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Comparison of the Bills

Introduction

2.1 This review of the Bills focuses on four key areas of comparison. The first is whether they only apply to prices or whether they apply to other market information as well. For example, signalling information which results in quantity restrictions of a certain good could then result in price increases.

2.2 The second is whether the Bills require 'purpose and effect'. That is, would the Australian Competition and Consumer Commission (ACCC) have to prove both the purpose and effect of an action which could substantially lessen competition? The ACCC argues that to prove both could be extremely difficult.

2.3 Thirdly, the ACCC notes that the behaviour covered by the Competition and Consumer (Price Signalling) Amendment Bill 2010 (the first Bill) is subject to the substantial lessening of competition test. However, the ACCC points out that, as some of the potential behaviour associated with price signalling is so offensive, then it would be reasonable to include a *per se* offence.

2.4 The final question is the coverage of the Bills. That is, whether they apply to the economy overall or just a particular sector.

2.5 Each of these issues is discussed in detail in this chapter.

Conduct within the scope of the Bills

Background

2.6 Proposed section 45A in the first Bill states that corporations may not engage in price signalling, which involves communicating price related information. Under proposed subsection 45A(5), this is defined as:

> ***price-related information*** *means information that relates to the price or terms and conditions of the supply or acquisition, or proposed supply or acquisition, of goods or services, and that may have a bearing on the price of those goods or services.*

2.7 The Competition and Consumer Amendment Bill (No. 1) 2011 (the government Bill) takes a different approach. It generally refers to the disclosure of information and applies two definitions, depending on the prohibition. Proposed section 44ZZW (the *per se* prohibition in relation to private disclosure between competitors) applies to price related information only. Proposed section 44ZZX (the general prohibition on information disclosure where it has the purpose of substantially lessening competition) applies to the following categories of information:

- price related information;
- the capacity of the organisation to supply certain goods or services; and
- anything related to the business's commercial strategy for certain goods and services.

Analysis

2.8 The ACCC criticised the first Bill because it only applies to prices. The ACCC explained that a range of cartel or collusive behaviour may not specifically deal in prices but ultimately could affect market prices. A 'cartel provision' is a provision that fixes prices, restricts outputs in the production supply chain, allocates customers suppliers or territories, or rigs bids. For example, the ACCC cited quantity based offences such as market sharing or collusive tendering 'which is organising who is going to bid in a particular tender and who is not'.[1] The ACCC stated:

> You can either engage in collusive behaviour or signalling behaviour in order to increase your price directly or alternatively

1 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 11.

> you can engage in collusive behaviour or signalling behaviour in order to achieve some sort of quantity restriction, perhaps to be the sole supplier in a particular segment of the market and then you can increase your price without worrying about any competitive reaction.[2]

2.9 The ACCC identified market sharing as a further example where prices could be distorted to the detriment of consumers but which may not be caught by the bill. For example, a competitor could disclose information to the market that they are going to focus on a certain area of the market. This could lead other competitors to focus on the segments of the market that have been vacated. The ACCC explained that this could allow a competitor to increase their prices in their market segment because they know that their competitors are focusing on other segments.[3]

2.10 The committee scrutinised the ACCC over the potential difficulties of extending the bill from dealing with 'price signalling' to broader types of conduct. The ACCC in response stated:

> I do not think that extending this bill to cover more than price signalling is an enormously difficult task. I think it is, if you like, a bit of 'mind over drafting' here and there so that, instead of talking about prices, you are talking about output-related information as well.[4]

2.11 On an initial analysis, the government Bill is to be preferred over the first Bill because of its wider application. However, the committee also received evidence that any such legislation should be wider again. Two academics, Brent Fisse and Caron Beaton-Wells, and Luke Woodward, previously Executive General Manager, Compliance Division at the ACCC, proposed that legislation should focus on collusive practices, rather than the disclosure of information.

2.12 One reason for this approach is that it prevents pro-competition legislation from inadvertently prohibiting competitive information disclosures.[5] This has also been referred to as 'overreach'. The Explanatory Memorandum to the government Bill recognises this issue[6] and the government Bill addresses it through creating two targeted offences. It creates the *per se*

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2 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 11.

3 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 21.

4 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 16.

5 Mr Luke Woodward, *Submission 3A,* pp. 4-5; Mr Brent Fisse and Ms Caron Beaton-Wells, *Submission 1A,* pp. 2-3.

6 Australian Government, *Explanatory Memorandum* (government Bill), pp. 45-47, 52-54.

prohibition for the private disclosure to a competitor of prices. This would apply to the disclosures made in the Apco case. In proposed section 44ZZX, it prohibits more general disclosures where they are made for the purpose of substantially lessening competition in a market.

2.13 There is also a range of exemptions, which are discussed in more detail below. They include notifications, where a business notifies the ACCC of its conduct and that conduct is in the public interest, and authorisations, where a business obtains the ACCC's approval to engage in a particular activity. The exemptions also include disclosures:

- between related bodies corporate;
- for collective bargaining;
- to participants in a joint venture (the *per se* prohibition only); and
- for acquisitions of shares or assets (the *per se* prohibition only).

2.14 While the committee received evidence in support of wide-ranging legislation, other organisations were of the view that maintaining a price-based approach was more appropriate. Caltex commented that the bill 'should only apply to price information and not more broadly, as is the case in the government bill, and it is our view that it should only apply to future prices.'[7]

Conclusion

2.15 The first Bill applies to price related information only. The ACCC and others argued that there is a range of behaviour that, while not directly involving price, will ultimately impact on the price consumers pay for goods or services. For example, the ACCC cited quantity based offences or collusive tendering which is organising who is going to bid in a particular tender and who is not.

2.16 Market sharing is a further example where prices could be distorted to the detriment of consumers. For example, a business could disclose to the market or particular competitors that they are going to focus on a certain area of the market thereby leaving their competitors to focus on other sectors. These types of activities work to undermine markets and disadvantage consumers. Therefore, the government Bill, which applies to a range of information disclosures rather than just prices, is superior to the first Bill.

7 Mr Jordan French, Caltex, *Committee Hansard*, 18 February 2011, p. 49.

2.17 Some individuals argued that the government Bill should be widened to focus on collusion, rather than information disclosure. In the view of the committee, the government Bill addresses this in two ways. Firstly, it has created two targeted offences where there is a *per se* prohibition on the most problematic conduct (private disclosures between competitors) and a general prohibition on disclosures where they are made for the purpose of substantially lessening competition. There is also a range of important exemptions to ensure that legitimate commercial conduct is not inadvertently captured. Therefore, the government Bill has broad scope while simultaneously targeting the most anti-competitive conduct.

Purpose and effect

Background

2.18 The first Bill's provisions require that a deliberate intent of producing anti-competitive behaviour be shown, but also that an actual effect be demonstrated. Proposed subsection 45A(2) defines price signalling:

> *(2) For this section, a corporation engages in **price signalling** if:*
>
> *(a) it communicates price-related information to a competitor; and*
>
> *(b) it does so for the **purpose** of inducing or encouraging the competitor to vary the price at which it supplies or acquires, offers to supply or acquire, or proposes to supply or acquire, goods or services; and*
>
> *(c) the communication of that information has, or is likely to have, the **effect** of substantially lessening competition in the market for those goods or services, or in another market.*

2.19 Proposed subsection 45A(9) states:

> *For this section, a communication has, or is likely to have, the **effect** of substantially lessening competition in a market if it has that effect on its own, or in combination with other communications or other acts.*

2.20 The government Bill would be less restrictive on the ACCC. Private price communications between competitors are prohibited unless they fall within the exemptions, regardless of purpose or effect. Other more general disclosures of information are prohibited if they have the purpose of substantially lessening competition.

Analysis

2.21 The ACCC argued that the requirement to establish both purpose and effect of substantially lessening competition was a serious shortcoming of the first Bill. The ACCC would not only need to demonstrate that the purpose of a communication was to substantially lessen competition, but that this was also the outcome or effect. The ACCC noted that the normal competition provisions in the *Competition and Consumer Act 2010* (CC Act) 'are couched in terms of purpose and/or effect.'[8] The Treasury supported this view noting that under existing legislation, 'the intent of damaging competition is considered to be enough to contravene those provisions.'[9]

2.22 The ACCC advised that the usual test in the competition area is purpose and/or effect. While a purpose and effect test applies to secondary boycott provisions, the ACCC was not aware of any legislative provisions since 1996 that required both purpose and effect.[10]

2.23 The ACCC advised that having to prove both purpose and effect could be so onerous that it would limit the investigations it undertakes. The ACCC stated:

> …with the purpose and effect formulation, that would be a very difficult burden of proof for us. I suspect that would mean that we would probably take very few cases and that would be recognised as being the case.[11]

2.24 However, the requirement to prove both purpose and effect was supported by Caltex which considered it a safeguard to capturing pro competitive information. CALTEX stated:

> The addition of an effects test provides an additional safeguard to avoiding the capture of communication of neutral and pro-competitive information. This means that even if communication of price-related information is inferred (incorrectly) to have an anti-competitive purpose, it must be shown to substantially lessen competition. This is a more difficult test than in the government Bill, which requires a public disclosure of information not to have the purpose of substantially lessening competition, regardless of the effect.[12]

8 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 11.

9 Mr Andrew Deitz, Treasury, *Committee Hansard*, 18 February 2011, p. 33.

10 Mr Marcus Bezzi, ACCC, *Committee Hansard*, 18 February 2011, p. 21.

11 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 15.

12 Caltex, *Submission* 7, para 2.2.4.

Conclusion

2.25 It is clear that the requirement for both purpose and effect would be counter-productive in terms of unintentionally limiting the ability of the ACCC to successfully enforce the CC Act. The ACCC advised that the usual test in the competition area is purpose and/or effect. The purpose and effect test required in the first Bill would be so onerous that the ACCC advised that it would 'probably take very few cases.'

2.26 The government Bill is superior. It places a strong prohibition on private price disclosures between competitors, which is the most reprehensible conduct in this field. It then provides an additional requirement on the ACCC to show that more general disclosures have the purpose of substantially lessening competition. This is a fair protection for business.

Substantial lessening of competition test

Background

2.27 Proposed section 45A in the first Bill sets out a prohibition of price signalling which is governed by a substantial lessening of competition test. Proposed subsection 45A (2) states:

> *(2) For this section, a corporation engages in price signalling if:*
>
> *(a) it communicates price-related information to a competitor; and*
>
> *(b) it does so for the purpose of inducing or encouraging the competitor to vary the price at which it supplies or acquires, offers to supply or acquire, or proposes to supply or acquire, goods or services; and*
>
> *(c) the communication of that information has, or is likely to have, the effect of* ***substantially lessening competition*** *in the market for those goods or services, or in another market.*

2.28 The government Bill has two prohibitions. The *per se* offence in relation to private disclosures of price information between competitors does not require that the conduct substantially lessens competition or have that purpose. The second offence relating to more general disclosures requires that the conduct has this purpose.

Analysis

2.29 The ACCC was critical of the first Bill because all the behaviour it covered was subject to the substantial lessening of competition test. The ACCC asserted that there should be a higher level prohibition on behaviour that was so offensive and unredeeming.[13] These offences are normally referred to as *per se* offences. The ACCC commented that:

> ...if you go to what we might call the very worst end of the spectrum and you were to consider something like competitors passing between themselves their future pricing intentions and doing it in secret—using those criteria, that is about the worst end of the spectrum—you would wonder whether that sort of conduct perhaps should not be simply a *per se* offence.[14]

2.30 In contrast, the government Bill seeks to create a *per se* prohibition and a substantial lessening of competition prohibition. Proposed section 44ZZW prohibits a business from making a private disclosure of pricing information to a competitor (a *per se* offence). Proposed section 44ZZX prohibits a business from making a disclosure on a wide range of matters if the purpose of the disclosure is to substantially lessen competition in the market.

2.31 The ACCC advised that the approach taken in the UK and European Community 'is basically per se, in the sense that they refer to object and/or effect rather than purpose and/or effect'.[15]

2.32 However, the Australian Bankers' Association (ABA) criticised the use of *per se* offences. It commented that it could identify a range of legitimate activities that 'would fall foul' of the *per se* offence.[16] In February, the ABA stated in relation to the exposure draft of the government Bill:

> Just to give one illustration: under the government's bill, based on the legal advice I have received from trade practices lawyers, it would be an offence for a bank to give a written quote to a customer. The reason is that if a customer comes in and says, 'I am fortunate enough to have $10,000 to put on term deposit, what is the best interest rate you can do for me?' and the bank says, 'We're prepared to pay you six per cent' and the customer says, 'Can I have that in writing?' and then takes that written communication

13 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 11.
14 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 11.
15 Mr Brian Cassidy, ACCC, *Committee Hansard*, 18 February 2011, p. 13.
16 Mr Steven Munchenberg, ABA, *Committee Hansard*, 18 February 2011, p. 39.

> from that bank to another bank—because the government's bill explicitly says that this communication can be through intermediaries—and shows it to the other bank, our advice is that that will fall foul of the *per se* offence.[17]

2.33 Disclosure through intermediary is covered under proposed subsection 44ZZU(3) of the government Bill tabled on 24 March 2011. The EM states that:

> ...if a corporation makes a disclosure to an intermediary, for the purpose of the intermediary disclosing (or organising for the disclosure of) that information to other persons and the intermediary does in fact disclose that information to those other persons, then a disclosure is deemed to have been made by the corporation to those persons.[18]

2.34 However, the EM provides an example where disclosure by a third party to a competitor is not action by an intermediary and therefore is not a disclosure. The EM provides the following example:

> Ms Smith wishes to buy a new car. Corporation A discloses to Ms Smith that the best price they can sell the car for is $24,000. Ms Smith is dissatisfied with this quote and goes to a competitor of Corporation A, Corporation B. Ms Smith discloses to Corporation B that Corporation A's best price is $24,000, in the hope that Corporation B offers a cheaper price.
>
> In this scenario, Ms Smith is not an intermediary, and a disclosure has not occurred by Corporation A to Corporation B. This is because Corporation A did not disclose the price of the car to Ms Smith for the substantial purpose of Ms Smith passing it on to Corporation B. The substantial purpose of Corporation A's disclosure was to inform Ms Smith, a potential customer.[19]

2.35 The government Bill explicitly protects legitimate pro-competitive communications. The EM commented that:

> ... it is important to recognise that any provision which seeks to address anti-competitive price signalling and other information exchanges will be exposed to the difficulty of only capturing

17 Mr Steven Munchenberg, ABA, *Committee Hansard*, 18 February 2011, pp. 41-42.

18 Australian Government, *Explanatory Memorandum* (government Bill), p. 12.

19 Australian Government, *Explanatory Memorandum* (government Bill), p. 13.

> anti-competitive exchanges, whilst not impacting on pro-competitive or benign information exchanges.[20]

2.36 The government's EM discussed a range of 'defences, exceptions and authorisations' in order to ensure that only conduct of most concern is prohibited. The government's EM stated that:

> ... it is anticipated that provision would be made for reasonable defences, similar to those available for the cartel provisions of the TPA so that the 'per se' prohibition would not apply to disclosures between:
>
> - related companies;
> - joint venture participants or their representatives on a joint venture management board or committee concerning the prices to be charged by the joint venture;
> - a supplier and an acquirer concerning a supply price, where the supplier and acquirer also compete in respect of the supply of the relevant product; and
> - entities that comprise a dual listed company.[21]

2.37 The government EM noted that 'businesses who wish to continue engaging in conduct in contravention of the new prohibitions, and can demonstrate that doing so provides a net public benefit, can seek authorisation from the ACCC.'[22]

2.38 The government EM advised that through the consultation process, stakeholders argued that the defences and exemptions should be expanded. The EM outlines a range of areas where this occurred. The EM commented that the 'the inclusion of these new exceptions addresses concerns raised by stakeholders and further reduces the prospects for unintended consequences'.[23]

2.39 In addition to the defences and exemptions, notifications and authorisations will provide further protection. The government EM stated that 'businesses will be able to obtain immunity from the 'per se' prohibition by notifying their conduct to the ACCC.'[24] The notification provisions are laid out in section 93 of the CC Act. The government EM stated:

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20 Australian Government, *Explanatory Memorandum* (government Bill), p. 53.

21 Australian Government, *Explanatory Memorandum* (government Bill), pp. 57-58.

22 Australian Government, *Explanatory Memorandum* (government Bill), p. 58.

23 Australian Government, *Explanatory Memorandum* (government Bill), pp. 73-74.

24 Australian Government, *Explanatory Memorandum* (government Bill), p. 75.

> Notification can provide businesses who wish to continue engaging in conduct in contravention of the new prohibitions, and can demonstrate that doing so provides a net public benefit, with immunity. It is a more cost effective and timely process, relative to authorisation, to seek immunity and will reduce the compliance costs on business of the proposed prohibitions. The proposed notification process is analogous with the third line forcing notification (a form of exclusive dealing conduct (section 93) which currently has a lodgement fee of $100 per notification.[25]

2.40 In submissions, the banking industry expressed concern that it would not be able to conduct corporate workouts. These are where a distressed business needs to change its financing arrangements. If the business has a number of lenders, then they will need to communicate price information to each other. Time is critical in these cases because directors have a legal obligation not to continue trading if the business is insolvent. The industry is concerned that notifications are not practical because section 93 allows the ACCC to state that the proposed conduct does not meet the requirements of section 93.[26]

Conclusion

2.41 The first Bill only provides for a substantial lessening of competition prohibition. However, it does not include a *per se* prohibition which deals with the most offensive types of anticompetitive behaviour such as the private communication of prices between competitors. The committee asserts that where a business secretly passes pricing information to a competitor then a clear *per se* prohibition should apply.

2.42 The government Bill has a range of exemptions to both prohibitions. Although industry has expressed some concern about how they would operate, the committee is satisfied that they provide scope for businesses to exchange sufficient information to continue normal operations. The committee anticipates that the ACCC and businesses will establish a suitable range of precedents so that some specialised tasks, such as corporate workouts, will again become routine matters.

25 Australian Government, *Explanatory Memorandum* (government Bill), p. 76.

26 Westpac, *Submission 8A*, p. 2; ABA, *Submission 5A,* pp. 12-13.

Industry coverage

Background

2.43 The Bills take different approaches to specifying the industries subject to prohibitions on anti-competitive price-signalling. Proposed subsection 45A in the first Bill has a general statement that, 'A corporation must not engage in price signalling'. Proposed section 44ZZT in the government Bill states that the provisions apply to goods and services specified in the regulations.

Analysis

2.44 The committee received a number of submissions that discussed the issue of how far across the economy the prohibition of price-signalling should reach. A number of stakeholders stated that coverage should be universal, rather than specific to one or other designated sector of the economy.[27] The Law Council of Australia elaborated on this:

> Any prohibition on price signalling should apply universally and not just to selected business sectors. Competition law seeks to prohibit particular types of conduct on account of their detrimental impact on competition. Selective application of the proposed prohibitions undermines the general application of the Competition and Consumer Act 2010 (Cth) (CCA) across all industries on an equal basis. The possibility of the prohibitions being unilaterally applied to specified goods or services by regulation is contrary to the principle of general application, and risks introducing considerable uncertainty, not only for firms whose primary business is dealing in the goods or services that are prescribed by regulation, but also for customers of such businesses, and for businesses dealing in goods or services that are at risk of being prescribed.[28]

2.45 On the other hand, an industry group outside the banking sector, the Australian National Retailers Association, accepted that the Government intends to apply the prohibitions to banks. The Association requested that

27 For example, the Rule of Law Institute of Australia, *Submission 6A*; Brent Fisse and Caron Beaton-Wells, *Submission 1A*, pp. 13-14.

28 Law Council of Australia, *Submission 13A,* p. 2.

the provisions should not be extended until their operation has been adequately reviewed, preferably through a statutory mechanism.[29]

2.46 The Explanatory Memorandum discussed this matter. It stated that the Government's proposed approach, 'allows the Government to target the proposed prohibitions towards sectors where conduct of concern has been identified, without raising unintended consequences in other sectors'.[30]

2.47 It also noted that the use of regulations to target specific sectors that require urgent attention provides the Government with:

> ... greater flexibility in applying such prohibitions to other sectors in the future. All regulations made under the new Division 1A of the CCA will be disallowable instruments and therefore subject to Parliamentary oversight.[31]

2.48 If an incremental approach is going to be used in selecting which sectors will be subject to the provisions, the ACCC supported the use of regulations:

> ... if there is going to be some sort of phased mechanism for coverage we think the process of 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.[32]

Conclusion

2.49 The committee is faced with a question of balance. The committee recognises that there are advantages in having generally applicable legislation. However, the committee also recognises that there is significant community concern about the conduct of banks. The government Bill allows the ACCC to focus its resources on a high priority area. It also gives the Government the flexibility to make further regulations to apply the prohibitions to other sections of the economy as called for, while providing the Government with enough time for further review and detailed consideration.

2.50 The committee notes that the Government has made a commitment to review the operation of the Bill before extending it to other sectors of the

29 Australian National Retailers Association, *Submission 10A*.

30 Australian Government, *Explanatory Memorandum* (government Bill), p. 68.

31 Australian Government, *Explanatory Memorandum* (government Bill), p. 69.

32 Mr Brian Cassidy, ACCC, *Senate Economics Reference Committee: Hansard*, 25 January 2011, p. 31.

economy.[33] Some industry groups regarded this undertaking to be so important that it should be a requirement in the Bill.[34] Although the committee does not believe that legislation is warranted on this, the committee agrees that a review prior to extending the operation of the Bill is important and should be conducted.

Overall conclusion

2.51 Competitive markets help to raise productivity, efficiency and innovation which lead to increased living standards, increased consumer choice, sustainable economic growth and lower unemployment rates. Anti-competitive price signalling has the potential to undermine these outcomes. Currently, the ACCC's powers are inadequate to deal with price signalling.

2.52 The first Bill attempts to address this shortcoming. The committee supports the intent of the Bill but, due to its fundamental limitations, the legislation will not provide sufficient power for the ACCC to address price signalling behaviour.

2.53 The government Bill is superior. It captures the most serious conduct, that of competitors privately disclosing price information, with a *per se* offence. This would mean that the conduct in the Apco case would be successfully prosecuted.

2.54 The House should pass the government Bill.

Recommendation 1

2.55 **The House of Representatives pass the Competition and Consumer Amendment Bill (No.1) 2011 and reject the Competition and Consumer (Price Signalling) Amendment Bill 2010.**

Mr Craig Thomson MP
Chair
21 June 2011

33 The Hon. Mr Wayne Swan MP, Treasurer, *House of Representatives Hansard,* 24 March 2011, p. 3133.

34 For example, Business Council of Australia, *Submission 2A,* p. 2.