The Parliament of the Commonwealth of Australia

Advisory Report on the Competition and Consumer (Price Signalling) Amendment Bill 2010 and the Competition and Consumer Amendment Bill (No. 1) 2011

House of Representatives Standing Committee on Economics

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Canberra

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Chair's foreword

In this inquiry, the committee conducted the rare task of comparing two Bills that have the same purpose, in this case to control price signalling in Australian markets.

In November 2010, the Hon Bruce Billson MP introduced a Bill to this effect and the Treasurer, the Hon Wayne Swan MP, introduced a government Bill in March 2011. The government Bill followed a consultation process, including an exposure draft in December 2010.

Although the Bills have similar aims, they take different approaches. Mr Billson's Bill only applies to the communication of price related information to a competitor, for the purpose of encouraging the competitor to vary their price, and where the communication has the effect of substantially lessening competition. This Bill applies to the economy generally.

The Treasurer's Bill creates two prohibitions. The first is where a firm privately communicates price related information to a competitor. This is described as a *per se* offence because the conduct of itself is so unredeeming that no further elements are required for liability. The second prohibition is where a firm generally communicates information relating to price, business strategy, or its capacity, and does so with the purpose of substantially lessening competition.

The Treasurer's Bill applies to sectors of the economy stipulated in regulations. The Treasurer has committed to applying the Bill initially to the banking sector and conducting a review before extending it further.

It is immediately apparent that the Treasurer's Bill would have a stronger effect and this is the reason why the committee is supporting it over Mr Billson's Bill. The committee's conclusion is consistent with evidence provided by the competition regulator, the Australian Competition and Consumer Commission. It

stated that elements of Mr Billson's Bill would meant that it would be of little practical use to the Commission in controlling price signalling.

I would like to thank those organisations and individuals that assisted the committee during the inquiry through submissions or participating in the hearing in Canberra. I also thank my colleagues on the committee for their contribution to the report, including Mr Billson, who joined the committee as a supplementary member for the inquiry.

Craig Thomson MP
Chair

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Membership of the Committee

Chair	Mr Craig Thomson MP
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Members	Mr Scott Buchholz MP
	Mr Stephen Jones MP
	Dr Andrew Leigh MP
	Ms Kelly O'Dwyer MP
	Ms Julie Owens MP
Supplementary Member	The Hon Bruce Billson MP

Committee Secretariat

Secretary	Mr Stephen Boyd
Inquiry Secretary	Mr David Monk (from 30 April 2011)
	Dr Andrew Gaczol (until 29 April 2011)
Research Officer	Dr Phillip Hilton
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Terms of reference

On 24 November 2010 the Selection Committee asked the Committee to inquire into and report on the Competition and Consumer (Price Signalling) Amendment Bill 2010.

On 12 May 2011 the Selection Committee asked the Committee to inquire into and report on the Competition and Consumer Amendment Bill (No. 1) 2011.

Under Standing Order 222(e), the House is taken to have adopted the Selection Committee's reports when they are presented.

List of abbreviations

ACCC	Australian Competition and Consumer Commission
EM	Explanatory Memorandum
RBA	Reserve Bank of Australia

Recommendation

2 Comparison of the Bills

Recommendation 1

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.

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Introduction

Background

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

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

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

> Anti-competitive price signalling and information disclosures are communications between competitors which facilitate prices above the competitive level and can lead to inefficient outcomes for the economy and reduce wellbeing for consumers. They fall short of cartel behaviour but can have similar effect.
> Anti-competitive price signalling and information disclosures can occur as part of a wider cooperation agreement, or as a stand-alone practice absent of an explicit cartel arrangement.[1]

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

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

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

Purpose and overview of the first Bill

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

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

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

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

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

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

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

1.8 The Bill aims to:

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

Purpose and overview of the government Bill

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

1.10 The most important amendments in the government Bill involve:

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

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

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

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

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

Treasury consultations

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

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

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

The ACCC's current powers

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

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

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

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

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

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

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

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

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

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

Are laws needed to address price signalling?

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

Committee objectives and scope

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

Conduct of the Inquiry

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

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

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

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

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

2

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.

Dissenting report

Introduction

As Opposition Members, we observe that government members on the Committee have recommended that:

> 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.

What is significant and of particular concern to non-government members of the Committee is the lack of any independent evidence presented to the Committee or relied upon in this report to support such an unequivocal recommendation.

In fact, the Government's Bill has been criticised as failing to "resolve fundamental problems with the Exposure Draft" and assessed as "highly unsatisfactory (that) should not be enacted".1

The evidence presented clearly highlights concerns about the Competition and Consumer Amendment Bill (No.1) 2011 (Government Bill). No evidence has been received that endorses the Government Bill without reservation and argues that it should simply be passed unamended as the government member's recommend.

A range of concerns about the Government's Bill have been detailed in considerable detail by those who were able to participate in the truncated timetable for the inquiry and without the opportunity to appear before the committee.

1 Brent Fisse, Lawyer, Adjunct Professor, University of Sydney; Senior Fellow, Melbourne Law School, University of Melbourne and Caron Beaton-Wells,

Associate Professor, Melbourne Law School; Director, University of Melbourne Competition Law & Economic Network.

The considerable shortcomings and concerns about the Government Bill include:

- Failure to base the government's bill on sound competition policy concepts
- Market-specific rather than economy-wide application
- Expanded application to be prescribed by regulation
- Lack of justification for the per se offence for private disclosures
- Over-reach into disclosures with legitimate business justification
- Lack of a competition effects test
- Scope of disclosure to be captured by the prohibitions
- Inadequate exemptions and defences for pro-competitive disclosures
- Numerous technical drafting deficiencies
- Inability to canvass alternative approaches to anti-competitive conduct
- Process inadequacies in the government's consultative approach
- Practical difficulties with the notification and authorisation processes

These concerns are legitimate, deserve examination by the committee with key witnesses and warrant a considered response by the government if the committee and parliament is to be adequately satisfied to support the passage of the Government's Bill.

A comparative analysis of the government Bill and Competition and Consumer (Price Signalling) Amendment Bill 2010 (Coalition Bill) lead to some to conclude that the Coalition Bill was superior.

In evidence to the one-day public hearing, the Caltex Senior Corporate Counsel stated:

> We believe that legislation in this area should apply across all industries and not single out a particular industry. We think that it should contain concepts and principles that are known and well understood within competition law, business and the courts. We think that the prohibitions—all the prohibitions—that are contained in the legislation should be subject to a substantial lessening of competition test. It 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. And we believe that the legislation in this area should be subject to a legitimate business justification test. It is clear, I think, from that that the opposition bill does tick a number of those boxes, whereas the government bill does not2.

We support introducing anti-competitive price signalling laws to provide the ACCC with the tools to carry out its role 'to promote vigorous and lawful competition, to encourage fair business dealings and to protect consumers from misleading and deceptive conduct'.3

2 Jordan French, senior Corporate Counsel, Caltex, *Committee Hansard*, 18 February 2011, Canberra, p. 47.

3 Australian Competition and Consumer Commission website

Without genuinely addressing the numerous defects in the government Bill, it is unfit to be passed by the parliament in its current form.

The Government's Bill, even with changes made from the exposure draft, has been characterised as *"international worst practice on information exchanges between competitors"* (Brent Fisse4) before listing 11 key reasons for this assessment and where the Bill failed to address fundamental problems with the Exposure Draft.

By contrast, Mallesons' April 20 bulletin concluded:

> While the Coalition's draft Bill would need some revision and modification, it would appear to be the preferable alternative on the basis that it would require demonstration of an anti-competitive purpose and a substantial anti-competitive effect, rather than simply imposing a blanket prohibition on disclosure.

The Coalition Bill is more sound in terms of its competition policy foundation, its ability to better decipher conduct that is genuinely anti-competitive and detrimental to consumers and conduct that is pro-competitive, advantages consumers or at least not harmful to the economic wellbeing of Australia and quality of life for all its citizens.

Some potential improvements have been identified that may further enhance the Coalition Bill, but the committee process and government-imposed timeframes for the inquiry provide no opportunity to examine the utility of these proposals.

Stakeholders are understandably disappointed at the very limited time in which submission could be prepared and submitted material to the inquiry.

The inability of those who have made submissions to appear before the committee and to have their input and proposals examined and tested as evidence has greatly diminished the committee's work and parliamentary role.

Alternative approaches to addressing anti-competitive price signalling and broader concerted or facilitating practices in ways more comprehensive way akin to the European approach remain 'on the table' with no parliamentary mechanism to consider their merit.

This missed opportunity devalues the considerable effort and expertise brought forward to assist the committee despite the government–imposed timetable making a proper evaluation and considered response assessment impossible.

In our view, the government should abandon its substantially flawed Bill and permit a proper consideration of proposals to recalibrate specific provisions of the superior Coalition Bill that have been identified as potential improvements.

4 Brent Fisse, *Abstract*, 8 April, 2011, www.brentfisse.com

Scope of 'Price Signalling' Prohibitions

Non-government committee members noted quite an array of views about the scope of the Government and Coalition Bills.

A number of submissions contested the need for additional laws to tackle anti-competitive price signalling and drew attention to international experience that might provide useful guidance.

The ACCC observed:

> …in Europe there is what we call a per se prohibition on competitors exchanging information about their future conduct. In that sense the bill does not go as far as the European legislation. Also, the European legislation applies not only to prices but also to other behaviour by firms. We would say that the (Coalition) bill is narrower than in the European situation.
>
> I suppose that in that sense the bill perhaps goes a bit further than the US, as the in the US you still need to have some measure of agreement underpinning the price signalling. On the other hand of course, in the US the prohibition is broader than just prices; it does cover other forms of behaviour".

Cassidy hearing p. 19 & 20

Evidence was received that suggested cautioned with simply seeking to implant the EU's principles-based approach or the evolving juris prudence of the United States into Australia's competition framework.

In its evidence to the public hearing, Caltex concluded that:

> …the concepts and principles that are evident in the opposition bill are much more familiar to Australian competition law than are the concepts evidenced in the government's bill.

Jordan French, senior Corporate Counsel, Caltex, *Committee Hansard*, 18 February 2011, Canberra, p. 55.

Some submissions argue for the Bills to expand beyond 'signalling' prohibitions into the broader range of practices that facilitate co-ordinated conduct.

Choice argued that 'there needs to be a comprehensive and considered approach to solving the issues surrounding price signalling and other types of facilitating practices' . Lee hearing transcript p.1

The possibility of formulating a prohibition that targets a broader range of practices that facilitate coordination between competitors 'not confined to communications' was encouraged by leading competition law academics. Fisse & C Beaton-Wells submission, p. 5

Coverage

The majority of submissions challenged the Government's decision to target its Bill on only one broadly defined sector of the economy – the banking sector.

In contrast, the Coalition Bill's general application across the economy was in line with the majority of views conveyed to the Committee and consistent with sound competition policy principles.

The Law Council advised that:

> Any prohibition on price signalling should apply universally and not just to selected business sectors. 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.

Law Council submission p. 2 section 1.3

Even the ACCC, the regulator which would be enforcing the proposed prohibitions under both the Government's and Coalition bills stated that:

> …we would hope signalling laws would be of a general application rather than focusing on a particular sector, because we do not see that there is reason for signalling out one sector as opposed to another.1

Cassidy ACCC hearing p. 21

Under questioning at the inquiry hearing Treasury officials choose not to defend the banking-specific initial application of the Government's, offering only the insight that 'ultimately, the government and the parliament decide which sectors or which bill you finally approve will apply'.
Mr Paine Treasury hearing p.22

Consumer advocacy group, Choice, applauded one aspect of the Coalition's bill in that it applies to all industries.

> This is in comparison to, for example, the Australian government's exposure draft of the Competition and Consumer Amendment Bill (No.1) 2011, which is, at least initially, only intended to apply to the banking sector. So it is Choice's submission that legislation should be, to the extent possible, uniform in its approach to all industries across Australia.

Ms Lee, hearing p 2

Despite being captured by the reach of the Coalition Bill's economy-wide approach, Caltex favoured this approach over the sector or market-specific approach of the Government's Bill:

> "Our in-principle approach is that competition regulation should apply generally, and I think that is the view shared by the ACCC".

Jordan French, senior Corporate Counsel, Caltex, *Committee Hansard*, 18 February 2011, Canberra, p. 50.

In relation to coverage, competition law concepts, Caltex representatives summarised that:

> We believe that legislation in this area should apply across all industries and not single out a particular industry. We think that it should contain concepts and principles that are known and well understood within competition law, business and the courts. We think that the prohibitions—all the prohibitions—that are contained in the legislation should be subject to a substantial lessening of competition test. It 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.

Caltex, Ms Bennett, hearing p 49

Caltex representatives concluded:

> I think the most serious aspects of the government's exposure draft are the per se offence and the application to selective industries— obviously the banking industry has been targeted.

Caltex, Mr French hearing p52

Per se offences

Submissions to the inquiry conveyed considerable concern about the introduction of per se offences in the Government's Bill for private information disclosures between competitors.

Competition lawyer experts caution:

> Per se liability is warranted only where almost all of the cases to which the prohibition applies will have anti-competitive effects or likely effects. The section 44ZZW prohibition applies in many situations where the conduct is not anticompetitive.
>
> If per se liability is imposed, a requirement of collusion or facilitated coordination serves the important function of screening out conduct that is unlikely to be anti-competitive in most situations. The absence of any requirement of collusion or facilitated coordination in s 44ZZW inevitably results in overreach and in many instances the overreach is such as likely to defy any attempt to draft workable exceptions"

Fisse & C Beaton-Wells submission on p.3

The Law Council went further to assert that :

> No case is made out in the Explanatory Memorandum for why the (Government's) Bill needs to be drafted so as to prohibit the disclosure of existing and past pricing on a per se basis.

Law Council submission p5 section 3.1

The Australian Bankers' Association expressed a strong opinion on the per se offence provisions of the Government's bill.

> There is a place for per se offences. They do exist in the current act. They are for behaviour that in almost any conceivable circumstance is inappropriate. The problem with a per se offence in a subjective area such as price signalling is that I have no trouble in identifying a whole range of perfectly legitimate commercial activities that fall foul of that per se offence.
>
> A per se offence means that if you do these things then you are guilty of an offence. That is why, traditionally, per se offences have applied to only the most egregious of behaviours.

Mr Munchenberg hearing p 37-38, 42.

The Committee of the Law Council that examined the Government's Bill concluded that:

> …the strict liability scheme created by section 44ZZW is unnecessary and should be narrowed so that it only applies to the private disclosure of information about future pricing.

Law Council submission p 6 section 3.4

The Law Council Committee is also concerned that the inadvertent passing on of genuinely public information between competitors would be caught as a per se prohibited private disclosure within the meaning given to that term by proposed section 44ZZV.

> For example, the innocuous forwarding of a published rates notice or press release by one competitor to another would fall within the category of private disclosures proposed to be prohibited per se.

Law Council submission 7 section 3.10

The Law Council submission suggested amendments to the Government's Bill to guard against innocuous and inadvertent on-forwarding of information being captured by the per se prohibition.

> This could be achieved by redrafting section 44ZZV(3) such that a disclosure of information by a corporation will not be a private disclosure to competitors or potential competitors if, at the time of disclosure, the information is available generally to persons other than competitors or potential competitors. This would bring the Bill closer into line with the European approach. To address concerns over the potential for such disclosures to be anti-competitive in nature, the overarching prohibition on disclosures

> for the purpose of substantially lessening competition would still apply.

Law Council sub p. 7 section 3.12

Purpose and Effect

The non-Government members of the Committee note the discussion about the relative merits of applying and 'purpose and/or effects' to offend the provisions of the Government's Bill compared to the 'purpose and effects' test of the Coalition Bill.

The Australian Bankers' Association saw considerable merit in the approach of the Coalition's Bill.

> Price signalling is an intent driven offence, if you like. It is not a strict liability sort of situation. It is about trying to understand, as difficult as it can be in some circumstances, what was the corporation attempting to do in this case and was it anti-competitive? Mr Munchenberg hearing p 38

In a statement that amounts to an endorsement of the Coalition approach, the ABA added that:

> We need to be wary of the effects element of it, certainly where the effect element stands on its own. The reason for that is we do not want to create an offence were an individual or company behaves in a certain way and whether or not they have committed an offence is determined by the independent behaviour of a third party, which is what you have potentially if you have just an effect element. Certainly the combination of the purpose or intent behind the behaviour and its actual effect I think is important.

Mr Munchenberg hearing p 38

The view was re-enforced by the evidence provided to the committee by Caltex that 'the combination of purpose and effect in this bill gives us some comfort'

Mr French, Caltex . Hearing p. 54

Non-government members believe that the application of both a purpose and effects test helps to guard against potentially pro-competitive and pro-consumer

impacts of information sharing being stymied by the poor drafting of the Government's Bill.

Caltex went further to suggest that some refinement of the 'purpose' provisions could occur by requiring that the intent be the 'principle purpose' rather than a 'substantial purpose' as both the Government and Coalition bills provide.

> On a substantial purpose test the threshold is too low in that an interpretation of purpose, which is at the end of the day a subjective assessment, may result in a prosecution with respect to a purpose that the initiator never had in mind. So essentially the point is to raise that threshold to ensure that, on the face of this legislation, there is clear intent about the principal purpose. That is what is going to get people caught. Mr French Caltex hearing p 53

The ACCC advised the committee that under the Coalition's Bill:

> …what you might call inadvertent behaviour or quite legitimate behaviour in prices being passed from one competitor to another, it is not simply adequate for it to be an offence for the information to pass. It has to be established that that has posed a purpose and also had the effect of substantially lessening competition. In our view, the burden of proof on us would take out much of what you might call 'inadvertent' behaviour.

Mr Cassidy p. 9, Hearing

Over-reach and Unintended Consequences

Non-government members noted the particular concern of a number of contributors to the inquiry about the risk of over-reach and unintended consequences.

The Law Council drew attention to 'the potential for some information exchanges and disclosures to be pro-competitive, and the potential for unintended consequences to arise in the context of a blanket prohibition'. Law Council p4 section 2.8

Choice submitted that:

> …any laws in relation to price signalling need to be carefully constructed so that the provision of information to consumers is not unnecessarily prevented or, alternatively, that any legislation

> brought in is not perceived by corporations as preventing the provision of information to consumers unnecessarily. Lee p. 2

As mentioned earlier, non-government members believe that the application of both a 'purpose and effects' test places the need for the conduct to have anti-competitive consequences at the heart of any prohibition of information exchange between competitors.

The Law Council asserted that:

> The blanket application of the Bill to prohibit disclosure of past, historical pricing should be removed. The threat to competition from disclosure to competitors of future or proposed pricing is, in most cases, the "real mischief' (and only mischief) intended to be addressed.

Law Council p.2 section 1,5

The Law Council also cautioned against relying on ACCC guidelines to overcome deficiencies in the drafting of the Government's Bill:

> Unforeseen consequences under the Bill cannot be resolved by the ACCC publishing administrative guidelines explaining how the ACCC intends to enforce the Bill. Such guidelines will not be binding on the Courts or the ACCC. Moreover, the ACCC is not the only person which may seek to enforce the Bill, once enacted - private parties may do so as well and, in some cases, the private parties may seek the assistance of litigation funders, which are becoming more involved in litigation of this kind.

The Committee does not agree with the notion that any doubts over the proper interpretation of the Bill can or should be resolved by administrative guidelines published by the ACCC.

ACCC guidelines are welcome as an educative tool and to clarify how the ACCC intends to exercise its powers, but they are not a solution to problems in the design of the Bill and they cannot oust the ACCC's discretion. Rather, these issues must be resolved in framing the Bill itself".

Law Council submission p 10 section 5.1 5.2

The Law Council concluded that the risk of over-reach, unintended consequences and drafting errors cannot be cured by the ACCC 'staying its hand as to when it may choose to enforce the new Division'.

"The new Division will be capable of enforcement by others for motives that have nothing to do with the competition objects of this reform".
Law Council submission p 10 section 5.7

Market-specific application

Most submitters to the inquiry could not support the Government's market-specific approach to its Bill.

The Law Council's Competition and Consumer Committee argued that:

> …it is completely inappropriate for the Signalling and Private Disclosure Prohibitions to apply only to Prescribed Goods/Services.
>
> If the prohibitions are sound as a matter of law and economics, they ought, unless there is a principled basis for their selective application, to apply generally or not at all.

Law Council Jan 21 submission p.17

The Law Council added that:

> No principled justification has been offered to support the selective application of the prohibitions. The Swanson, Hilmer and Dawson committees took the view that, absent a principled justification for selective application, competition law prohibitions should apply generally or not at all. Their views ought not be ignored lightly.
>
> It is also manifestly inappropriate, and severely undermines the integrity of the proposed reforms, for the application of the proposed prohibitions to be determined by regulation.

Law Council Jan 21 submission p.1

> 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. Law Council p. 2 section 1.3

The Committee maintains its position that selective application of competition law is a fundamentally undesirable development under the CCA. This undesirable feature of the Bill is exacerbated by permitting the extension of Division lA by regulation. Law Council p.3 section 2.1

However, if the Bill is to have "sector specific" application:

(a) goods or services to which the Bill applies will need to be clearly and precisely defined to minimise the uncertainty that arises from general descriptions such as "the banking sector", which at the very least should be narrowed to the "retail banking sector"; and

(b) there should be a prescribed process of proper review of a proposal to apply the
proposed new Division lA to a new sector of the economy by way of regulation.

Law council submission p. 2 section 1.4

Expanded Application by Regulation

Non-government members are concerned about the lack of certainty and identified process governing the application of the Government Bill to addition markets by way of a subordinate instrument.

Even the ACCC is unclear on how additional markets might be added to subject to the prohibitions in the Government's Bill, beyond its initial banking target.

This is despite the ACCC chairman's widely published public statements made during the course of the inquiry that:

> This (price signalling) is an issue that would affect a variety of sectors, not just banking

Graeme Samuel, '*Samuel urges wider net for laws on price signals*', Sydney Morning Herald, 26 January 2011

Mr Samuel added:

> We think there are a number of (other) industries that immediately come to mind that could be subject to this form of regulation.

Graeme Samuel, '*Banks remain top target for rate collusion*', Courier Mail, 26 January 2011

The ACCC CEO reaffirmed the Chairman's position but added to the uncertainty surrounding the process for expanding the application of the Government's bill.

> We would hope, as I think is flagged in some of the explanatory material from Treasury in relation to the government's draft bill, that the coverage would be extended. But there are no actual criteria that you could set up and say, 'Well, it should be this sector and it should be that sector.

Mr Cassidy hearing p. 21

In light of the concern about the unknown 'declared market' process, the Law Council submitted that:

> …if the Government is nonetheless determined to proceed in this way, there should be in the Bill a prescribed process to allow for proper review and Parliamentary oversight of any proposal to apply the proposed new Division lA to a new sector of the economy by way of regulation.

Law council submission p.3 section 2.2

The Australian Bankers' Association expressed reservations about the 'market declaration by regulation' provisions of the Government's Bill:

> The quite extensive reach of (the Government's) legislation can be extended to a whole range of other parts of the business community by the mere making of a regulation and its subsequent tabling. While I am sure that the parliament scrutinises those regulations intensely, it seems it is the 'least' process you can go through to change the extent and the effect of legislation.

Mr Munchenberg hearing p.40

This concern has also been recognised by the Senate Standing Committee for the Scrutiny of Bills:

> The Committee therefore seeks the Treasurer's advice about this approach and in particular whether consideration has been given to the possibility of defining the scope of operation of the laws (such as the intended areas of operation, guidance as to the types of industries to which it will apply or relevant considerations that will be examined before a decision is made) in the primary legislation.

Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 4 of 2011, p'19

Exemptions

Extensive commentary on the range, adequacy and effectiveness of exemptions provide in both the government's and Coalition's Bills.

The exemptions seek to ensure that routine commercial conduct that represents no threat or mischief to competition and consumer interest are not inadvertently capture by the proposed prohibitions.

Non-government member believe that the Coalition's approach requiring both a 'purpose and effects' test always place the need for an anti-competitive consequence as a pre-condition to offend the prohibition. In this light, the exemptions in the Coalition's Bill ensure that there is no question of risk for routine and legitimate commercial conduct.

We believe that the per se prohibition and nature of the general offence provisions requiring only a 'purpose and/or effects' as exists in the Government's Bill, place a greater burden on the Government to precisely and comprehensively define the exemptions in its Bill.

Competition law academic experts capture the challenge the Government's Bill has inadequately address:

> Focussing on information disclosure rather than collusion or facilitated coordination of market conduct inevitably results in overreach and forlorn attempts to avoid overreach by means of a thicket of exceptions.

Fisse & Beaton-Wells submission p. 2

The submissions provided detailed technical arguments on the need to vary and refine the exemptions contained in the Bills considered by the Committee.

Caltex suggested that:

> If legislation is pursued, changes should be made, including the clarification of the meaning of 'already in the public domain'. In addition, all historic data should be excluded from the prohibition of the communication of prices so that only communications explicitly relating to future prices would be covered and subject to a substantial lessening of competition test. Under the legislation,

> the communication of pricing information to Informed Sources would potentially be prohibited, even though it does not relate to future prices. It is unlikely any retailer would continue to participate in the Informed Sources service for fear of prosecution, even though retailers see this service as pro-competitive because it facilitates price discounting.

Ms Polly Bennett, manager, Government Affairs, Caltex, *Committee Hansard*, 18 February 2011, Canberra, p. 48.

The Law Council cautioned that it:

> …is aware of the indication in the Explanatory Memorandum that a disclosure of pricing information for a proposed joint or syndicated commercial lending arrangement to a potential borrower will be exempt under the new Bill, as long as it is subject to the joint venture exception.
>
> However, …not all syndicated lending arrangements will satisfy the exception for joint ventures. Further, the disclosure of proposed pricing and other information necessary to facilitate the formation of a multi-lender syndicate frequently precedes any decision by any lender to join the proposed syndicate.

Law Council submission p9 section 4.16

The Law Council identified a further deficiency in the way of 'block' exemptions:

> The Bill does not expressly address "block" exemptions, i.e. notification of a class of conduct that is not necessarily limited to a "one off' disclosure in particular circumstances. Permitting such "block" exemptions in the notification process would go a long way to alleviating some of the concerns of the unnecessary regulatory burden to continuously notify benign, but at risk, conduct in respect of each circumstance in which it is proposed.

Law Council submission p 12 section 6.10

The exemption definition of 'joint venture' also attracted criticism, with the Law Council asserting that:

> …if the Price Disclosure Prohibition is to be introduced, there ought to be a joint venture exception to the prohibition. However the Committee submits that the joint venture exception should be extended in three important respects:

> (a) to include proposed joint ventures, rather than solely joint ventures that have already been formed (this is the approach taken in relation to contracts, arrangements and understandings for the acquisition of shares or assets in s 44ZZZ(4));86
> (b) to include joint ventures that are not for the production or supply of goods or services (for example, joint ventures engaged in research and development or acquisition activities); and
> (c) to encompass other legitimate collaborative arrangements, such as pro-competitive commercial alliances and consortia.
>
> The Committee has previously proposed, and now reiterates, that ss 44ZZRO, 44ZZRP and s 76D of the CCA should be similarly extended".

Defences

A number of submissions to the inquiry sought to introduce the concept of 'legitimate business justification' as a defence to avoid a range of problems identified with the scope and enforcement of the Government's Bill.

The Australian Bankers' Association provided some practical examples:

> Given that this bill has been rushed into parliament, it is no surprise that the bill as currently crafted would cause numerous problems for business. The net is cast very widely and would appear to prohibit or make considerably more difficult a range of legitimate business activities, such as syndicated lending for large projects, work-outs for companies in difficulty and the exchange of information to assist the mortgage-broking industry.

Mr Munchenberg, hearing p34

The Law Council advised the committee that:

> The (Government's) Bill has unintended implications for everyday transactions that are beneficial and critical to the Australian economy, including, for example, the formation of multi-lender transactions and timely corporate workouts. These implications could potentially jeopardise the ongoing operations of financially distressed companies and their ability to refinance, possibly leading to insolvency and the employment of their employees being put at risk.

Law Council submission p.3 section 1.8

The Law Council recommended that:

> …legitimate business justifications can exist for such exchanges between competitors. It is problematic to have created a situation where individuals and businesses must demonstrate they fall within a specific defence or have obtained a specific exemption before otherwise legitimate business conduct is lawful.

Law Council submission p. 3 section 1.8

The Explanatory Memorandum to the Government's Bill contemplates ACCC guidelines to address concerns over the reach and interpretation of the Bill.

The Law Council is not convinced that *'doubts over the proper interpretation of the (Government's) Bill can and should not be resolved by administrative guidelines published by the ACCC'.*

> Such guidelines are not a solution to any problems in the design of the Bill itself; guidelines are just guidelines and do not have the force of law. Further, whether in fact there is a contravention of the law is ultimately a question for the Courts. The consequences of a finding that there has been a civil contravention are serious, and may threaten the enforceability of security or other loan arrangements made by the relevant parties. Legal drafting issues should therefore be resolved in the legislation itself.

Law Council submission p2. Section 1.6

Notification and Authorisation

The Bill provides for notification under section 93 as a means of addressing concerns that the Government's Bill *'will apply to everyday commonplace transactions that are beneficial and critical to the Australian economy, some of which may require a disclosure to be made as a matter of urgency to meet the timing requirements of a transaction'.*

Law Council p. 2 section 1.7

The Law Council has advised the Committee that:

> The confidentiality and assessment process currently used under section 93 by the ACCC needs a considerable overhaul to address

> the very different issues raised by the notification of disclosures which otherwise will be caught by the prohibitions"

Law Council p. 2 section 1.7

Two examples provide by the Law Council of routine transactions which it asserts do not warrant review under section 93 are the formation of corporate "workout" scenarios and multi0lender transactions.

> The Bill provides no specific solution for these commonplace transactions, other than to point to the ability to file a notification under section 93 of the CCA.

Law Council submission p 7 section 4.1

Another concern raised the Law Council is the mechanics of the notification process.

> One major difficulty is that, under section 93, assuming no ACCC objection is raised to any notification which is lodged, there is necessarily a delay during the period of assessment, which may be l4 days or longer after notice is given to the ACCC, before the lenders can proceed to hold these discussions.
>
> Further, the notification process would place Australia out of step with all other jurisdictions in which multiple lenders finance projects and where corporate workouts occur. It is only likely to make Australia a less attractive place in which to conduct these important transactions, undermining Australia's potential to be a banking and business hub for emerging Asian markets.

The Law Council expresses further concern about the practical timeframes for the notification process will disadvantage distressed businesses, impose unnecessary costs and delays.

> In urgent matters, a delay in commencing a workout plan could also cause significant problems for borrowers in distress, and the relevant borrower's employees, customers and suppliers.

Law Council submission, p. 8, section 4.9

The Law Council further warns that:

> …the section 93 process does not allow for any retrospectivity - the complete defence that is gained from the notification process only applies from the end of a prescribed statutory period, which is

> currently 14 days or more from the date on which the section 93 notice is lodged with the ACCC.

Law Council submission, p. 8, section 4.10

The Law Council also identified a number of procedural and administrative considerations that apply under section 93 for exclusive dealing notifications that are not readily suited to the kind of transactions and conduct addressed by the Government's Bill.

A number of amendments have been proposed by the Law Council to deal with private price disclosures that should not be prohibited by section 44ZZW as they amount to ordinary commercial transactions.

Concerns were also raised about the protection of confidentiality as part of the Disclosure Notification process for what is determined to be private communications.

The Law Council proposed the exclusion of Disclosure Notifications from the Public Register and careful consideration of how public consultation processes may impact what may well be matter of significant commercial sensitivity.

The Law Council concluded that:

> There is no good reason known to the Committee why the Bill needs to extend to these scenarios or to impose an unwieldy notification process. The laws of "facilitating" and "concerted" practices in Europe and the UK and United States do not prohibit, or require case by case exemptions to be obtained for, disclosures of information about lending facilities in any circumstances.
>
> Fundamentally, the Bill is overly inclusive if, every time financiers wish to enter into a multilender facility or to participate in a workout, they will need to resort to a formal notification process. The increase in cost, legal fees and administrative time for the ACCC receiving such notices will be disproportionate to any real concerns that arise in relation to the disclosure of pricing for a particular financing arrangement. This overly inclusive aspect of the Bill should be directly overcome in drafting rather than by requiring that affected parties resort to notification.

Law council submission p 9 section 4.14-4.15

Caltex added that:

> there is a reasonable degree of uncertainty in the authorisation process given the role the regulator has in the authorisation process.

Mr Street, Caltex Hearing p 54

Consultative Process

Non-Government member share the concerns of a number of contributors to the inquiry about the Government's and 'lack of transparency in the process that accompanies the government's bill'.

"We are not in a discussion with anybody about how that future regulation might arise in connection with our industry". French, Caltex hearing p. 53

Even on questions about what is meant by the Government when it refers to the 'banking sector' remain unresolved from the consultation over the Government's Bill.

> "That process should include bringing greater clarity over the definition of the proposed sector, including initially over what is meant by "the banking sector".
>
> ln order to ensure that the application of the prohibitions in Division lA does not have any unintended consequences within the banking industry, the Committee believes there would be benefit in a consultative process with the banking industry in relation to the terms and limitations of any draft regulation proposed".

Law Council submission p.3 section 2.2

The Law Council submitted that the "banking sector" should not include wholesale or institutional banking services."

Improved consultation and process steps were advocated by the Law Council 'if the Government maintains the policy of providing for sector by sector extension by regulation'.

> "The process for extension of the CCA should be subject to wider consultation with the sector concerned before any regulation is issued.

> This process should be set out in the Bill … (and) include (at a minimum):
>
> (a) criteria relating to the features of a product market that warrant it being brought under the Bill should be developed and stated in the Bill;
>
> (b) publication by the Minister of a draft proposal to include a sector or market under the new Division, with appropriate definition of the market or sector and the basis for the inclusion;
>
> (c) a review and public consultation period should apply to all proposed new
>
> regulations; and
>
> (d) publication by the Minister of reasons for proceeding with the regulation, after taking into account the submissions received".

Law Council p4 section 2.7

The Law Council, in the view of non-government members, rightly criticises the indecent haste with which the Government has sought to advance its Bill.

The Law Council observed that:
"The fact that:

> (a) the proposed prohibitions are intended to apply only to the banking sector in the first instance;
>
> (b) the Exposure Draft has been released in the context of the Banking Reforms;
>
> (c) the government has not led a public discussion about the application of the proposed prohibitions in any other context;
>
> (d) the government hopes to "move through" the public consultation on the Exposure Draft "as quickly as we possibly can"; and
>
> (e) the public consultation period is limited to less than five weeks, including the Christmas and New Year period,
>
> means that the proposed prohibitions are unlikely to benefit from the depth and breadth of public input that such significant legal reforms warrant, to the detriment of Australian competition law, and ultimately to the Australian economy".

Law Council p4 section 2.7

Conclusion

Non-government members of the Committee believe that it is particularly important to have thoughtful and well-informed input into the development both the Government and Coalition Bills.

The submissions to the inquiry provide example after example of deficiencies in the Government's Bill that the Government is either unwilling or unable to address.

The Government's Bill is simply underdone and far to flawed to support in its current form.

Competition law academic experts concur with this assessment of the Government's Bill. Alternative approaches and substantive amendments have been proposed by contributors to the inquiry but no meaningful examination of this input has occurred.

> We recommend that the (Government's) CCA Bill not be enacted. The policy objective of prohibiting practices that facilitate anti-competitive coordination between competitors is achievable by amendments that would avoid the complexity, overreach and impracticality of the provisions in the (Government's) Bill.

Fisse & Beaton-Wells submission, p.18

In the absence of any preparedness by the Government to genuinely address the many legitimate concerns about its Bill, the non-government member of the Committee believe the parliament and Australian would be best served by considering the passage of the Coalition's Bill.

As leading law firm Mallesons concluded and convey in its 20 April 2011 bulletin :

> "While the Coalition's draft Bill would need some revision and modification, it would appear to be the preferable alternative on the basis that it would require demonstration of an anti-competitive purpose and a substantial anti-competitive effect, rather than simply imposing a blanket prohibition on disclosure".

Recommendation

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

Mr Steven Ciobo MP
Deputy Chair

The Hon Bruce Billson MP

Mr Scott Buchholz MP

Ms Kelly O'Dwyer MP

A

Appendix A – Submissions

Submissions to the Competition and Consumer (Price Signalling) Amendment Bill 2010

No.	Provided by
1	Royal Automobile Club of Queensland (RACQ)
2	CHOICE
3	Royal Automobile Association (RAA)
4	Australian Bankers' Association (ABA)
5	National Roads and Motorists' Association (NRMA)
6	Australian Automobile Association (AAA)
7	Caltex Australia

Submissions to the Competition and Consumer Amendment Bill (No. 1) 2011

No.	Provided by
1A	Brent Fisse and Caron Beaton-Wells
2A	Business Council of Australia
3A	Luke Woodward
4A	Allen & Overy
5A	Australian Bankers' Association (ABA)
6A	Rule of Law Institute of Australia
7A	Suncorp Bank
8A	Westpac
9A	Australian Institute of Petroleum
10A	The Australian National Retailers Association (ANRA)
11A	Caltex Australia
12A	The Australian Automobile Association (AAA)
13A	Law Council of Australia

B

Appendix B – Witnesses

Friday, 18 February 2011 – Canberra

CHOICE

Ms Katrina Lee, Strategic Policy Advisor

Australian Competition & Consumer Commission (ACCC)

Mr Brian Cassidy, Chief Executive Officer

Mr Marcus Bezzi, Executive General Manager, Enforcement & Compliance Division

Department of the Treasury

Mr Andrew Deitz, Manager, Competition, Law & Policy Unit

Mr Bruce Paine, Acting General Manager, Infrastructure, Competition and Consumer Division

Australian Bankers' Association

Mr Steven Munchenberg, Chief Executive Officer

Caltex

Mr Jordan French, Senior Corporate Counsel

Mr Brian Street, Projects

Ms Polly Bennett, Manager, Government Affairs

C

Appendix C – Exhibits

No.

1. Brent Fisse and Caron Beaton-Wells, *Submission to Treasury on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011,* 14 January 2011 (provided by Brent Fisse and Caron Beaton-Wells)

2. Law Council of Australia, *Submission to Treasury on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011,* 20 January 2011 (provided by the Law Council of Australia)

3. Australian Bankers' Association, *Submission to Treasury on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011,* 20 January 2011 (provided by the Australian Bankers' Association)