27 May 2011

Mr Craig Thompson, MP
Committee Chair
House of Representatives Economics Committee
By email: economics.reps@aph.gov.au

Dear Committee Chair

It's time to fix Australia's laws against price fixing and collusive practices

Submission to the House of Representatives Standing Committee on Economics regarding the Competition and Consumer Amendment Bill (No.1) 2011

Thank you for the opportunity to make a submission on the Competition and Consumer Amendment Bill (No.1) 2011 (**the Bill**).

I have previously made a personal submission on the Exposure Draft, reflecting my personal views drawn from experience over 20 years in both private practice and in public enforcement of the Competition and Consumer Act (**CCA**)[1]. I welcome the opportunity to make a further submission to the Committee on the Bill.

Summary

- *Australia's competition laws don't fully protect Australian consumers from anti-competitive practices between competitors.*
- *The Government is on solid ground in addressing the gap in Australian competition law.*
- *In introducing law reform, the Government should protect Australian consumers from anti-competitive practices, without tying up business in red tape.*
- *In getting the balance right, there are two principal issues with the Bill:*
  - *The per se prohibition on price signalling is likely to overreach. While this risk has been recognised by the Government, it is not fully addressed through the inclusion in the Bill of additional exemptions and the notification/authorisation process is likely to involve a level of undue red tape.*
  - *The Bill may in fact not go far enough in catching all forms of collusive conduct.*
- *These issues can be readily addressed through straightforward amendments to the Bill.*
- *If they are addressed, the Bill would be well adapted* ***for general application*** *and would be a welcome reform to Australian competition law.*

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[1] I am a partner of Gilbert + Tobin and head its Competition and Regulation team. Prior to commencing with Gilbert + Tobin in 2000, I was ACCC General-Counsel and Executive General Manager, Compliance Division, with responsibility for ACCC enforcement activities. This submission is a personal submission and cannot be taken to reflect the views of Gilbert + Tobin or its clients.

General Observations

The CCA prohibits arrangements or understandings between competitors that have the purpose or effect of substantially lessening competition generally; that have the purpose or effect of price fixing; or the purpose of market sharing, restricting supply, capacity or production, or bid rigging.

Australian courts have held that an arrangement or understanding requires proof of commitment from at least one of the parties. Without commitment, the courts will not find a contravention. The legal principle is well entrenched.

One might ask why? There is no obvious reason why commitment should be required, if an arrangement has an anti-competitive purpose or effect. It is curious that we might expect cartel participants to feel a sense of moral or other commitment.

The challenge for ACCC can be seen in the views of Justice Gray in one petrol decision (*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794):

> "There can be no doubt that a good deal of information about price increases was passed between competitors in the Geelong petrol market, most of it by means of telephone conversations, but this did not amount to the fixing of prices. It was more likely to have been the mere passage of such information in the hope that a general price rise could be achieved. On occasions, it amounted to urging a decision to increase a price, particularly in the case of what was designated as follow-up or complaint calls, but the fact that these were made is itself inconsistent with the existence of the alleged arrangements or understandings."

If conduct between competitors:

- in which *information about price increases is passed* between them in the *hope that a general price rise could be achieved*; and
- *urging a decision to increase a price, particularly with follow-up or complaint calls*,

is not covered by the CCA today, then it should be amended to ensure that it does apply to such conduct.

This conduct is illegal in other countries with modern competition laws. For example, recently Germany's Competition Authority (the Bundeskartellamt) announced fines of €38 million against three food and consumer goods makers, including Kraft and Unilever. The Bundeskartellamt said the companies met regularly over several years. At these meetings high-ranking sales executives were said to inform each other on their negotiations with major retailers. Some of the participants were also said to exchange information on price increases.

Announcing the fines, the Bundeskartellamt President stated: "Certain types of information exchange between competitors are illegal under competition law. Competition is impaired by such practices, even if they are not classical hardcore agreements about prices, supply areas, customers or quotas."

This conduct is not just illegal in Germany, but also throughout Europe and in many other countries. In Europe the problem doesn't arise because the EC law prohibits anti-competitive concerted practices as well as agreements (Article 101 of the EC Treaty). A concerted practice is where two or more parties act together for a common objective. There is no requirement for a commitment between them.

This is not a technical issue; conduct that hurts consumers is not currently caught by our competition laws. The ACCC has lost several petrol retailing cases, notwithstanding clear evidence of concerted conduct to lift prices. The recent German case shows this issue is not limited to petrol (or banking). The ACCC will have past examples in other sectors.

The Government is consequently on solid ground in identifying a gap in Australian competition law and moving to address it. To fill that gap, the Government proposed reforms to the CCA to prohibit price signaling and information exchanges, which would apply to the banking sector in the first place but could be extended to other sectors in the future.

The question is not whether we need law reform, but what is the right reform and whether reform can be introduced that is capable of broader application (even if only over time).

Treasury released an Exposure Draft Bill last December, with two new prohibitions: an absolute (per se) prohibition on unilateral price-related information disclosures to a competitor; and a general prohibition on disclosure of a range of commercial information for an anti-competitive purpose.

The Exposure Draft raised concerns: that, on the one hand, it went too far in prohibiting legitimate business conduct; and on the other, that it may fall short in providing protection against broader anti-competitive practices across the economy.

The genuine concerns with the Exposure Draft related most importantly to the per se price-related information disclosure prohibition. On its face, it seems reasonable. But the breadth of the price-related information concept; the many accepted legitimate cases where businesses share information; and extensive anti-avoidance extensions, resulted in substantial overreach. I have enclosed my submission on the Exposure Draft.

Issues with the Competition and Consumer Amendment Bill

The Government has moved to mitigate the overreach of the Exposure Draft through revisions which have been incorporated in the Bill. It has extended the range of exemptions and it has extended the application of the notification process to the private price related information disclosure (proposed s 44ZZW) and general information disclosure prohibitions (proposed s 44ZZX).

In particular, the extension of the notification regime to information exchange conduct is welcomed. However, the inclusion of a notification exemption of itself is not a sufficient response to the potential overreach of the law, and in particular to the private price related information disclosure prohibition. A notification regime may have the appearance of administrative simplicity and speed, but the reality is it does not necessarily achieve either. The submission of the Trade Practices Committee of the Business Law Section of the Law Council of Australia sets out in some detail the potential red tape implications of the notification regime.

Further, notification (or the more complicated, costly and lengthy authorisation process) as the sole means to obtain an exemption for what may otherwise be an ordinary non anti-competitive business disclosure, runs contrary to the general principle of self assessment for compliance with the law. In effect, it will now be required to obtain an ACCC review and approval for all such disclosures (which do not otherwise fall within one of the exemptions).

On the other hand, there remains the risk that the two new proposed prohibitions will not capture broader anti-competitive concerted practices. One practical issue is that the general information disclosure prohibition only prohibits disclosures which have an anti-competitive purpose (not an anti-competitive effect). On the other hand, the more narrowly drawn per se private price related information disclosure only applies to price related information disclosures. More generally, both

provisions focus on the act of information exchange and information disclosures, which may not properly reflect the range of concerted practices which may be anti-competitive in purpose or effect.

An example of conduct that may not be caught by the amendments can be drawn from the earlier Sydney Petrol case (*Trade Practices Commission v Service Station Association* (1993) 44 FCR 206), the then Trade Practices Commission was unsuccessful in establishing that the SSA's "prosper from petrol" campaign breached the relevant prohibition on price fixing. The "prosper from petrol" campaign proposed that petrol retailers impose a retail margin in the order of 10 per cent in the selling price and included an "education campaign" in which various local SSA member petrol retailers would co-ordinate the campaign, including holding various local meetings to "re-educate service station dealers" in order "to achieve sensible profit objectives".

Notwithstanding that there was a marked Sydney wide increase in petrol prices, the trial Judge concluded that on the evidence there was no evidence that the traders had agreed between themselves that each would follow the recommended prices published by the SSA. His decision was upheld on appeal. The point is that this conduct (notwithstanding a price effect) is not only not caught by the price fixing provisions of the CCA, but that it is also unlikely to fall within either the proposed ss 44ZZW or 44ZZX, in that it involved no disclosure of price related information by competitors (rather it was simply an industry wide campaign conducted by the association) and no relevant public disclosure of the type of information to which s 44ZZX applies. Notwithstanding that, the conduct would almost certainly have been caught by a broader concerted practices provision in line with that in the EC.

These issues can be readily addressed through straightforward amendments to the Bill

Notwithstanding, the concerns with the current draft of the Bill, in my view these issues could be addressed through relatively straightforward amendments to the Bill. I have set out below the suggested revisions.

- *Include an exception/defence to the private price related information disclosure prohibition that the disclosure was in the ordinary course of business and not for an anti-competitive purpose.*

This would maintain the strong form per se offence that is currently in the Bill, subject only to a defence (which the respondent would need to establish) that the disclosure was in the ordinary course of business and not for an anti-competitive purpose.

Such a defence avoids the need for business to rely on costly and potentially slow exemption procedures for routine innocent business disclosures. The ordinary course of business concept is a well understood legal concept and is currently reflected in provisions of the CCA, for example s 4(4) of the CCA.

It is acknowledged that if this proposal is adopted in relation to the price signaling offence, the effect is that the information exchange provisions (price related disclosures and general information disclosure) would be subject to a general anti-competitive purpose defence, such that an arrangement which was anti-competitive **in effect** would not be caught by the prohibition. This potential gap would be addressed through inclusion of a broader concerted practices prohibition, which as set out below, would also address potential gaps in the proposed law.

- *Insert an anti-competitive concerted practices offence in s 45 to cover the gap in the proposed law.*

By including a general concerted practice offence, the law would address the potential weakness in the current Bill in that it focuses on information disclosures only and there may be other

concerted practices which do not have information disclosure as their mode of achieving the anti-competitive outcome. Further, while s 44ZZW would catch conduct which was anti-competitive in effect, it only applies to private price related information disclosures, and s 44ZZX which is broader, only applies to conduct which is anti-competitive in purpose.

A broad anti-competitive concerted practices provision would address this gap. It would also apply directly to information exchange arrangements including a person who is an active information recipient, where it can be shown to be anti-competitive in purpose or effect and would apply to other concerted anti-competitive conduct (eg *TPC v Service Station Association*).

Information exchange arrangements which were not considered by the parties to be anti-competitive in effect or purpose could be self assessed (subject to the risk of ACCC investigation and enforcement action) or could gain certainty of exemption through review under either the notification or authorisation processes (including where they otherwise met the overall net public benefit standard).

The concept is not novel. The CCA already has equivalent provisions which prohibit anti-competitive concerted conduct, in particular, the prohibition in s 45DA which prohibits anti-competitive secondary boycotts. Alternatively, a concerted practice concept, consistent with the European concept, could be adopted.

- *Include in the list of factors relevant to purpose in s 44ZZX(2), whether the communication was in the ordinary course of business.*

In relation to the general information disclosure prohibition, in assessing whether the purpose of the disclosure was anti-competitive or not, it is appropriate to consider whether the disclosure was an ordinary business disclosure. There appears no particular reason not to include this consideration in the list of factors relevant to the assessment of purpose in s 44ZZX(2).

Conclusion: With these changes, the law would be appropriate for general application

The Government is to be commended for addressing the gap in Australia's competition laws.

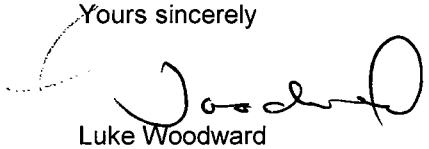
In doing so, it is vital that we get the detail of the law right so that it is capable of general application. While it is recognized that the Government has introduced the proposed law in the context of its competitive banking sector reform package, it is important to get the law right not just for the banking sector, but so that it is capable of being applied generally.

Getting the balance right avoids a second best outcome where the Government is reluctant to extend a law which may overreach; or the law is extended more broadly and legitimate information sharing is widely prohibited subject to potentially costly bureaucratic exemption processes.

The potential overreach of the law can be addressed through a straightforward amendment to the proposed new private price related information disclosure in s 44ZZW.

At the same time by simply prohibiting unilateral information disclosures, other anti-competitive practices may escape the net. The Parliament should take this opportunity to cover all the gaps by including a general anti-competitive concerted practices prohibition.

Yours sincerely



Luke Woodward

Suggested drafting for revisions to the Competition and Consumer Amendment Bill (No.1) 2011

Include an exception/defence to the private signalling offence that the disclosure was in the ordinary course of business and not for an anti-competitive purpose.

Suggested drafting:

Insert in s 44ZZZ a new sub-section:

> *Ordinary business disclosure*
>
> *(5) Section 44ZZW does not apply to the disclosure of information by a corporation if the information is disclosed:*
>
> *(a) in the ordinary course of business; and*
>
> *(b) not for the purpose of substantially lessening competition between the corporation and a competitor in relation to the supply or acquisition of goods or services.*

Insert a concerted practices offence in s 45 to cover any gap in proposed law.

Suggested drafting:

Insert after s 45(2)(b): [A Corporation shall not:]

> *in concert with a second person, engage in conduct for the purpose or with the effect or likely effect of substantially lessening competition in the acquisition or supply of goods or services in respect of which it is in competition with the second person.*

Note: it has been suggested by Brent Fisse that the concept of "in concert" is too narrow and considerably narrower than the concept of a concerted practice. See *Australasian Meat Industry Employees' Union v Meat & Allied Trades Federation of Australia* (1991) 104 ALR 199 at [25]-[34]. In this case, the alternative formulation of the above prohibition would be as follows:

> *together with a second person, engage in a concerted practice for the purpose or with the effect or likely effect of substantially lessening competition in the acquisition or supply of goods or services in respect of which it is in competition with the second person.*

As the concept of a "concerted practice" is new in Australian competition law, it may be appropriate to include a definition of concerted practice.

Include in the list of factors relevant to purpose in s 44ZZX(2), whether the communication was in the ordinary course of business.