Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010 and Competition and Consumer Amendment Bill (No. 1) 2011

Questions on Notice to Treasury asked by the Hon Bruce Billson MP

1. Use of Regulation power - on what basis will a decision be made as to adding industries by sector to the prohibitions? What criteria will be applied?

The Competition and Consumer Amendment Bill (No. 1) 2011 (the Bill) amends the *Competition and Consumer Act 2010* (the Act) to ban anti-competitive price signalling, targeting in particular the banking sector where the Chairman of the Australian Competition and Consumer Commission (ACCC) has expressed concern about the price signalling undertaken by banks.

The ACCC also recently testified in the Senate Economics References Committee's inquiry into banking competition that banks were publicly price signalling their intended interest rate moves to each other and that:

'The problem with that sort of comment – the evil of it, if you like – is that it says to the competitors, "If you increase your interest rates I will follow", which means you are signalling to the competitor that if they increase their interest rates they would not need to worry about being stuck out there on their own and losing market share'.

As outlined in the Explanatory Memorandum, the application of the anti-competitive price signalling prohibitions by way of regulation allows a comprehensive assessment to be undertaken by the Government as to the potential impacts of the new prohibitions on specific goods and services before they are applied to those goods and services.

The Government has stated that it would only extend these laws to other sectors of the economy after further detailed review and consideration.

Any regulations made will be subject to the disallowance procedure under the *Legislative Instruments Act 2003*, providing the Parliament with the opportunity to scrutinise the application of these new prohibitions to specific sectors.

2. How would Treasury define 'banking' when it is possible for a range of businesses e.g. telco's to offer financial products and services?

The Government will undertake consultation during the process of developing regulations to define banking.

3. Information covered by the Government's Bill relates to future information - why would this be appropriate when this may include communicating information that is already publicly available?

The Bill prohibits outright the private disclosure of pricing information between competitors (the *per se* prohibition) and secondly, prohibits the disclosure of pricing or other information if the disclosure is made for the purpose of substantially lessening competition (the SLC prohibition).

The *per se* prohibition recognises that it is the private circumstances in which the information is disclosed which provides the greatest risk of collusion. Private sharing of pricing information amongst competitors can reduce uncertainty, the incentive to compete, and facilitate coordination on price, all of which harm consumers. Therefore, the Bill places an outright prohibition on private disclosures of pricing information.

4. Notification regime - how would Treasury expect the notification regime to work for a large scale insolvency when there are multiple lenders (some international) and on what basis would the directors allow the company to keep trading whilst approval was sought given insolvent trading laws?

In addition to the authorisation regime, the notification regime is a process under which businesses that propose to engage in certain proscribed conduct, can obtain immunity from legal action under the *per se* prohibition, if the conduct is in the public interest.

Notification is a more timely and cost effective method for parties to obtain immunity. Once a notice is lodged with the Australian Competition and Consumer Commission (ACCC), the ACCC will then have a maximum of 14 days to assess the notice, before the immunity commences. If parties notify and receive immunity for disclosures under the *per se* prohibition they will also receive immunity from the SLC prohibition.

5. What is Treasury's response to the proposal in some submissions to include an 'ordinary course of business' or 'legitimate business justification' defence? Why would this not be appropriate and a way of protecting against over-reach, particularly as it relates to the per se prohibition?

The Bill provides for a comprehensive set of exceptions to ensure that legitimate business activities are not captured by the prohibitions. The prescriptive nature of the exceptions is consistent with the existing exceptions in the Act and provides clarity to businesses around what conduct is, and is not, subject to particular prohibitions.

Furthermore, including broad exceptions could reduce certainty and increase costs for business.

6. Is Treasury confident that it has predicted all of the circumstances in which the law might apply and incorporated adequate exceptions and exemptions particularly as further examples of the role of intermediaries (both intended and unintended) and bona fide joint venture activities have been cited as captured by the Government's Bill?

Consistent with the operation of the other competition provisions in the Act, the Bill provides for a comprehensive set of exceptions to ensure that legitimate business activities are not captured by the prohibitions. To the extent that a business considers that their proposed conduct may not fall within one of the exceptions, and that it will be of net public benefit to proceed, they may seek immunity from the ACCC via the authorisation or notification processes.