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The Secretary
House of Representatives Standing
Committee on Economics
Parliament House
CANBERRA ACT 2600

ABA Submission on the *Competition and Consumer Amendment Bill (No.1) 2011*

The Australian Bankers' Association appreciates the opportunity to provide comments to the Committee on the *Competition and Consumer Amendment Bill (No.1) 2011* ('Bill').

The ABA is the peak national body representing 23 banks authorised by the Australian Prudential Regulatory Authority (APRA) to carry on the business of banking in Australia. The ABA's membership includes the four large banks, foreign banks and smaller retail banks, all of which operate on a national scale.

The ABA has made a number of submissions and representations to the Government on this matter. The ABA does not wish to revisit all of the issues associated with the Bill, therefore our submission is limited to key outstanding concerns.

1. Introductory Comments

1.1 Background

The Government's price signalling policy was outlined in the *Competitive and Sustainable Banking System Package* and was released for public comment on 12 December 2010.

The proposed measures in the Bill are based on previous proposals directed at concerns by the ACCC about the perceived narrow legislative scope of prohibiting anti-competitive conduct pursuant to a "contract, arrangement or understanding" under section 45 of the *Competition and Consumer Act 2010* (CCA).

We understand that these concerns originally emerged around the time of the ACCC's losses in 'petrol cases', which involved allegations of purported price fixing against retail petrol station operators. The ACCC has stated that it continues to believe there is price coordination in petrol retailing[1].

More recently, political debate has shifted the focus to the banking sector, although we have been unable to find any evidence that the ACCC was concerned about price signalling in the banking sector prior to October last year. It also remains unclear why the banking sector alone will be the subject of this legislation.

The Government stated in its Competition Package that its measures have the purpose of preventing "banks from engaging in anti-competitive price signalling that is designed to keep interest rates higher than they would otherwise be"[2].

Consultation on the Exposure Draft of the Bill took place during January 2011 and the due date for submissions was set for 14 January 2011. Thus, the period for comment coincided with the Christmas/New Year holiday season. This initial consultation process was manifestly inadequate to allow interested parties to respond fully, and on an informed basis, given the time of year.

The Government introduced an amended Bill into Parliament on 24 March 2011. Whilst the original approach was maintained, additional exceptions were introduced which are intended to limit the scope of the proposed law and to increase business certainty, including protection for conduct formally notified to, or authorised by, the ACCC. The banking industry accepts that these changes have reduced the number of unintended consequences arising from the approach set out in the Bill, however, serious complexity and compliance issues remain.

The ABA also wishes to highlight to the Committee our concerns that less than three full working days were originally provided for submissions to be made in this inquiry. However, the ABA appreciates the extension of time given to lodge our submission with the Committee.

We are also concerned that the inquiry is not to include public hearings. We note that public hearings were held when the Committee considered the Coalition's Bill in this area. At that time, the ABA felt it was inappropriate to comment on the proposed Government Bill as that was still to be finalised. We are disappointed that we are to be denied that opportunity now, especially as this is a complex piece of legislation, the scope of which can be greatly increased through mere regulation making.

1.2 Scope of the Bill

If passed, the Bill will prohibit (subject to exceptions):

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[1] ACCC, "Monitoring of the Australian Petroleum Industry" (2009) pg xxiii and (2010) pg xxvii.

[2] Australian Government, "Competitive and Sustainable Banking System" (12 December 2010) pg 3.

1. Private disclosure of price-related information to a competitor and not to any other person (*per se* prohibition) (section 44ZZW); and

2. Disclosure (whether public or private) of certain information for the purpose of substantially lessening competition (SLC prohibition) (Section 44ZZX).

Any breach would attract liability for the same civil penalties in the CCA as for anti-competitive collusion, including cartels. Criminal sanctions would not apply.

Three mechanisms are available under the Bill for businesses seeking protection for legitimate activities they engage in:

1. By relying on the exceptions contained in the Bill;

2. By seeking authorisation from the ACCC in relation to proposed conduct that would otherwise contravene either of the *per se* or SLC prohibitions; or

3. By notifying the ACCC of a proposed disclosure that would otherwise contravene the *per se* prohibition (i.e. not available for the SLC prohibition).

Section 44ZZY of the Bill includes six exemptions for the *per se* and SLC prohibitions and Section 44ZZZ outlines four more additional exceptions that only apply to the *per se* prohibition for disclosures.

The Government intends to define by regulation the specific goods and services to which the Bill applies (Division 1A). Regulations may make reference to the following matters, without limitation: the kind of supplier, the kind of industry or business in which goods or services are supplied; or the circumstances in which goods or services are supplied.

The absence of proposed regulations to accompany the Bill means that industry cannot fully assess the potential impact or likelihood of unintended consequences of this new regime. Only once the final package is released can the industry comprehensively comment on the full impact of the reform package.

While draft regulations have not yet been released, the Government has made it clear that initially the prohibitions will apply only to the banking sector[3]. The ABA submits that it is inappropriate for the banking industry to be singled out in the application of the legislation. It is unclear why, as a matter of public policy, this approach has been taken. As noted above, there is no evidence of ongoing concern with price signalling in the banking sector. It is also unclear why activities or statements made in the banking sector should be subject to stringent penalties when exactly the same activities and statements are considered entirely lawful in other industries, including those supplying goods and services to the general public.

The industry does not believe there is any credible evidence of price signalling occurring in the banking sector. The industry understands, however, that the

[3] The Hon Wayne Swan MP, "Second Reading Speech: *Competition and Consumer Amendment Bill (No.1) 2011"* (24 March 2011) pg 2.

Government's intention is to address a perceived gap in the CCA with respect to anti-competitive price signalling.

The industry supports in principle the Government's policy objective of prohibiting any deliberate attempt to substantially lessen competition (SLC), however this policy initiative needs to be implemented without causing unnecessary uncertainty or restraint in the conduct of legitimate business activity.

The industry appreciates that the Government has made a number of amendments to the Bill to address many of our concerns, as outlined in our submission on the Exposure Draft Bill on 20 January 2011. These include, for example, the introduction of additional exceptions, such as disclosures to agents or for the purpose of complying with continuous disclosure obligations (pursuant to Chapter 6CA of the *Corporations Act 2001*) and disclosures covered by ACCC notification and authorisation, as well as further clarification of the acquirer/supplier and joint venture (JV) exceptions. Nevertheless, the industry is highly concerned with the approach being taken in the legislation and fundamental problems remain, particularly with the *per se* prohibition and with whether the scope of the exceptions adequately excludes legitimate commercial conduct.

For example, it is unreasonable to expect creditors to go through the ACCC notification process before they can start putting together refinancing details for a company in financial difficulty. It is also highly likely that, faced with this additional complication, many company directors will prefer to put their companies into administration rather than run the personal risk of allowing the company to trade while insolvent. It is therefore reasonable to assume that this legislation, if passed in its current form, will result in an increase in company failures.

It is also far from clear that the joint venture exemption will provide the protection for syndicates and other forms of joint lending or that brokers or white labelling arrangements between banks will be protected. The joint venture exception also only applies to the production or supply of goods or services, thereby excluding joint ventures for the acquisition of goods or services.

Therefore, the industry remains concerned that legitimate activities conducted in the ordinary course of business fall foul of the *per se* prohibition, including disclosures of a pro-competitive, efficiency-enhancing or neutral nature. The Government itself has acknowledged that "[i]nformation disclosure plays a vital role in any economy and is to be encouraged"[4] and there may be legitimate scenarios of information disclosure such as keeping customers informed.

There is an opportunity to make some significant improvements to the Bill that will allow the Government to achieve its original policy commitments whilst

[4] Australian Government, "Explanatory Memorandum: *Competition and Consumer Amendment Bill (No.1) 2011"* pg 6.

reducing the unintended consequences and legal and practical implications of the Bill.

The industry respectfully submits that the *per se* prohibition should be removed. The *per se* prohibition goes beyond comparable legislation in overseas jurisdictions and it is likely to stifle benign commercial activities. *Per se* prohibitions are normally reserved for conduct that is so clearly or unmistakably anti-competitive that no evidence of an anti-competitive purpose or effect is necessary. The industry submits that clear and unmistakable evidence of anti-competitive conduct within the banking sector does not exist, rather there is clear recognition that legitimate activities conducted in the ordinary course of banking business may have pro-competitive, efficiency-enhancing or competitively neutral effects[5].

If a *per se* prohibition is to remain, it should be narrowly confined to the particular area of concern to the Government. It seems the only alleged market failure raised by the Government relates to particular goods and services in the retail banking sector (consumer credit). On this basis, the regulations should make it clear that the law does not apply to wholesale and institutional banking arrangements, where no concerns by Government have been raised, but where many of the difficulties with the legislation occur. Further, under Division 1A the legislation could be directed to the particular consumer credit goods and services which, seemingly, are the Government's principal concern. Enough legislation relevant to the banking sector exists to adequately define 'retail banking'. For example, 'consumer credit' is defined under the *National Consumer Credit Protection Act 2009* and Chapter 7 of the *Corporations Act 2001* defines a 'retail client'.

In addition, to moderate any unintended consequences of the prohibitions, the Government should introduce an exemption in the Bill for ordinary business activities or provide a business justification defence.

An additional exception to the *per se* prohibition which relates to the 'ordinary course of business' or 'legitimate commercial activity' is practical given that it is not possible to identify every instance of a private commercial disclosure that may be captured by the *per se* prohibition. Such an exception would therefore ameliorate concerns that the Bill may impact on legitimate commercial activities and would be in line with the Government's explicit acknowledgment in the Bill's Second Reading Speech that legitimate activities or ordinary business communications should not be caught by the legislation.

If the *per se* prohibition is not removed or, alternatively, improvements to the Bill to moderate the prohibition are not made, banks will be forced to seek authorisations from the ACCC or utilise the notification procedure. Both of these options pose practical problems and may lead to suboptimal outcomes, such as an increase in otherwise avoidable business insolvencies due to corporate

[5] Australian Government, "Explanatory Memorandum: *Competition and Consumer Amendment Bill (No.1) 2011"* pg 6.

workouts becoming impractical. Seeking authorisations or notifications from the ACCC are not preferable options compared to making the appropriate changes within the Bill itself.

Important issues therefore remain unresolved, and the ABA respectfully submits to the Committee that these issues warrant a public hearing during the inquiry process. Specific comments on these concerns are outlined below.

2. Specific comments

2.1 Overreach of prohibitions beyond UK, EU and US Competition laws

The proposed prohibitions were initially justified by the Government on the basis that "most comparable jurisdictions, including the UK, EU and US all have laws which are capable of dealing with anti-competitive price signalling and other information exchanges"[6].

However, the industry respectfully submits that the Government has significantly overstated the extent to which the laws in comparable jurisdictions provide a precedent for the unilateral prohibitions proposed in the Bill. Neither the US or EU has a free-standing unilateral conduct prohibition against information disclosure of the kind contemplated in the Bill and therefore the Bill reaches far beyond the laws of comparable jurisdictions.

Firstly, the EU and US prohibitions require some element of concerted conduct, reciprocity, coordination or mutuality between competitors in order for the disclosing conduct to be prohibited. Conversely, the Bill prohibits disclosures by focussing solely on the unilateral conduct of the person making the disclosure. No element of reciprocity, mutuality, concerted action or coordination on the part of competitors who receive the disclosure information is required to be established[7]. By extending well beyond the prohibitions under EU and US laws, the scope of the proposed prohibitions in the Bill is unprecedented, despite the Government's assertions that the proposed measures match those of comparable jurisdictions.

Secondly, the UK, US and EU jurisdictions do not legally impose a specific *per se* prohibition on the private disclosure of information between competitors. The law in each of these jurisdictions recognises that there may be pro-competitive reasons for such disclosure and that legitimate disclosures should not be prohibited. Consequently, the context of the market and circumstances in which disclosures occur are considered.

The approach of the Bill also contrasts to the operation of section 45 of the CCA with the terms "contract, arrangement or understanding" requiring bilateral conduct.

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[6] Australian Government, "Regulation Impact Statement: Anti-competitive Price Signaling and Information Exchange" pgs 1 & 6.

[7] Australian Government, "Explanatory Memorandum: *Competition and Consumer Amendment Bill (No.1) 2011)"* pg 10.

2.2 Authorisation by the ACCC

The Bill provides that conduct which would otherwise contravene the *per se* or SLC prohibitions may be authorised by the ACCC under section 88 of the CCA. Authorisations would be prospective, therefore disclosures must not be made prior to the ACCC making a determination on the matter.

In the case of the *per se* prohibition the ACCC will not grant authorisation unless it is satisfied that the disclosure would result, or is likely to result, in such a benefit to the public that the disclosure should be allowed to be made. In relation to conduct that would contravene the SLC prohibition, the ACCC will not grant authorisation unless it is satisfied that the disclosure would result, or is likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public, that would result if the corporation disclosed the information (section 90). Therefore, for an authorisation to be granted the applicant must show that the relevant conduct has a net public benefit.

The ACCC may revoke an authorisation at any time provided the authorised disclosure no longer satisfies the relevant test for granting authorisation. Notably, the Government has suggested that there would only be limited circumstances where price signalling may legitimately provide overall net public benefits[8], thereby suggesting that authorisations would only be granted in a small number of cases.

2.3 Notification procedure

The Bill proposes an extension of the existing notification regime operating under section 93 the CCA to conduct that would otherwise fall foul of the *per se* prohibition. It is therefore not available for disclosures that would be captured by the SLC prohibition.

Under current regulations, the notification regime provides immunity on net public benefit grounds, 14 days after a valid notice is lodged, unless the ACCC formally objects to the conduct within that period.

Applying the notification regime to the *per se* prohibition suggests that the Government has implicitly acknowledged that many legitimate commercial activities may not be adequately covered by the exceptions, even in their extended and modified form. Where there is uncertainty, or it is unlikely, that an activity may satisfy an exception, banks will be forced to seek authorisation or rely on the notification process.

However, the ABA respectfully submits that notification is an impractical solution to fix the overreach of prohibitions and limited efficacy of the exceptions, for the following reasons:

[8] Australian Government, "Competitive and Sustainable Banking System" (12 December 2010) pg 12.

1. Prospective immunity

Immunity from legal action is prospective; it will therefore not cover any conduct engaged in before a notification takes effect. Consequently, a bank will need to delay engaging in any legitimate disclosure until the proscribed 14 day period has elapsed.

In a number of legitimate circumstances, parties may need to exchange information quickly and efficiently. Requiring parties to delay initial information disclosures may result in certain bank practices becoming unviable. For example, disclosures to brokers or during corporate workouts where information exchanges are required to be timely and efficient, even though these practices may have a clear public benefit and no anti-competitive effect.

2. Uncertainty

Even once the proposed conduct is successfully notified and immunity is in place after the 14 day period, the ACCC may remove the standing notification. Significant uncertainty therefore remains which is inappropriate given the risks associated with the *per se* prohibition.

It is also possible for interested third parties to assert a lack of public benefits and potential anti-competitive effects. The ACCC would need to take these assertions into account, thereby delaying the process.

3. Resource costs and regulatory burdens

While the actual cost of lodging a notification may be relatively low, there are other considerable costs associated with the process. The notification process is resource intensive and will impose a significant regulatory burden on parties due to the need to prepare the notification, assess the risks, seek legal advice, and develop an evidentiary net public benefit case.

Continuous individual notifications from the industry may also impose resource strains on the ACCC.

4. Public nature of the notification process

The notification process is designed to be public in nature as the ACCC must make a determination of net public benefit. Notifications are disclosed on a public register. This seems to conflict with the intent of the *per se* prohibition, as the intended private disclosure is made publicly available, including to potential competitors.

It would not appear that the ACCC has an ability to keep commercially sensitive notifications confidential, as they need to determine public benefit. Nevertheless, the public nature of notifications may be detrimental in specific circumstances such as corporate work-outs. This is explained further below.

In summary, the industry notes the ability of corporations to seek authorisation or notification from the ACCC for conduct that has net public benefits but would breach the *per se* prohibition. However, as explained above, these procedures

have inherent problems. While we do not suggest that the authorisation and notification exceptions should be removed from the Bill, the industry respectfully submits that there are more appropriate solutions to deal with the legislation capturing conduct which has public benefits or is pro-competitive, efficiency-enhancing or benign, namely, the removal of the *per se* prohibition and/or a general 'ordinary course of business' exception.

2.4 Industry concerns with Public Disclosure Prohibition

The Bill introduces a general prohibition against a corporation disclosing information (publicly or privately) for the purpose of SLC, if the information relates to:

- a price, discount, rebate or credit in relation to specified goods/services that are, or are likely to be, supplied or acquired by the corporation;
- capacity, or likely capacity, of the corporation to supply or acquire specified goods/services; or
- any aspect of the commercial strategy of the corporation in relation to specified goods/services.

Therefore, information disclosures subject to the general prohibition will only be captured where a bank has the purpose of SLC. Nevertheless, the scope of the information caught by the prohibition is extremely broad, particularly as there is no requirement for the information to be commercially sensitive.

The section provides that purpose may be established by direct evidence or by inference from the conduct or any other relevant circumstances. This interpretation provision is reflected in the Government's Competitive Package, which stated in relation to purpose that, 'the proposed law will be clear that a court can make up its own mind as to what it thinks the real purpose was, based on the surrounding circumstances – so there is no need for a 'smoking gun''. Notably, however, the EM states that "[i]f a substantive legitimate purpose can be inferred, inference of an anti-competitive purpose is unlikely to be made".[9]

Individual banks' decisions to provide transparent information about their cost pressures, explain their pricing and reduce information asymmetry are essential elements of an informed, efficient and competitive market.

Banks frequently provide market update information to shareholders, investors and analysts including views on interest rate margins, costs, commercial strategies and other issues that may affect future profitability or be relevant to a decision to buy, hold or sell a stock. Unless such disclosures are 'authorised' by Australian laws in section 44ZZY(1) or fall under the Continuous Disclosure exception[10] in section 44ZZY(6) the risk remains that disclosures for legitimate

[9] Australian Government, "Explanatory Memorandum: *Competition and Consumer Amendment Bill (No.1) 2011)"* pg 19.

[10] For the purpose of complying with Chapter 6CA of the *Corporations Act 2001.*

purposes, such as to comply with foreign laws and regulations or for public policy reasons (e.g. Australian Prudential Standard 330) may be captured by the SLC prohibition.

The exception for disclosures 'authorised' by law is limited to disclosures occurring within 10 years after the Bill receives royal assent and it may be argued that this exception does not extend to disclosures for the purpose of 'complying' with laws. Furthermore, it will be unclear whether any particular statement is necessarily 'authorised by law', particularly where the materiality of the statement is contestable. Accordingly, there should be a clear exception where disclosure is made to comply with any law (whether Australian or foreign), to comply with rules or requirements of competent supervisory bodies or any stock exchange upon which the securities of an entity are listed.

In relation to media responses and commentary, while it is clear that a journalist or politician would not be a competitor, and therefore not captured by the *per se* prohibition, this does not address the issues with the SLC prohibition, as it is unlikely the information disclosed will be covered by the Continuous Disclosure exception. New information provided directly to journalists, politicians or bank customers in response to queries is unlikely to be material price sensitive information; otherwise it would first need to be publicly disclosed on the ASX platform.

The industry submits that significant care will therefore need to be taken by banks when making any public statements, particularly in relation to pricing or strategy, to avoid the risk of an SLC purpose being ascribed to what is intended to be a legitimate disclosure in the interests of market transparency. The impact of the prohibition is therefore likely to be a reduction of the flow of information to the market, resulting in an asymmetry of information between the bank, its investors and customers.

In summary, the industry remains concerned about the lack of clarity about how the public disclosure prohibition will apply to legitimate business information disclosures, such as the provision of market update information and media responses and commentary. The Government should therefore require the ACCC to give explicitly clear guidance on what types of public statements it believes will lead to investigation, so that industry leaders have some sense of what they are permitted to say publicly.

Further, the Bill should recognise that a 'competitor' can also be a customer or potential customer. For example, a potential customer of bank A can be an employee of bank B.

2.5 Industry Concerns with the Private or *Per Se* Disclosure Prohibition

Under the *per se* prohibition, a corporation is prohibited from disclosing pricing information to its competitors (including discounts, allowances, rebates or credits) in relation to prescribed goods and services that the corporation supplies or acquires. The disclosure is therefore only prohibited where the corporation and the recipient are competitors in the market for goods or services about which the

information disclosure relates. A bank may still disclose pricing information about goods and services to an entity that is not a competitor in that market.

A private disclosure would occur even where information is disclosed to competitors through third-party intermediaries as long as the disclosure to the intermediary was for the purpose of the intermediary disclosing it to a competitor (section 44ZZU) and not to any other person (section 44ZZV). If the information is disclosed to one or more non-competitors at the same time it is disclosed to competitors, it will not be captured, unless the disclosure to a non-competitor was deliberately for the purpose of avoiding the prohibition and consequently a contravention.

The prohibition operates outright, regardless of the purpose of disclosure or its effect on competition, and thus does not consider whether the disclosure is in pursuit of a legitimate business activity. A *per se* standard is normally reserved for conduct that is so clearly or unmistakably anti-competitive that no evidence of an anti-competitive purpose or effect is necessary. However, as noted above, the Government has recognised that information disclosures may be perfectly legitimate and indeed pro-competitive or competitively benign. The industry therefore submits that it is inappropriate for the Bill to impose a *per se* prohibition, subject to only limited exceptions, without any consideration of 'purpose'. We recommend the inclusion of a new exception covering ordinary business activities which includes a purpose test[11].

Furthermore, the fact that information is already, or may otherwise become, available to competitors or other persons will be disregarded in determining whether a private disclosure was made (Section 44ZZV(3)). Consequently, pricing information already in the public domain is captured. The prohibition also does not distinguish between historical and current data, or raw from aggregated data. Therefore, the industry submits that the scope of the prohibition is inappropriately broad.

A large number of activities and relationships in the banking sector inherently require cooperation between banks, involving relevant information disclosures that could be considered 'private'. The assumption that all information disclosures that would be considered 'private' under the Bill and that relate to prices are *per se* anti-competitive is manifestly incorrect. Indeed, as the examples below highlight, many such disclosures are pro-competitive or competitively benign.

The industry does not agree with the Government's perception that the introduction, or clarification, of exceptions in the Bill adequately exempts legitimate business activities from the scope of the Bill.

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[11] The industry proposes the introduction of an additional exception into section 44ZZZ:

Disclosure in the ordinary course of business
(5) Section 44ZZW does not apply to the disclosure of information by a corporation if information is disclosed:
(a) in the ordinary course of business; and
(b) not for the purpose of substantially lessening competition in a market.

The inclusion of a *per se* unilateral prohibition is also in direct contrast to the Government's recognition of the importance of balancing "the prohibition of anti-competitive, and continuation of legitimate information exchanges"[12].

The ABA notes the following examples where the *per se* prohibition would create legal uncertainty and practical problems for banks.

2.5.1 Corporate workouts

Two or more lenders to a financially distressed business seeking to arrange a workout for the business through the adjustment of loan arrangements, rather than relying on enforcement of their securities, will need to discuss pricing arrangements in order to implement a workout plan, such as interest and fee waivers and deferrals. A successful corporate workout will enable the company to continue trading, which benefits shareholders, creditors and employees.

Without the ability to discuss prices, workouts by lenders for financially distressed businesses would not be possible. This would result in more loans being recalled and an increase in otherwise avoidable business insolvencies.

It has been suggested the ACCC notification regime will address concerns around corporate workouts[13].

However, a 14 day notification regime is impractical in a workout situation as:

- Directors of the distressed company have an ongoing duty, and personal liability, to avoid insolvent trading under section 588G *Corporations Act*[14]*.* Faced with the additional complications of a notification procedure, it is likely that directors will prefer to put their companies into administration rather than run the personal risk of allowing the company to trade while insolvent.

- Notification is not a feasible solution for a situation where decisions need to be made extremely quickly. Directors generally require an overnight response from lenders on the likelihood of a successful workout taking place. Given a 14 day delay, directors will therefore presumably opt for voluntary administration.

- It is unreasonable to expect creditors to go through the ACCC notification process before they can start putting together refinancing details for a company in financial difficulty.

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[12] Australian Government, "Explanatory Memorandum: *Competition and Consumer Amendment Bill (No.1) 2011)"* pg 36.

[13] The Hon Wayne Swan MP, "Second Reading Speech: *Competition and Consumer Amendment Bill (No.1) 2011"* (24 March 2011).

[14] The duty requires directors to determine whether the distressed company is able to pay all debts as and when they become due and payable. Understanding the lenders' intentions is critical in making that assessment.

- The mere existence of notifications on a public register may be an impediment to workouts, in relation to suppliers withholding goods and impacting the decisions of potential purchasers.

It has also been suggested corporate workouts could be covered by the Joint Venture (JV) exception. However, it is unlikely that the JV exception would adequately cover corporate workouts nor would it be consistent with previous characterisations.

Characterising a workout as a JV would impose additional complexities in relation to:

- tax implications (a workout may therefore need to characterised as a JV for the purposes of the CCA but not treated as a JV under taxation law); and

- fiduciary obligations that arise under general law (there is no formal arrangement in a workout to act in a coalition towards a shared objective (unlike a syndicate of lenders). Lenders in corporate workouts agree to restrict certain rights; however, they act in their own interests, not the 'JVs'. This is in direct conflict with general law fiduciary duties).

It is not easy to simply contract out of the fiduciary obligations that general law otherwise applies and it would be difficult to simply carve out those obligations from applying for the purposes of this amendment.

Finally, a lack of clarity about why the JV exemption is considered by Government to be appropriate and how it actually applies to these arrangements is creating uncertainty within the industry. Whilst the JV definition in the CCA is relatively broad, it has not been judicially considered.

A high level of uncertainty is therefore attached to this exception. In order to receive legal certainty banks would be likely to seek ACCC approval either through authorisation or notification, which as noted, may be problematic in certain circumstances. An effective exception for workouts is therefore required.

2.5.2 Syndicated lending arrangements

Syndicated lending practices are common and often necessary to meet prudential requirements and avoid overexposure to a particular borrower. Communication between a syndicate of lenders will inevitably involve pricing disclosures as part of the negotiations for the syndicated facility. Without such pricing disclosures, syndicated lending would be unworkable, thereby dramatically decreasing the availability of funds for economic development in Australia.

In contrast to corporate workouts, the JV exception may adequately cover syndicated lending in most cases[15]. However, it would not be consistent with previous characterisation in legal documents. If syndicates were to rely on this

[15] The JV exception is unlikely to cover syndicated lending which involves multiple levels of debt seniority.

exemption, legal documentation would need to be reviewed and it would need to be clear among all syndicate members how the concept of a JV applies to the lending arrangement. As noted above, defining the arrangement as a JV may have other implications, for example, under taxation and corporations law. For these reasons there may be reluctance to suggest a syndicated lending arrangement is a JV.

If syndicate members resist the characterisation of the arrangement as a JV, this would cause general uncertainty and potential delay to the finalisation of financing. Consequential changes to agreements, delays and in the worst case, restrictions on syndicated lending, are costs that could be passed on to borrowers.

The Government has suggested that a syndicated loan 'appears to fit' the definition of a JV (proposed or actual) under section 44ZZZ(3) and is therefore excluded. As noted above, this does not provide a sufficient degree of certainty. Banks will therefore be forced to seek approval from the ACCC or utilise the notification process.

Given this uncertainty, legitimate arrangements, such as syndicated lending should be more effectively excluded from the regime. The industry submits it would be preferable for the JV exemption to explicitly cover syndicated lending, and the incidental roles involved in these arrangements.

Alternatively, a new exemption could be included to cover disclosures made between two or more providers for the purposes of providing a service, such as finance, to a common client. This exception could cover club lending facilities and white labelling arrangements.

2.5.3 Intermediaries

Disclosures to intermediaries, such as mortgage brokers, inevitably involve the provision of price related information.

The Bill clarifies that if a bank makes a disclosure to someone who is acting as an agent for that bank, regardless of whether they are also a competitor, then the disclosure will not be captured by either the *per se* or SLC prohibition (Section 44ZZU).

However, brokers, mortgage managers and financial planners are not generally regarded as agents of lenders and therefore the agency exemption would not apply. In providing broking services, it is generally acknowledged in case law that brokers act on behalf of clients and not of the lender. Bank documentation reflects this premise.

The role of brokers is central to competition in the banking sector and consumers switching banks. In order to secure the best deals for clients, brokers need to be alerted to pricing issues in a timely manner. The industry therefore seeks the introduction of a clearer exemption. Alternatively the industry seeks endorsement of the goods and services exemption applying to brokers, mortgage managers and financial planners. It is arguable that a pricing disclosure may be related to

the provision of goods and services between the bank and broker, manager or planner, for example the bank provides access to bank systems and information to support the arrangement of a loan by a broker.

Either way a relationship as fundamental to the provision of financial services to consumers as brokers, mortgage managers and financial planners should be the subject of a more explicit exemption under the legislation.

2.5.4 Legitimate distribution and other vertical supply arrangements

Legitimate distribution arrangements between banks are common in the financial services industry. In some contexts the institutions compete, while in others they act as customer and supplier to each other. Current and historic pricing information is likely to be disclosed in the context of these arrangements. Specific examples include:

Outsourcing

Banks may enter into arrangements with competitors to provide 'back office' functions or infrastructure to allow them to provide products or services to their customers. These arrangements may involve disclosures of pricing information. For example, disclosures of changes in rates are necessary to allow the other bank to perform outsourcing arrangements.

Where these arrangements are discreet, and provided to allow a competitor to provide their own branded product, it is less likely to be a joint venture. The goods and services exemption may be sufficient to the extent these arrangements can be structured and documented as a supply of services to support the counter-party's delivery of the end product. However, we consider that these are legitimate business arrangements which should clearly be outside of the scope of the prohibitions. We therefore seek the introduction of a clearer exemption.

White Label and Wrap Product Arrangements

Some banks serve as credit card and/or home loan issuers and supply a "white label" product to other credit providers, which then supply it as a branded product to customers. It is inherent in this arrangement that current and historical pricing would be disclosed.

Under a white-labelling arrangement there is no re-sale, nor is a joint venture or agency relationship created. It is also not clear whether this arrangement would be covered by the acquirer/supplier exception.

The joint venture exemption may be sufficient, however there should be a clearer exemption for legitimate business activities such as white label arrangements, as these arrangements are not commonly known between parties as joint ventures.

The response from the Government that these arrangements are "likely" to be covered by an exemption is hardly a satisfactory response to the risk of a *per se* offence.

It would seem reasonable that the Bill specifically addresses these types of arrangements, which are legitimate business activities.

3. Conclusion

The proposed law would significantly increase the ACCC's power to investigate suspected price signalling. The mere threat of investigation may result in banks taking a highly cautionary approach to information disclosures, to the detriment of the Australian public.

Fundamental concerns remain with the legislation, particularly the *per se* prohibition, which ultimately captures legitimate business activities that are pro-competitive or competitively benign, despite the inclusion of additional exceptions. These difficulties could be largely overcome without undermining the Government's stated policy intent, particularly in relation to consumer credit.

We respectfully submit that the Committee should recommend changes to the primary Bill that will remove the likelihood of unintended consequences and reduce legal and practical problems for banks, which could result in suboptimal outcomes for customers, investors and the market.

Firstly, it is imperative to either drop the *per se* prohibition and/or include an exemption or defence in the Bill for ordinary business activities.

Failing that, the regulations could be used to limit the scope of the Bill to, for example, retail banking arrangements, or to explicitly exclude activities such as workouts, syndicated lending, outsourcing and white label arrangements. Concerns by Government have not been raised in relation to wholesale and institutional banking arrangements; however these types of arrangements are where many of the difficulties with the legislation occur. While this regulation approach would not resolve all of the issues with the legislation, it would at least carve out many of the legitimate business activities that have been caught by the *per se* prohibition.

In conclusion, the ABA respectfully requests that the Committee give careful consideration to the Bill in light of the significant impacts that the Bill will have on the banking and to changes that could reasonably be made to significantly reduce the Bill's unintended consequences.

Yours sincerely

Steven Münchenberg