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Ben Dolman
General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
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Email: competition@treasury.gov.au

Dear Mr Dolman,

Competition Policy Review Final Report

The Australian Bankers' Association (ABA) is the peak national body representing banks which are authorised by the Australian Prudential Regulation Authority (APCA) to carry on banking business in Australia and to use the word "bank".

The membership of the ABA includes the four major banks, former regional banks which now operate on a national basis, foreign banks which carry on banking business as Australian banks and mutual banks.

The ABA supports the submission of the Business Council of Australia which has been provided to the Government last week.

In particular, in supporting the BCA's submission the ABA wishes to provide further detail of two aspects of the Final Report of the Competition Policy Review panel; the proposed replacement of the existing price signalling laws in section 45 of the Competition and Consumer Act 2010 and the changes to section 46 of the Act.

ABA's members believe their experience with the development of the price signalling law in section 45 of the Act will be helpful for the Government in better understanding the implications of the proposed concerted practice law for the banking sector.

The accompanying Schedule to this letter sets out some important illustrations of situations in which banks need to legitimately collaborate with other banks as part of normal banking practice. If the Government were to proceed with the Final Report's recommendation 29 it would be important that adequate provision is made for the exemption of these and similar banking practices to ensure that they are not interpreted to be concerted practices for the purpose of that law.

The ABA submits it would be far preferable, as the BCA has submitted, that the proposed substitution of the price signalling laws with a far wider industry applied law of concerted practice should be more carefully considered including a consideration of the full range of options available for dealing with information exchanges – including under the existing law without the price signalling amendments.

The ABA would be pleased to discuss these concerns with the Government at its convenience.

Yours sincerely,

Steven Münchenberg

SCHEDULE

ABA SUBMISSION ON FINAL REPORT OF THE COMPETITION POLICY REVIEW

1 Price signalling and concerted practices

1.1 Price signalling laws

The ABA supports the Final Report's proposal to repeal the price signalling laws and agrees that they "*do not strike the right balance in distinguishing between anti-competitive and pro-competitive conduct*". The ABA agrees with the Harper Report's statement that the laws "*may over-capture pro-competitive or benign conduct*" and that "*[o]ther provisions of the competition law are capable of addressing anti-competitive price signalling*".

In particular, the ABA believes the price signalling laws were overly complex and failed to address any perceived inadequacy in the current section 45 of the *Competition and Consumer Act Cth* (2010) (**CCA**).

Furthermore, the ABA agrees that the current section 45, being confined to the banking industry, is inconsistent with the principle that the CCA should apply to all businesses generally.

1.2 Introduction of 'concerted practices' into section 45

The ABA does not support the proposal in the Final Report to extend section 45 to include "concerted practices".

1.2.1 Concept of concerted practices unclear

The Final Report does not provide great detail as to what is meant by "concerted practices" and how it will modify the current position under section 45. It defines a concerted practice as:

> "*the regular practice undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange*".

It further states that a concerted practice "*between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants*" and is "*neither unilateral conduct nor mere parallel conduct by market participants*".

The ABA has the following concerns with the explanation of concerted practices in the Final Report:

1.1.1 It is unclear that the concept of concerted practices adds anything to the existing position. It does not cover unilateral or parallel behaviour but, as the Final Report itself states, "*it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis*".

1.1.2 The perceived concern that concerted practices is meant to address (being able to prove a concrete understanding) is questionable – as the Final Report itself states "*[w]hether that concern is realistic might be debated*".

1.1.3 The term "regular" is not quantified and could include conduct that is repeated any number of times. The ABA notes that although the Final Report refers to the European concept of a concerted practice, Europe has no requirement of repetition, and a single incident is sufficient.

1.1.4 It is unclear what disclosures are intended to be captured by the concept, as the Final Report refers to disclosures of price information but not to other commercially sensitive matters such as strategy.

1.1.5 Even though the Final Report states it will carve out unilateral conduct, the European concerted practices prohibition clearly reaches unilateral conduct (including both disclosures and receipt).

The ABA supports the Final Report's statement that "*[o]ther provisions of the competition law are capable of addressing anti-competitive price signalling*". In the ABA's view, a more practical and certain solution is to provide more detail in the definition of "understanding", if considered necessary.

The ABA also notes that an attempt to reach a contract or arrangement, or arrive at an understanding, is a contravention under the CCA, which provides a broader scope of conduct that may be subject of regulation compared with the United States, where attempts to reach agreement are not a violation under section 1 of the Sherman Act.

1.2.2 European precedent raises concerns if applied in Australia

The introduction of concerted practices under section 45 is a significant change and, in the absence of adequate direction as to its meaning in the Final Report, consideration should be given to how it has been considered in European law. The ABA notes, however, that juridical decisions on point are limited and there is considerable uncertainty regarding the scope of the prohibition.

Article 101 of the *Treaty for the Functioning of the European Union* (**TFEU**) does not include anti-competitive "understandings" or "arrangements", instead referring to concerted practices. The limited European jurisprudence has interpreted this extremely broadly and in a way that is potentially risky and inhibitive.

If Australian courts were to be influenced by the European jurisprudence (which the ABA considers likely in the absence of Australian legislative direction), normal and important day to day business practices would be at risk (see discussion of unintended consequences below).

In the European leading case, *T-Mobile Netherlands*,[1] the Court of Justice found a concerted practice occurred when participants received information which the Court considered allowed them to substitute practical cooperation (by the receipt of information) for the risks of competition. In that case, participants in a meeting who received competitively sensitive information were held to have participated in a concerted practice.

Under European law on concerted practices, it is presumed that by receiving such information, a competitor alters its conduct on the market with anti-competitive implications. Importantly, it is sufficient to attend only one such meeting, or to receive information on only one occasion to fall foul of the prohibition. This is very risky for a recipient since, to avoid being considered a participant in an unlawful concerted practice, the recipient must publicly distance itself from receipt of the information, even if it does not act on the information. This was clear in the OFT's concerted practices findings in the loan products case between RBS and Barclays under the UK's equivalent laws, whereby RBS employees disclosed commercially sensitive information, including in relation to views on the impact

[1] *T-Mobile Netherlands VB and others v Raad van bestuur van der Nederlandse Mededingingsauteriteit*, Case C-9/08, 4 June 2009.

of new capital adequacy requirements, to employees at Barclays.[2] Although Barclays only received information and did not share or necessarily act upon it, this was sufficient to find a concerted practice.[3]

This particularly broad approach has called into question practices that would otherwise be considered acceptable and part of the normal competitive process. For example, the European Commission is now investigating the publishing online and in trade press of intended price increases on the basis that this could be a concerted practice.[4]

However, the broad European approach is subject to an economic efficiencies exception (Article 101(3) *TFEU*), which provides some protection against unintended consequences and restrictions on legitimate business conduct. This acts as a defence and is therefore more robust and certain for businesses than a test which considers whether the conduct has the purpose or effect of substantially lessening competition.

The Final Report suggests no exception for practices that are legitimate business practices or which create economic efficiencies. This is particularly of concern given the potentially massive reach of the concerted practices prohibition. If the concept of concerted practices is introduced, the ABA submits that a clear and robust exception is vital to ensuring the smooth operation of business without causing unintended consequences.

1.2.3 Concept likely to have unintended consequences

The introduction of a concerted practices element into section 45 could have unintended and potentially detrimental consequences for businesses in the Australian market, particularly in financial services.

Financial services markets operate such that banks are typically each other's competitors as well as customers. Cooperation and collaboration are frequently necessary. As such, the following are examples of instances where banks must share information which would likely become illegal if the concept of concerted practices is introduced. Each example is important to the operation of financial services markets.

(a) **Core banking services**: banks provide each other/financial institutions banking facilities such as loans and transactional banking facilities.

(b) **Clearing and settlement services**: these services are essential to the operation of banking markets, particularly for foreign banks and those who cannot settle directly into the Australian Payments Clearing System.

(c) **Payment systems**: payment systems such as BPay and APCA require bank participation and discussion (welcomed by in particular the RBA) and require some interaction on pricing issues at least insofar as they impact access issues.

(d) **Acquisition of financial markets products**: banks must trade with each other (particularly in interbank markets) for financial products such as notes, bills, foreign exchange and commodities. They must also manage risk by trading financial products such as swaps.

(e) **Investment banking**: banks and financial institutions must provide investment banking services to each other, including arranging financing and marketing for financial products.

(f) **Franchisees**: where a bank branch is a franchise operation, it will have both a vertical relationship with the brand bank but may also be a competitor in that its branch competes with bank-owned branches. The brand bank needs to share information such as upcoming interest rate changes.

(g) **Loan originators**: banks need to share loan pricing information with loan originators, who may be partially or wholly owned by a bank that is a competitor in some contexts.

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[2] *Barclays/RBS*, OFT, 20 January 2011.
[3] Note that Barclays was an immunity applicant and avoided a fine.
[4] Case COMP/39850 *Container Shipping*, Initiation of Proceedings 21 November 2013.

(h) **White label products/services**: banks commonly white label products, such as credit cards, which are sold by a bank which may be a competitor in some circumstances. These arrangements require discussions of pricing e.g. of the credit card.

(i) **Outsourcing**: some banks perform outsourced back office functions for other banks, which requires disclosure of, among other things, rates in order to perform the activity.

(j) **Syndicated lending**: banks must engage in syndicated lending sometimes for prudential reasons but also to avoid over-exposure to borrowers and this requires the syndicate to discuss relevant pricing issues.

(k) **Corporate workouts/restructurings**: as with syndicated lending, banks need to work together on measures to restructure or avoid securities enforcements under loans.

(l) **Announcing pricing policies regarding interest rates**: banks make public statements about their intentions for interest rate movements in order to provide certainty in the market and to retain/keep customers.

2 Misuse of market power

If the prohibition in section 46 of the CCA is re-framed to introduce an "effects" test, the ABA submits that it is preferable that a defence be introduced in section 46 to address concerns that the revised prohibition may inadvertently capture pro-competitive conduct, rather than the legislative guidance proposed in the Final Report, which would direct the court to have regard to the following factors when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market:

(a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and

(b) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

The ABA has the following concerns with the directions to the court approach proposed in the Final Report:

- By providing only that the court "have regard" to certain matters, the proposed directions to fall far short of a legislative defence and have a less certain application than an appropriately worded and workable defence would have;

- The practical impact of the directions is unclear and arguably the directions do not add to the overall concept of substantially lessening competition. If the directions only require the courts to consider the ways in which conduct may both increase and lessen competition, they will merely confirm existing practice in respect of other provisions of the CCA; and

- The directions do not give any indication of how much weight different factors – or indeed different and perhaps conflicting purposes, effects and likely effects – are to be given by the court and how the two limbs of the direction will interact with each other in their application. In the absence of sufficient certainty as to the intended application of the directions there is a risk that the directions may be applied in an inconsistent and unpredictable manner.

In light of the risk that the re-framed prohibition in section 46 will capture pro-competitive conduct, and in the absence of certainty as to the interpretation and application of the directions, there is a real risk that the re-framed prohibition as proposed in the Final Report will result in a reduction in pro-competitive activity and more conservative decisions by businesses that may be considered to have market power.

For these reasons, the ABA is strongly in favour of the inclusion of a defence to the prohibition. However, the ABA recognises the difficulties with the two-limbed defence proposed in the Draft Report. In particular, the ABA

considers the second limb of the proposed defence, which requires an *ex ante* assessment of whether the conduct in question "would be likely to have the effect of advancing the long-term interests of consumers", is a nebulous test which is practically unworkable and renders the proposed defence, which requires both limbs to be established, equally unworkable.

The ABA submits that a workable defence would be the adoption of a legitimate business justification test absent any overriding anti-competitive purpose, and that the second limb of the defence proposed in the Draft report not be adopted in any such defence.