Law Council
OF AUSTRALIA

Via email: economics.reps@aph.gov.au

Dear Sir,

"Inquiry" Into The Government's Price Signalling Bill

I have the pleasure in enclosing a submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth).

The submission has been prepared by the Competition and Consumer Committee, formerly known as the Trade Practices Committee, of the Business Law Section of the Law Council of Australia. The Submission has been endorsed by the Business Law Section.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Mr Stephen Ridgeway by phone on 03 9679 3529 or via email: stephen.redgeway@blakedawson.com.

Yours sincerely,

Tony O'Malley
Section Chairman

25 May 2011

Enc.

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Submission on the *Competition and Consumer Amendment Bill (No 1)* 2011 (Cth)

Submission by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia

25 May 2011

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1. Executive Summary

1.1 The Competition and Consumer Committee of the Law Council of Australia (**Committee**) makes the following submission to the House of Representatives Standing Committee on Economics on the *Competition and Consumer Amendment Bill (No. 1)* 2011 (Cth) (**Bill**).

1.2 In particular, the Committee submits that, if there is to be a prohibition on price signalling:

(a) it should apply universally and not just to selected business sectors;

(b) it should only apply in respect of future prices, not current or historical prices;

(c) it should be narrowly drafted, as notifications to the ACCC and ACCC guidelines (whilst helpful) are not practical or sufficient to overcome overreach.

1.3 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.

1.4 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 1A to a new sector of the economy by way of regulation.

1.5 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.

1.6 The Bill provides for notification under **section 93** and the Explanatory Memorandum contemplates ACCC guidelines to address concerns over the reach and interpretation of the Bill. The Committee submits that any doubts over the proper interpretation of the Bill cannot 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.

1.7 The **section 93** process is inadequate to address concerns that the 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. 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.

1.8 The 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. The Committee believes 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.

1.9 The financial services sector in Australia has withstood the global financial crisis well and legislators should be reluctant to create uncertainty for the Australian financial and business community in relation to traditional forms of lending and other legitimate everyday commercial transactions.

1.10 The Explanatory Memorandum and the Regulatory Impact Statements do not include any consideration of the civil consequences for lenders in enforcing their loan arrangements (and the risk of increased lending cost to borrowers which may follow), if the Bill creates too many broad avenues for borrowers to try to challenge lending commitments for reasons unrelated to competition, but using technical or unintended contraventions of the new provisions.

1.11 The Committee notes the concerns over the broad scope and reach of the Bill recently expressed by the Senate Economics References Committee in its report of May 2011, "*Competition within the Australian Banking Sector*". This Committee supports many of those concerns.

1.12 The Committee also notes that many of the views expressed in its submission to Treasury in response to the Exposure Draft of the Bill continue to be relevant to the current Bill. Those views are not re-stated in this submission. A copy of that submission **(Exposure Draft Submission)** is **attached.**

2. Process for Sector Specific Application and Regulation Making Power

2.1 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 1A by regulation.

2.2 However, 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 1A to a new sector of the economy by way of regulation. That process should include bringing greater clarity over the definition of the proposed sector, including initially over what is meant by "the banking sector". In order to ensure that the application of the prohibitions in Division 1A 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. The Committee submits that the "banking sector" should not include wholesale or institutional banking services.

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

> *"This bill prohibits businesses from disclosing pricing information to competitors in various circumstances. The prohibitions in the bill will only apply to classes of goods and services prescribed by the regulations (see Schedule 1, item 2, proposed section 44ZZT). The explanatory memorandum states at page 11 that this 'allows an assessment to be undertaken [by the Minister] as to the potential impacts of the new prohibitions on specific goods or services before they are applied to those goods or services'. Although the making of regulations reflecting such assessments*

will continue to be subject to Parliamentary scrutiny through the disallowance procedure under the Legislative Instruments Act, it is of concern that this scope of the prohibitions introduced by this bill are to be determined entirely through delegated legislation. Regrettably, the explanatory memorandum merely states the effect of the provisions rather than justifying the need to leave the scope of operation of these new provisions to be determined by the regulations. 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".***[1]

2.4 The Committee agrees that there is insufficient discussion of this process in the Explanatory Memorandum and Bill.

2.5 Whilst the Committee recognises that a new sector included by means of a regulation making power may be disallowed using the process enacted in the *Legislative Instruments Act* 2003 (Cth), that process is retrospective. The extension by regulation of the new law to a new sector, and the possible subsequent disallowance of that regulation, will have major ramifications for companies and persons carrying on business in that sector, considering the broad reach of the Bill on day to day transactions, as well as the heavy penalties which apply for contravention.

2.6 The Committee suggests that, if the Government maintains the policy of providing for sector by sector extension by regulation, then 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.

2.7 The Committee submits that this process should 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.

2.8 The need for such a process arises because of 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 (as demonstrated through the current discussion of such potential consequences in the context of the application of the proposed prohibitions to the banking sector).

2.9 The European Commission's *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* **(EC Guidelines)** relevantly recognise that:

"Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may

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

improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice".[2]

"Information exchange that is genuinely public can also benefit consumers by helping them to make a more informed choice (and reducing their search costs). Consumers are most likely to benefit in this way from public exchanges of current data, which are the most relevant for their purchasing decisions. Similarly, public information exchange about current input prices can lower search costs for companies, which would normally benefit consumers through lower final prices. Those types of direct consumer benefits are less likely to be generated by exchanges of future pricing intentions because companies which announce their pricing intentions are likely to revise them before consumers actually purchase based on that information. Consumers generally cannot rely on companies' future intentions when making their consumption plans. However, to some extent, companies may be disciplined not to change the announced future prices before implementation when, for example, they have repeated interactions with consumers and consumers rely on knowing the prices in advance or, for example, when consumers can make advance orders. In those situations, exchanging information related to the future may improve customers' planning of expenditure".[3]

2.10 In this regard there are relevant criteria developed in the EC Guidelines:

(a) the starting point for the analysis of market power is the position of the parties in the markets affected by the cooperation;

(b) the relevant markets have to be defined;

(c) the parties to the cooperation possess more than a low combined market share;

(d) if one of just two parties has only an insignificant market share, and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a likely restrictive effect on competition in the market[4].

3. *Per Se* Prohibition of the Disclosure of Existing Pricing and Genuinely Public Pricing Information is Unnecessary

Disclosure of existing and past pricing

3.1 No case is made out in the Explanatory Memorandum for why the Bill needs to be drafted so as to prohibit the disclosure of existing and past pricing on a *per se* basis. This is illustrated by the problem of multi-lender transactions and corporate workouts set out in section 4 of this submission.

3.2 **Section 44ZZW** prohibits disclosures of information about existing pricing, which includes the terms of a proposed, current or previous loan, irrespective of the purpose or the effect on competition.

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[2] EC Guidelines, paragraph [57]

[3] EC Guidelines, paragraph [99]

[4] EC Guidelines, paragraph [42-44].

3.3 The Committee submits that, in this respect, 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.

3.4 If there are concerns that, in some cases, disclosure of current pricing could pose problems for competition, the appropriate balancing mechanism is to allow disclosures of existing pricing to be considered under the "public disclosure" provisions of **section 44ZZX**, on the basis that such disclosure may be challenged if it involves a purpose of substantially lessening competition.

3.5 This approach would be more consistent with the EC Guidelines, which note that the "*exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market*"[5]. The EC Guidelines note that the older the data that is exchanged, the less useful it will be for timely detection of deviations by firms and, thus, a credible threat of prompt retaliation against another firm which departs from such consensus in its pricing or strategy. The EC Guidelines also note that there is no predetermined threshold when data becomes historic and it will depend on the specific characteristics of the market and the frequency of price renegotiations, as well as the nature of the data and other characteristics.

3.6 Whilst accepting there may be some grey areas in relation to the use of historic data, the EC Guidelines do not recommend the prohibition of all exchange of all historic data, no matter how old.

3.7 Rather, the EC Guidelines recognise that information exchanges should be the subject of competitive self-assessment on a case-by-case basis:

> *"The likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged".*[6]

3.8 The EC Guidelines apply this approach to all information exchanges, whether of past, current or future pricing information.

3.9 The Committee submits that, where there is a need to draw a dividing line because of the prescriptive drafting of the Bill, it should, in the first instance, be done by confining this reform to prohibit disclosures of future data and allowing a period of assessment of that reform, before any steps are taken to deal with the issues of exchange of historic data. There is, after all, no available evidence to suggest that the exchange of historic data has proven to be a significant impediment to competition in Australian banking markets or any other markets more generally[7].

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[5] EC Guidelines, paragraph [90]

[6] EC Guidelines, paragraph [75]

[7] These concerns may be solved if the prohibition in **section 44ZZW** were limited to the disclosure of information that relates to a price etc for goods or services to be supplied or likely to be supplied or to be acquired or likely to be

Disclosure of genuinely public information

3.10 The 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*.

3.11 Again, there appears to be no justification for the *per se* prohibition of the disclosure of such genuinely public information and it is difficult to see what competition concerns might arise in such circumstances. The Committee submits that, to the extent that the disclosure of genuinely public information could have an anti-competitive effect, such disclosure should only be prohibited under the "public disclosure" provisions of **section 44ZZX**, on the basis that such disclosure may be challenged if it involves a purpose of substantially lessening competition.

3.12 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.[8] 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.

4. Disclosure of Pricing in Multi-Lender Transactions and Corporate Workouts

4.1 Two examples of routine transactions which do not warrant review under **section 93** are the formation of corporate "workout" scenarios and multi-lender transactions, which have attracted widespread comment in relation to the Bill. 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.

4.2 Under a "workout", different lenders to a borrower in financial difficulty typically need to communicate the borrower's existing loan pricing and terms with each other in order to resolve new terms to restructure finances for the borrower's troubled business. This process invariably requires the lenders to disclose to each other their existing financing arrangements, to allow assessment and renegotiation and the offer of some kind of "lifeline" to the borrower by each lender. Any workout has to be on a basis acceptable to all lenders, all being concerned in the financial survival of the borrower.

4.3 In some workout scenarios, the various lenders will not form a syndicate or joint venture, and may have separately and at various times (and on different conditions) extended finance to the borrower. The joint venture exception will be of no assistance to those lenders in these discussions over a "lifeline".

4.4 Similarly, when multiple lenders are asked whether they wish to provide finance to a project, they are commonly asked to disclose the terms and conditions on which they would be prepared to provide finance for the project. In some cases, the arranger who asks them to provide the information is also providing finance for the project, in competition with the other potential lenders.

4.5 From the Treasurer's Second Reading Speech, it appears, in these circumstances, that the Government intends that communications between lenders, of current and proposed finance

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acquired (i.e. a supply or acquisition in the future)? The disclosure of current prices would then only be prohibited if those prices related to goods/services to be supplied in the future (in which case the disclosure should be prohibited).

[8] See paragraph 2.10 above and EC Guidelines, paragraph [99]

terms, and "prices" offered, or to be offered, to the borrower may only be permitted by use of the ACCC notification process.

4.6 This raises a number of problems. 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 14 days or longer after notice is given to the ACCC[9], before the lenders can proceed to hold these discussions.

4.7 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.

4.8 Allowing for lenders to take advice on the CCA, and for each lender to have a notice drafted, signed and lodged, the practical period of delay will be more than 14 days in most cases. In cases of multiple lenders, a requirement for each to lodge a formal notice is obviously excessive and imposes unnecessary costs and delays.

4.9 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. In many cases, lenders may need quickly to communicate information with each other to address a borrower's financial situation. The survival of a distressed business and the continued employment of its staff in some cases may be jeopardised by the delays caused by the notification requirements proposed in the Bill.

4.10 However, 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.

4.11 It seems difficult to envisage any real competition concern arising from the formation of multi-lender transactions or corporate workouts. Both are a common, everyday feature of the economy.

4.12 The lending terms agreed to by a borrower in distress will be negotiated in circumstances of the borrower having difficulty meeting its obligations. Such a borrower will probably find it difficult to approach other lenders on the open market and may be relying on its existing lenders restructuring its obligations to stave off a business failure that will be costly to all, as well as to employees, unsecured creditors and the wider economy.

4.13 A key feature of a workout is that the directors of the relevant borrowing company (the company that is in financial difficulty) may be anxious to receive urgent comfort from the revised arrangements. This will ensure that they do not run the risk of breaching **section 588G** of the *Corporations Act* (the prohibition on insolvent trading). This legislation can be relied on by the regulator, the liquidator, or indeed by creditors in appropriate circumstances, at a later time. A delay in the ACCC "approving" the arrangements through the notification process may lead to the abandonment of the workout rather than run the risks of engaging in insolvent trading. This is likely to be quite unsatisfactory from a commercial viewpoint – the workout scenario may be regarded as more sensible, less costly and less time consuming than the formal procedures under the *Corporations Act* that might otherwise have to be entertained and put in place by the company needing the revised financing. There is also a chance (which may be remote but nevertheless may be utilised) of third parties trying to make the companies providing the finance subject to accessorial liability should there be a breach by the directors

[9] Depending on whether the delay period currently employed in respect of third line forcing notifications is applied in respect of the new notification procedure for private price related communications.

of the insolvent trading provisions. There is one other potential problem. In some cases the relevant workout may have to be revised because of the circumstances of the matter – will it need further protection by a new notification?

4.14 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.

4.15 Fundamentally, the Bill is overly inclusive if, every time financiers wish to enter into a multi-lender 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.

4.16 The Committee 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 in **section 44ZZZ(3)**- see **example 1.9** in paragraph 1.137. However, the Committee understands that 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.

4.17 In this context, the Committee notes that the description of a "*joint venture*" adopted in the Explanatory Memorandum in paragraph 1.131 is different to, and arguably slightly broader than, the definition of a joint venture in **section 4J** of the CCA.

4.18 The Explanatory Memorandum, however, cannot override the definitions of joint venture in the legislation and, in any event, the Explanatory Memorandum does not state that the concept of a "joint venture" has a broader meaning than **section 4J** in proposed **section 44ZZZ(3)**. The Committee also notes that, for legitimate reasons, many syndicated lending arrangements have express provisions that the arrangements are not joint ventures.

4.19 Because there is uncertainty about what exactly is meant by "joint venture" in the CCA (beyond a mere requirement that the parties carry on an activity jointly in trade or commerce - taking **section 4J** as the starting point) and bearing in mind that certain disclosures need to be made prior to the formation of multi-lender syndicates, the Committee submits that a specific exception is required for multi-lender transactions, as well as for corporate workouts.

4.20 Further, in another respect the proposed joint venture exception in proposed **section 44ZZZ(3)** is unjustifiably narrow, limited to joint ventures for the production and/or supply of goods or services, similar to the joint venture exceptions to the prohibitions on cartel conduct. See CCA **sections 44ZZRO, 44ZZRP**. In contrast, the joint venture defence to exclusionary provisions in **section 76C** is not so limited, and extends to all joint ventures, including joint ventures for the *acquisition* as well as the production or supply of goods or services. Indeed, many joint ventures will involve joint acquisition as well as joint production or supply. It is unclear how the currently proposed exception would apply to such a joint venture. The Committee submits that there is no justification for limiting the type of joint venture to which the exception in proposed **section 44ZZZ(3)** should apply and that the exception should be extended so that it applies to all types of joint ventures, consistent with the joint venture defence in **section 76C**.

5. Civil Consequences of Contravention are Serious and Could Increase Lending Costs

5.1 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.

5.2 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.

5.3 In this context, little attention is given in the Explanatory Memorandum to the civil consequences of a contravention of the proposed new Division 1A of the CCA.

5.4 Because the new Division 1A will be included in Part IV of the CCA, it follows that any person (such as a borrower) affected by a contravention will have an entitlement to bring an action for the remedies available for any contravention of Part IV, namely:

(a) the recovery of loss or damage caused by conduct of persons in breach of the new Division - **section 82**;

(b) other orders, including orders in the nature of injunctions, and orders declaring the term of a loan arrangement void or unenforceable - **section 87(2)(a)**;

(c) orders varying the (financing) arrangements in a manner specified by the court - **section 87(2)(b)**; and

(d) orders restraining lenders from enforcing their securities against the borrower, if the court considers that the order will compensate the borrower for loss or damage caused by any contravening conduct that occurred before the finance arrangements were established **(section 87(1))**.

5.5 It follows that lenders will be greatly concerned to see that the security of their lending arrangements is not placed at risk from unintended consequences from the enactment of the Bill.

5.6 Regardless of any guidelines issued by the ACCC concerning the interpretation or application of new Division 1A, it will ultimately be a matter for a Court, applying the new law, to determine whether or not a contravention has occurred. If so, the Court will have to rule whether the contravention should give rise to other consequences which may threaten the enforceability of security or other loan arrangements made by participating lenders.

5.7 The ACCC cannot "cure" those problems by, in effect, 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.

5.8 That kind of use of the new Division is likely only to increase the risk and therefore cost to lenders and, thereby, reduce rather than increase, competition in lending practices.

6. Exemptions for Notifications under Section 93

6.1 The Committee agrees that, in principle, a **section 93** exemption is a useful addition to the Bill. However, the **section 93** process is designed for occasional circumstances, rather than for established and legitimate industry practices or everyday transactions. It is not suitable as a catch all mechanism to seek to immunise the formation of all multi-lender transactions (on

which the Australian economy depends) or numerous legitimate everyday commercial transactions.

6.2 **Section 93** does not overcome concerns that the Bill would catch many routine transactions, which do not raise any real risk to competition and do not warrant the cost and delay associated with:

(a) requiring parties to prepare and lodge formal notices and pay a fee;

(b) requiring parties to wait a prescribed period for a review before engaging in the proposed conduct;

(c) requiring the ACCC to place the formal notice (which must describe the proposed conduct and identify the parties intending to engage in it) on its public register subject to only limited claims for confidentiality; and

(d) requiring the ACCC to devote resources to undertaking a case by case review of transactions that, in the vast majority of cases, will warrant no possible competition concern.

6.3 In the Committee's assessment, the Bill places too heavy a reliance on the notification regime in **section 93** as a means of solving the widely expressed concerns that the prohibition of private disclosures in **section 44ZZW** of the Bill will catch many forms of legitimate conduct in daily commercial transactions.

6.4 There is also an inherent tension to use what is, by nature, a public notification process to deal with "private" communications that should for genuine and legitimate reasons remain confidential. This raises procedural difficulties that are discussed further below.

Timing and other aspects of ACCC review of a Disclosure Notification

6.5 From a process perspective, when the ACCC receives a notification of a "private disclosure" proposed under **section 44ZZW** (which we will call a "**Disclosure Notification**"), the ACCC will need to consider very quickly whether or not to object to the Disclosure Notification - practically before the person lodging it is able to proceed with the disclosure.

6.6 The Bill will allow a disclosure to occur immediately after the prescribed period elapses (after the notification is lodged and provided the ACCC has not issued a notice which would have the effect of stopping the statutory clock to give the ACCC more time to consider the proposed conduct).

6.7 Further, in many cases, there will be no point in the ACCC later objecting to a disclosure and opposing the notification if, by that stage, the proposed disclosure has already occurred.

6.8 This suggests that, in most cases, for all practical purposes, the ACCC's initial decision on the Disclosure Notification within the prescribed period - which may be as short as 14 days - will be its final decision. This timing will place some pressure on the ACCC to act expeditiously. It could create a significant administrative burden for the ACCC, especially if one anticipates a reasonable volume of Disclosure Notifications will be lodged, because, for example, of the wide net cast by the Bill over ordinary commercial transactions.

6.9 Even though the approach proposed for Disclosure Notifications bears close resemblance to that adopted for notifying third line forcing conduct, Disclosure Notifications will be very different in nature to notifications of conduct caught by **subsections 47(6)** and **(7)**. Notifications of **section 47** conduct - especially third line forcing under **subsections 47(6)** and **47(7)** - often relate to conduct that has an enduring nature. This feature allows the ACCC more time to reach a decision whether or not to object, some weeks or even months after the notice is lodged - even if the conduct has commenced but before much harm is done before an objection is raised.

Block exemptions and authorisations?

6.10 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.

6.11 By not expressly permitting such a "block" exemption, Disclosure Notifications under **section 93** may be interpreted by the ACCC as only permitting notification of "one off" disclosures in particular circumstances. This would be an undesirable approach for Disclosure Notifications and **section 93** should expressly allow for generic notifications of a general class or description of transaction to be lodged. This is different to the practice the ACCC adopts with **section 47** notifications where its practice has been to require the conduct to be carefully described in specific circumstances, and for the other party to the conduct in each example to be specifically identified.

6.12 Hence the Committee is concerned that, as currently framed, **section 93** will be interpreted so as to not allow for block or blanket style exemptions for a class of everyday transaction which would deserve to be exempted without the regulatory burden of repeated notifications.

6.13 Again, it may be argued that the "public benefit" test in **section 90** in its current form would preclude the ACCC from granting an authorisation for a category of dealings and disclosures of information without regard to the identity of the particular persons involved or the precise circumstances of the disclosures. Again, the potential that the test should be narrowly applied in this way should be removed by expressly permitting such an authorisation.

6.14 It is not clear if there is any intention with this Bill to have the ACCC grant a form of standing exemption for certain practices or conduct. Such a proposal could potentially have merit to address concerns identified above. However such broad exemptions would arguably fall outside the scope of both **section 93** and the authorisation process as currently prescribed in **sections 88-90** and it would be desirable to make it clear that such exemptions are permissible.

6.15 In the Committee's view, any proposed mechanisms for granting block exemptions and authorisations needs detailed review (including a review of the block exemption mechanism in the EU).

Should confidentiality of Disclosure Notifications be mandatory?

6.16 There is an inherent tension in using what is inherently a public notification process in **section 93** to deal with private communications. In those circumstances, additional attention should be given to ensure that confidentiality is protected for Disclosure Notifications at least until the ACCC issues any notice under **subsection 93A(2)**. This is particularly important as Disclosure Notifications that are permitted to come into force are intended to deal with private price disclosures that should not be prohibited by **section 44ZZW**.

6.17 The existing provisions of **section 93** do not provide that Disclosure Notifications must be kept confidential and leaves it entirely to the discretion of the ACCC under confidentiality provisions that were framed for exclusive dealing notifications rather than Disclosure Notifications. Moreover, if the party notifying the Disclosure Notification does not request confidentiality, the ACCC appears to have no power to exclude a Disclosure Notification from the public register for reasons related to confidentiality of the information under **subsection 95(7)**.

6.18 We say this because **subsection 95(7)** does not seem to allow the ACCC to require the notification to be kept confidential, since the reason for doing so may fall outside the limited power available to the ACCC in that provision (the reason being that the "confidential" nature

of the proposed disclosure); but more importantly, in any event **subsection 95(7)** does not catch the notification itself but rather, applies only to:

(a) a document referred to in **subsection 95(1)(d)** (documents accompanying the notification) or

(b) particulars under **subsection 95(1)(e)** (which concern oral submissions).

6.19 The Committee submits that a more logical design of the Bill (subject however to the issue discussed below in par. 6.35) would require that all Disclosure Notifications should be excluded from the Public Register unless and until the ACCC issues a notice under **subsection 93A(2)**. In addition, it would appear to be necessary that the confidentiality provisions should be amended to empower the ACCC to:

(a) exclude the Disclosure Notification from any public register; and

(b) make a decision on the Disclosure Notification without necessarily disclosing the Disclosure Notification to persons likely to be affected by it.

Considering the confidentiality of Disclosure Notifications

6.20 The ACCC will also need to develop a new policy concerning the confidentiality of the information set out in Disclosure Notifications as they raise different issues to those arising for other notifications of exclusive dealing conduct under **section 93**. Furthermore, the relevant provisions of the CCA concerning confidentiality of notifications and authorisation appear to require further amendment in relation to disclosure if unintended consequences are not to occur.

6.21 The standard ACCC approach to confidentiality as explained in its Guidelines[10] is to require the party lodging a notice to request confidentiality and then to require that party to meet a standard set out in the CCA in justifying a claim for confidentiality.

6.22 The CCA allows for applicants, notifying parties and interested parties providing information about an authorisation or merger clearance application or notification to ask that the information, or parts of it, be excluded from the relevant public register - **section 95** in the case of notifications, **subsections 89(5) and (5A)** in the case of authorisations.

6.23 Under those provisions of the CCA, when a request to exclude information from the public register is made, the ACCC must exclude the information from the public register if it contains the details of:

(a) a secret formula or process;

(b) the cash consideration offered for the acquisition of shares or assets; and

(c) the current costs of manufacturing, producing or marketing goods or services (eg see **subsection 95(3))**.

6.24 Otherwise, the ACCC has a discretion under the CCA to exclude material from the public register if it is satisfied that it is desirable to do so, either because of the confidential nature of the material or for any other reason (eg see **subsection 95 (3)(b)**).

When should there be public consultation over Disclosure Notifications?

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[10] ACCC, Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes

6.25 The Committee assumes the Government intends that the notification procedure may not itself be used by persons lodging Disclosure Notifications to achieve the proposed disclosure which is described in the notification. The Committee submits some further attention is warranted to the process for lodging Disclosure Notifications in order to secure that intention.

6.26 The CCA requires that a public register of notifications be maintained under **section 95**. As noted above, if the ACCC proposes to object to a Disclosure Notification, it must act quickly to notify the party lodging the notification and all other "interested persons" under **subsection 93A(2)**. Given the tight timing for a response (as noted above in paragraphs 6.5 - 6.9), it is not clear how the identity of other "interested persons" will be ascertained. A party and any interested persons may request a public conference under **section 93A** on the ACCC's draft notice to object to the notification.

6.27 This statutory scheme is important for proper consultation and scrutiny of notices given under **section 93** in relation to exclusive dealing conduct described in **section 47**. However, this scheme seems to be inconsistent with the Government's intentions to prohibit private disclosure of information as proposed under **section 44ZZW** of the Bill until after a Disclosure Notification is fully and properly assessed.

6.28 In some cases, a person filing a Disclosure Notification may also have important commercial reasons to request confidentiality for the entire notice (quite apart from any concern that early disclosure could tip off the recipients as to the "intended disclosure").

6.29 In a workout scenario, the early disclosure of the reasons for the lenders exchanging information could have serious adverse commercial consequences for the borrower - and potentially threaten the continued business of the affected borrower before a workout arrangement is agreed. In such a case, the CCA should allow the entire Disclosure Notification to be kept confidential.

6.30 At the same time, in some cases, it may be difficult for the ACCC to assess the issues quickly, if it cannot undertake any public inquiries without disclosing facts that could prejudice the proposal which is the subject of the Disclosure Notification.

6.31 The Bill does not seem to have considered these issues, as no change is proposed to **section 95** concerning confidentiality.

Risk of regulatory error - ACCC undertaking market inquiries to assess the proposal

6.32 As a general comment on the ACCC's role, because the Bill is intended to prohibit the disclosure of certain information in a market context, the ACCC's policy imperative under the **section 93** process will be quite different from other notifications lodged in relation to conduct under **section 47**.

6.33 The Bill does not appear to recognise these difficulties.

6.34 As noted above, the ACCC will be concerned to guard against premature publication of a Disclosure Notification, unless the ACCC is satisfied that the disclosure should be permitted. This suggests the ACCC is more likely to limit or avoid any public disclosure of the information contained in Disclosure Notifications it receives and to undertake minimal or no public market inquiries into the impact of the intended disclosure on those affected.

6.35 This in turn raises the question - how effectively will the ACCC be able to balance the case for or against permitting disclosure, if the ACCC cannot sensibly undertake any external inquiries into the surrounding circumstances?

6.36 In many instances, it is reasonable to assume the ACCC will not be familiar with the precise factual circumstances surrounding the intended disclosure. Its judgment therefore may have to be made based on the information provided by the notifying party and internal review; little else may be available.

6.37 This feature of the process seems to raise significant risks of regulatory error intruding, despite the best efforts of the ACCC and its staff, who cannot be assumed to be fully aware of all the factual circumstances relevant to a proposal, which might be available if market inquiries of third parties could realistically be undertaken.

6.38 The Committee submits that the proponents of the Bill should address these issues and how the notification process is intended to ensure the Bill does not have adverse unintended consequences in ordinary commercial transactions.

7. Ordinary course of business exception

7.1 As outlined in the Committee's Exposure Draft Submission in response to the earlier Bill, and as the examples above highlight, there are numerous circumstances in which the broad reach of the proposed per se prohibition in proposed **section 44ZZW** would have the unintended consequence of prohibiting conduct with a legitimate business purpose, or in the ordinary course of business, that is pro-competitive or competitively benign. The concerns outlined above demonstrate that in many cases the notification process is an inadequate and impractical remedy for such unintended consequences.

7.2 The Committee submits that such a disclosure should be subject to an exception to the application of proposed **section 44ZZW**, provided that the disclosure would not have an anticompetitive purpose or effect. The Committee's Exposure Draft Submission (at 2, 32) addressed this concern by suggesting a legitimate business justification exception. Another approach would be to provide for an exception for conduct "in the ordinary course of business," provided such conduct had no purpose, effect or likely effect of substantially lessening competition. The phrase "ordinary course of business" is a familiar concept under the CCA. See **CCA subsection 4(4)(b)**.