RULE OF LAW
INSTITUTE OF AUSTRALIA

3 June 2011

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

Dear Sir

Submission to Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010 and the Competition and Consumer Amendment Bill (No. 1) 2011

The Rule of Law Institute of Australia is grateful for the opportunity to provide this submission to the Committee on the proposed amendments to the Competition and Consumer Act 2010 which are intended to address "price signalling". RoLIA regards it as central to the principle of "the rule of law" that Bills such as those the focus of this Inquiry are indeed the subject of both parliamentary and public scrutiny and comment.

The opportunity for individuals, companies and associations, such as RoLIA, to make submissions to a parliamentary inquiry and for those submissions to be carefully considered is fundamental to the making of good law and good laws are fundamental to the "rule of law" – as good laws encourage acceptance and compliance with the law.

The Rule of Law Institute of Australia

RoLIA is an independent not-for-profit body formed to uphold the rule of law in Australia. The Institute aims to promote discussion on the importance of the principles which underpin the rule of law.

Section 44ZZT

RoLIA has a fundamental concern with the Competition and Consumer Amendment Bill (No.1) 2011 (the "Government Bill"). Our concern is with section 44ZZT of that Bill. This section provides that the relevant Division introducing the proposed provisions dealing with "price signalling":

> "*applies to goods and services of the classes (however described) that are prescribed by the regulations for the purpose of this section*".

Background

In the Explanatory Memorandum to the Bill, under the heading “context of amendments”, it is said that the amendments contained in the Bill form part of the Government's Competitive and Sustainable Banking System package. Later in the Bill, under the heading “sector specific application and regulation making power”, it is said that "*the Government has decided that in the first instance, a regulation should be made to proscribe banks to the prohibitions. There is capacity for regulations to be made to apply the prohibitions to other sectors after further review and detailed consideration*".

By virtue of these statements, and the fact that the media has suggested that the Australian Competition and Consumer Commission is itself pressing for the introduction of these provisions concerning "price signalling" because of the difficulties it has experienced in prosecuting, in reliance on the existing provisions of the Act, petrol station owners - there is a perception in the market that the current Bill will only affect the banking and petrol industries. Not surprisingly therefore the six of the seven submissions made to this inquiry, as published on your website, come from participants in or persons interested in these two industries.

Our Concern

By dint of the Government indicating that the proposed prohibitions dealing with "price signalling" will only initially deal with the banking industry and the petrol industry being the only other industry identified as being likely to be added to the list, this Inquiry and Parliament generally have only effectively tapped the knowledge and concerns of these two industries. Yet the Government has facilitated through its Bill, and in particular section 44ZZT, the application of those provisions to other industries through mere regulations. Regulations which, by their nature, will not be the subject of proper parliamentary scrutiny and comment, and are also not likely to be the subject of proper public scrutiny and comment.

Section 44ZZT allows the executive arm of government to decide which industries or sectors of the economy should be brought under the provisions agreed by Parliament. This approach is contrary to a key rule of law principle which is that Parliament should itself make the laws and not abrogate that responsibility to the executive arm of government.

The Institute's concern with section 44ZZT is not merely a theoretical concern of principle. This can be highlighted by the following example.

Example

Section 44ZZX prohibits a Corporation from disclosing information if:

> *(a) the information relates to any one or more of the following (whether or not it also relates to other matters):*
>
> > *(i) a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, required or likely to be acquired, by the corporation;*

(ii) ..

(iii) ...; and

(b) the corporation makes the disclosure for the purpose of substantially lessening competition in a market.

An issue, as the Institute sees it, under this proposed provision is whether a corporation, which has developed at its own expense and with its own initiative (and patented) a new means of manufacture (which substantially reduces its manufacturing costs), is prohibited from making the most of its consequent advantage over its competitors by being prohibited from disclosing through marketing a price for that product which is well below the current market price of those products (albeit at a price well above its cost price) and at a price below its competitors' cost price.

Certainly it would be the intention of this corporation to secure substantially greater market share from its competitors than it previously had and this corporation would be well aware that in slashing its prices (and by disclosing its slashed prices) it will damage these competitors and likely cause them to leave the market – substantially lessening competition.

The Institute suspects, however, that the Bill is not intended to capture such conduct and is certainly not intended to impose substantial penalties in respect of such conduct. The aim of the Bill we suspect is to foster such competitive conduct acknowledging that:

> "*competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always tried to "injure" each other in this way. This competition ... and these injuries are an inevitable consequence of the competition [the Act] is designed to foster*": High Court in *Queensland Wire Industries Pty Limited v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

Summary

The Institute's aim in providing the above example is not to focus the Inquiry on simply solving the problem presented by this example, by possible amendment to the Bill or otherwise. Rather the purpose of the Institute in providing this example is to highlight the fact that the proposed provisions are likely to have unintended consequences in industries outside of the banking and petrol industry, if provisions ever apply to those industries. Yet if the provisions are extended to those industries by mere regulation, those industries will likely never be given the proper opportunity to engage with Parliament in relation to their legitimate interests and concerns such that Parliament properly informed of those legitimate interests and concerns can effectively make "good law".

The Institute believes that it is important that any substantive changes to the law, such as extending the prohibitions proposed in the Government's Bill to other industries, should be the subject to the full weight of parliamentary scrutiny which legislative procedures encompass.

The Institute therefore requests that this Inquiry recommend that if it is in due course considered that the proposed prohibitions should be extended to industries beyond the banking industry then

such extension should be done by Parliament itself rather than by the executive through regulations and done after proper notice, consultation and consideration with those relevant industries.

Yours faithfully

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