

**AUSTRALIAN BANKERS' ASSOCIATION INC.**

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31 January 2011

Mr Stephen Boyd
Committee Secretary
Standing Committee on Economics
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Email: economics.reps@aph.gov.au

Dear Mr Boyd,

**Inquiry into the Competition and Consumer (Price Signalling)
Amendment Bill 2010 (Coalition Bill)**

The Australian Bankers' Association (**ABA**) is the peak national body representing banks that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia and to describe themselves as banks.

The ABA appreciates the opportunity to provide this submission to your Economics Committee, noting that the Coalition Bill is one of two Bills upon which public submissions have been invited, the other Bill being the Exposure Draft - Competition and Consumer Amendment Bill (No.1) 2011 (**Government Bill**). The Committee's attention is drawn to the ABA's submission on the Government Bill that has been published on the Commonwealth Treasury website: http://www.treasury.gov.au/documents/1941/PDF/Australian_Bankers_Association.pdf.

The ABA's membership comprises 23 banks, as listed in the **Attachment** to this letter. Members include the four major Australian banks, regional and smaller Australian banks and a broadly representative range of international retail, commercial and wholesale banks operating in Australia. A key role for the ABA in representing its members is to provide important factual information for the public, other interested parties, politicians and the media to ensure that public debate is based on fact rather than surmise or bias.

The ABA considers it important to inform debate in relation to the Government Bill based on the facts, namely:

- The banks' individual commercial decisions on interest rates are related to economic realities and not upon any coordinated or concerted action of price signalling between competitors.
- As the recent Global Financial Crisis made plain, bank stability is critical to sustain the economy, employment and ultimately competition.
- The Reserve Bank considers that current mortgage rates are acceptable from the perspective of monetary and anti-inflation policies.
- Compared with other major banks around the world, Australian banks are not making super-normal profits. In fact, on a global basis, the 30 year average return on equity for major banks is 15 per cent, roughly the same returns as the Australian banks are making today. Indeed, bank returns on loans are less than 1 per cent and margins on home lending in Australia are less than the margins available in Britain or Canada.
- The Australian economy is heavily reliant on overseas funding; approximately 30% of all funds lent in Australia has to be raised from overseas sources, which increases funding costs and may from time to time require a bank to increase rates by more than the cash rate.

The ABA has been disappointed that these fundamental facts have been overlooked or ignored in much of the debate about mortgage interest rates, including in the arguments put forward in support of the Coalition's and Government's Bills. The ABA is also concerned that individual banks' decisions to inform the market, their customers, consumers, and the public and media at large about their cost pressures, to explain their pricing and provide transparency and reduce information asymmetry, are essential elements of a competitive banking market that will be restricted by the proposed anti-price signalling legislation. .

The ABA offers below some brief comments highlighting the specific issues and concerns that arise in relation to the Coalition Bill.

Overreach of prohibition beyond EU and US competition laws

In the Explanatory Memorandum to the Coalition Bill, the Coalition asserts that the proposed measures seek "to respond to repeated calls from the [Australian Competition and Consumer Commission (ACCC)]... to address [a] 'gap' in

Australia's competition 'tool kit'" through "a European-type prohibition against facilitating or concerted practices...."¹

But the unilateral conduct prohibition contained in the Coalition Bill would reach far beyond the EU prohibition, or for that matter, the laws of the United States and Canada. The EU prohibition on information exchanges (as well as equivalent US laws) requires some element of concerted conduct, reciprocity, coordination or mutuality between competitors in order for the disclosing conduct to be prohibited. By contrast, the Coalition Bill would prohibit unilateral disclosures with no element of concerted action or coordination with a competitor required to be established. By extending well beyond the prohibitions under EU and US antitrust laws, the scope of the proposed prohibitions in the Coalition Bill is unprecedented and do not emulate "a European-type prohibition" at all.

Key elements of the Coalition Bill

The Coalition Bill would prohibit unilateral communications (as broadly defined) by corporations which have the following elements:²

- (1) The communication of price related information to a competitor,
- (2) For the purpose, able to be inferred by a court from the conduct of any person or other relevant circumstances, of inducing or encouraging a competitor to vary its price of supply or acquisition of goods or services, and
- (3) The communication has, or is likely to have, the effect of substantially lessening competition in the market for those goods or services, or in another market.

In relation to these elements, we note:

- the meaning of "**communicates**"³ is extremely broad and would capture private and public, as well as direct and indirect communications in any form and by any means, which may include responses to questions from shareholders, Parliamentarians or journalists or to market analysts that serve to inform competitive markets.
- The meaning of "**price-related information**"⁴ is extremely broad such that a mere "bearing" on price need only be established for information to be price-related. For example, an observation by a bank officer to a journalist that volatility in overseas funding markets is expected to continue for some time clearly has a bearing on price and so could be a prohibited communication.

¹ Coalition, *Explanatory Memorandum – Competition and Consumer (Price Signalling) Amendment Act 2010*, p 1.

² Coalition Bill s 45A(2).

³ Ibid s 45A(4).

⁴ Ibid s 45A(5).

- The meaning of "**competitor**"⁵ is unclear and extremely broad by including any entity that is in actual or potential competition in a market with the corporation or a related body corporate of the corporation. This definition would suggest that a communication about the price of a product to a person who competes with the company making the communication *in some other market*, but not in the market with respect to the goods or services the subject of the price disclosure, could be subject to liability.

In addition, the meaning of "**potential competitor**"⁶ is not defined and it is unclear what degree of likelihood is required to constitute a potential competitor. An entity which has the commercial ability to enter a market and announces its intention to do so may constitute a potential competitor. However, it is uncertain whether this would also include *possible* new entrants with sufficient capital who *could* enter and into which market. Further, the **purpose element**⁷ is speculative, artificial and complex, requiring an assessment of whether the communication is made for the purpose of "inducing or encouraging the competitor to vary the price..." In turn, a competitor is considered to vary its prices if, after receiving a communication, the terms and conditions or prices "materially differ" from those that would have applied had no communication been received, thus requiring an *ex ante* assessment of the competitor's conduct as if the communication had not been made, merely to determine the purpose of the person making the communication.⁸

Commercial uncertainty and potential for regulatory intervention

The Explanatory Memorandum proclaims that "[t]he Bill will have no financial impact."⁹ This assertion ignores significant costs that may be incurred due to the regulator's power to investigate pursuant to s 155 of the CCA. The Coalition Bill would create commercial uncertainty, risking allegations and investigations on the basis of an assertion that a disclosure was made for the purpose of varying the price of a competitor and with the effect of substantially lessening competition. The Explanatory Memorandum to the Coalition Bill states that "[i]t is important to recognise that the communication of price-related information can be pro-competitive and beneficial for consumers."¹⁰ However, given the breadth of the proposed prohibition, the ACCC's investigation powers would be significantly broadened with the potential for legitimate disclosures by competitors to be misinterpreted and then investigated by the regulator on the basis of mere suspicions or allegations, notwithstanding that the communications were procompetitive, legitimate business practice.

⁵ Ibid s 45A(6).

⁶ Coalition Bill s45A(6).

⁷ Ibid s 45A(2)(b).

⁸ Ibid s 45A(7).

⁹ Coalition, *Explanatory Memorandum – Competition and Consumer (Price Signalling) Amendment Act 2010*, p 2.

¹⁰ Ibid, p 1.

By way of example, a lender may announce its intention that for a certain period it will not change its lending interest rate other than in line with changes to the RBA's overnight cash rate in order to provide certainty for its customers, and to retain and attract new customers. Even though this purpose may ultimately be found to be unobjectionable, the regulator could choose to investigate the announcement for an asserted anticompetitive purpose. Such risk is an unwarranted regulatory burden on business and gives enormous, unfettered discretion to a regulator.

Exclusions

The Committee is invited to consider the ABA's submission to the Government Bill with respect to the inadequacies of the exceptions in that Bill, some of which are just as apposite with respect to the exclusions in the Coalition Bill.

Authorisation

The potential for authorisation is no answer to the over-reaching powers that the Coalition Bill would make law. As with the Government Bill, the ACCC may prospectively authorise conduct which would otherwise contravene the prohibition contained in the Coalition Bill.¹¹ As many legitimate communications form part of daily business practice but would be caught by the prohibition, it would be impractical, even impossible, for corporations to obtain authorisation in each instance. The authorisation process is at odds with the immediacy of disclosure decisions that must frequently be made and, in most cases, it will not be possible to rely on obtaining a prospective authorisation. Moreover, the costs of applying for an authorisation are substantial; to impose such a regulatory burden on legitimate business practice is a significant waste of resources. The ABA is also concerned with the assumption in the Bill that a Government regulator should be given wide ranging powers from which companies then need to seek exemptions to allow them to conduct legitimate business activities.

Concluding comment

The ABA disagrees with the Coalition's conclusion in the Explanatory Memorandum that "[t]he Bill is responsive to the 'gap in the law' repeatedly identified by the ACCC and achieves the Coalition's stated policy objective without risking over-reach."¹² To the contrary, the Coalition Bill would indeed result in significant over-reach and uncertainty.

The ABA reiterates that individual banks' decisions to inform the market, their customers, consumers, the public and media at large about their cost pressures, to explain their pricing and provide transparency and reduce information asymmetry, are essential elements of a competitive banking market.

Banks have been under considerable political pressure to change their interest rates according to RBA changes in the official cash rate, regardless of funding

¹¹ Coalition Bill ss 88(2), 90(6).

¹² Coalition, *Explanatory Memorandum – Competition and Consumer (Price Signalling) Amendment Act 2010*, p 2.

costs. It would be ironic if any bank were to announce this as its policy, only to fall foul of price signalling laws.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Steven Münchenberg', followed by a large, stylized triangular flourish.

Steven Münchenberg

Attachment

Australian Bankers' Association – Members
AMP Bank Limited
ANZ Banking Group Limited
Arab Bank Australia Limited
Bank of Cyprus Australia Pty Ltd
Bank of Queensland Limited
Bendigo and Adelaide Bank Limited
BNP Paribas
Citigroup Pty Ld
Commonwealth Bank of Australia
Credit Suisse
HSBC Bank Australia Limited
ING Bank (Australia) Limited
Investec Bank (Australia) Limited
Laiki Bank Australia Limited
Macquarie Bank Limited
Members Equity Bank
National Australia Bank Limited
Rural Bank Limited
Rabobank Australia Limited
Suncorp-Metway Limited
UBS AG
United Overseas Bank Limited
Westpac Banking Corporation