Chapter 8

Price signalling

> *People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.*[1]

8.1 In the recent public debate on banking competition in Australia, the issue of anti-competitive price signalling has been raised as a possible area of legislative reform. Anti-competitive price signalling refers to a corporation conveying to its rivals its future price intentions. By so doing, the corporation eliminates uncertainty about the price of its goods or services, thereby reducing the risks of competition and impeding the functioning of a competitive market.

8.2 Price signalling has been a significant issue in this inquiry. Various witnesses have put differing views on the nature and harm of this conduct and several have offered comment on the legislative proposals. The Committee has also kept abreast of the broader public debate on the issue. Since the Senate referred this inquiry:

- both the Government and the Coalition have proposed legislation to address price signalling;[2]
- the Government has called for, and received submissions on its Exposure Draft Bill and has subsequently introduced a bill into the parliament to address price signalling;
- the House of Representatives Standing Committee on Economics has received submissions and held a public hearing into the Coalition's bill;[3]

---

1 Adam Smith, *The Wealth of Nations*, first published 1776–8, Book 1, Chapter 10, paragraph 82.

2 The Coalition's bill—the Competition and Consumer (Price Signalling) Amendment Bill (No. 1) 2010—was introduced into the House of Representatives on 22 November 2010. The Government released an exposure draft of its bill on 12 December 2010 and conducted a consultation process. Following this, the Government's bill—the Competition and Consumer Amendment Bill (No. 1) 2011—was introduced into the House of Representatives on 24 March 2011.

3 House Standing Committee on Economics, *Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010*, http://www.aph.gov.au/house/Committee/economics/1BillPriceSignalling/hearings.htm (accessed 1 March 2011).

- several bank chief executives and the Treasurer have commented on the issue of price signalling;[4] and
- several academic articles[5], newspaper articles[6] and analyses by law firms[7] have been published.

8.3 This chapter examines the current debate, the legislative proposals and the Committee's view on price signalling. It is divided into three sections which:

- define 'price signalling' and present the main arguments as to whether it is a problem;
- discuss the current provisions of the *Competition and Consumer Act 2010* on contracts, arrangements or understandings that restrict or affect competition. It then considers the ramifications of the Australian Competition and Consumer Commission's (ACCC) recent petrol cases for the legal interpretation of an 'understanding' under section 45(2); and
- compare the Government's proposed legislation to prohibit price signalling with the Coalition's proposal and concludes with the Committee's view on these bills.

---

4 The Hon. Wayne Swan MP, Interview with Lyndal Curtis, *ABC Radio, AM Program*, 13 December 2011; The Hon. Wayne Swan, Interview with Kieran Gilbert, *Sky News Channel*, 13 December 2010. Mr Ralph Norris, *Commonwealth Bank of Australia Profit Statement*, 9 February 2011.

5 Baxt, Kiratzis and Eglezoz, (2011, p 6); Smith, Duke and Round (2009, pp 26–27); Noble (2010); and Fisse and Caron Beaton-Wells (2011).

6 Patrick Durkin, 'Banks irate over price signalling', *Australian Financial Review*, 4 January 2011, p 3; John Durie, 'Price signalling plans cast too wide a net', *The Australian*, 13 January 2011; Matthew Drummond, 'Proposed price signalling law 'just does not work', *Australian Financial Review*, 8 February 2011, p 54; Katja Buhrer and Jason Murphy, 'ACCC adamant on price signalling', *Australian Financial Review*, 27 January 2011, p 37; John Kehoe, 'Broader fears on price signalling clamp', *Australian Financial Review*, 9 February 2011, p 53; Josh Gordon, 'Petrol, groceries in consumer law push', *Sydney Morning Herald*, 9 January 2011; Michael Jacobs and Bill Reid, 'Price-signalling laws fraught with danger', *Australian Financial Review*, 1 March 2011, p 63; Terry McCrann, 'Zumbo and Samuel, a strange tag team', *Herald Sun*, 15 December 2010.

7 Mallesons Stephen Jaques, 'Price signalling - two Bills compared, neither needed', 21 January 2011; Allens Arthur Robinson, 'Client Update: Prohibiting Price Signalling', 13 December 2010; Freehills, 'Price signalling "Take 2"—the government's turn', 16 December 2010; Johnson Winter & Slattery, 'ACCC power to prosecute anti-competitive price signalling', December 2010; Mallesons Stephen Jaques, 'Government releases Exposure Draft Bill to outlaw price signalling', 12 December 2010; MinterEllison, 'Anti-competitive price signalling— implications beyond the banking sector', 15 December 2010.

What is price signalling?

8.4 Defining 'price signalling' is not straightforward. The term is often used pejoratively, denoting an anti-competitive conduct, but not all price signalling will have an anti-competitive intent or outcome. Indeed, public disclosure of price information is essential to efficient markets. As this chapter discusses, there is a complex legal debate as to what should be classed as illegal 'price signalling'. This debate relates to various factors including whether there is a 'commitment' to act on the information passed, whether the pricing information is relayed publicly or privately between competitors, and whether the competitor relaying the information has the purpose as well as the effect of 'substantially lessening competition'.

8.5 Notwithstanding this complexity, a working definition of price signalling is useful. In broad terms, it refers to one competitor relaying its future pricing information to another competitor. For example, Bank A announces on its website that effective from a future date, it may increase its interest rate for home mortgage loans by one per cent. This is price signalling. Should Bank B note this information and announce in response that it will either change its rate or keep it unchanged, this is also price signalling.

8.6 Australian academics Dr Rhonda Smith, Mr Arlen Duke and Professor David Round identify three facets of price signalling. First, it is a form of communication that is indirect: it is not stating an actual price but indicating to the market the capacity of a firm to price. They give the example of a retailer advertising that it will better by 10 per cent a lower price for an equivalent product found at another store by a customer. Second, the signal may be intended to convey broad messages beyond consumers to actual and potential rivals. Signalling does not necessarily involve reciprocity from the recipient of the signal, although it is expected to achieve a particular outcome. Third, a firm's conduct may be a signal if it has a track record of responding in a particular way.

8.7 Dr Smith, Mr Duke and Professor Round define signalling as:

> ...the conveying of information about one or more aspects of the market to actual or potential market participants (including consumers) through 'one-off' acts or as a result of establishing a pattern of behaviour. Signalling as a means of coordination may be directly about prices or it may be indirect, for example, by indicating how the signaller will react in certain circumstances to the conduct of one or more rivals with the aim of causing rivals to respond in a way that is mutually profit-enhancing.[8]

8 Smith, Duke and Round (2009, p 24).

8.8 Price signalling is often identified on a spectrum of coordinated conduct.[9] At one extreme is collusion whereby firms enter into an oral or written agreement in relation to pricing, market sharing or bidding for contracts. Collusion is a per se illegal offence in Australia.[10] At the other end of the spectrum is conduct known as 'conscious parallelism' whereby profit maximising firms in an oligopolistic market take into account the expected reactions of their rivals. In this market, the firms are interdependent and act unilaterally in response to similar cost and demand factors.[11] 'Conscious parallelism' is not illegal.

8.9 Between these extremes is conduct termed 'tacit collusion'. This form of conduct involves no oral or written communication between competitors but does involve deliberate behaviour intended to coordinate the decision-making of competitors. Price signalling falls within this category. However, the nature and effect of price signalling may differ markedly: it may itself be placed on a spectrum. It can include:

- providing information that enables consumers to make better choices, thereby increasing consumer welfare and encouraging competition;
- deliberately limiting the information available to consumers thereby raising consumers' search costs and reducing competition;
- deliberately restricting output or allocating market shares, thereby increasing firms' capacity to raise prices and narrow competition;[12] and
- coordinating a move from one consensus price to another by signalling planned price increases on the internet or in press statements, and thereby lessening competitive tension in the market.[13]

---

9 See Beaton-Wells and Fisse, (2010, p 83), Smith, Duke and Round (2009, pp 26-27) and Noble (2010). The coordination spectrum was also noted by ACCC Commissioner Dr Jill Walker at a public hearing; *Proof Committee Hansard*, 25 January 2011, p 39.

10 The Part IV per se prohibitions are in sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK relating to cartel provisions, section 45(2) relating to exclusionary conduct, sections 47(6) and (7) relating to third line forcing and section 48 relating to resale price maintenance.

11 Noble (2010, p 1).

12 Mr Brian Cassidy, Chief Executive Officer of the ACCC, gave the House of Representatives Standing Committee on Economics the example of a company signalling that the following week it would concentrate on supplying a certain segment of the market. This signal says to its competitors that the company will be vacating the other segments they operate in and that could establish a market-sharing arrangement. One competitor says, 'Well, in that case, I'm going to concentrate on this segment,' and another competitor says, 'Well, I'll concentrate on that segment.' With this arrangement in place, the company is free to increase its prices in the segment of market it has signalled it is going to concentrate on without any worry about its competitors taking away market share.; *House of Representative Standing Committee on Economics Hansard*, 18 February 2011, p 21.

13 Smith, Duke and Round (2009, pp 27-28).

The banks' understanding of 'price signalling'

8.10 The Committee sought the views of the major banks on the issue of price signalling. The following comments give a sense of what the banks understand by 'price signalling', whether they believe it occurs in the banking sector and whether it should be explicitly prohibited by law. (The banks' views on the proposed price signalling legislation are discussed later in the chapter.)

8.11 Mr Ralph Norris, Chief Executive Officer of the Commonwealth Bank, was asked whether he understood price signalling to mean 'merely making predictive statements about possible future movements in rates'. He responded: 'I do not see that as being price signalling'.[14] Another Commonwealth Bank officer was adamant: 'we do not price-signal, and we absolutely have not had private discussions between banks about pricing'.[15]

8.12 Westpac CEO Ms Gail Kelly told the Committee that price signalling was not occurring in the Australian banking industry and that Westpac was 'clearly' against any kind of price collusion or any sort of price signalling.[16]

8.13 ANZ CEO Mr Mike Smith broadly defended his right to talk on interest rates and pricing issues. He made no distinction, however, between general commentary on these matters and public statements about the bank's pricing intentions, nor did he distinguish between current pricing and future pricing statements. Mr Smith did emphasise that the public comments he might make on pricing matters are not intended to be price signalling. As he told the Committee:

> It is right to be able to have an opinion on these things. Any of these comments, certainly from my perspective, were not meant to be price signalling. I do not care what the other banks do as long as we can remain competitive.[17]

Why is price signalling a problem?

8.14 What is the 'mischief' in price signalling? In other words, where should the line be drawn between a healthy disclosure of information to the market and anti-competitive conduct? These are fundamental, yet vexed questions.[18] Mr Brent Fisse argued that 'distinguishing between oligopolistic interdependence and unjustified coordination of market activity by competitors is probably the toughest

---

14 Mr Ralph Norris, *Committee Hansard*, 15 December 2010, p 72.

15 Mr David Craig, Chief Financial Officer, Commonwealth Bank of Australia, *Committee Hansard*, 15 December 2010, p 65.

16 Ms Gail Kelly, *Committee Hansard*, 21 January 2011, p 71.

17 Mr Mike Smith, *Committee Hansard*, 15 December 2010, p 141.

18 The issue has also been the subject of recent legal and academic debate. See footnotes 6 and 8.

challenge in competition law'. He added: 'satisfactory approaches have yet to emerge anywhere in the world'.[19]

Mr Smith's comment

8.15 A significant point of reference for the Committee in terms of identifying price signalling and why it is can be harmful was a comment reported in *The Australian* in November 2009 by Mr Smith. He was reported as saying that while he would be 'reluctant' to increase home loan rates above the Reserve Bank's rates, if other banks moved their rates outside moves by the RBA, he would not be 'stuck on my own'.[20] The question the Committee put to some witnesses was whether this statement constituted 'price signalling' and whether legislation is needed to prohibit this type of statement.

8.16 The ACCC identified Mr Smith's comment as an example of price signalling but noted that it is not prohibited under the current law.[21] The ACCC Chairman, Mr Graeme Samuel, told the Committee that the type of comment made by Mr Smith constitutes a 'softening up' of the market: it effectively signals to ANZ's competitors that if they increased their rates, they would not have to worry about losing market share to ANZ. Mr Samuel argued that this conduct removes the uncertainty associated with true competitive tension and should therefore be prohibited. He observed that while information on prices in advance of time can in one sense be seen to be useful, in most cases 'the vast value of its usefulness is in allowing competitors to know what you intend to do'.[22] A pertinent question is:

> 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?[23]

8.17 Other witnesses were more circumspect about Mr Smith's intent and the need to prohibit this type of comment. Ms Sharon Henrick, a partner at Mallesons Stephens Jaques, believed that Mr Smith's purpose and intent in making the comment is unclear.[24] Mr Brent Fisse told the Committee that in his view, it is 'very marginal' as to whether the type of comment made by Mr Smith should be prohibited. Moreover, he queried:

> ...whether in any event it should be a matter of priority for the ACCC to be taking enforcement action in that kind of case, particularly given that the

---

19 Mr Brent Fisse, *Submission 67*, p 1.

20 Richard Gluyas, 'ANZ shift on plan to stick with RBA', *The Australian*, 4 November 2009, p 5.

21 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 40.

22 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 42.

23 Mr Brian Cassidy, Chief Executive Officer, ACCC, *House of Representatives Standing Committee on Economics Hansard*, 18 February 2011, p. 12. While Mr Cassidy's remark did not explicitly mention Mr Smith's comment, it is likely he had this comment in mind.

24 Ms Sharon Henrick, *Committee Hansard*, 25 January 2011, p 100.

> same outcome could be achieved in other ways—for example, by making a continuous disclosure statement in a rather more skilful way than was made by the CEO on that particular occasion, as reported by *The Australian* in 2009. It is a marginal case. The ACCC should focus much more obviously on stark cases of price fixing, of which there are still many recorded instances in the Australian economy.[25]

8.18 Associate Professor Frank Zumbo identified price signalling as a symptom of the lack of 'real, quality, intensive competition'. He elaborated:

> The underlying problem is the greater concentration of the market that we have seen, the increasing concentration we have seen. Where you have a highly concentrated market you do have a problem with price-signalling, but the price-signalling is a reflection of the highly concentrated market.[26]

8.19 Nonetheless, in an oligopolistic market, Associate Professor Zumbo recognised the potential anti-competitive effect of price signalling. He identified the harm as a form of collusion:

> I believe the evil in relation to price signalling is that you have one competitor basically telling another competitor in a variety of ways that if that other competitor behaves in a particular way on price, the competitor making the comment will also behave in a particular way. That is why price-signalling legislation has to be highly targeted to the particular mischief that we are concerned with.[27]

8.20 Other witnesses argued that the debate on price signalling is misguided. Professor Tom Valentine, notably, described the 'whole discussion' on signalling as 'ridiculous' given that the banks already know what each others' funding costs are. He told the Committee:

> They know what they are going to charge, roughly, and I do not see why we should stop consumers getting important information which might be useful to them in deciding, for example, what size mortgage they should be applying for. Let's face it: the Reserve Bank was able to predict what was going to happen to the banks' cost of funds and therefore to the charges. It expected that they would put up their rates by more than the increase the bank made in the cash rate. Consequently, we would not be surprised if the other banks had that sort of information.[28]

8.21 The Committee notes that while Professor Valentine may well be correct that the banks have access to each others' funding information, his observation misses the point. The concern with price signalling as a form of anti-competitive conduct is not

---

25 Mr Brent Fisse, Adjunct Professor of Law at the University of Sydney, *Committee Hansard*, 25 January 2011, p 100.

26 Associate Professor Frank Zumbo, *Committee Hansard*, 14 December 2010, p 59.

27 Associate Professor Frank Zumbo, *Committee Hansard*, 14 December 2010, p 59.

28 Professor Tom Valentine, *Committee Hansard*, 25 January 2011, p 62.

whether the banks are aware of each others' cost of funds, but the message that specific comments about a competitor's future pricing intentions may have on competitive tension in the market. Further, Mr Smith's comment was not a general reference to his competitors' higher funding costs but a specific observation about where he would position his bank on interest rates should his competitors move theirs.

The need for the banks to provide economic commentary

8.22 Various submitters and witnesses emphasised that the banks (as with other companies) have a legitimate and important role in informing the market about their pricing. They extended this defence by arguing that tighter prohibitions on price signalling would effectively end banks' public comments on their prices and strategies.

8.23 The Commonwealth Bank's CEO was questioned over a comment he reportedly made in August 2010 that the Commonwealth Bank was likely to raise its interest rates above any Reserve Bank cash movements. He responded that the comment was not intended as price signalling and that all bank chief executives have made public statements about their funding costs. He told the Committee that there are legitimate reasons to offer this type of economic commentary about interest rate outlooks.[29]

8.24 One of his colleagues argued that restrictive price signalling provisions would prevent the banks from explaining their pricing structures and the cost of their funds:

> We are all competing for funds in the same market and the costs are going up. Everybody has got different funding structures, and you will note that the different banks put up their rates by different amounts presumably because their funding costs are a little different, but at the end of the day all that we have tried to explain—and interestingly I think you have done a very good job of pointing this out as well—is that our costs are going up. There is a risk clearly with this legislation that we will not be able to explain that as clearly in the future because it will be seen to be price signalling. But from our investor point of view and our continuous disclosure point of view we think it is important that we are able to explain what is happening with our business, and obviously you believe that as well from the point of view of the Australian public understanding these costs.[30]

8.25 Mr Smith also defended the banks' public statements about interest rates. He reasoned that:

> It would be rather unusual if I were asked my views on interest rates, or the likely movement of interest rates, or the interest rate environment or foreign

29 Mr Ralph Norris, *Committee Hansard*, 15 December 2010, pp 60 and 72.

30 Mr David Craig, Chief Financial Officer, Commonwealth Bank of Australia, *Committee Hansard*, 15 December 2010, p 72.

> exchange—what is the Aussie dollar doing?—unless I could actually see exactly what I could and could not say.[31]

8.26 Suncorp Bank's CEO was another to express his concern at the possible impact of legislation to prohibit price signalling on the capacity of the banks to provide information to the market. He told the Committee:

> ...the proposed legislation against price collusion stops the industry commentating and commenting on interest rate and market movements, preventing education of the community about interest rates and the factors that go into product pricing and exacerbating a one-sided debate.[32]

8.27 The Australian Bankers' Association (ABA) has argued that not only would tighter legislation on price signalling stop the flow of information to the market, it could lead to consumers making bad decisions regarding their product or loan choices. The banks would not be able to correct misinformation and provide facts about banking services and markets.

8.28 The ABA noted that individual banks and the Association 'are constantly facing inquiries from journalists, politicians and bank customers seeking a response to comments, allegations or analysis regarding banks' funding costs and other pricing-related issues'. Further, it observed that many of these inquiries stem from comments or analysis from parties other than the banks themselves, such as the RBA Board Meeting minutes and comments from politicians, media commentators and academics.[33]

The ACCC's response

8.29 The ACCC took issue with what it saw as some of the more 'outrageous' comments that legislation to prohibit price signalling would stop the banks from making any public comment. Mr Samuel emphasised the distinction between forecasting by individual banks of what they intend to do with their interest rates on the one hand, and discussing interest rates and economic conditions in general terms on the other.[34] He drew the Committee's attention to the following three scenarios:

> One is an after-the event commentary and discussion as to why it is that bank A has moved its interest rates. We have done so because there are prospectuses et cetera and therefore we have had to move our interest rates in accordance with what has just been announced. That is perfectly legitimate. The second is to discuss beforehand where, generally, economic conditions may be, how bank economists and even bank CEOs say, 'Look, we think that economic conditions are such that we think that the cash rate might move in certain directions.' That again would appear to be perfectly

---

31 Mr Mike Smith, ANZ Bank, *Committee Hansard*, 15 December 2010, p 131.

32 Mr David Foster, *Committee Hansard*, 9 February 2011, p 2.

33 Australian Bankers' Association, *Submission 76*, p 41.

34 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p. 41.

> legitimate. Where we get into some difficulties is when a bank CEO or others within the bank say, 'We are not sure what the Reserve Bank will do next week, but we are saying now, ahead of time, "If the Reserve Bank moves by 25 basis points, it is almost certain we are going to move beyond that.'"[35]

8.30 The Committee finds these distinctions very useful. They have not been recognised in the recent commentary expressing concern that signalling prohibitions may muzzle the banks from making any public comment on funding and interest rates. The precise form of the legislation and the courts' subsequent interpretation of the provisions are another matter (see below). Nonetheless, the ACCC's comments on the issue have been important to highlight the nature of comments that, in its opinion, should fall foul of the law.

Can price signalling be pro-competitive?

8.31 There has also been some comment that signalling can have a pro-competitive effect. Professor Michael Jacobs and Mr Bill Reid recently presented a scenario involving four banks.[36] Bank A publicises that it will increase its interest rate for mortgage loans by 50 basis points. Bank B learns of this but makes an announcement that it has no intention of raising its rates. Banks C and D subsequently announce that they will also keep their rates unchanged. Finally, Bank A announces that it has changed its mind about the contemplated increases and will also keep its rates on hold.

8.32 Professor Jacobs and Mr Reid make the following points in defence of the banks' conduct in this case:

- the signalling of price intentions was required by Bank A to inform customers of rate changes 'per its prevailing standard form loan agreements';
- the signalling by Banks B, C and D may have been intended to win customers from Bank A—a 'legitimate and desirable outcome';
- the signalling exposed disagreement among the banks, suggesting that each was acting independently of the others; and
- when the signalling ended, the banks' rates remained at the pre-signalling level—had Banks B, C and D remained silent, they could have increased their rates under the cover of Bank A's initial announcement.

8.33 This hypothetical example assumes Bank A is contractually obliged to inform customers of rate increases it is contemplating but then does not actually do, which would be rather unusual. And if Bank B had instead responded to Bank A's signal by saying it too would increase interest rates by 50 basis points, then Banks C and D may well have jumped on the bandwagon and customers would have been worse off. Contrast to the case where price signalling is not allowed. Bank A would then be more

---

35 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p. 41.

36 *Australian Financial Review*, 'Price-signalling laws fraught with danger', 1 March 2011.

reluctant to announce an increase in its rate. If Banks B, C and D did not follow, it would lose customers and likely be forced to lower its rate back down.

8.34 Mr Cassidy was asked whether price signalling could be competitive if a bank signalled an increase in its interest rates by less than what it anticipated the Reserve Bank's was going to move. Mr Cassidy responded:

> That can be just as deleterious to consumers. It may be in a context where several of the banks are worrying about market shares and contemplating not increasing their interest rates by as much as the Reserve Bank. Again that could be an attempt by that particular bank to, if you like, limit the extent to which their competitors hold their rates down. So it can work on the down that way just as much as on the up.[37]

The current law: a contract, arrangement or understanding

8.35 Section 45(2) of the *Competition and Consumer Act* (formerly the *Trade Practices Act 1974*) states that a corporation shall not make a contract or arrangement, or arrive at an understanding if it has the purpose, or would have or be likely to have the effect, of substantially lessening competition. The starting point for the ACCC in prosecuting a case under this section is to show that a contract, arrangement or understanding has been entered into. However, in the past six years, there have been two significant decisions of the Full Federal Court that have, at least in the ACCC's view, raised the required proof that an 'understanding' has been made.

The Apco case

8.36 The 2005 Ballarat petrol case *Apco Service Stations Pty Ltd v ACCC*[38] was significant in defining an 'understanding' for purposes of section 45(2) of the *Trade Practices Act*. The ACCC's case relied heavily on circumstantial evidence involving records of telephone conversations between the parties, and correlations between these calls and the timing of petrol price rises. The ACCC instituted proceedings against sixteen respondents—eight corporations and eight individuals—for price fixing conduct in the Ballarat retail petrol market over an eighteen month period from June 1999 to December 2000. Of these, four corporations and five individuals either admitted or did not contest the ACCC's claims and proceeded to penalty hearings before the Federal Court. The remaining four corporation-34s and three individuals proceeded to trial before Justice Merkel.[39]

8.37 Justice Merkel found there was no expectation by the initiating respondents that Apco's readiness to receive calls meant it would match price increases advised by

37 Mr Brian Cassidy, *Committee Hansard*, 25 January 2011, p 53.

38 [2005] FCAFC 161.

39 Marshall (2008, p 2).

the initiating respondents.[40] The Full Court said there was no more than a hope or factual expectation that Apco would act in a particular way, and that fell short of an understanding.[41] The Full Court thereby ruled that a commitment by a party to a particular course of action or inaction is necessary to establish an 'understanding' within the meaning of section 45(2) of the *Trade Practices Act*. The ACCC's case failed because it did not prove the requisite commitment.[42]

8.38 The ACCC sought special leave to appeal the Full Court decision to the High Court, however this application was dismissed.[43]

Geelong petrol case

8.39 In *ACCC v Leahy Petroleum Pty Ltd & Ors*,[44] Justice Gray found that alleged price fixing arrangements arising out of disclosures of information between petrol retailers in the Geelong area did not constitute an 'understanding'. He noted that parallel conduct, even where conscious, lay outside the scope of an understanding.[45]

8.40 The ACCC told the Committee that in the Geelong petrol case:

> ...a group of petrol companies and petrol retailers in the Geelong region were passing on to one another their pricing intentions. They were not innocent discussions talking about the footy and the weather and saying, 'Oh, by the way, I'm increasing my price to $1.45 a litre this afternoon,' because they were using code in these discussions. Admittedly the discussions then looked a bit odd but nonetheless they were using code in the discussions...and yet the court ruled. We took legal advice on whether we had grounds to appeal, and the legal advice we had was that we had no grounds to appeal following the Apco decision; the court ruled that that behaviour was not unlawful.[46]

Is the current law adequate to prohibit price signalling?

8.41 The Committee received some evidence that section 45(2) of the *Competition and Consumer Act* is adequate to deal with anti-competitive signalling. The legal firm Mallesons Stephen Jaques told the Committee that in their opinion, the current wording of the Act is sufficient for the ACCC to prosecute one or more competitors

---

40 ACCC (2007, p 228).

41 ACCC (2007, p 228).

42 Beaton-Wells and Fisse (2010, p 75).

43 Australian Competition and Consumer Commission, "High Court dismisses ACCC – APCO special leave application", *Media release*, MR 112/06, 5 June 2006.

44 [2007] FCA 794.

45 Law Council of Australia, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011.

46 Mr Brian Cassidy, *Committee Hansard*, 25 January 2011, pp 33-34.

for exchanging information about a future price. What needs to be proven, they argue, is that:

> (i) one or more competitors was attempting to arrive at an understanding that had the purpose or likely effect of fixing, controlling or maintaining a price or a component of a price; or
>
> (ii) or one or more of the competitors was attempting to arrive at an understanding to exchange information about future prices and the understanding had the purpose, or would be likely to have the effect of substantially lessening competition in a market; or
>
> (iii) two or more competitors had arrived at an understanding to exchange pricing information, and the understanding to exchange the pricing information had the purpose or would have likely effect of substantially lessening competition in a market; or
>
> (iv) two or more competitors had arrived at an understanding that had the purpose or likely effect of fixing, controlling or maintaining a price or a component of a price.[47]

8.42 Mallesons' submission notes that in the first two of the above cases (i and ii), the current 'law of attempts' requires both an intention to signal a price and an express or implied suggestion that the recipient of the information might act on the information that has been signalled. In the last two cases—an understanding to exchange information (iii and iv)—the submission notes that under current law, 'a mere expectation on the part of the party who signals the price is not enough to establish a commitment to act'.[48]

8.43 The ACCC disagreed with Mallesons' analysis, arguing that there is conduct that goes beyond the four scenarios which should be capable of being subject to the law. Their Chairman elaborated:

> The problem is the requirement of a commitment as summarised in Apco and as affirmed by the High Court. Let me take the example of a group of competitors sitting around a table when one of them says, 'You know it would be really useful if we were to let each other know what we're doing in our prices,' and the others say, 'Yes, that would be a useful exercise,' but that is as far as they go. That does not amount to a commitment. Indeed it may be that in those circumstances they go away and they do exchange prices as a matter of process but on the few occasions they just do not cooperate; they do not do it. That, if you like, creates the perception that there was in effect no commitment but there is a wink and a nod. That is not a commitment that is sufficient to be covered by the current law.[49]

---

47 Mallesons Stephen Jaques, *Submission 60*, p 6.

48 Mallesons Stephen Jaques, *Submission 60*, p 6.

49 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 33.

8.44 In relation to the Apco case, Mallesons' submission queried whether the finding demonstrates a current gap in the law, 'or whether the judgment was due to the way the ACCC pleaded its case'.[50] Ms Sharon Henrick, a partner and convenor of the Competition Law Group at Mallesons, told the Committee:

> Without wishing to criticise the Commission for the way it pleaded the Apco case, we considered that if the Commission had pleaded that case differently it would have been able to succeed against Apco and Apco's managing director who received the information about future prices. In particular, we believe that if the Commission had pleaded an understanding to exchange information or to give and receive information with an anticompetitive purpose or with an anticompetitive effect—so either of those things—it should have won the case against Apco and Apco's managing director.[51]

8.45 In evidence to the Committee, Mr Brent Fisse argued that in his view, and that of Ms Henrick, not enough work has been done to examine the reasons that the ACCC enforcement actions in cases such as Apco and Leahy did not succeed. He queried whether or not the evidence that was put forward by the ACCC was done so in a way that corresponded adequately to the relevant theory of the case.[52]

8.46 Unsurprisingly, the ACCC disagreed. Mr Samuel told the Committee that as a result of the Apco case, a finding of price signalling in contravention with the current law would only be in a case:

> ...where Banker A and Banker B agree that they will not only exchange information but that they will also say to each other, 'I'm lifting mine by 45 basis points next week, will you do the same?' and the other says, 'Yes, I'll do the same.'[53]

The ACCC's 2007 proposed amendment

8.47 The ACCC has argued since these rulings that the requirement to prove a commitment makes it difficult to show there is a contract, arrangement or understanding within the meaning of the cartel provisions of the *Trade Practices Act*. It noted that some of its investigations into alleged cartel conduct could not be taken further where the parties have denied a commitment, notwithstanding their acknowledgement to have met and exchanged information on prices.[54] In its 2007 report on petrol prices, the ACCC expressed concern that these findings:

> ...disclose a subtle but significant shift in the nature of the commitment that must be found to establish the existence of an understanding. Earlier

---

50 Mallesons Stephen Jaques, *Submission 60*, p 6.

51 Ms Sharon Henrick, *Committee Hansard*, 25 January 2011, p 91.

52 Mr Brent Fisse, *Committee Hansard*, 25 January 2011, p 93.

53 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 43.

54 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 27.

> decisions of the Federal Court interpreted the term to include an expectation regarding future conduct consciously or intentionally engendered in one person by the words or conduct of another person. However, the more recent decisions suggest that an understanding will not be regarded as having been reached in those circumstances; rather, there is a need for at least one of the parties to give or accept a commitment, obligation, undertaking or assurance that they will act in a certain way.[55]

8.48 In the petrol prices report, the ACCC proposed an amendment to section 45 of the *Trade Practices Act* to clarify the meaning of the term 'understanding'. It sets out a number of factual matters the court may take into account in determining whether an understanding has been arrived at and specifically provides that it is not a necessary element of an understanding that the parties to the understanding be committed to giving effect to it.[56]

---

55 ACCC (2007, p 228).

56 ACCC (2007, p 230). Specifically, the ACCC's proposed amendment stated:

(a) The court may determine that a corporation has arrived at an understanding notwithstanding that:

(i) the understanding is ascertainable only by inference from any factual matters the court considers appropriate

(ii) the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding.

(b) The factual matters the court may consider in determining whether a corporation has arrived at an understanding include but are not limited to:

(i) the conduct of the corporation or of any other person, including other parties to the alleged understanding

(ii) the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding

(iii) the extent to which the corporation was acting in concert with others in relation to the subject matter of the alleged understanding

(iv) any dealings between the corporation and any other parties to the alleged understanding before the time at which the understanding is alleged to have been arrived at

(v) the provision by the corporation to a competitor, or the receipt by the corporation from a competitor, of information concerning the price at which or conditions on which, goods or services are supplied or acquired, or are to be supplied or acquired, by any of the parties to the alleged understanding or by any bodies corporate that are related to any of them, in competition with each other

(vi) whether the information referred to in (v) above is also provided to the market generally at the same time

(vii) the characteristics of the market

(viii) the likelihood of the information referred to in (v) above being useful to the recipient of the information for any purpose other than fixing or maintaining prices;

(ix) the extent to which, if at all, the communication referred to in (v) above was secret or intended by the parties to the communication to be secret.

Treasury's discussion paper

8.49 In January 2009, Treasury released a discussion paper and called for submissions on the meaning of 'understanding' in section 45 of the *Trade Practices Act*. The discussion paper asked, among other matters, whether the current judicial approach to the interpretation of 'understanding' limits the ability of the *Trade Practices Act* to address properly anticompetitive practices and if so, whether there is a need to clarify or define the meaning of 'understanding'.[57]

8.50 A submission of particular note to the Treasury inquiry was made by Dr Caron Beaton-Wells and Mr Brent Fisse. Their submission argued that case law has failed to provide a clear conceptual definition of the conduct that should be caught by the requirement of a 'contract, arrangement or understanding' under section 45 of the *Trade Practices Act*. It also noted that economic theory provides guidance on where the line should be drawn conceptually between legal and illegal coordination between competitors. The submission claimed that in interpreting the word 'understanding' in section 45 of the *Trade Practices Act* consideration should be given to the approach in the United States and the European Community, particularly the concept of 'concerted practice' under EC law.[58]

A 'concerted' practice'

8.51 A 'concerted practice' is harmful to competition because it enables competitors to determine a coordinated course of action…and to ensure its success by eliminating any uncertainty as to its competitors' conduct.[59] It is not a recognised concept in Australian competition law.

8.52 Dr Beaton-Wells and Mr Fisse's submission to Treasury's inquiry noted that under Article 81(1) of the European Community Treaty, there is a distinction between 'concerted practices' and an 'agreement'. The aim of this provision is to prevent firms from evading the application of the law by colluding in a manner that falls short of an agreement.[60] The submission observed that in general, the standard required to establish a 'concerted practice' is much less demanding than that required to establish

---

57 Department of the Treasury, *Discussion Paper: The meaning of 'understanding' in the Trade Practices Act 1974*, http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1459 (accessed 25 February 2011).

58 Dr Caron Beaton-Wells and Mr Brent Fisse, *Submission*, Treasury inquiry into the meaning of 'understanding' in the Trade Practices Act, April 2009 http://www.treasury.gov.au/documents/1511/PDF/Beaton-Wells_and_Fisse.pdf (accessed 25 February 2011).

59 Imperial Chemical Industries Ltd v Commission [1972] ECR 619, [118].

60 Dr Caron Beaton-Wells and Mr Brent Fisse, *Submission*, Treasury inquiry into the meaning of 'understanding' in the Trade Practices Act, April 2009, p 12 http://www.treasury.gov.au/documents/1511/PDF/Beaton-Wells_and_Fisse.pdf (accessed 25 February 2011).

an 'agreement'. A 'concerted practice' does not require any element of commitment'. Rather, what needs to be shown is:

(a) some form of contact between competitors (which may be indirect or weak as, for example, contact via a publicly announced price increase);

(b) a meeting of minds or consensus in relation to cooperation which may be inferred from mere receipt of information; and

(c) a relationship of cause and effect between the concertation and the subsequent market conduct.[61]

8.53 Dr Beaton-Wells and Mr Fisse emphasise that the EC law concept of 'concerted practice' is intended specifically to catch tacit collusion or facilitating practices. Significantly, they contend that it is likely that the EC concept of a 'concerted practice' would catch the behaviour alleged to constitute an 'understanding' in the Apco and Leahy cases. Specifically, they note that in these cases:

> ...there would be no need to establish commitment on the part of the respondents to increase prices in accordance with the signals provided. Nor would it be necessary to show that there was a reciprocal or two way exchange of information – the concept of 'concerted practice' covers the situation where one party is active in disclosing information and another is passive in receiving or accepting it. Thus, for the purposes of finding those respondents who conveyed the information about changes in petrol prices liable, it would be sufficient to show that they did so with the purpose of influencing their competitors to follow the signalled price rise (even if in some cases, they failed to achieve the desired effect). For the purposes of finding the recipients of the information liable, it would be sufficient to show that their conduct was influenced even if merely by aiding their decisions as to whether or not to follow the signalled price.[62]

8.54 Treasury has not as yet responded to the submissions to its discussion paper. Some have argued that it should do so before proceeding with legislation to address price signalling.[63] In their submission to the Government's Exposure Draft, Dr Rhonda Smith, Mr Arlen Duke and Professor David Round argue that the government should not rush to introduce price signalling laws before considering other options such as those raised by the discussion paper. They also maintain that the proposals to lower the bar to prove an 'understanding' and the proposal to introduce price signalling laws should be introduced together.[64]

---

61 Dr Caron Beaton-Wells and Mr Brent Fisse, *Submission*, Treasury inquiry into the meaning of 'understanding' in the *Trade Practices Act*, April 2009, p 12 http://www.treasury.gov.au/documents/1511/PDF/Beaton-Wells_and_Fisse.pdf (accessed 25 February 2011).

62 Dr Caron Beaton-Wells and Mr Brent Fisse, *Submission*, Treasury inquiry into the meaning of 'understanding' in the *Trade Practices Act*, April 2009, pp 13-14.

63 See Mr Brent Fisse, *Submission 67*, p 3.

64 See also Smith, Duke and Round (2009, pp 22-42).

The ACCC's current view on price signalling prohibitions

8.55 The ACCC told the Committee that signalling may involve no underlying contract, arrangement or understanding but can, nonetheless, have exactly the same outcome as the more traditional cartel type behaviour.[65] It thereby argued that in terms of addressing signalling, clarifying the meaning of the word 'understanding' in section 45 is not the key. As Mr Cassidy explained to the Committee:

> ...there is a class of conduct—a not insignificant class of conduct—that we simply cannot get to with the law as it currently stands but which is unlawful in other jurisdictions.[66]

8.56 In terms of addressing signalling, the ACCC appears to have shifted its focus from a clearer definition of 'understanding' in the context of section 45(2) of the *Competition and Consumer Act* to an EC-style provision on concerted practices. Mr Samuel noted in his evidence that the ACCC had 'had another look' at the issue of signalling and considered the concerted practices approach recommended by Dr Beaton-Wells and Mr Fisse.[67] In this context, Mr Cassidy contrasted Australian provisions with those currently operating in the EC and the UK:

> We particularly look at the EC and the UK, where there is a solution, we believe, and the solution has been in existence ever since the EC was formed. It is in the original article 81 of the treaty which formed the EC. The sky has not fallen in in the EC or the UK because of this particular piece of law. Nonetheless, it is operative. We have very recent cases that we can go to which...are unlawful in the UK and unlawful in the EC but would not be unlawful here. We believe there is a way of...getting at this sort of behaviour, this sort of conduct, without affecting legitimate market conduct. It is an area where you need to be careful, admittedly, because there are some fine lines between what you might call questionable conduct and quite legitimate conduct, but nonetheless we believe it can be done.[68]

---

65 Mr Brian Cassidy, *Committee Hansard*, 25 January 2011, p 29.

66 Mr Brian Cassidy, *Committee Hansard*, 25 January 2011, p 28.

67 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 28. This shift was earlier acknowledged by ACCC Commissioner Dr Jill Walker in a speech to the Law Council of Australia's annual Trade Practices Workshop in August 2010; http://www.accc.gov.au/content/item.phtml?itemId=944183&nodeId=3a77a169d2335c5403d1052290e9407e&fn=20100821_Walker_Law%20Council%20AgreementsFacPracFinal.pdf (accessed 27 March 2011).

68 Mr Brian Cassidy, *Committee Hansard*, 25 January 2011, p 30. Mr Cassidy also told the Committee of a recent UK case involving the Royal Bank of Scotland and Barclays. The Royal Bank of Scotland was found to have passed on specific price information to Barclays and—even in the absence of an underlying agreement—was fined £328.5 million.

The proposals for reform

8.57 As noted earlier, both the Opposition and the Government have proposed legislative reforms to address price signalling. In November 2010, the Opposition competition spokesman, the Hon. Bruce Billson MP, introduced the Competition and Consumer (Price Signalling) Amendment Bill 2010 to make anti-competitive price signalling unlawful. On 12 December 2010, the Government published the Competition and Consumer Amendment Bill (No. 1) 2011 as an Exposure Draft for comment by 14 January 2011. This section looks at these proposals and some of the commentary on their merits and shortcomings.

The Government's Exposure Draft Bill

8.58 The Government's Exposure Draft Bill contains two strict liability (or 'per se') prohibitions. It contains a proposed prohibition on making a private disclosure of pricing information (which includes pricing information in the public domain) to an actual or potential competitor.[69] In terms of public disclosure and/or disclosure of information beyond pricing, the bill prohibits disclosing information about prices, capacity or strategy for the purpose of substantially lessening competition (SLC).[70]

8.59 This second prohibition, the SLC prohibition[71], clarifies that a corporation's purpose may be inferred from surrounding circumstances. The Court may have regard to a non-exhaustive list of factors for the purposes of determining whether a corporation had the requisite purpose of SLC when making a disclosure. These factors are: whether the disclosure was a private disclosure to competitors; the degree of specificity of the information; whether the information relates to past, current or future activities; how readily available the information is to the public; and whether the disclosure is part of a pattern of similar disclosures by the corporation.

8.60 The Explanatory Note accompanying the Exposure Draft bill described private disclosure of pricing information as 'most readily distinguishable from benign or pro-competitive forms of conduct'. It noted that it is difficult to ascertain a rationale for disclosing pricing information to competitors in a private manner, other than to seek to facilitate prices above a competitive level. The Government also argues that this prohibition will eliminate a key element of the communications required for setting up, monitoring and sustaining cartel behaviour.[72]

---

69 Proposed section 44ZZW.

70 Proposed section 44ZZX.

71 Some have referred to this prohibition as 'the signalling prohibition'. See Law Council of Australia, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011.

72 Department of the Treasury, Competition and Consumer Amendment Bill (No. 1) 2010, *Explanatory Note*, http://www.treasury.gov.au/documents/1918/PDF/Explanatory_Material_CCAB.pdf (accessed 10 March 2010).

8.61 The SLC prohibition captures a range of disclosures beyond those relating to pricing information and recognises the possibility that anti-competitive pricing and information disclosures can be made in public. The Government has justified the prohibition on the basis that the disclosure of a broader range of strategic business information can lead to anti-competitive outcomes. It justifies the 'purpose test' on the basis that it will 'limit the possibility of capturing pro-competitive information disclosures'.[73] The Government has stated that:

> The Government has received independent legal advice that considers it would not be appropriate to ban the communication of pricing intentions that have the effect or likely effect of substantially lessening competition, as opposed to the purpose. Such a prohibition would create substantial uncertainty, because market participants could not know in advance how their competitors will react to their public statements, and therefore what the effect or likely effect would be.[74]

Proposed amendments to the Exposure Draft Bill

8.62 In March 2011, Treasury told the Committee that the Government was considering introducing an authorisation and notification regime to accompany the Exposure Draft Bill's prohibitions. Banks will not be subject to the prohibitions when they join together to lend money to large businesses and during corporate workouts when companies are unable to repay debts. A notification regime is proposed to allow banks to seek approval from the ACCC to share their pricing with their competitors if they believe there is a net public benefit in the information being exchanged (see paragraph 8.80).[75]

Criticism of the government's bill—the per se prohibitions

8.63 The central criticism of the Government's draft bill is that it risks prohibiting legitimate commercial activity. Various critiques of the bill refer to the potential for 'overreach' and 'unintended consequences' from the per se prohibitions. As Mr Fisse told the Committee:

> There is no requirement of proof of an agreement or an understanding—there is no requirement of proof of collusion, in other words—and that is the fundamental tack that has been taken in the exposure draft provisions. That approach, in our view, is fundamentally mistaken, because once one moves away from a requirement of collusion, deliberate coordination or, under the current law, contract arrangement or understanding, and focuses merely on information disclosure, it is inevitable that the prohibitions are going to suffer from extreme reach—in our view, unjustified overreach.[76]

---

73 Department of the Treasury, Competition and Consumer Amendment Bill (No. 1) 2010, *Explanatory Note*, p 4.

74 Australian Government, *Competitive and sustainable banking system*, 2010, p 11.

75 Mr Jim Murphy, Treasury, *Proof Committee Hansard*, 9 March 2011, p 7.

76 Mr Brent Fisse, *Committee Hansard*, 25 January 2011, p 93.

8.64 In their submission to the Treasury inquiry, Dr Beaton-Wells and Mr Fisse describe the prohibitions in the Exposure Draft as 'novel' and note that they depart 'radically' from the law in other jurisdictions. They criticise the narrowness of the bill, arguing that prohibiting a specific form of conduct (price signalling) in a specific sector (banking) runs the risk that courts will not focus on the legislative intent of the provision.[77] In their view, both the per se prohibitions require clarification. The private disclosure prohibition must include distinctions on whether the information relates to past, current or future behaviour, whether it is confidential, whether it involves commitment, whether it is verifiable and whether it involves aggregated or disaggregated data. The SLC prohibition should focus on whether or not a competitor is acting strategically to coordinate market conduct with a competitor.[78]

8.65 The Law Council of Australia has argued that the private disclosure prohibition requires significant amendments to avoid unintended consequences. It recommended prohibiting disclosures that are made to competitors for the 'purpose of, or with the effect or likely effect of, substantially lessening competition'. It also it emphasised the need for a defence of legitimate business justification.[79]

8.66 Ms Henrick of Mallesons Stephen Jaques also warned the Committee of the unintended consequences of the Government's legislation. She argued that the proposed legislation would pose 'significant and unnecessary' risks for the way alliances and consortiums operate given they exchange information about prices. Further, vertically integrated businesses supplying goods or services to their competitors routinely need to discuss prices, but they are not protected by the bill's proposed exemptions. Ms Henrick also noted that the Government's bill would pose unnecessary risks for many information vendors, such as firms that provide estimates of market shares.[80]

8.67 Another criticism of the Government's proposed legislation is that the SLC test is too difficult to satisfy. Mr Fisse argued that there are practical concerns with the SLC test. Apart from being 'notoriously vague', he emphasised that the test would require proof of a direct link between the signalling and the effect on the market. In the case of a bank announcing a future mortgage rate increase, the SLC test would not be passed if it is likely that the information about the future price would have become known to the market in other ways. He also noted that the 'purpose' test of the

---

77 Dr Caron-Beaton-Wells and Mr Brent Fisse, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011, p 2.

78 Mr Brent Fisse and Dr Caron-Beaton-Wells, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011, p 4.

79 Law Council of Australia, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011, p 2.

80 Ms Sharon Henrick, *Committee Hansard*, 25 January 2011, p 92.

prohibition can be avoided by the defendant drawing a distinction between the purpose of the disclosure and the purpose of the conduct to which it related.[81]

8.68 Dr Smith, Mr Duke and Professor Round have also criticised the per se prohibitions in the Draft Exposure Bill. In their submission to Treasury, they recommend that the bill be amended to accompany the prohibitions with an anti-competitive effects test through a requirement that the conduct has the effect or likely effect of substantially lessening competition. They note that as signalling conduct can have both positive and negative effects on competition, it is important that the effect of competition is recognised to guard against overreach.[82]

8.69 The academics also insist that an authorisation is not an adequate check on per se prohibitions. Not only do authorisations take time, but they are:

> ...not intended to permit policy makers to adopt overly broad laws knowing that a party who is inappropriately caught by such a law is able to escape the imposition of unreasonably [sic] penalties by lodging a costly authorisation application with the ACCC.[83]

8.70 The Law Council of Australia has also argued that reliance on an authorisation process is inappropriate to ensure that legitimate information disclosures do not breach the prohibitions.[84] It also cited the cost and time associated with the process.

8.71 The Committee received some comment that the legislation should be applied to all sectors of the economy, not just the banking sector. The ACCC, notably, told the Committee that:

> The general principle of the *Trade Practices Act*...is that it should apply with very rare exceptions, such as telecommunications, across all sectors of industry and commerce. We consider that this is an issue that will affect a variety of sectors in industry and commerce in Australia and ought to apply across the board.[85]

8.72 While the ACCC's preference is for economy-wide legislation on signalling, given the proposed legislation focuses on the banking sector, it supports expansion to other sectors through regulation:

> ...we would think it should apply more broadly, but equally if there is going to be some sort of phased mechanism for coverage we think a process of

---

81 Mr Brent Fisse and Dr Caron-Beaton-Wells, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011, p 5.

82 Dr Rhonda Smith, Mr Arlen Duke and Professor David Round, *Submission to Treasury*, p 2.

83 Dr Rhonda Smith, Mr Arlen Duke and Professor David Round, *Submission to Treasury*, p 8.

84 Law Council of Australia, *Submission to Treasury*, Competition and Consumer Amendment Bill (No. 1) 2011 (Exposure draft), January 2011.

85 Mr Graeme Samuel, *Committee Hansard*, 25 January 2011, p 31.

> regulation going through both houses of parliament is a preferable approach because it does give us clarity as to exactly what the law is and who it applies to at a particular point in time.[86]

8.73 A further criticism of the Government's Draft Bill is that it will be easily circumvented. Mr Fisse argued in his submission to this inquiry that the narrow focus of the bill creates opportunities for companies to sidestep the provisions. The prohibition against public notification by a competitor of a future price increase (the SLC prohibition) could be avoided by notifying customers privately and leaving it to the media to report the information. Moreover, the focus on price signalling may force companies to examine other facilitating practices such as price matching or use of non-price terms and conditions.[87]

8.74 Before being appointed an ACCC Commissioner, Dr Jill Walker wrote that the problem with making the private exchange of pricing information a per se prohibition is that it:

> ...seems likely to simply result in the modification of conduct to publicise the price exchanges, thereby lifting the conduct out of the per se category, because it would be too difficult to draw a bright line between those public actions which should be condemned per se and those which should not.[88]

Committee view

8.75 The Committee strongly supports these critiques. It believes that the per se prohibitions in the Government's Exposure Draft Bill run the risk that legitimate communication of pricing information that is not anti-competitive in its intent or its effect will be captured. The Committee argues that it is better for a bank engaging in anti-competitive price signalling to go undetected than it is for a bank conducting legitimate communications to be inappropriately penalised. In this vein, the Committee also contends that the government's over-reliance on the proposed new ACCC notification regime as a solution to the problems in the bill is likely to be cumbersome and restrictive for the banks, as well as a burden on the ACCC. The far better alternative is to replace the prohibitions with a competition test that applies to both public and private communications.

The Government's bill

8.76 In March 2011, the government introduced into the House of Representatives its bill on price signalling. The EM accompanying the bill noted that many stakeholder concerns relating to the draft bill had been considered and addressed.[89] The main changes to the bill from the Exposure Draft are some new exceptions to the

---

86 Mr Brian Cassidy, *Committee Hansard*, 25 January 2011, p 31.

87 Mr Brent Fisse, *Submission 67*, p 2.

88 Dr Jill Walker, LECG, Memo dated 5 May 2009, p 9.

89 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, p. 67.

prohibitions as well as a notification process to enable parties to obtain immunity from the *per se* prohibition.

8.77 However, the bill does not abolish the per se prohibition as several stakeholders had recommended. The government bill retains (from the Exposure Draft) the SLC prohibition. The EM responded to stakeholder concerns that this prohibition should be limited to confidential and prospective pricing information by noting that disclosures will only be prohibited if a business has the requisite (substantial) purpose of substantially lessening competition in making the disclosure.[90]

8.78 The EM also recognised stakeholder concerns that the SLC prohibition does not contain the requirement that the conduct has 'the effect, or likely effect of substantially lessening competition'. It claimed that an effects test is 'unwarranted at this time'. It added: 'that the disclosure must be made for the purpose of SLC recognises that there may be legitimate and pro-competitive reasons to make such disclosures'.[91]

Defences

8.79 The EM to the government's bill states that a number of exceptions to the prohibitions will be made available. In terms of the *per se* prohibition, disclosures relating to pricing information regarding goods or services will be exempt if the information relates to goods or services supplied or likely to be supplied, acquired, or likely to be acquired by the corporation from the recipient. In terms of exceptions applying to both the prohibitions, the bill amends the Exposure Draft by adding three new exceptions:

- disclosures made for the purpose of complying with the continuous disclosure obligations within the *Corporations Act 2001*;
- disclosures made in the course of engaging in conduct that is covered by an authorisation; and
- disclosures made in relation to a collective bargaining notice, if the disclosure is made to one of the contracting parties.[92]

Notification

8.80 As flagged with the Committee (see paragraph 8.62), the Government's bill expands the existing notification process to allow parties to notify for conduct which falls under the *per se* prohibition. It will allow parties to obtain immunity through the lodgement of a notification of the conduct with the ACCC which has 14 days to assess the notice before immunity commences. The notification process will operate

90 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, p. 71.

91 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, p. 72.

92 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, p. 72.

alongside the authorisation process, which will enable business to obtain immunity from both prohibitions.[93]

Regulations

8.81 The EM clarifies that in the first instance, a regulation 'should be made to proscribe banks to the prohibitions'. There is capacity for the regulations to be made to apply to prohibitions to other sectors after further review.[94] The EM noted that the use of regulations to give effect to the sector specific application of the prohibitions gives greater flexibility in applying the prohibitions to other sectors in the future. All the regulations will be disallowable instruments and therefore subject to Parliamentary oversight.[95]

The Coalition's bill

8.82 In his Second Reading Speech on the Competition and Consumer (Price Signalling) Amendment Bill (No. 1) 2010, the Hon. Bruce Billson MP told Parliament that the bill addresses a gap in the current law. He added that this 'gap' has assumed 'particular salience' in light of the current vigorous debate about the state of competition in the banking sector and interest rate movements.[96]

8.83 Mr Billson explained that the bill's key elements—a purpose and effects test and the yardstick of 'substantially lessening competition'—are important to focus on the anticompetitive conduct. In terms of determining the purpose of the conduct, he noted that:

> The bill makes it possible for a court to infer purpose on the basis of the conduct. This is the 'if it looks like, walks like, squawks like and hangs out with ducks, it is fair enough for the court to infer that it is a duck' reasoning.[97]

8.84 In terms of the 'substantially lessening competition test', Mr Billson noted that it is a recognised threshold in the *Trade Practices Act* and was selected to ensure that the anticompetitive effects manifested in identical prices or parallel price movements are captured.[98]

8.85 The Coalition's bill differs from the government's proposed legislation in three key respects:

---

93 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, pp 75-76.

94 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, p. 68.

95 Competition and Consumer Amendment Bill (No. 1) 2011, *Explanatory Memorandum*, p. 69.

96 Mr Bruce Billson, Second Reading Speech, *House of Representatives Hansard*, 22 November 2010, p 3118.

97 Mr Bruce Billson, *House of Representatives Hansard*, 22 November 2010, p 3118.

98 Mr Bruce Billson, *House of Representatives Hansard*, 22 November 2010, p 3118.

- first, whereas the Government's bill has a per se prohibition on private disclosures of pricing information to competitors, the Coalition's bill states that the illegality of these private disclosures is dependent on the purpose of the corporation in making the disclosure;
- second, the Government's bill also prohibits disclosure of information about prices, capacity or strategy for the purpose of substantially lessening competition. With no effects test, it would be possible to breach both the prohibitions even if the disclosure has no discernable effect on competition. The Coalition's bill has both a 'purpose' and 'effect' test: it prohibits communication of price related information to a competitor for the purpose of inducing or encouraging the competitor to vary a price, *and* which is likely to have the effect of substantially lessening competition in the market for the goods or services in question; and
- third, the prohibitions in the Government's bill relate to information about pricing, capacity and commercial strategy, whereas the Coalition's bill relates only to pricing.

8.86 The Coalition's bill therefore sets a higher threshold than the Government's proposed legislation. Not only does it not apply a per se prohibition on private disclosures, but the proof for an offence for a public disclosure is that it has both the purpose and the effect (or likely effect) of substantially lessening competition. This provision guards against the risk—distinct in the Government's bill—that signalling with a pro-competitive effect could be prosecuted.

Criticisms of the Coalition's bill

8.87 In evidence to the House of Representatives Standing Committee on Economics, the ACCC outlined its objections to the Coalition's legislation. Mr Cassidy told the Committee that three aspects of the legislation concerned the ACCC:

- first, the bill relates only to price signalling and not to quantity based offences such as market sharing or collusive tendering;
- second, the bill requires both purpose and effect to be shown, 'whereas the more normal competition provisions...are couched in terms of purpose and/or effect'. Mr Cassidy explained that the ACCC would normally proceed 'on one or the other' and the bill thereby establishes a fairly high burden of proof; and
- third, as per the Government's proposed legislation, some signalling conduct should be subject to a per se prohibition. Mr Cassidy argued that where competitors privately pass between themselves their future pricing intentions, a per se prohibition should apply.[99]

99 Mr Brian Cassidy, *House of Representatives Standing Committee on Economics Hansard*, 18 February 2011, p 11.

8.88 The Australian Bankers' Association (ABA) has cautioned that the Opposition's bill could have unintended consequences if it is not carefully considered. It noted that banks are required to communicate their funding costs and other price related issues as part of their liaison with the media, the parliament and their customers. Mr Steven Münchenberg, Chief Executive of the ABA, has argued that the banks need to comment in the public debate and any attempt to constrain this participation will mean that the media and other commentators will be unable to present a balanced view.

8.89 The ABA also criticised the Coalition's bill on the basis that it is out of step with the prohibitions in EU and US anti-trust laws. It argued in its submission to the House inquiry that the bill's prohibition on unilateral disclosures (rather than 'concerted' practices) with no requirement of concerted action or coordination with a competitor is 'unprecedented'.[100] Mr Münchenberg told the House Committee that it is 'a very, very low threshold' for an offence 'by just putting out a communication that others may or may not respond to'.[101]

8.90 The ABA disputed the Explanatory Memorandum's claim that 'the Bill will have no financial impact'. It claimed that this ignores 'significant costs' that may be incurred due to the ACCC's power to investigate through section 155 of the Competition and Consumer Act. Its submission noted that:

> ...given the breadth of the proposed prohibition, the ACCC's investigation powers would be significantly broadened with the potential for legitimate disclosures by competitors to be misinterpreted and then investigated by the regulator on the basis of mere suspicions or allegations, notwithstanding that the communications were procompetitive, legitimate business practice.[102]

Committee view

8.91 On the basis of the proceeding discussion, the Committee makes the following observations. The first is to reiterate that legislating to prohibit anti-competitive price signalling is a difficult and complex matter. Fundamentally, however, it is important that any proposed legislation recognises that not all price signalling—whether publicly or privately communicated—will have an anti-competitive intent or effect. It is important that the banks do not feel constrained to speak publicly in general terms about the future direction of the market.

---

100 Australian Bankers' Association, *Submission 4*, House of Representatives Standing Committee on Economics, p 3.

101 Mr Stephen Münchenberg, *House of Representatives Standing Committee on Economics Hansard*, 18 February 2011, p 36.

102 Australian Bankers' Association, *Submission 4*, House of Representatives Standing Committee on Economics, p 4.

8.92 The second point is that the Committee believes that there is a need to address price signalling through an amendment to the *Competition and Consumer Act*. It agrees with the ACCC that the Act is currently inadequate to prohibit statements of the type made by ANZ CEO Mr Smith. This type of statement, which relays to the market the future pricing intentions of a company, should be addressed by the ACCC. The Committee agrees with the ACCC that the courts have ruled in Apco and Leahy that an 'understanding' for purposes of section 45(2) constitutes more than what is necessary to prosecute a case of 'price signalling'. Regardless of whether the ACCC might have been able to plead more effectively in the case, this is where the current understanding of the law stands.

8.93 Thirdly, and following from these points, the Committee believes that the Government's Draft Exposure Bill is poorly drafted and should not contain per se prohibitions. The Committee contends that a new provision addressing price signalling in the banking sector must contain a competition test in language that is familiar to the *Competition and Consumer Act*. Accordingly, the Committee recommends that the Government amend its proposed draft legislation to prohibit price signalling with 'the purpose, effect or likely effect of substantially lessening competition in the market'.

8.94 Fourth, the Committee requests that the Government release the independent legal advice it received that it would not be appropriate to ban the communication of pricing intentions that have the effect or likely effect of substantially lessening competition, as opposed to purpose. It queries why the provision could not be couched in terms familiar with the Act; namely, 'the purpose and/or effect or likely effect of substantially lessening competition'.

Recommendation 15

8.95 Subject to the release of the Government's independent legal advice, the Committee recommends that the *Competition and Consumer Act 2010* be amended to include a provision which states that a corporation engages in price signalling if it communicates future price-related information to a competitor, and the communication of that information has the purpose, or has or is likely to have the effect, of substantially lessening competition.

8.96 Finally, the Committee notes that the banks' understanding of price signalling, and the reason why it should be subject to a competition test, is quite limited. It is important that any legislation is accompanied by clear explanations providing examples of signalling that would be in breach of the law and assurances on the types of statements that remain legal.

Recommendation 16

8.97 The Committee recommends that an amendment to the *Competition and Consumer Act 2010* to introduce a price signalling provision should be accompanied by ACCC guidelines providing:

- **examples of the type of communication that would fall foul of this provision;**
- **examples of the type of communication that would not fall foul of this provision; and**
- **the protection offered by the exemptions.**