Competition and Consumer Amendment Bill (No.1) 2011 Explanatory Note

This note has been compiled by the Treasury following the Competitive and Sustainable Banking Package announcement on 12 December 2010. New laws will be introduced to prevent banks from engaging in anti-competitive price signalling that is designed to keep interest rates or other fees higher than they would otherwise be.

These new laws will be introduced via amendments to Part IV of the *Trade Practices Act 1974* (TPA) (to be referred to as the *Competition and Consumer Act 2010* from 1 January 2011). The prohibitions will only apply to classes of goods and services that are prescribed by regulations. Initially the prohibitions will only apply to the banking sector.

The TPA and anti-competitive conduct

The object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Competitiveness of markets improves productivity and efficiency, leading to increased living standards in the form of higher incomes in real terms, increased consumer choices, sustainable economic growth, and lower unemployment rates than would otherwise be the case.

Effective competition can be reduced by businesses behaving, either independently or with other businesses, in ways that reduce rivalry in the market, or prevent or deter the entry of new businesses. Recognition of these problems gives rise to the core purpose of the competition rules in Part IV of the TPA which seek to restrain conduct that tends to lessen competition, but to otherwise leave businesses free to act as they see fit.

Collusive behaviour is detrimental to the economy and consumers. By colluding with one another, competitors are able to distort the competitive process by, for example, reaching an agreement about the price to be charged for goods or an agreement about who will supply particular segments of the market.

Collusive or cartel behaviour is prohibited under the long-standing cartel provisions and the new criminal cartel provisions in Part IV of the TPA. The cartel provisions capture anti-competitive conduct which involves one competitor attempting to induce another into collusive conduct. They require the presence of a 'contract, arrangement or understanding' which Australian courts have held requires evidence of a 'meeting of minds' and a commitment (albeit moral, not legal) about the subject matter of the arrangement.[1] Anti-competitive price signalling and other information disclosures do not have these characteristics. It is apparent from numerous judicial decisions that

[1] See *Trade Practices Commission v Nicholas Enterprises Pty Ltd & Ors (No 2)* (1979) 26 ALR 609; *Trade Practices Commission v Email Ltd (1980) 43 FLR 383*; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321.

these existing cartel provisions do not effectively address anti-competitive information disclosures that occur outside of a 'contract, arrangement or understanding'.[2]

Anti-competitive price signalling and information disclosures

Anti-competitive price signalling and other information disclosures are communications between competitors which facilitate prices above the competitive level and can lead to inefficient outcomes for the economy and reduce wellbeing for consumers (these practices are sometimes referred to as facilitating, coordinated or concerted practices). Anti-competitive price signalling and other information disclosures can occur as part of a wider cooperation agreement, or as a stand-alone practice absent of an explicit cartel arrangement.

Most comparable jurisdictions, including the UK, EU and US, have laws which are capable of dealing with anti-competitive price signalling and other information disclosures.

Legitimate communications

Information disclosures play a vital role in the economy; they increase transparency in the market to the benefit of consumers and the competitive process. Businesses communicate to the public and stakeholders for a variety of reasons including to inform customers, to advertise their market positioning, to improve brand awareness and to fulfil legal and regulatory obligations. Industry associations and representative organisations can fulfil important roles in our economy which require the free flow of certain types of information amongst their members, to governments and other businesses.

In general, such communications are perfectly legitimate, pro-competitive and efficiency enhancing. Freedom to communicate with suppliers, customers and the market is essential to gaining competition and efficiency benefits in a well-functioning market. However, the positive benefits of many information disclosures do not imply that the potential for harm to competition and consumers which may arise from anti-competitive price signalling and information disclosures should be disregarded.

Accordingly, it is recognised that any proposal to address anti-competitive price signalling and other information disclosures will need to carefully balance the potential anti-competitive impacts of particular information disclosures, with the benign and pro-competitive effects of other information disclosures. The Exposure Draft Legislation seeks to achieve this balance. Of course, all publicly listed companies will be able to comply with their continuous disclosure requirements in full.

Commitment to consultation

Treasury is committed to substantive consultation within the parameters of the Competitive and Sustainable Banking Package. Treasury is, *inter alia*, very interested in understanding any potential unintended consequences of the Exposure Draft Legislation, although the likelihood of such is reduced by initially targeting the banking sector, where the Chairman of the ACCC has expressed concerns about the price signalling undertaken by banks. Specific examples of any unintended consequences, at least in concept, are preferred. Treasury invites interested parties to provide a brief written submission by 14 January 2011. Treasury's intention is to provide any written submissions to the Government concurrently with the Treasury's advice before the Bill is introduced into Parliament.

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[2] *Ibid.*

Exposure Draft Legislation

Exposure Draft Legislation was released on 12 December 2010, for consultation. In developing the Exposure Draft Legislation, the current practices and legal precedent in Australia, along with views expressed by business, the Australian Competition and Consumer Commission (ACCC), economists and legal advisors have been considered.

Consideration has been given to the statute and case law in jurisdictions including the US, EU and the UK.

Regulation making power

The prohibitions will only apply to classes of goods and services that are prescribed by regulations for the purpose of the prohibitions (**section 44ZZT**).

In the first instance these new provisions will only apply to the banking sector. The prohibitions will only apply to other sectors after further review and detailed consideration.

Per Se Prohibition

The *per se* prohibition targets those information disclosures that are most readily distinguishable from benign or pro-competitive forms of conduct, namely the private disclosure of pricing information between competitors.

It is difficult to ascertain a rationale for disclosing pricing information to competitors in a private manner, other than to seek to facilitate prices above a competitive level. The private nature of such a disclosure, even in the absence of any agreement to act on the disclosure, creates a risk of collusion. Furthermore, the disclosure of pricing information is more unambiguously harmful than the disclosure of other forms of information. For these reasons, the intention is to ban private disclosures of pricing information outright.

It is intended that this and the following prohibition will also limit the ability for competitors to engage in, and maintain, more explicit cartel behaviour. These new prohibitions will eliminate a key element of the communications required for setting up, monitoring and sustaining cartel behaviour.

The *per se* prohibition will prohibit the private disclosure of pricing information (information that relates to a price for, or a discount, allowance, rebate or credit in relation to goods or services to which the prohibitions relate to) between competitors (**section 44ZZW**).

The *per se* prohibition requires no proof as to the purpose or effect of the conduct. The prohibition is designed so that:

- Corporations will only be captured by the provision if the information disclosure is in private and it is disclosed to one or more competitors or potential competitors (**subsection 44ZZV(1)**).
  - Information disclosed to a competitor through an intermediary, if the corporation's purpose was for the intermediary to disclose the information to a competitor will not preclude the disclosure from the prohibition (**subsection 44ZZU(2)**).
- The prohibition will apply whether or not the information that is disclosed privately is available by other means or is available to the world at large (**subsection 44ZZV(3)**). It is the circumstance of private disclosure of prices which creates the high risk of anti-competitive behaviour, not the information disclosed.

- Corporations will not be able to avoid the prohibition by purposefully disclosing the information to other people who are not competitors (**subsection 44ZZV(2)**).

Substantial Lessening of Competition (SLC) Prohibition

The SLC prohibition is intended to capture a range of disclosures beyond those that relate to pricing information. This recognises that the disclosure of a broader range of strategic business information can lead to anti-competitive outcomes.

The SLC prohibition also recognises the possibility that anti-competitive pricing and information disclosures can be made in public. While many public disclosures are made for pro-competitive purposes, including to better inform consumers or to inform shareholders, stock analysts and the broader market, in some instances, public disclosures can be used as a means of signalling information to competitors.

In order to limit the possibility of capturing pro-competitive information disclosures, those disclosures which take place in the public domain and/or are related to information other than pricing information will only be prohibited if they were made with the purpose of substantially lessening competition.

The SLC prohibition will prohibit a wide range of disclosures if the purpose of disclosure is to substantially lessen competition in a market (**section 44ZZX**).

- By incorporating a competition test, the SLC prohibition is consistent with the framework of the TPA as it is the basis of various Part IV prohibitions including section 45 (exclusionary provisions), section 47 (vertical restraints) and section 50 (mergers).

The prohibition is designed so that:

- A corporation's purpose may be inferred from surrounding circumstances (**subsection 44ZZX(3)**).

- The Court may have regard to a non-exhaustive list of factors for the purposes of determining whether a corporation had the requisite purpose of SLC when making a disclosure (**subsection 44ZZX(2)**). The matters to which the Court may have regard to include:

  - whether the disclosure was a private disclosure to competitors;

  - the degree of specificity of the information;

  - whether the information relates to past, current or future activities;

  - how readily available the information is to the public; and

  - whether the disclosure is part of a pattern of similar disclosures by the corporation.

Authorisations and exemptions

In order to ensure that only the conduct of most concern is prohibited, the Exposure Draft Legislation provides for reasonable defences, similar to those available for the cartel provisions of the TPA.

The prohibitions do not apply to the disclosure of information by a corporation if the disclosure is authorised by or under a law (**subsection 44ZZY(1)**). This exemption will have effect for 10 years after the day on which the Act receives the Royal Assent and will allow publicly listed companies to fully comply with their continuous disclosure requirements.

Communications between related bodies corporate (including dual listed companies), if they are the only parties to the communication, will be exempt from the prohibitions (**subsection 44ZZY(2)**).

If a disclosure was an accident or caused by something beyond the control of the corporation, the corporation will be exempt from the prohibitions (**subsection 44ZZU(3)**).

Businesses will be able to obtain immunity from the prohibitions by seeking authorisation from the ACCC (**subsection 88(6A)**).

- The ACCC will only grant authorisation if the proposed disclosure would result in a net public benefit (**subsections 90(5C) and 90(5D)**).

Specific exemptions for the per se prohibition only

Given the strict nature of the *per se* prohibition, certain other exemptions have been made:

- Disclosures relating to pricing information regarding goods or services, made for the purposes of re-supply of those goods or services (**subsection 44ZZZ(1)**).
- Disclosures that are made to a person, which at the time the corporation did not know was a competitor (**subsection 44ZZZ(2)**).
- Disclosures made for the purposes of joint venture activities, if they are the only parties to the communication (**subsection 44ZZZ(3)**).
- Disclosures made in connection with an actual or proposed agreement, that would provide for the acquisition of shares or assets from the corporation (**subsection 44ZZZ(4)**).

Disclosures that are exempt from the *per se* prohibition may still breach the SLC prohibition if it can be established that the corporation had the requisite purpose of SLC.

Enforcement and remedies

The prohibitions are civil only. The enforcement and remedy provisions contained in Part VI will apply in relation to the new prohibitions in the same way that they apply now in relation to other Part IV provisions.

Civil remedies available for contraventions of the prohibition will include: pecuniary penalties (which could be up to $10 million, 10 per cent of a business's annual turnover, or three times the benefit gained) (**section 76**), damages (**section 82**), injunctions (**section 80**) and non-punitive orders (**section 86C**).