

Deitz, Andrew

From: Deitz, Andrew
Sent: Thursday, 21 October 2010 6:13 PM
To: Murphy, Jim
Cc: Lonsdale, John; Archer, Brad; Douglas, Justin; Dunn, Karen; Jones, Lauren; Loan, Nick; Clausen, Timothy; Daft, Emily; Burch, John
Subject: Competition in banking - ACCC investigatory powers [SEC=UNCLASSIFIED]
Attachments: 101021 NFF ACCC powers to initiate investigation of market.docx

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Hi Jim

I understand that earlier today you requested an overview of the full spectrum of possible activities the ACCC can undertake to investigate competition concerns it may have in relation to banks.

Please see the attached note from Karen, which sets out those activities in three broad categories:

- General research powers
- Independent investigatory powers associated with enforcing suspected breaches of the anti-competition conduct provisions of Part IV and
- Ministerially-directed prices surveillance powers.

In short, in the absence of either a suspected breach of Part IV, or a Ministerial direction, the ACCC's powers in this area are limited to research and advocacy.

Happy to discuss.

Regards
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ACCC POWERS TO INVESTIGATE PRICING ISSUES

ACCC research powers

Under section 28 of the TPA, the ACCC has the power to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which Parliament has power to make laws.

- The Minister can direct the ACCC to conduct a critical examination of the same matters, with its inquiry and subsequent report a matter of public record.
- There are no information-gathering powers attached to this section.

ACCC investigatory powers

The ACCC has broad powers to investigate matters that may constitute a contravention of the anticompetitive conduct provisions of the TPA, and where appropriate, to bring proceedings against those suspected of breaching the TPA.

The Minister has no capacity to influence the areas in which the ACCC conducts investigations. In order to preserve the integrity and independence of the ACCC in its enforcement role, section 29 of the TPA prevents the Minister from giving any direction to the ACCC in relation to Part IV.

- The kinds of conduct prohibited under Part IV of the TPA includes:
 - any agreements that contain a cartel provision (including price fixing; restricting outputs in the production or supply chain; allocating customers, suppliers or territories; and bid rigging);
 - any agreements that substantially lessen competition (including price fixing, but also covers a broad range of conduct);
 - the misuse of market power for the purpose of eliminating or substantially damaging a competitor or competition in a market, or preventing or deterring a person from entering a market or engaging in competitive conduct;
 - vertical restraint practices (supply or refusal to supply goods or services, if the acquisition or supply is on certain restrictive conditions); and
 - acquisitions that would have the effect or likely effect of substantially lessen competition.
- Section 155 gives the ACCC broad powers to require a person to produce information, documents or give evidence relating to a matter that constitutes, or may constitute, a contravention of the TPA.

As part of its role in enforcing the TPA, the ACCC may informally monitor and investigate various persons and industries on a confidential basis. As a consequence, if the ACCC were investigating potential breaches in a particular sector (i.e. banking), the Minister and/or Treasury may not be privy to that information until proceedings were commenced.

ACCC Prices surveillance powers

Part VIIA of the TPA enables the ACCC to undertake various forms of prices surveillance at the ACCC's initiative (with the approval of the Minister).

- Notification: whereby the ACCC or Minister declare that specified companies are required to notify the ACCC of a proposed price increase for specified goods and services. The ACCC has 21 days within which to make a determination on the proposal and while the determination

itself is not enforceable, it is an offence to give effect to a price increase within the determination period.

- Inquiry: whereby the Minister approves an ACCC request or directs the ACCC (or another body) to undertake a public inquiry into matters relating to the prices for the supply of goods or services, and to report these results to the Minister. The inquiry body has powers to compel information from relevant parties. Price restrictions are imposed which prevent price increases during the inquiry.

Part VIIA also enables the ACCC to undertake monitoring of prices, costs and profits of specified goods and services by specified persons or industries. While the Minister must initiate price monitoring, it would be open to the ACCC to suggest that the Minister make such a request.