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