BRENT FISSE

LAWYERS

70 Paddington Street
Paddington NSW 2021

www.brentfisse.com

30 November 2010

By email

Senator D Bushby
Chair
Senate Economics References Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

SENATE ECONOMICS REFERENCES COMMITTEE – COMPETITION WITHIN THE AUSTRALIAN BANKING SECTOR – PRICE SIGNALLING

Dear Senator Bushby

I thank the Committee for the opportunity to make a submission.

This submission relates to term of reference (j) (any other policies, practices and strategies that may enhance competition in banking, including legislative change). It deals with the question of price signalling. It shows that the issues involved in addressing the issue of price signalling are complex and cannot sensibly be addressed by hasty amendments to the Trade Practices Act 1974 (Cth).

The submission identifies the main possible legislative options and sets out many of the basic questions that need to be answered about each of them.

These basic questions have yet to be answered. Ideally, the Australian Treasury would have provided a discussion paper dealing with the legislative options and the issues they raise but, as yet, has failed to do so.

There are no simple solutions. Distinguishing between oligopolistic interdependence and unjustified coordination of market activity by competitors is probably the toughest challenge in competition law. Satisfactory approaches have yet to emerge anywhere in the world. The US has battled on with general prohibitions against 'unreasonable restraint of trade' and 'unfair competition', the application of which is often contentious and the subject of much litigation. The EU and UK prohibit anti-competitive 'concerted practices', an opaque concept that needs to be fleshed out on a case by case basis. The OECD has

restated the issues without coming up with convincing practical answers. Many distinguished economists have grappled with the subject, to little avail in terms of finding workable legal solutions.

'Price signalling' takes many forms and many forms of it are pro-competitive. Communications about price by competitors to customers are a quintessential feature of an informed market. However, it is possible for competitors in concentrated markets to communicate their prices each other without entering into an agreement and in ways designed to co-ordinate their conduct and reduce or avoid price competition. Detecting such cases and establishing liability is a huge challenge. Competitors that co-ordinate their conduct strategically are likely to take care to cover themselves by making sure there is a solid commercial justification for any communications about price. This kind of practice is often called a 'facilitating practice'. It is a martial art in modern commerce.

Attempts to define and prohibit particular types of communications about price are unlikely to work. For example, a prohibition against public notification by a competitor of a future price increase could be side-stepped by notifying customers privately and leaving it to the media to report the information. A prohibition against private communications between competitors about future prices could be run around in the same way or by making a suitable public notification.

A prohibition wide enough to catch the various types of communications that could be used strategically by competitors to coordinate pricing needs to be qualified by a competition test. One suggestion is that facilitating practices be prohibited if they have the purpose or effect or likely effect of substantially lessening competition in a market. While a competition test may make sense in theory, it raises major practical concerns. One is the complexity and difficulty or proving that a pricing signal (or a number of them) was likely to substantially lessen competition in a market. Take the case of a bank that announces a future mortgage rate increase. In such a case there would not be a substantial lessening of competition if it was likely that the information about the future price would have become known to the market in other ways (eg through a private communication to the bank's customers and the reporting of that communication by the news media). Another concern is uncertainty: the substantial lessening of competition test is notoriously vague.

Finally, amending the Trade Practices Act in this area could be futile. Whatever amendments may be made, corporations are likely to react strategically in ways that pursue their rational self-interest while avoiding liability. For every legislative action there are corporate counteractions. Many types of facilitating practices are conceivable. The fundamental underlying problem of oligopolistic interdependence will remain. Worse, if corporations are backed into a corner they are likely to re-assess the strategies available to them. It would be a bitter irony if an inept clampdown on price signalling were to facilitate the increased exploitation of other strategic opportunities (eg price-matching or most favoured customer clauses; artful use on non-price terms and conditions; etc).

Yours sincerely

Brent Fisse

1. LEGISLATIVE OPTIONS AND BASIC QUESTIONS

1.1 Legislative options

Possible legislative options include:

1. preserve the status quo (see section 1.2)

2. adopt or modify the EU concept of a concerted practice (see section 1.3)

3. prohibit 'facilitating practices' that have the purpose, effect or likely effect of substantially lessening competition in a market (see section 1.4)

4. prohibit one or more specific facilitating practices (eg price signalling; discussing pricing with a competitor; using a most-favoured customer (**MFC**) or price-matching clause; etc) (see section 1.5)

5. extend the ACCC investigative powers to enable investigation where use of a facilitating practice is suspected (as speculated in M Drummond, 'Bank, petrol chiefs face ACCC grilling', AFR 9 November 2010, p 1) (see section 1.6)

6. follow s 5 of the Federal Trade Commission Act (US) and prohibit 'unfair competition' (see section 1.7).

1.2 Preserve the status quo?

- In what particular respects, if any, is the current requirement of a contract, arrangement or understanding prone to underreach? There is no adequate official explanation of what exactly the perceived problems are. A discussion paper should have been provided by Treasury to clarify this question but has yet to emerge.

- Is the difficulty that arose in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 attributable to the theory of the case upon which the ACCC proceeded, and/or the evidence put?

  ⇒ Alternative possible theory of case: there was an understanding between competitors containing a provision that one would receive information about pricing from the other and that provision was likely to control a price to be offered by one competitor. Consistent with the evidence in *Apco*? *Leahy*?

- Can the difficulty that is believed to arise from the requirement of 'commitment' be overcome by reliance on liability for *attempting* to arrive at an understanding?

  ⇒ proximity rule

  ⇒ legal impossibility

- ⇒ mental element.

- Is the reasoning in *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 sound? See the criticisms in eg W Pengilley, *Price Fixing and Exclusionary Provisions*, Prospect Media, Sydney, 2001, pp. 20-22.

- If 'price signalling', what exactly are the situations where it is believed that liability would be justified? And why should any such concern be limited to price signalling? Price signalling is only one of a number of facilitating practices that may be used anti-competitively (see eg PE Areeda and H Hovenkamp, *Antitrust Law:An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1435).

- If the present law does suffer from underreach, is that problem more or less significant than the problems likely to result from the particular amendments proposed (eg possible overreach, uncertainty, intrusion in market conduct, creation of further information asymmetry, compliance costs)?

1.3 Adopt or modify the EU concept of a concerted practice?

- What are the essential elements of the EU concept of a concerted practice? How do those elements differ from those of an arrangement or understanding?

- Would adoption of the EU concept of a concerted practice avoid the underreach from which the current law is alleged to suffer? What results would be likely if this approach were to be applied on the facts of *Apco*, *Leahy*, *Email*, and *Ethyl Corp*?

- Is the EU concept of a concerted practice sufficiently well-defined? Have any problems of interpretation and application arisen? Is the concept prone to overreach?

- How exactly would the concept of a concerted practice be adopted or modified under the Trade Practices Act

  ⇒ The concept of a concerted practice is different from that of a contract, arrangement or understanding and may not involve any 'provision'.

  ⇒ Article 101(3) of the EU Treaty has no counterpart under the Trade Practices Act. Is it proposed that efficiencies will be relevant to deny liability? Is it proposed that defendants will carry a persuasive as well as evidential burden of proof?

- Guidelines issued by the EC are binding whereas those issued by the ACCC are not. To what extent is the imprecise definition of the concept of a concerted practice explicable on the basis that concept can be clarified more definitively via EC guidelines?

- Is it possible to tighten up the definition of a concerted practice? See eg O Black, *Conceptual Foundations of Antitrust,* Cambridge University Press, 2005, ch 5. Is

Black's joint action model workable? What would be the effect of any such tightening up in situations where the current law is alleged to suffer from underreach?

- Exceptions? Will the current range of exceptions that apply to the prohibitions relating to cartel provisions and exclusionary provisions apply? If so, is that satisfactory given the many deficiencies of those exceptions (see C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, Cambridge University Press, 2011, ch 8)?

- Vertical supply agreements between competitors? There is no adequate carve out under the Trade Practices Act at present; a specific exemption is needed. Vertical relationships between competitors fall within the concept of a concerted practice (see J Faull and A Nikpay, *The EC Law of Competition*, Oxford University Press, Oxford, New York, 2007, pp. 214-5).

- Statements made in compliance with continuous disclosure obligations? If there is to be an exemption for continuous disclosure, will that provide a major loophole? Consider the gaping loophole proposed under cl 45A(11)(d) of the Competition and Consumer (Price Signalling) Amendment Bill 2010.

- Is authorisation a satisfactory solution for dealing with the overreach of a prohibition cast in terms of a concerted practice? No authorisation procedure applies to Article 101 (the ground is covered by Article 101(3)).

1.4 Prohibit facilitating practices that have the purpose, effect or likely effect of substantially lessening competition in a market?

- How are 'facilitating practices' to be defined? There are many different kinds of facilitating practices: see eg PE Areeda and H Hovenkamp, *Antitrust Law:An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1435; D Gilo and A Porat, 'The Hidden Roles of Boilerplate and Standard-From Contracts: Strategic Imposition of Transactions Costs, Segmentation of Consumers, and Anticompetitive Effects', Michigan Law Review, vol. 104, 2006, p. 983. Terms like 'price signalling' have myriad possible meanings that include pro-competitive communications as well as anti-competitive communications. The attempt to define 'price signalling' in the Competition and Consumer (Price Signalling) Amendment Bill 2010 is not limited to price signalling and is very loosely defined. It is also difficult to understand why a prohibition against anti-competitive facilitating practices should be limited to price-related communications: there is no apparent economic rationale for any such limitation.

- Would adoption of the proposal avoid the underreach from which the current law is alleged to suffer? What results would be likely if this approach were to be applied on the facts of *Apco*, *Leahy*, *Email*, *Ethyl Corp*, and *Wood Pulp*?

- A 'facilitating practice' requires some form of communication to competitors. What types of communication will be required? Will the public display of current prices offered to customers be a communication under the definition proposed? Should it be? The attempt to define 'price signalling' in the Competition and

Consumer (Price Signalling) Amendment Bill 2010 defines ‘communication’ in extremely broad terms (see cl 45A(4)).

- Various commentators have suggested that a prohibition against facilitating practice be limited to private communications between competitors. What is the definition of ‘private’ and ‘communication’? What is the proscribed content of such private communications? What is to stop competitors achieving the same effect as a public announcement by means of communications with all their customers where the communication inevitable will soon be published in the trade press (see eg *Wood Pulp*)?

- Should the definition of ‘facilitating practices’ include price-matching guarantees and MFC clauses? If so, why? Contracts, arrangements or understandings containing price matching or MFC clauses are subject to the prohibitions against provisions that have the purpose, effect or likely effect of substantially lessening competition in a market (s 45(2)).

- Overreach? A key feature of Article 101 of the EU Treaty is that liability for a concerted practice is excluded where is a legitimate business justification for communication. There is no such exclusion from liability under Part IV of the Trade Practices Act. A substantial lessening of competition test, as adopted under cl 45A(2)(c) of the Competition and Consumer (Price Signalling) Amendment Bill 2010 does not allow account to be taken of efficiencies, whereas a defence of business justification does. The exemptions under the Competition and Consumer (Price Signalling) Amendment Bill 2010 (cl 45A(11)) are much more limited than a defence of business justification. Authorisation is impractical and cannot sensibly be advocated as a sufficient escape route. This important issue is not addressed adequately in RL Smith, A Duke and D Round, ‘Signalling, Collusion and s 45 of the Trade Practices Act’, Competition & Consumer Law Journal, vol. 17, 2009, p. 22, or in J Walker’s commentary.

- What will be impact of the approach proposed on market research companies (eg Nielsen; Informed Sources; GFK)? Will there be overreach in this context? Consider the sweeping propositions in J Walker’s commentary at paras 33-34. Where information hubs involve a series of contracts with the corporations that supply information, the contracts will be subject to the substantial lessening of competition test under s 45(2) and the aggregate effect of the contracts on competition will be taken into account. Why urge the need for a prohibition against facilitating practices in this context?

- Why a substantial lessening of competition test rather than a per se test? Contrast the EU concept of a concerted practice. Is a substantial lessening of competition test workable in this context? Consider for example the application of a substantial lessening of competition counterfactual analysis to ‘price signalling’ in the Australian retail banking market. Consider also the approach commended in RL Smith, A Duke and D Round, ‘Signalling, Collusion and s 45 of the Trade Practices Act’ Competition & Consumer Law Journal, vol. 17, 2009, p. 22. How realistic is it to expect corporations to run the gauntlet of the kind of economic analysis they advocate? Is a requirement of a ‘facilitating practice’ a sufficient threshold requirement to justify triggering the work and cost entailed in applying the substantial lessening of competition test in this context? Contrast the limiting

and cost-reduction effect of a requirement of a contract, arrangement or understanding. Consider also the implications of the US case law discussed in GA Hay, 'Facilitating Practices', ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189 at pp 1208-16. The ACCC rarely brings proceedings alleging that a provision in a contract, arrangement or understanding is likely to substantially lessen competition. How realistic is it to expect the Commission to take on complex and easily losable cases like eg *Ethyl Corp*? This is a fundamental weakness of substantial lessening of competition test under cl 45A(2)(c) of the Competition and Consumer (Price Signalling) Amendment Bill 2010.

- If a substantial lessening of competition test is adopted, should the test be: (a) purpose, effect or likely effect; (b) purpose; or (c) effect or likely effect?

- Is the aggregate effect of a number of similar facilitating practices relevant? What is the test of aggregation? The aggregation test under the Competition and Consumer (Price Signalling) Amendment Bill 2010 (cl 45A(9)) is remarkably loose and sweeping and inconsistent with the approach taken to aggregation in eg s 45(4) of the Trade Practices Act.

- Is this option compatible with the s 46 prohibition against misuse of market power? Is it a back-door way of introducing an effects test? Consider the sweeping proposition in J Walker's commentary at para 34 that 'any conduct which substantially lessens competition in a market should be unlawful unless authorised on public benefit grounds'. Consider also the sweeping scope of the prohibition under s 45A(1) of the Competition and Consumer (Price Signalling) Amendment Bill 2010. Should market power be a requisite additional element of liability?

- A facilitating practice is akin to an attempt. How will the Trade Practices Act prohibitions against attempt, inducement and attempted inducement operate in this context? For example, liability for attempting to engage in a facilitating practice would be a form of double inchoate liability. Is double inchoate liability justified?

- Exceptions? Will the current range of exceptions that apply to the prohibitions relating to cartel provisions and exclusionary provisions apply? If so, is that satisfactory given the many deficiencies of those exceptions (see C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, Cambridge University Press, 2011, ch 8)? The drafting of the exclusions under cl 45A(11) of the Competition and Consumer (Price Signalling) Amendment Bill 2010 is full of holes, including the loose treatment of joint ventures in cl 45A(11)(a).

- Vertical supply agreements between competitors? There is no adequate carve out under the Trade Practices Act at present; a special exemption is needed.

- Will withdrawal be a defence? If not, why not? Consider eg Criminal Code (Cth) s 11.2(4).

- Statements made in compliance with continuous disclosure obligations? If there

is to be an exemption for continuous disclosure, will this create a major loophole?

- If a related corporation exception applies, might corporations exploit it by using a special purpose vehicle that makes them related corporations?

- Will greater use be made of joint ventures as a facilitating practice? Consider eg MA Rabkin, 'Tactical Interdependence and Institutionalized Trust: The Unrecognized Risks of Joint Ventures among Competitors', DePaul Business & Commercial Law Journal, vol. 7, 2008, p. 63.

- Will s 51(3) apply? Might s 51(3) be used strategically as a facilitating practice?

1.5 Prohibit one or more specific facilitating practices?

- Would specific prohibitions against certain kinds of facilitating practices be preferable to a general prohibition? Given the issues outlined in section 1.4 above, what would be the comparative advantages and disadvantages?

- What specific prohibitions would be responsive to the particular areas of underreach from which the current law is alleged to suffer? In relation to the *Apco*/*Leahy* 'problem' see the possible amendment to s 45 raised for consideration in I Tonking, 'Belling the CAU: Finding a Substitute for "Understandings" about Price', Competition & Consumer Law Journal, vol. 16, 2008, p. 46, p. 69.

- The specific prohibition against price signalling in the Competition and Consumer (Price Signalling) Amendment Bill 2010 is poorly defined. One problem is the requirement under cl 45A(2)(b) that the communication in issue be 'for the purpose of inducing or encouraging a competitor to *vary* the price …' (emphasis supplied). Like price fixing, price signalling can be anti-competitive where the purpose is that a price be maintained and not reduced.

- Should there be sector-specific prohibitions against facilitating practices (whether defined generally or limited to some specific kinds of facilitating practices)?

- Exceptions? As noted in section 1.4 above, the drafting of the exclusions under cl 45A(11) of the Competition and Consumer (Price Signalling) Amendment Bill 2010 is full of holes, including the loose treatment of joint ventures in cl 45A(11)(a).

1.6 Extend ACCC investigative powers to enable investigation where use of a facilitating practice is suspected?

- Is it necessary or desirable to create any additional special powers of investigation in relation to concerted practices or facilitating practices? Would such an approach resolve the problem of underreach from which the current law is alleged to suffer? What would it be likely to achieve in cases such as *Apco*, *Leahy*, *Email*, *Ethyl Corp*, and *Wood Pulp*?

- Is there any need for an additional special power of *investigation* if concerted practices or facilitating practices are made the subject of *liability*?

- Why should the ACCC have a special power of investigation in relation to suspected facilitating practices and not in relation to suspected naked price fixing? In general, naked price fixing is likely to be more anti-competitive than price signalling or other facilitating practices.

1.7 Prohibit 'unfair competition'

- The broad brush drafting approach of the Australian Consumer Law invites speculation as to the possibility of a Part IV prohibition against unfair competition based on s 5 of the Federal Trade Commission Act (US). Why have generally worded prohibitions become the fashion in Australian consumer protection law but not in Australian competition law? The difference in approach seems schizoid.

- Would prohibiting unfair competition resolve the problem of underreach from which the current law is alleged to suffer? What results would be likely if this approach were to be applied on the facts of *Apco*, *Leahy*, *Email*, *Ethyl Corp*, and *Wood Pulp*?

- If the main effect of adopting an 'unfair competition' prohibition would be to cover 'invitation to collude' cases would it be preferable to deploy a prohibition specifically against invitations to collude? Consider *Apco* and *Leahy* in light of eg the recent U-Haul case (FTC Release 06/09/2010, 'U-Haul and its Parent Company settle FTC Charges that They Invited Competitors to Fix Prices on Truck Rentals').

- Consider *Ethyl Corp*. Is the reasoning persuasive? Is the analytical framework workable from a practical standpoint?

2. CONCLUSION: CONCERTED PRACTICES AND FACILITATING PRACTICES AND THE NEED FOR A PUBLIC DISCUSSION PAPER ASSESSING THE LEGISLATIVE OPTIONS

If headway is to be made in this area, the first essential step is to review the various possible legislative options, to set out how they would apply by using telling worked examples, and to assess their pros and cons. A public discussion paper of the legislative options and the issues they raise is long overdue.

SELECT REFERENCES

Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission (2005) 159 FCR 452 (‘*Apco*’)

Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (2007) 160 FCR 321 (‘*Leahy*’)

Trade Practices Commission v Email Ltd (1980) 31 ALR 53 (‘*Email*’)

E.I. duPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (‘*Ethyl Corp*’)

Ahlström Oy and others v Commission [1993]ECR 1-1307 (‘*Wood Pulp*’)

GJ Werden, ‘Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory’, Antitrust Law Journal, vol. 71, 2004, p. 719

GA Hay, ‘Facilitating Practices’, ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189

DW Carlton and JM Perloff, *Modern Industrial Organization*, Pearson, 4th ed, 2005, 379-87

M Porter, *Competitive Strategy,* The Free Press, New York, 1980

DS Clark, ‘Price Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp’, Wisconsin Law Review, 1983, p. 887

C Beaton-Wells and B Fisse, ‘Broadening the Definition of Collusion: A Call for Caution’, Federal Law Review, vol. 38, 2010, p. 71

RL Smith, A Duke and D Round, ‘Signalling, Collusion and s 45 of the Trade Practices Act’ Competition & Consumer Law Journal, vol. 17, 2009, p. 22

M Noble, ‘Facilitating Practices: Innocuous, Illegal or Somewhere in Between?’ (2010) 17 CCLJ 276

I Tonking, ‘Belling the CAU: Finding a Substitute for “Understandings” about Price’, Competition & Consumer Law Journal, vol. 16, 2008, p. 46

J Walker, ‘Agreements, Communication and Facilitating Practices: where is the harm?’ ACCC Paper presented at the Law Council Trade Practices Workshop Gold Coast 21 August 2010

I Wylie, ‘Understanding “Understandings” under the Trade Practices Act – an Enforcement Abyss?’, Trade Practices Law Journal, vol. 16, 2008, p. 33

C Beaton-Wells and B Fisse, *Australian Cartel Regulation* , Cambridge University Press, 2011, chs 3, 8

J Faull and A Nikpay, *The EC Law of Competition*, Oxford University Press, Oxford, New York, 2007, pp. 210-7

R Whish, *Competition Law*, 6th edn, 2009, Oxford University Press, Oxford, pp. 104-7.

G. Van Gerven and E. Navarro Varona, ‘The Wood Pulp Case and the Future of Concerted Practices', 31 Common Market Law Review, 1994, p. 575

B Fisse, ‘Avoidance and Denial of Liability for Cartel Offences: Proactive Lawful Escape Routes Left Open by the Cartel Legislation’, Paper presented at the 2009 Competition Law Conference, Sydney, 23 May 2009, pp. 1-3, 9-14

M Moore, R Morgan and M Moore, ‘Only the Illusion of Possible Collusion? Cheap Talk and Similar Goals: Some Experimental Evidence’, Journal of Public Policy and Marketing, vol. 20, 2001, p 27

K-U Kuhn, ‘Fighting Collusion by Regulating Communication between Firms’, Economic Policy, vol. 16, no. 32 (Apr., 2001), p. 169