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Introduction

Background

1.1 On 24 November 2010 the Selection Committee referred the Competition and Consumer (Price Signalling) Amendment Bill 2010 (the first Bill) to the committee for inquiry and report.

1.2 The first Bill was introduced as a Private Member's Bill by the Shadow Minister for Small Business, Competition Policy and Consumer Affairs, the Hon Bruce Billson, MP.

1.3 While the review of the first Bill was being conducted, the Government released its own price signalling legislation. On 12 December 2010 the government released for public comment an exposure draft dealing with price signalling. Following its consultation, the government tabled the Competition and Consumer Amendment Bill (No.1) 2011 (the government Bill) on 24 March 2011. The Explanatory Memorandum (EM) to the government Bill states:

> Anti-competitive price signalling and 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. They fall short of cartel behaviour but can have similar effect.
> Anti-competitive price signalling and information disclosures can occur as part of a wider cooperation agreement, or as a stand-alone practice absent of an explicit cartel arrangement.[1]

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1 Australian Government, *Explanatory Memorandum* (government Bill), p. 3.

1.4 On 12 May 2011 the Selection Committee referred the government Bill to the committee for inquiry and report. The government Bill was introduced by the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP.

1.5 The committee has resolved to scrutinise the two bills together.

Purpose and overview of the first Bill

1.6 The first Bill seeks to 'establish a new head of power under which the Australian Competition and Consumer Commission (ACCC) would be able to investigate and seek penalties for "price signalling" that produces anti-competitive effects in the Australian market to the detriment of consumers.'[2]

1.7 The first Bill creates a new provision to make anti-competitive price signalling unlawful. It is designed to operate within the framework of the *Competition and Consumer Act 2010* (which was the *Trade Practices Act 1974* prior to 1 January 2011) and 'to respond to repeated calls from the ACCC for Parliament to address this "gap" in Australia's competition "tool kit."'[3] The EM states:

> Price signalling is a facilitating practice by which corporations inform their rivals about price actions and intentions, so as to eliminate uncertainty about the price of their goods or services, thus reducing the inherent risks of competition which would be a feature of a workably competitive market.
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> Anti-competitive price signalling is engaged in with the hope, or even expectation, that competitors will reciprocate in term of the setting of the price and price-terms and conditions for their goods or services, although it does not require any commitment from them to do so. The effect of such behaviour will often be the same as prohibited conduct but is said by the ACCC to currently not be captured by existing prohibitions.[4] The EM states that the 'definition of unlawful anti-competitive 'price signalling' detailed in the Bill contains three elements specifically designed to ensure that pro-competitive and pro-consumer price-related communication is not impeded while the anti-competitive price-

2 Australian Government, *Explanatory Memorandum* (government Bill), p. 1.

3 Australian Government, *Explanatory Memorandum* (government Bill), p. 1.

4 Australian Government, *Explanatory Memorandum* (government Bill), p. 1.

> related communication that facilitates co-ordination to distort markets and disadvantage consumers is captured as unlawful.'[5]

1.8 The Bill aims to:

- make it possible for a Court to infer that the purpose of communication by a corporation about price-related information was to encourage a rival to vary a price having considered the evidence, conduct of the parties involved and relevant circumstances;
- define key terms relevant to the operation of the provisions and where necessary, provides further clarity for terms defined more generally in the *Trade Practices Act*, for the purposes of avoiding uncertainty about the new head of power for the ACCC; and
- provide for the ACCC to receive, consider and grant an authorisation for conduct that may offend the price signalling prohibition, where the ACCC is satisfied that the public benefit of authorised conduct outweighs the likely detriment to the public constituted by any lessening of competition.[6]

Purpose and overview of the government Bill

1.9 The government Bill aims 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'[7] It does this by amending the existing *Competition and Consumer Act 2010* (CC Act).

1.10 The most important amendments in the government Bill involve:

- prohibiting businesses from making a private disclosure of pricing information to a competitor;
- prohibiting businesses from making a disclosure (on a wide range of matters) if the purpose of the disclosure is to substantially lessen competition in a market;
- ensuring that prohibitions apply only to goods and services that are specifically prescribed by regulations and identify exceptions to them where necessary; and

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5 Australian Government, *Explanatory Memorandum* (government Bill), pp. 1-2.

6 Australian Government, *Explanatory Memorandum* (government Bill), pp. 1-3.

7 Australian Government, *Explanatory Memorandum* (government Bill), p. 5.

- providing a number of exemptions to the prohibitions to enable businesses to continue normal operations, including timely notifications to the ACCC on the grounds of providing a net public benefit.

Treasury consultations

1.11 The committee received evidence in its submissions that Treasury's consultations on the exposure draft led to significant improvements to the government Bill. For example, the Australian Institute of Petroleum stated:

> In light of these issues, AIP and some AIP member companies made detailed public submissions to the Treasury consultation process outlining our concerns and suggestions in relation to the exposure draft legislation, and assuming they will apply to the Australian fuels industry. AIP acknowledges that the Government, through the consultation process, has taken account in the Bill of some of the issues identified by AIP and its members, and these changes will help address some of the unintended commercial consequences for the fuels industry.
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> Specifically, these improvements by the Government to the exposure draft legislation include the exclusion in the Bill of disclosures relating to: (i) purchases or sale of goods; (ii) by companies to agents; and (iii) relating to proposed joint ventures.[8]

1.12 The Australian Bankers' Association (ABA) also recognised that consultations had improved certainty for business.[9]

The ACCC's current powers

1.13 The ACCC's current powers extend to price fixing but not to price signalling. The ACCC advised that 'under the existing cartel provision in the legislation we need to establish that there is a contract, an arrangement or an understanding between the parties.'[10] Under the legislation the ACCC would need to establish that 'there is some form of agreement

8 Australian Institute of Petroleum, *Submission 9A,* p. 2.

9 ABA, *Submission 5A,* p. 2.

10 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 10.

between the parties and that there is some measure of commitment.'[11] However, this can be extremely difficult for the ACCC to prove.

1.14 In 2005 the 'Apco' case revealed inadequacies with the ACCC's legislation. As a result of ACCC action, a number of petrol retailers in the Ballarat area were prosecuted. The ACCC alleged 'that they were passing information to one another on a confidential basis on what they were proposing to do with their petrol prices.'[12] However, one of the respondents in the case, a company called Apco, appealed to the Full Court of the Federal Court. The argument Apco put 'was that they were not committed to the conduct; they received the prices and sometimes they acted on them by increasing their own price and sometimes they did not.'[13] The appeal by Apco was upheld on the basis that there was not a sufficient level of commitment on the part of Apco.

1.15 The ACCC sought to appeal that decision to the High Court but was refused leave to appeal. The High Court stated that there were no issues of law that arose out of the Apco case. The ACCC concluded that 'in our view that means there has been a significant raising of the bar in relation to what is required to establish a contract arrangement or an understanding, which is what we were arguing in this case.'[14]

1.16 In January 2009 the Treasury issued a discussion paper which sought submissions on the adequacy of the current interpretation of the term 'understanding' in section 45 of the CC Act. That process 'identified that anti-competitive price signalling and information disclosures were not captured by the CC Act and rather than amend the meaning of understanding, could be directly targeted by new prohibitions under the CC Act.'[15] The Treasury stated:

> The Treasury considers that there is a gap in the effectiveness of Australia's competition law framework in addressing anticompetitive price signalling and other forms of information disclosures. Essentially, that potentially allows a form of anticompetitive conduct to be undertaken—obviously depending on whether businesses choose to engage in that area.[16]

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11 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 10.
12 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, pp. 9-10.
13 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 10.
14 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, pp. 9-10.
15 Australian Government, *Explanatory Memorandum* (government Bill), p. 7.
16 Mr Bruce Paine, Treasury, *Committee Hansard*, 18 February 2011, p. 22.

Are laws needed to address price signalling?

1.17 The ACCC and Treasury are in agreement that the current legislation was inadequate to deal with price signalling. This lack of power has become more notable in recent times, especially in relation to the banking sector. Concerns have been expressed about possible price signalling comments made by banks in relation to possible movements in the official cash rate by the Reserve Bank of Australia (RBA). The ACCC advised that if the legislation was strengthened to deal with price signalling, then the comments of key bank officials would come under far more scrutiny. The ACCC stated:

> …some comments from certain of the bank CEOs where, if we had this sort of legislation in place, and assuming they still made the comments, we would certainly at least have cause to be having a close look at them because, with a couple of the comments, we ask ourselves: 'Why would someone say what was said, other than for the purpose of signalling perhaps to their competitors what their behaviour was going to be in relation to increases in bank housing loan interest rates?'[17]

1.18 The ACCC confirmed that a recent example where it would have cause to investigate involved comments by the CEO of the ANZ Bank Mr Mike Smith. In a particular situation, Mr Smith commented that he would move in lock-step with the RBA's expected 25 basis point move. Mr Smith was subsequently asked what he would do if the other banks did something differently to which he is reported to have said that he would not be stuck on his own.[18]

1.19 The ACCC and Treasury perspectives were not universally accepted. The ABA questioned the necessity for the Bill, arguing that no substantive evidence had been produced to support the need for reform. The ABA stated:

> The submissions to this inquiry into the government's bill and indeed the submissions in the original Treasury paper indicate that most pre-eminent trade practices lawyers in the country have different views about whether or not there is a problem. At the moment the weighting seems to be towards the view that there is not a problem. The other area we would look at is: 'What is the actual substantive evidence of misconduct or of behaviour that is

17 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 12.

18 *Committee Hansard*, 18 February 2011, p. 13.

seen to be inappropriate but has fallen outside the reach of the current legislation?' Again, it is very difficult to find that.[19]

1.20 The ABA concluded that 'at this point we have not seen an overwhelming or even particularly persuasive argument for change.'[20]

Conclusions

1.21 The ACCC's current powers extend to price fixing but the ACCC is limited in what it can do to investigate and seek prosecution for price signalling. The Apco case was significant in revealing limitations in the ACCC's powers. Currently the ACCC would need to establish that there is an agreement or understanding between parties in any alleged case of price signalling which would be very difficult to do.

1.22 The ACCC and Treasury both confirmed that the current legislation is limited and it must be strengthened if it is to deal with price signalling. Price signalling cannot be ignored and if left to occur then consumers will be disadvantaged and the competitive framework of markets is undermined. The recent action of bank CEOs and their comments in relation to possible movements in the cash rate by the RBA is a particular case that has brought most attention to price signalling. It should be noted that both Bills before the committee would apply beyond the banking sector.

1.23 The committee concludes that the ACCC's current powers are insufficient to deal with price signalling and they must be strengthened to give the ACCC more power and as a warning to the market that this conduct will not be tolerated. The committee dismisses the view of the ABA that reform in this area is unnecessary.

1.24 While the intent of the first Bill is therefore supported, it is not the most effective legislative solution for dealing with price signalling. The following chapter will draw attention to some of the disadvantages inherent in the Bill and concludes that it should not be supported.

1.25 The committee is of the view that the government Bill provides a more effective legislative solution for dealing with price signalling. Chapter 2 reviews the feedback received in submissions and will also identify some of the advantages in the government Bill. It concludes with a recommendation that the Bill be supported.

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19 ABA, Mr Steven Munchenberg, *Committee Hansard*, 18 February 2011, p. 35.

20 ABA, Mr Steven Munchenberg, *Committee Hansard,* 18 February 2011, p. 39.

Committee objectives and scope

1.26 The objective of the inquiry is to scrutinise the technical adequacy of both Bills and their competing claims to delivering the policy intent required to address the problem of price signalling, especially in the banking sector. In conducting this examination, the committee focused on four key comparisons between the Bills.

Conduct of the Inquiry

1.27 Information about the inquiry into the first Bill was advertised in *The Australian* on 15 December 2010. Details of the inquiry and the Bill were placed on the committee's website. A media release announcing the inquiry and seeking submissions was issued on 10 December 2010.

1.28 Seven submissions were received which are listed at Appendix A. Three exhibits were received which are listed at Appendix C.

1.29 A public hearing was held in Canberra on Friday 18 February 2011. A list of the witnesses who appeared at the hearing is available at Appendix B. The submissions and transcript of evidence were placed on the committee's website at http://www.aph.gov.au/house/committee/economics/index.htm.

1.30 Information about the inquiry into the government Bill was posted to a range of groups. Details of the inquiry and the Bill were also placed on the committee's website. A media release announcing the inquiry and seeking submissions was issued on 17 May 2011.

1.31 Thirteen submissions were received on the government Bill; these are listed at Appendix A.