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24 May 2011

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

Business Council of Australia

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

Dear Sir

INQUIRY INTO THE COMPETITION AND CONSUMER (PRICE SIGNALLING) AMENDMENT BILL 2010 AND THE COMPETITION AND CONSUMER AMENDMENT BILL (NO. 1) 2011

The Business Council of Australia (BCA) is grateful for the opportunity to comment on this Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010 (the Coalition Bill) and the Competition and Consumer Amendment Bill (No. 1) 2011 (the government Bill).

The BCA has in recent months made a number of submissions and representations to the government on this matter (some of which are attached). While we do not wish to revisit all of the issues, we consider it important to highlight several key concerns. These concerns are outlined below.

1 The BCA position on legislation related to price signalling

In the BCA's view the case has not been made for legislation in this area. While the BCA appreciates and understands the community's concerns to ensure that our markets operate in a way that is open, transparent and effective, in practice we do not believe that the approach taken by both the government and the Coalition will necessarily enhance the functioning of markets or achieve these outcomes by driving competition. Inappropriate legislative intervention could result in poor outcomes for consumers and has the potential to act as an impediment to legitimate and pro-competitive commercial behaviour.

The BCA's submission of 20 January 2011 dealt with the exposure draft of the government Bill, and we note that following the consultation process several amendments were made to the Bill. However, a number of substantive concerns remain and these are dealt with in the balance of this submission.

2 An additional exception to the per se Private Disclosure Prohibition which relates to "ordinary course of business" or "legitimate commercial activity"

The BCA continues to be concerned that it is not possible to foresee all the range of circumstances which may occur which fall foul of the per se Private Disclosure Prohibition in the government Bill. It is of significant concern that actions that would be regarded as part of the ordinary course of business or legitimate commercial activity may be captured by the Bill.

In this regard, we would like to see a further exception to the Bill which clearly covers such circumstances. That exception would be based on the clear sentiment of the government that legitimate activities or ordinary commercial communications not be caught by the legislation.

In support of this approach we note the comments of the Parliamentary Secretary the Hon. David Bradbury that:

"We understand that businesses need certainty and appropriate guidance so that legitimate activities are not unintentionally caught by the regulatory regime."[1]

We also note the comments in the Second Reading Speech:

"The Bill allows a court to infer the real purpose a bank has in making such a statement – so there is no need for a "smoking gun". Of course, we are not talking here about ordinary commercial communications."[2]

Consistent with this approach, an additional exception would provide comfort that the government Bill will not unduly encroach upon legitimate commercial activities, without the need to identify each and every instance of a private disclosure that may be unintentionally caught by the per se prohibition.

The exception should also place the onus on the alleged contravener to establish that their conduct fell within the exception.

Further, whilst the government has clearly stated it is not its intention to bring industries other than the banking sector within the ambit of the new provisions, the Competition and Consumer Act (CCA) is in fact legislation of general application.

Given this general application, including such an 'ordinary course of business' exception at this time might prove to be both timely and opportune.

As we stated in our submission of 20 January 2011 we are indeed particularly concerned about the use of the regulation making power. Accordingly, we consider that the legislation should contain an automatic review of these provisions and their application and additionally we would strongly oppose use of the regulation power to add further industry sectors in the future.

[1] Speech to Gilbert + Tobin, 14 April 2011.
[2] Second Reading Speech, 24 March 2011.

3 Ability to notify conduct

We also note that the government Bill now provides for the ability of corporations wishing to engage in conduct that would breach the per se prohibition but has pro-competitive or public benefits to notify the ACCC under section 93 of the CCA. This is in addition to the ability of a corporation to seek authorisation from the ACCC under section 88 of the CCA.

We also have a number of concerns with using the existing section 93 notification process in this context and these concerns are set out below. In our view, a general exception would be a more appropriate safeguard against capturing pro-competitive conduct or conduct with a public benefit in the circumstances.

We are not proposing that the notification option should be removed from the regime as contemplated; rather, our concerns are practical in nature and need to be addressed.

3.1 Practicality and cost of seeking notification

Notification even in a contracted timeframe is a resource-intensive process, both for the corporation and for the ACCC. It will impose a significant upfront regulatory burden on parties in preparing the notification, in assessing the risks and seeking advice, mounting a public benefit case and marshalling the economic and legal resources needed to do this effectively. While the cost of lodging a notification itself may be relatively low, the costs associated with obtaining advice, preparing a notification, diverting commercial management time and delaying engaging in the relevant conduct until the proscribed period has elapsed should not be underestimated. Similarly, the resources needed to be allocated by the ACCC to reviewing notifications within the 14-day period should be considered.

3.2 Uncertainty issues in notification

We note that it is also possible for the ACCC to revoke such a notification, even once immunity is in place, which will add uncertainty to business dealings.

It would also be possible for an interested third party to assert a lack of public benefits and potential anti-competitive effects which the ACCC would need to take into account, adding to delay in the notification process.

3.3 Unnecessary delay

Any disclosures made prior to the notification taking effect risk breaching the prohibitions. Accordingly, parties wishing to disclose information for legitimate purposes and choosing to make a notification to the ACCC will need to delay any disclosures until the notification process is complete.

There may be a number of instances, for example in a corporate restructuring or work-out, where time is of the essence and the parties need to exchange information quickly and efficiently to see whether indeed a work-out is possible. Requiring parties to delay taking these first initial steps in order for a notification to be prepared, lodged and then take effect will frustrate the benefits inherent in corporations engaging in this type of conduct, which has a clear public benefit, and no anti-competitive effect.

It may also cause issues for the directors of the company or companies that are the subject of the work-out as they will be concerned that, in absence of an agreement regarding the company's funding, they will be personally exposed to liability for trading whilst insolvent.

3.4 Confidentiality issues

The current notification process is generally designed to be public in nature – indeed, that is how the ACCC can properly make a decision about public benefit. Notifications are placed on a public register and provide a useful indication of the type of conduct that the ACCC has accepted in the past. There appears to be no ability of the ACCC to keep the notification itself confidential, or to keep aspects of materials lodged with a notification confidential unless the lodging party makes a submission to this effect.

The notification process appears at odds with the Private Disclosure Prohibition to which it applies because, by notifying the ACCC of the intended private disclosure to a competitor, the ACCC is then required to make the notification public, enabling the public generally (and the competitor) to access that information. Further, if the ACCC wishes to object to a notification, it must notify the corporation and other interested parties. This in turn raises a practical issue of how the ACCC will balance the desire not to have matters that are the subject of the notification disclosed before it has undertaken its public benefit assessment, and the need to undertake an analysis of the public benefit based on information that may only be able to be obtained from the market more generally.

In a number of situations, such as a corporate work-out, it is difficult to see how the ACCC could receive information of a commercially sensitive nature in confidence and yet make a decision that could clearly explain why the authorisation was of the public benefit.

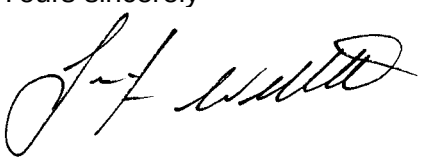
4 Conclusion

The BCA continues to have considerable concerns about the legislation in relation to price signalling and in particular in relation to the Private Disclosure Prohibition.

We would urge the committee to consider the matters raised and in particular a further general exception to the per se prohibition based on ordinary course of business or legitimate business activity.

If any further information is required, please contact either the BCA's Chief Economist and Policy Director, Peter Crone on 03 8664 2604 or Julie Abramson, Senior Adviser, Policy on 03 8664 2614.

Yours sincerely



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