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General Manager
Infrastructure, Competition and Consumer Division
The Treasury
Langton Crescent
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Business Council of Australia

By email: competitionlaw@treasury.gov.au

Dear Madam/Sir

COMPETITION AND CONSUMER AMENDMENT BILL (NO. 1) 2011

The Business Council of Australia (BCA) welcomes the opportunity to comment on the Competition and Consumer Amendment Bill (No. 1) 2011.

The BCA has previously provided general views to government in relation to competition policy and price signalling including in our letter to the Prime Minister of 4 November 2010.

The BCA has also previously articulated a set of ten fundamental principles that underpin a properly functioning and competitive market. These are contained in our submission to the Senate Standing Committee on Economics Inquiry into the Banking Sector, and are reproduced in Appendix A to this letter. We refer to those principles in the context of this submission.

Overall, while the BCA appreciates and understands the government's concern to ensure that our markets operate in a way that is open, transparent and effective, in practice we do not believe the approach taken or the legislation as presently drafted will necessarily enhance the functioning of markets or achieve these outcomes.

We note in particular the comments in the Explanatory Note:

"... it is recognised that any proposal to address anti-competitive price signalling and other information disclosures will need to carefully balance the potential anti-competitive impacts of particular information disclosures, with the benign and pro-competitive effects of other information disclosures...."[1]

We also note the Regulation Impact Statement, which states:

[1] See Competition and Consumer Amendment Bill (No.1) Explanatory Note, p. 2.

> "Addressing this problem will need to carefully balance the prohibition of anti-competitive and continuation of legitimate information exchanges."[2]

We do not believe that the legislation has achieved the appropriate balance. Indeed, we have a particular concern that the legislation could actually result in poor outcomes for consumers and act as an impediment on legitimate and pro-competitive commercial behaviour.

Our commentary on these provisions is divided into three parts:

- our understanding as to how the laws are intended to operate
- general comments in relation to the approach and the law as proposed
- some specific commentary about the particular provisions.

What the new laws seek to achieve?

As outlined in the explanatory material provided, the new laws are directed to prohibiting two specific sets of behaviours in relation to unilateral information disclosures.

Firstly, a corporation would be prevented from making a *private disclosure* to *competitors* of information relating to price (including discounts, allowances, rebates or credits) in relation to specified goods or services that the corporation supplies or acquires – the Private Disclosure Prohibition. This provision operates on a per se basis – that is, without a requirement as to purpose or effect of the conduct. Importantly, it focuses on the private nature of disclosure to competitors only (although that can include circumstances where the disclosure is undertaken via intermediaries).

Secondly, a corporation would be prevented from disclosing information where the *purpose of the disclosure* is to *substantially lessen competition* in a market and the information relates to: price (including discounts, allowances, rebates or credits) in relation to specified goods or services that the corporation supplies or acquires; the capacity of the corporation to supply or acquire such goods or services; or the commercial strategy of the corporation in relation to such goods or services. This second prohibition is the Price Signalling Prohibition.

The prohibitions will apply to classes of goods and services as prescribed by regulations and in the first instance these new provisions will only apply to the banking sector.[3] There are exemptions to the prohibitions and also a process for obtaining authorisation from the ACCC.

General concerns with the proposed legislation and the approach taken

At the broadest level there are several key areas of concern with the approach proposed.

[2] See Regulation Impact Statement at Page 1.
[3] Competition and Consumer Amendment Bill (No.1) Explanatory Note, p. 3.

General legislation which is being used to apply to a specific sector

In our view, the introduction of competition laws with broad application to address industry specific concerns should be avoided.[4] The amendment of laws that are intended to be of broad application, such as the Competition and Consumer Act to target particular goods and services (or an industry), is not warranted and may introduce uncertainty into commercial dealings.

We also consider that drawing an appropriate line around goods and services and/or those that supply them could be problematic and subject to change over time.

Given the dynamic nature of markets and firms providing goods and services, we query the ease with which a minister will be able to define a sector or industry to which the proposed laws will apply. It is common practice now, for example that new financial products are distributed through "non-traditional" agencies such as Australia Post; in other industries such as the retail sector, products may be distributed through a variety of different outlets including franchises; and in the telecommunications industry new products and distribution methods are being developed all the time.

Ensuring that proposed laws address appropriate areas of concern and go no further is likely to be very difficult in practice. For example, given the government's commentary that the laws would initially apply only to the goods and services offered by the banking sector; questions arise as to whether this might cover telecommunications or other products that may be offered by financial service providers under new arrangements in future, which may or may not be linked with banking products.

Use of the Regulation making power

In our view the application of the new laws by way of using the Regulation power is undesirable. There is no provision in the Bill outlining the process by which such Regulations will be made, or any clarity as to whether Regulations would be a disallowable instrument which could be rejected by the parliament.

This has the potential to introduce unnecessary uncertainty into the business environment. Accordingly, it would be inconsistent with the principle that competition laws should be applied consistently, transparently and in a timely way to avoid creating such uncertainty.[5]

It is also undesirable that no clear criteria have been outlined as to how the minister is to determine the basis for a particular good or service to be prescribed. Transparency in the application of the law is in our view critical to supporting the validity and application of laws and the absence of criteria will inevitably lead to disputes about the motives for the law applying or not applying to particular sectors of the economy.

[4] Business Council of Australia Competition Principle 9.
[5] Business Council of Australia Competition Principle 10.

Lack of evidence of market failure

BCA believes that sector specific competition regulation should only be introduced where there is clear evidence of market failure that requires it, and allegations of market failure should be evidence-based and subject to broad consultation.[6]

The *Competitive and Sustainable Banking System* report notes that:

"These reforms will capture anti-competitive behaviours in specific sectors like banking where there is strong evidence they exist, without creating unintended consequences for other sectors of our economy"[7]

We also note the recent comments from the Treasurer that:

> "… the purpose of this legislation … is to identify price signalling because what price signalling can do is dramatically reduce competition and what we have to do is deal with it.
>
> I've been advised by the ACCC that they have seen evidence of price signalling but they have not had the power to deal with it. This package will deliver that power to them, to crack down on price signalling. The content of the legislation will be subject to consultation with the industry but where statements are made which have the purpose of lessening competition in the sector, the ACCC will have the power to deal with that."[8]

While we have carefully noted and followed the government's statements in relation to claims of market failure in the banking industry, we are not convinced that a case has been made publicly. Moreover it is not clear that recent decisions by banks in relation to movements in interest rates on mortgages has actually resulted in anti-competitive behaviour or had any anti-competitive effect.

Indeed, we note that the recent OECD Review of Regulatory Reform, *Australia: Towards a Seamless National Economy*, states that:

> "Even though concentration in housing loans has recently increased, the market is still contestable as non-Australian banks account for 30% of business credit and competition is generally considered to be healthy."[9]

Further, the Treasury Secretary Dr Ken Henry stated in a recent speech:

> "Increasing concentration in the home loan market is not conclusive evidence of a lessening of competition in this segment of the banking sector. Nor… is

[6] Business Council of Australia Competition Principles 8 and 9.
[7] See Commonwealth Government *Competitive and Sustainable Banking System* report, 2010.
[8] Treasurer of Australia interview with Lyndal Curtis, ABC radio *AM* program, 13 December 2010, transcript at www.treasurer.gov.au.
[9] OECD, *Australia: Towards a Seamless National Economy*, 2010, p. 42.

> the fact of interest rates on home loan products increasing by amounts in excess of movements in the RBA's cash rate ...[10]

We believe that there is an obligation for government to demonstrate exactly how public information disclosure of the type to be prohibited is reducing competition in industries which the government has signalled should be subject to such provisions.

Indeed, in the circumstances it would be preferable if the government referred such matters for further inquiry to bodies such as the Productivity Commission to ensure that a comprehensive assessment of the issue is undertaken.[11]

Additional regulatory burden

In our view the new laws also have the potential to increase the regulatory burden on the industries impacted. Ensuring compliance with the Competition and Consumer Act is vital for businesses operating in Australia and it is important that the application of the Act is clear and not unduly complex.

Businesses will be required to obtain further advice before making comments or statements which could contravene the new laws in circumstances where the scope of the new laws are in fact unclear. It may also have the impact of discouraging companies from undertaking activities which may well benefit consumers due to concerns related to triggering the provisions. For example, companies may decide against making public statements in relation to their future discounting.

Informed markets and communication and the Continuous Disclosure Regime

For many years Australia has adopted a regulatory approach based on the importance of disclosure of information, including for the purpose of creating an informed market to support competition laws. This also includes disclosures on the provisions of financial services and other products. Indeed, the Explanatory Note makes this point where it states "information disclosures play a vital role in the economy; they increase transparency in the market to the benefit of the consumers and the competitive process."[12]

We also note that the Explanatory Note specifically states that "of course all publicly listed companies will be able to comply with their continuous disclosure requirements in full."[13]

The continuous disclosure requirements are described in ASX Listing Rule 3.1 as follows:

"Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of that entity's securities, the entity must immediately tell ASX that information."[14]

[10] Dr Ken Henry, Secretary to the Treasury, 'The Australian Banking System – Challenges in the Post Global Financial Crisis Environment', speech to the Australasian Finance and Banking Conference, 15 December 2010, p. 18.
[11] See Business Council of Australia Competition Principle 8.
[12] Competition and Consumer Amendment Bill (No.1), Explanatory Note, p. 2.
[13] ibid.
[14] Australian Securities Exchange Listing Rules.

In practice, what should or should not be disclosed is often the subject of advice and discussion within corporations. These are sometimes matters of judgement where a company discloses information in relation to its pricing or other strategic goals out of an abundance of caution in line with the continuous disclosure laws. Under the proposed arrangements this situation could be reversed as companies may be dissuaded from such disclosures because of concern over possible investigation under the proposed Price Signalling Prohibition.

It should be noted that different regulators will be responsible for examining these issues with the ACCC having responsibilities under the Competition and Consumer Act and ASIC in relation to markets (after referral from the ASX). Clearly, there will be a need for both regulators to be in discussion and involved in giving further guidance to the market on how they will operate together in this space.

We would also seek clarification as to whether the intention is that complying with the Listing Rules would be covered by Subsection 44ZZY(1) of the Competition and Consumer Amendment Bill which provides an exemption where disclosure is authorised by or under a law. We would point out that the listing rules are in fact a contract between the listed entities and the exchange. Similar comments might also be applicable in relation to compliance with Prudential Standards and Guidelines of Regulators which may in certain instances require public disclosures.

In this event, and more generally given our position above, if the government does proceed with the legislation in the current format then serious consideration should be given to including compliance with continuous disclosure and similar laws as an additional defence to a breach of the provisions.

Specific comments in relation to the legislation

In this section we have given some consideration to the specific legislative provisions highlighting especially where we think the legislation may result in unintended consequences.

The Private Disclosure Prohibition

We note that the Private Disclosure Prohibition is intended to operate on the basis that the mere conduct of disclosing pricing information is so serious that it is not necessary for there to be either an anti-competitive purpose or effect. Given this, it is all the more important that there is clarity in relation to the circumstances in which the provisions will apply.

In this regard we believe that the provisions have in a number of critical respects been drawn far too broadly and this is discussed further below.

Additionally we note that the Private Disclosure Prohibition applies whether or not the information that is disclosed privately is available to the world at large. The Explanatory Note states that "It is the circumstance of private disclosure of prices which creates the high risk of anti-competitive behaviour, not the information disclosed."[15]

This seems to be an odd outcome – it is not the content of what is said or the effect or purpose of disclosing such information but rather, how it is disclosed and to whom

[15] Competition and Consumer Amendment Bill (No.1) Explanatory Note, p. 3.

it is disclosed that is problematic. We believe that the mere method of disclosure (i.e. private disclosure) and the identity of the recipient (i.e. a competitor) is not sufficient to classify the disclosure as inherently anti-competitive. Rather, the type of information and the purpose or effect of its disclosure is critical to a true assessment of whether the disclosure is in fact anti-competitive.

The scope of the information covered by the Prohibitions is drawn too broadly

In our view the information which is the subject of the proposed prohibitions is drawn far too broadly. If the legislation is to be enacted then it should be limited, for example, to apply to information with respect to the future (i.e. future prices).

We cannot see a policy justification for applying the prohibition to information that is not competitively sensitive and could not facilitate competitors in coordinating or increasing prices. This category would include historical data, publicly available data and material which might be collected by a third party in an aggregated form.

We would also make these comments in relation to information which is deemed to be "any aspect of the commercial strategy". We can foresee that this may cause considerable difficulties for businesses subject to the laws, for example, in the context of the preparation and presentation of results and the conduct of annual general meetings.

Inclusion of intermediaries does not preclude the disclosure from the prohibitions

The broad scope of information prohibited from disclosure is also more problematic because the Private Disclosure Prohibition extends through communications via an intermediary.

This provision will impact heavily on the business of analysts, and accounting, legal and financial professionals assisting their clients and customers. In particular it could affect businesses undertaking refinancing or restructuring activities.

Businesses provide information to analysts understanding that analysts will write research reports which might or are intended to be distributed to some actual or potential competitors. We note with concern that even though this information would be likely to be publicly available (e.g. through continuous disclosure obligations), the private disclosure via an analyst to a selected list of recipients including competitors could breach the prohibition.

It is also difficult to see how professionals assisting companies in financing and restructuring could also conduct their business in a way which does not contravene the new regime.

For example, the person assisting the business would be likely to obtain written offers from various providers for the purpose of a client being able to make an informed choice as to what is the best product for them to purchase and on what terms. As a loan process would typically involve negotiation it would be hard to contemplate a situation where one financier was not made aware of what was being offered by a competitor. We would be pleased to receive further advice from Treasury as to how the legislation would accommodate this circumstance.

The proposed authorisation provisions

We note that businesses will able to obtain immunity from prohibitions by seeking authorisation from the ACCC. Given the lengthy and public nature of the authorisation process it is, in our view, unlikely that businesses will pursue this avenue.

Conclusion

A strong business sector and workable regulatory regime is essential for maintaining Australia's international competitiveness.

A key contributor to the continued success of the Australian economy has been the effective design and operation of our competition laws. Competition laws should seek to support vigorous competition to ensure higher productivity, efficient operation of markets, lower prices for consumers and sufficient certainty so that business is able to engage in ordinary activities.

The BCA is of the view that the provisions in their current form should not proceed. We do not believe that the legislation will provide better choices and outcomes for consumers but rather it will deliver a further layer of complexity and uncertainty in commercial dealings.

We would be pleased to provide further commentary or information as required. Please contact either the BCA's Chief Economist and Policy Director, Peter Crone on 03 8664 2604 or Julie Abramson, Senior Adviser, Policy on 03 8664 2614.

Yours sincerely

Maria Tarrant
Deputy Chief Executive

APPENDIX A: Business Council of Australia Competition Principles

1. A market-based system promotes growth and raises living standards.

2. For markets to work, the system must have a strong legal underpinning which inspires trust. Information must be readily available, and both individuals and businesses should be able to reap the rewards of their efforts.

3. Competition laws should protect the competitive process rather than particular competitors.

4. Competition laws should not be used to deliver broader social objectives, such as preserving domestic firms or employment.

5. Government businesses should not receive undue competitive advantage.

6. Better choices and outcomes for consumers should be the overriding goal, recognising that consumers' interests can be met when there are many competitors or in markets with a smaller number of large and efficient firms.

7. Competition laws should prohibit misconduct that seriously weakens the competitive process, including predatory pricing and collusive cartel conduct.

8. While instances of market failure will occur from time to time and require regulatory intervention, it should be evidence-based and only introduced after broad consultation with stakeholders.

9. Competition regulation targeting a particular sector should only be introduced where there is clear evidence of market failure that requires it. Addressing industry specific issues by introducing competition laws that affect the rest of the economy should be avoided.

10. Competition laws should be applied consistently, transparently and in a timely way to avoid creating unnecessary uncertainty.