petroleum products industry, operating efficiently, economically and safely, and in harmony with the environment and community standards.

AIP member companies play various roles in the fuel supply chain. They operate all of the petroleum refineries in Australia, play a significant role in the distribution of petroleum products across Australia, and handle a large proportion of the wholesale fuel market. However, AIP member companies directly operate and control only a relatively limited part of the retail market.

AIP is pleased to present this submission on behalf of the AIP's four core member companies:

BP Australia Pty Ltd
Caltex Australia Limited
Mobil Oil Australia Pty Ltd
The Shell Company of Australia Pty Ltd

## Contact Details

Should you have any questions in relation to this submission, or require additional information from AIP, the relevant contact details are outlined below.

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**Background**

The Government has sought comments on proposed amendments to the *Competition and Consumer Act 2010* related to 'price signalling' and other potentially anti-competitive information disclosures.

While the Government has indicated that the provisions set out in the *Competition and Consumer Amendment Bill (No 1) 2011* will initially only apply to the banking sector, AIP member companies note that there has been much speculation, including comments by the ACCC, that these or similar provisions may also be applied to the fuel industry. Since 2007, the ACCC has consistently expressed concerns about what it sees as price signalling and co-ordinated conduct associated with fuel retailing activities of the sector.

- The ACCC's 2007 Report on *Petrol Prices and Australian Consumers* proposed action to prevent facilitating practices in the retail petrol market (page 230), albeit via a different legislative approach to that proposed in the current exposure draft bill.

- The ACCC's 2009 Report - *Monitoring of the Australian Petroleum Industry* - indicated that "The degree of co-ordination exhibited in the [weekly] price cycle is also a concern for the ACCC. The ACCC considered that this co-ordination is facilitated through the frequent exchange of pricing information between competitors via the Informed Sources Oil Pricewatch System." (page xxiii)

- The ACCC's 2010 Report - *Monitoring of the Australian Petroleum Industry* - indicated that "The degree of co-ordination exhibited in the weekly price cycle remains a concern for the ACCC." (page xxvii)

- In a paper presented at the Law Council Trade Practices Workshop (21 August 2010), ACCC Commissioner Dr Jill Walker identifies sharing of publicly available petrol retail price information as an example of a practice that may facilitate anti-competitive outcomes, and further indicates that such conduct should be covered by competition law (page 4). Dr Walker goes on in this paper to comment on the decisions in the Ballarat and Geelong petrol cases, concluding
  "In my view, and that of the Commission, this gap in the law should be addressed:
    - Any conduct which substantially lessens competition in a market should be unlawful unless authorised on public benefit grounds; and
    - The focus should be on the harm to competition and consumers,....." (page 7).
- On 9 January 2011, the ACCC was reported in the media as likely to push for the provisions of the exposure draft bill to be applied to petrol retailing.

AIP notes that the ACCC has not provided substantive evidence of co-ordinated conduct or conduct that lessens competition. However, given the ACCC's views, AIP has reviewed the proposed legislative amendments to identify potential implications for the downstream petroleum industry at each of the key stages in the Australian fuel supply chain, ie the primary fuel supply (refining and import of petroleum products), fuel wholesaling, fuel distribution, and fuel retailing. We have sought to identify implications for stand-alone company operations as well as the potential implications for the many, long established, joint industry arrangements which enable the efficient, reliable supply of competitively priced fuels across the very extensive Australian supply network.

- These complex supply arrangements have been subject to extensive ACCC scrutiny as part of the very detailed ACCC petrol price monitoring reports over the past three years, and initial concerns raised by the ACCC about some aspects of these joint operations in the wholesale market, including product purchase and sale arrangements between fuel suppliers, have not been substantiated in the 2009 and 2010 fuel monitoring reports.

AIP has also reviewed the potential implications of the legislation for the many instances where AIP member companies and AIP provide information and views to Federal and State/Territory governments and members of parliaments, consumers, and the media concerning historical fuel

prices and price related information, retail and wholesale fuel price trends, fuel supply and demand history and forecasts, fuel supply capability and potential disruptions to fuel supply, fuel supply reliability assessments, fuel quality issues and implications of changes to fuel quality standards, fuel stocks levels, refinery capacity and future investment, and the many environment, safety and security requirements in place or under consideration by governments in Australia and by international organisations.

## Key Issues

### Limited time for public consultation about the proposed legislation and its impacts on business

AIP is extremely concerned about the limited time provided by the Government for consultation with industry about the potential impacts of the proposed legislation on particular businesses that could become subject to the legislation, or for these potential impacts (and benefits) of the legislation to be analysed and understood by business and consumers.

AIP suggests that before any legislation is introduced into the Parliament, a comprehensive consultation process be established along the lines of that set up to review the provisions and impacts of the proposed Minerals Resource Rent Tax. Such a process would enable the Government to assess whether there are real problems that need to be addressed through legislation and to introduce well informed and drafted legislation which addressed real problems in a way that would deliver demonstrable outcomes for consumers.

### Theoretical basis for concerns about price signalling facilitating co-ordinated conduct

The theory of price signalling and its role in facilitating co-ordinated conduct is not well understood or accepted in government or in business communities. Consequently, AIP is concerned that the consultation documents do not provide a sound theoretical basis for the legislative changes being proposed by the Government, or provide any practical insight into whether the information disclosures by companies or industries are actually lessening competition or what the impact of that lessened competition is on consumers. It is extremely important that there is an explicit and detailed acknowledgement that economic theory recognises a range of valid pro-competitive reasons for sharing pricing information and does not support the *Per Se* condemnation of such practices. AIP strongly believes that there is an onus on the Government to explain exactly how information disclosure is reducing competition in industries which the Government (or the ACCC) has signalled should be subject to such provisions. This explanation should address the specific types of circumstances in those businesses that are regarded as of most concern, as well as how the proposed amendments will remove those concerns and what practical outcomes consumers (and competitors in those industries) are likely to see.

AIP is concerned that the absence of such information means that the industries potentially affected, and consumers more generally, will have no basis for assessing the merits of the proposed legislative changes, or assessing in the future whether these changes have delivered real benefits to the economy.

### Absence of demonstrated anti-competitive outcomes for transport fuel users

Based on its past statements, it seems likely that the ACCC will seek to regulate petrol retailing under the legislation. It is unclear which practices the Government, or the ACCC, is trying to end as a result of the proposed legislation. If the intention is to end petrol price cycles, it is not clear that this aim will be achieved, and if it could be achieved what impact such an outcome would have on competition or on prices to consumers. AIP does not believe that either the ACCC or the Government have demonstrated that there are adverse outcomes for fuel consumers as a result of price cycles.

ACCC analysis of substantial data on fuel retail transactions and the petrol retail price cycles in metropolitan areas, has not demonstrated that the observed price cycles are caused by information sharing actions, are anti-competitive, or that the price cycles result in an adverse outcome for the majority of consumers. Neither the ACCC nor the Government has produced any information that demonstrates a better outcome would flow to consumers from the introduction of the proposed legislation.

To the contrary, AIP considers the presence of a retail petrol price cycle is indicative of vigorous competition, rather than coordinated conduct. In addition, AIP believes that the changing pattern

of price cycles over time and indeed the collapse of the cycle in some markets highlight a competitive and dynamic market. The operation of petrol price cycles in Australia is supported by economic theory and research (Edgeworth Cycles) as being indicative of strong competition – particularly for goods that are identical and where brand loyalty is weak with many consumers switching between suppliers for very small price differences. Retail petrol markets display these characteristics.

- In Edgeworth Cycles, this price sensitivity drives retailers to undercut competitors to increase market share. Operators continue to discount (as it is costly to yield first), but the bottom of the cycle is unprofitable so one retailer invariably stops discounting and increases prices. Other retailers follow over time with their own price increases.
    - Importantly, Edgeworth Cycle theory predicts that large firms are more likely to be the first to stop discounting, while small firms are more likely to start discounting. Analysis of Informed Sources data (and confirmed in the ACCC petrol price monitoring reports) shows that during the "price restoration" phase, not all operators increase price at the same time, the magnitude of the increase varies over time, patterns can be different across markets, and the price leader is not always the same in each of these markets.
- Disruptions to the weekly price cycle are not uncommon, as was seen in 2010 (see ACCC 2010 petrol price monitoring report). Disruptions can occur for a range of reasons, for example, when wholesale prices fall or rise very sharply or when a particular market operator seeks to change the timing of the cycle or its competitive position in the cycle.
- As the ACCC has itself concluded, price cycles are "due to the pricing policies employed by the local petrol companies in the face of local competition".
    - "The price charged at an individual site can vary due to the location, quality or size of the site, the other products available at the site, the number and identity of the other service stations in the area and the pricing policies of the operators."

Retail petrol price cycles are not unique to Australia and are present in other countries, including USA, Canada, Norway, Germany and Belgium.

**Selective application of proposed information disclosure prohibitions**

AIP is concerned that the Government is proposing to move away from the long-standing approach of applying Australian competition legislation consistently to all business sectors across the economy. Such an approach will be both unfairly discriminatory and distortionary towards the businesses covered by the proposed new provisions. If the prohibitions of information disclosure, particularly the *Per Se* prohibition, are deemed by the Government to be of such importance (ie good policy), then the provisions should be applied to all business activities to prevent an unfair and distortionary impact across the economy.

**Application of new legislative provisions through sub-ordinate legislation**

AIP is concerned that the proposed competition legislation is being introduced without any substantial explanation of how it will impact on particular sectors or on consumers of particular products. There is no supportive material provided to show how competition will be enhanced and consumers will be better off. Instead, Parliament is expected to support the need for the legislation based on general assertions about adverse competitive impacts, without being in a position to judge the desirability or need for the new provisions.

Once passed and in force, the proposed provisions will be able to be applied by the relevant Minister to any sector or activity by Regulation. Again there is no requirement for the Minister to demonstrate to the Parliament that the application of the proposed provisions to a particular industry or activity was essential to improve competition or that the outcome would be improved competition or lower prices for consumers. In the absence of any threshold tests for applying the provisions to an industry, or any tests concerning the actual outcomes of the application of the provisions, Parliament will not be in a position to effectively consider the reasonableness of the Regulation, nor will the affected industry be in a position to challenge formally or informally the application of the provisions to the industry.

***Per Se* Prohibition**

AIP is strongly opposed to the proposed *Per Se* prohibition on information disclosure. No case has been made to prohibit all price related information exchange between competitors. Disclosure of such information is not precluded in the main OECD jurisdictions (US, EU, UK). All jurisdictions recognise, as does economic theory, that there may be valid business reasons for this conduct, (for example the variety of industry practices outlined below). AIP believes that the Courts must have the discretion to consider all of the circumstances surrounding the disclosure of information to competitors, as is proposed in Section 44ZZX. Consequently AIP strongly believes that Section 44ZZW should be deleted in its entirety.

**Substantial lessening of competition prohibition**

AIP is particularly concerned that the general prohibition in Section 44ZZX is extraordinarily broad. There appears to be a risk of deterring ordinary communications with customers, consumers, governments and parliaments as much of this dialogue is based on information about historic prices, ability to supply and elements of the commercial/business plans of a company or an industry.

In the case of the fuels industry, almost any public comment or dialogue with customers about business activities could have the potential to breach the provisions regarding ability to supply or commercial strategy. For example, most customers, consumers, governments and parliaments (and the media) have a strong interest in fuel supply reliability and measures the industry has in place to maintain supply reliability. In its current form, the legislation will create uncertainty about provision of information to governments and other stakeholders. AIP believes there is a need to remove these uncertainties as much as possible so that the uncertainties do not discourage oil company dialogue with governments and others on supply reliability and other issues.

There are legitimate and pro-competitive reasons for companies to make historical pricing (and price related) fuel information available to other parties, with that information subsequently becoming available to current or potential competitors. AIP believes historical price related information (including price related information that is already in the public domain) should be explicitly excluded from the prohibition, so that the prohibition only applies to information regarding a supplier's intentions about future prices where that information has competitive significance. This would remove uncertainty about provision of historical information to assist with government and consumer analysis of price movements and trends (for example, historical fuel price movements and averages used to inform consumers about general price movements; historical fuel price data used to support fuel price benchmarks and indexes in commercial contracts involving services that include a transport cost component). In some circumstances there may also be public benefit in future price information being disclosed (eg long term projections of fuel prices provided to an industry association for the preparation of a submission on energy policy.

AIP also strongly urges the Government to remove the provisions from 44ZZX regarding ability to supply and commercial strategy. AIP does not believe that the Government has identified any problems that can be resolved by attempting to define or limit the scope of the provision relating to 'capacity to supply or acquire goods or services' or the provision relating to 'commercial strategy'. These concepts are so broad as to effectively comprehend every aspect of the fuel supply business. AIP is particularly concerned that these provisions would also go to the heart of the multiplicity of joint business arrangements that are essential for maintaining the current high level of fuel supply reliability and the efficient delivery of fuels at the lowest cost to consumers across Australia. Even if guidance (including safe havens) were to be provided, it is likely to be years before such provisions have been effectively tested and interpreted by the Courts..

It is also essential that the Government recognise that industry interfaces with many Federal, State and Territory government portfolios that do not rely on explicit legislative provisions to

acquire information from the industry or to engage in a dialogue with industry on many matters including key policies relating to fuel supply reliability and environmental protection.

For example, the provisions of the Liquid Fuels Emergency Act 1984 would not provide sufficient cover for an exemption under 44ZZY for the range of capacity to supply information that is currently provided to governments to assess the potential emergence of fuel supply problems. The availability of the expensive and time-consuming ACCC authorisation process is not seen as sufficient remedy for business concerns. Many of these dialogues would not justify the time or cost associated with ACCC authorisations. .

A further example is the operation of the Fuels Standards Consultative Committee under the *Fuel Quality Standards Act 1984*. Supply of information to the Government in accordance with The Procedures and Administrative Arrangements Guide of the FQSA regarding information for setting or varying fuel standards would appear to breach the prohibitions in the proposed legislation without being eligible for exemption under Section 44ZZY (1).

AIP is concerned that in the case of joint business activities and dialogues with governments it will be difficult for businesses to understand how the purpose of the disclosure test (ie a substantial lessening of competition) will apply. In addition, further uncertainty will be created by the provisions of Section 44ZZX (3) regarding inferences that might be able to be drawn from company behaviour. AIP is concerned that the 'purpose' of an action is highly subjective, open to interpretation and conjecture and can be easily misunderstood, raising significant risks of a false breach of the proposed prohibitions. AIP believes that amendments to the relevant exemption provisions would remove much of this uncertainty.

AIP also believes that the Government should explicitly indicate the circumstances in which particular types of price (and price related) information would be able to be released so as to provide a reasonable level of guidance to businesses as to the sorts of voluntary information releases that would be acceptable (ie for which there would be a reasonable prospect of authorisation by the ACCC). In the absence of such guidance, AIP is particularly concerned that ACCC authorisations could be extremely lengthy and costly, with very uncertain outcomes until there were significant precedents for the sector concerned. AIP notes that other jurisdictions (such as the EU) provide extensive guidance on the application of such provisions and the types of disclosures that would in principle be acceptable for authorisation.

**International inconsistency**

A number of AIP member companies operate in the US, the EU and the UK, as well as in many other countries around the world. The member companies regard the proposed Australian legislation as anomalous compared with US, EU and UK competition legislation, and consider the burden imposed on Australian businesses by the proposed legislation as being far more substantial than the burden imposed on similar businesses in those jurisdictions.

These burdens include

- lack of legislative clarity,
- broader scope of the measures compared to overseas law
- A *Per Se* prohibition on pricing information disclosure even where there is no negative impact on competition
- substantially greater in-house compliance requirements,
- intrusion into a much wider range of petroleum industry business activities,
- potential exclusion of fuel supply chain practices which are aimed at reducing overall costs to consumers and at increasing fuel supply reliability.

**Industry arrangements involving competitors**

The downstream petroleum industry in Australia operates a multiplicity of complex supply chains across the country for each fuel, lubricant and petroleum product marketed in Australia. This includes

- petroleum fuels, lubricants and other products supplied to, or acquired from, other refiners, independent wholesalers and independent retailers who are all current or potential competitors in the integrated fuels market. These arrangements generally apply in those jurisdictions where a company does not self-supply from its own refinery or from an import source
- logistics services and support provided by other companies in the industry when it is inefficient for customers to be supplied directly (eg port operation, terminal management, distribution of fuel to wholesale and retail outlets). These other companies may well be current or potential competitors in the integrated fuels market

While some of these arrangements may fall under the Joint Venture exemptions (Section 44ZZZ(3)) it is not clear that the range of necessary communications would be covered by other exemption provisions of the proposed legislation, or that existing ACCC authorisations for any of these activities would extend to the new legislation provisions. This is particularly the case for communications that might fall within the categories of 'supply capability' and 'commercial strategy' in Section 44ZZX.

It is also unclear whether any of the exemptions would apply to the operators and members of franchise systems and branded networks where the independent owners/operators of retail sites participate in group buying arrangements to access economies of scale in purchasing plant, equipment, consumables, services, non-fuel retail goods for use within their businesses (ie not for re-supply).

AIP believes that it is essential for liquid fuel supply reliability reasons that all of these joint fuel supply operational arrangements be treated in the same way as Joint Ventures for the purposes of the 44ZZZ(3) exemption. This will remove any doubt about the potential application of the prohibitions to well established fuel supply arrangements that are necessary to efficiently deliver fuels at the lowest cost to consumers across Australia. To do otherwise will make it difficult for businesses to understand how the purpose of the disclosure test (ie a substantial lessening of competition) will apply. In addition, further uncertainty will be created by the provisions of Section 44ZZX (3) regarding inferences that might be able to be drawn from company behaviour. As highlighted earlier, AIP is concerned that the 'purpose' of an action is highly subjective, open to interpretation and conjecture and can be easily misunderstood, raising significant risks of a false breach of the proposed prohibitions.

**Information disclosures authorised under other legislation**

While a small number of petroleum industry information disclosures are authorised by or under a Commonwealth, State or Territory law, the majority would not be subject to this exemption provision of the exposure draft bill. AIP strongly recommends that the provisions of Subsection 44ZZY(1) be extended to include submissions to formal government or parliamentary inquiries and submissions in response to written requests from government agencies and Ministers for information or views from a company or industry subject to these new provisions.

It will also be essential for the Government to clarify the status of a company that provided information to a government and that information was subsequently released by the government under a Freedom of Information request. AIP is concerned that there should be no suggestion that in such circumstances the company concerned would be considered to have breached the prohibitions in the exposure draft bill.

**ACCC authorisations**

AIP notes that it is the Government's intention to enable the ACCC to authorise activities which a company may be concerned have the potential to breach the proposed new legislation. AIP has a number of concerns about this proposed approach to providing 'safe havens' for company activities that potentially might breach the prohibitions under the new legislation and which would not be covered by the limited exemptions provided in the exposure draft bill.

- ☛ It is not clear that existing authorisations would be applicable to the new provisions, and hence a range of authorised activities that had the potential to breach the new prohibitions would need to be re-authorised. AIP would appreciate clarification of this point, and if correct, would suggest that amendments be made to the exposure draft bill to 'grandfather' all existing authorisations to cover the proposed new prohibitions. AIP finds it difficult to envisage any circumstances where the ACCC would wish to withdraw an existing authorisation in light of the new prohibitions.
- ☛ While some of the downstream petroleum industry actions have been authorised by the ACCC (eg shopper dockets and discounts; some joint supply or terminal operations), many activities within the industry have not been seen as requiring authorisation under the current provisions of the *Competition and Consumer Act*. On current understandings of the proposed amendments, particularly the broad coverage of Section 44ZZX, some of the industry's joint operations and some of the instances of industry dialogue with governments and other stakeholders may require authorisation to remove the business uncertainty created by the new prohibitions. AIP is concerned that the current ACCC authorisation processes will introduce considerable delays into business activities until the potentially large number of authorisations have been handled, will delay timely dialogues with governments, and will create unnecessary business uncertainty for an extended period of time. As a minimum, this exposure draft bill should be amended to enable the ACCC to issue formal guidance on the types (and purposes) of information disclosures that would be regarded as being acceptable, and to enable the ACCC to issue 'blanket' authorisations for particular types of information disclosures in particular circumstances without the need for a full scale authorisation assessment of each company's application for authorisation.

**Detailed comments by AIP on specific provisions of the exposure draft bill are set out in Attachment A.**

**Attachment A**

**AIP Draft Comments on Provisions of the Exposure Draft of the Competition and Consumer Amendment Bill (No1) 2011 dealing with 'price signalling and related matters'**

| | **Section/Clause** | **AIP Comment** | |
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| 1 | Section 2 Commencement | | |
| | **Schedule 1 Amendments** | | |
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| | **Division 1A** | | |
| 2 | 44ZZT<br><br>Goods and services to which this Division applies | *It is noted that, inter alia, the prescription by Regulations may apply to a kind of supplier, a kind of industry or business, or the circumstances in which goods and services are supplied.*<br><br>The exposure draft bill should include a provision which sets out a threshold test for a prescription of these kinds of things, or other kinds, under the Regulations. Apart from Parliamentary scrutiny of the Regulation prescribing an industry etc, there is no requirement for the Minister making the Regulation<br>☛ to demonstrate that particular behaviour or actions of a potentially anti-competitive nature have taken place within an industry, or are clearly likely to take place<br>☛ to establish the relative degree of significance of such behaviour or actions (ie whether it is a major or a minor circumstance)<br>☛ to demonstrate that the behaviour or actions meet any basic test of adverse impact on competitors, consumers or customers of the businesses concerned, or that there is a demonstrable anti-competitive outcome from those behaviours or actions.<br>☛ to demonstrate that regulation of the businesses will fix any identified anti-competitive behaviour<br><br>In the absence of any meaningful threshold criteria for applying these new provisions to particular goods and services, it will be impossible for Parliament, consumers or affected industries to judge whether there is substance to the Government's concerns leading to the making of the Regulation, or what impacts and outcomes a particular prescription may have on commercial activities in that sector, or on consumer interests. | |

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| 3 | 44ZZU<br><br>whether a corporation has disclosed information to a person | *It is noted that*<br>• *disclosure of information to an **intermediary** can be to a body corporate (if disclosure is to a director, employee or agent of that body corporate) or to a person.*<br>• *An intermediary can disclose information to one or more other persons (**recipients**).*<br><br>*It is also noted that if the purpose of making the disclosure to the intermediary is for the purpose of the intermediary disclosing the information to other persons, then the information is deemed to be disclosed by the originating corporation.*<br><br>☛ This would mean that information provided privately to an industry association, or a government review or inquiry which was subsequently disclosed to others in its original form or in a truncated or summarised form, could be deemed to be a disclosure of information by the originating corporation. In view of the absence of any guidelines (safe harbours) and the relatively low level threshold for determining/inferring 'substantial lessening of competition', it is expected that much of the current voluntary flow of information about historical fuel prices and about fuel supply reliability, will cease.<br>☛ Even in the context of private disclosures, it is unclear how the purpose of the disclosure requirement is intended to operate when the person making the disclosure may not know or care exactly who the recipient or intermediary further discloses the information to, yet an attempt to clarify this may bring a company within the anti-avoidance provision of Section 44ZZV(2). | |
| 4 | 44ZZV<br><br>Private disclosure to competitors | *It is noted that subsection (1) provides a definition of private disclosure to competitors, including current and potential competitors, but not to anyone else.*<br><br>☛ It is not clear how a distinction could be drawn between a company that may be a potential competitor at some stage in the future and 'any other person'. For example a current fuel wholesale competitor could be a potential retail competitor or they may never be a potential retail competitor, in which case they would appear to fall into the 'any other person' category.<br>☛ This uncertainty must be clarified in the exposure draft bill by deleting the reference to potential competitors. | |
| 5 | 44ZZW<br><br>No private disclosure of pricing information etc to competitors | *It is noted that this section prevents the private disclose to competitors of information about a price, discount, allowance, rebate or credit in relation to goods and services prescribed under this Division, and applies to past, current or potential future supply or acquisition of those goods and services. It is also noted that conduct that would contravene this section can be authorised by the ACCC under subsection 88(6A).*<br><br>☛ AIP is strongly opposed to the proposed *Per Se* prohibition on information disclosure. No case has been made to prohibit all price related information between competitors. Disclosure of such information is not precluded in the main OECD jurisdictions (US, EU, UK). All jurisdictions recognise, as does economic theory, that there may be valid business reasons for this conduct, (for example the variety of industry practices outlined at point 6 below). AIP believes that the Courts must have the discretion to consider all of the circumstances surrounding the disclosure of information to competitors, as is proposed in Section 44ZZX.<br>☛ AIP strongly believes that Section 44ZZW should be deleted in its entirety. | |

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| 6 | 44ZZX<br><br>No disclosure of pricing information etc for purposes of substantially lessening competition | *It is noted that information must not be disclosed if it relates to*<br>*1. a price, discount, allowance, rebate or credit for prescribed goods or services provided or acquired in the past, now or in the future*<br>*2. current or future capacity to supply or acquire prescribed goods or services*<br>*3. any aspect of the commercial strategy that relates to prescribed goods or services*<br>*AND*<br>*The disclosure is made for the purpose of substantially lessening competition in the market.*<br><br>☛ AIP believes historical price related information (including price related information that is already in the public domain) should be explicitly excluded from the prohibition, so that the prohibition only applies to information regarding a supplier's intentions about future prices where that information has competitive significance<br>☛ It is of particular concern that no attempt is made to define or limit the scope of the provision relating to 'capacity to supply or acquire goods or services' or the provision relating to 'commercial strategy'. These concepts are so broad as to effectively comprehend every aspect of the fuel supply business.<br>☛ The provisions in 44ZZX (1) (a) (ii) and (iii) of the exposure draft bill should be deleted<br><br>AIP is concerned that subsection (1) is so encompassing that almost any statement that a corporation might make in private or public could potentially breach this provision, particularly given the low threshold for demonstrating substantial lessening of competition. This could lead to a very conservative position by companies on information disclosure, even if the legal risk is small. Subject to points 7 and 8 below concerning exemptions, this provision would apply to<br>1. any fuel price related statements about<br>a. past wholesale or retail fuel prices<br>b. past and current fuel discounts<br>c. past and current or future allowances or rebates or credits to franchisees or other fuel purchasers<br>d. display of current fuel prices on service station price boards in States and Territories where the use of price boards is not required under legislation (all States and Territories other than NSW and possibly parts of WA); posting of current retail prices by fuel retailers on the internet and publicising details of discounts available through shopper dockets.<br>e. voluntary provision of information to industry associations or government agencies for the purpose of providing information about trends and averages of historic fuel prices<br>f. voluntary provision of information about past fuel prices or trends in fuel prices etc to journalists, market analysts, Members of Parliament seeking information or undertaking an Inquiry, government agencies collecting information on a voluntary basis or reviewing existing policies and government measures, international agencies collecting information about the fuels industry and fuel prices in Australia<br><br>2. any statements about the fuel industry's current or future capacity to supply or acquire fuel, including<br>a. voluntary advice to governments about short term fuel supply disruptions at the State or national level<br>b. voluntary advice to governments and the airline industry about the availability of fuel for the aviation industry (eg JUHI arrangements and operations at major airports)<br>c. preparatory discussions in NOSEC between Federal and State/Territory governments and the fuels industry about potential fuel supply issues and where a supply issue might be emerging, and how best to handle a fuel supply emergency<br>d. voluntary provision of information to the IEA about fuel stock levels | |

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| | | e. provision of information to major fuel user groups and Dept of Defence about the availability of fuel supplies and capacity to supply at times of increased demand – eg defence exercises, peak crops harvesting<br>f. provision of information about the supply of 'non-sniffable' fuel (Opal) to remote communities in Australia<br>g. voluntary provision of information to government agencies about import storage and handling facilities and fuel distribution facilities, as well as current and planned construction of new storage facilities<br>h. review of proposed policies or draft legislation impacting on fuel supply capabilities in Australia eg reviews of LFE Act or new policies related to stockpiling or fuel excise on alternative fuels<br>i. the consideration of specific proposals for fuel standards variations made under the *Fuel Quality Standards Act 2000*, and consideration of new fuel standards under the FQSA<br>j. consideration of contaminated sites policy under the CRC CARE in conjunction with State/Territory regulators<br>k. industry involvement in the Oil Stewardship Advisory Council (OSAC)<br><br>3. any voluntary statements (including to journalists, Ministers, MPs, Parliamentary Committees, Government agencies, market analysts, customers) about the commercial strategy of a company in the fuel supply industry including<br>a. sale, acquisition or merger of commercial enterprises, including support and service companies<br>b. diversity of supply of refinery inputs or sources of refined products<br>c. expansion of existing facilities in Australia, or potentially overseas facilities used to supply the Australian market; upgrade of Australian facilities to comply with Australian regulations; maintenance of existing Australian facilities and associated arrangements to maintain refined product supplies<br>d. impact of an unplanned disruption to an Australian facility or the delay in arrival of supplies from overseas<br>e. the consideration of specific proposals for fuel standards variations made under the *Fuel Quality Standards Act*<br>f. technical environment protection measures covered under NEPMs or State/Territory Government legislation such as phase 2 vapour recovery at service stations, integrity of underground petroleum storage tanks<br>g. operation and physical security of critical infrastructure and operation of major hazard facilities<br><br>☛ No guidance is provided on how the ACCC should or might consider an authorisation for provision of such information to customers or the general public (where the information provision is not covered by the exemption provisions in points 7 and 8 below). | |

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| 7 | 44ZZY<br><br>Exceptions to sections 44ZZW and 44ZZX | *It is noted that the section applies an exemption to information disclosed if*<br>*1. The disclosure is authorised by or under a law of the Commonwealth, a State or a Territory, and*<br>*2. The disclosure occurs within 10 years of this Act receiving Royal Assent*<br>*Disclose of information to a related corporation (and to no one else) is also exempt from the provisions of these two sections.*<br><br>☛ It is unclear why this provision is limited to the period of 10 years after this Act receives Royal Assent. It appears completely unreasonable for these exemption provisions to terminate at that point and leave corporations with no exemptions from government legislative requirements. This part of this subsection should be deleted from the exposure draft bill<br>☛ It is assumed that this Subsection applies to information of the kind covered in points 5 and 6 above when it is required to be provided either publicly or confidentially to a government official or Minister for the purpose undertaking some action or consideration under legislation, including requirements for provision of information set out in Regulations and administrative guidelines.<br>o It is also assumed that the exemption extends to the sharing of that information by the relevant government agency with other parties associated with an advisory group established under the legislation (eg *Fuel Quality Standards Act*).<br>o It is also assumed that the exemption applies to relevant information provided in confidence to government officials and subsequently released under FoI legislation<br>☛ If these assumptions are correct it would be highly desirable for these points to be explicitly addressed in the legislation or the Explanatory Memorandum in order to reduce uncertainty in industries subject to prescription under this Division<br>☛ The exemption must be extended to include provision of information to reviews of government policies and legislation initiated by parliaments or governments, and provision of information requested by government agencies and Ministers in writing (to assist them in undertaking their work).<br>☛ The exposure draft bill should also specifically address the situation where that information was subsequently released by the Government or the Parliament to other parties or publicly on a voluntary basis | |

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| 8 | 44ZZZ<br><br>Additional exemptions applying to 44ZZW (disclosure of pricing information to competitors) | *It is noted that sub-section (1) covers disclosure of information about prices, discounts, allowances, rebates or credits related to past, current or future supply or acquisition of prescribed goods or services to a competitor if*<br>*1. the recipient is re-supplying those goods or services to the market, or*<br>2. *The goods or services are being acquired from the recipient for re-supply by the corporation to the market*<br><br>☛ This provision should be amended so that any 'vertical' supply transaction between competitors is exempt, regardless of whether or not the buyer purchases for the purpose of re-supply or own use. There are occasions when fuel suppliers sell feedstock to one another for own use.<br>☛ It is essential that the Government confirm that this provision covers all of the circumstances (such as product purchase and sale arrangements between fuel suppliers) highlighted in point 5 above<br><br>*Subsection (2) provides an exemption for disclosure of information if the corporation could not reasonably be expected to know that a recipient was a current or potential competitor.*<br><br>☛ In the absence of any further guidance about the definition of 'potential competitor' it is difficult for any corporation involved in the fuels industry to establish that someone involved in one segment of the industry (eg retail) might not at some future stage enter the wholesale part of the business and become a competitor. It would also be difficult to establish a case that a major customer (eg wholesale customer) might not at some stage in the future become a competitor in the fuels industry through becoming an importer. The only potentially clear cut circumstances would be a corporation not involved in any aspect of the fuel industry.<br>☛ This uncertainty must be clarified in the exposure draft bill by deleting the reference to potential competitors.<br><br>*Subsection (3) provides an exemption for disclosure of information to participants in a Joint Venture for the purpose of the JV and to no other person*<br><br>☛ There are many joint fuel supply operational arrangements in place that would not be covered by the JV provision. These joint supply arrangements are essential to maintain the current high level of liquid fuel supply reliability and the efficient delivery of lowest cost fuel to consumers across Australia. The JV provisions should be extended to include these joint fuel supply operational arrangements that are not covered by agreements that would meet the JV definition. | |
| 9 | 44ZZZA<br><br>Burden of proof | | |
| 10 | Amendments to various paragraphs | | |

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| 11 | Amendment to subsection 88(6) of principal Act<br><br>ACCC authorisation of disclosure of information under 44ZZW or 44ZZX | | |
| 12 | Amendment to subsection 90(5B) of principal Act<br><br>ACCC authorisation of disclosure of information under 44ZZW or 44ZZX | *Under sub-section (5C) ACCC must be satisfied in all the circumstances that the proposed disclosure (relating to Section 44ZZW matters) would result, or be likely to result, in <u>such a benefit</u> to the public that the proposed disclosure should be allowed to be made.*<br><br>☛ It is not clear that existing authorisations would be applicable to the new provisions, and hence a range of authorised activities that had the potential to breach the new prohibitions would need to be re-authorised. AIP would appreciate clarification of this point, and if correct, would suggest that amendments be made to the exposure draft bill to 'grandfather' all existing authorisations to cover the proposed new prohibitions.<br>☛ the exposure draft bill should be amended to enable the ACCC to issue formal guidance on the types (and purposes) of information disclosures that would be regarded as being acceptable for authorisation, and to enable the ACCC to issue 'blanket' authorisations for particular types of information disclosures in particular circumstances without the need for a full scale authorisation assessment of each company's application for authorisation. | |
| 13 | Amendments to various subsections | | |