AUSTRALIAN BANKERS' ASSOCIATION INC.

Ian Gilbert
Policy Director

AUSTRALIAN BANKERS' ASSOCIATION INC.
Level 3, 56 Pitt Street, Sydney NSW 2000
p. +61 (0)2 8298 0406 **f.** +61 (0)2 8298 0402

www.bankers.asn.au

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General Manager

Infrastructure, Competition and Consumer Division

The Treasury

Langton Crescent

PARKES ACT 2600

Attention: Mr Ian Becket Principal Adviser Financial, System Division

Email: competitionlaw@treasury.gov.au

Dear Ian,

Competition and Consumer Amendment Regulations (2012) (No.) (Draft Regulations).

The Australian Bankers' Association (ABA) is the peak national body representing banks (other than mutuals) that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia. The ABA's membership of 25 banks comprises the four major banks, former regional banks that now operate nationally and foreign banks that are represented and carry on banking business in Australia as Australian banks.

We appreciate the opportunity we had for an initial discussion about the scope of the Draft Regulations with your Division personnel in February 2012. This discussion provided us with a better basis for providing this submission.

Regulatory scope

We observe that the scope of the Draft Regulations covering the "banking sector" mean there will be an expanded range of situations where the provisions of the Competition and Consumer Amendment (No 1) Act 2010 (Act) may be applied despite the extensive list of exceptions in the Act.

The stated reason why the Government considered the amending Act was necessary was a perception that public statements attributed to banks relating to funding costs and home loan mortgage interest rates, but not specifically any other situations, had had an impact on competition. The ABA disagrees with that conclusion and provides its view below on some competition aspects.

It is unclear in regulatory policy terms why the Government determined that the Act should apply broadly to the "banking sector". The Act (s.44ZZT (2)) affords the opportunity for the Government to limit the scope of application of the Act with reference to the affected class of goods or services as follows:

a) A kind of supplier of goods or services;
b) A kind of industry or business in which goods or services are supplied;
c) The circumstances in which goods or services are supplied.

The Draft Regulations mean that all deposit taking and lending activities of authorised deposit taking institutions (ADIs) irrespective of whether those activities are retail or wholesale, will be covered by the provisions of the Act. Consequently, the compliance arrangements and costs to our members will be increased accordingly.

For example, there is the question whether disclosures made overseas by banks as part of their wholesale fundraising activities or promotion of the interests of their companies that are reported in Australia would be subject to the Act.

Economic considerations

We believe that the Draft Regulations should be considered in terms of economic principle.

"Signalling" of prices occurs all the time in a market. The vast majority of price communications in a market are legitimate, are necessary for the operation of a free market, and are pro-competitive in impact. It is an established economic principle that price signalling or other information exchanges can only have an anti-competitive effect insofar as it facilitates tacit coordination of prices between competitors, thereby removing the need to collude explicitly. In other words, price signalling is only anti-competitive where it allows competitors to replace the inherent uncertainly of competition with some form of tacit understanding whereby the competitor firms know that they don't need to compete as hard because of that signal.

In practical terms, this only works in markets with the following characteristics: (1) largely homogenised product or service where market participants compete based on price, rather than service or product differentiation (petrol is an obvious example); and (2) transparent pricing, so that competitors could see what other competitors are doing, such that they can monitor whether any tacit understanding is holding or being breached (again, petrol is an obvious example).

The financial services market is much more complex than this. Arguably, basic home loans based on a standard variable rate might be homogenous and transparent enough for some kind of price signalling to work in theory (although it is doubtful). But by looking beyond basic home lending, the huge variety of products and different features between products makes it clear that competition is as much based on features and service as it is on price. For example, business lending tends to be much more tailored to the specific circumstances and risks of the individual borrower. It is less homogenous than home lending, terms and conditions tend to be confidential, and pricing is less easy to compare across products and customers. That means that it is almost impossible for "price signalling" to have any anti-competitive effect in markets for these products.

With the Draft Regulations covering services beyond simple consumer lending imposes compliance burdens on business (which is ultimately a cost to consumers, shareholders and the Australian economy) without any apparent corresponding economic benefit.

Conclusions

In the result and from our discussions with Treasury, we understand, but do not necessarily agree with, the reasons given by Treasury as to why the stated objective of the Government was to regulate “the banking sector” which explains the wider scope of the Draft Regulations and for the same reason why in the interests of consistency deposit taking activities also should be captured.

Treasury places strong reliance on the specific exceptions in the Act dealing with the *per se* price signalling provisions and the more general “not in the ordinary course of business” criterion. It remains to be seen whether this is borne out should reliance on one or more of the exceptions become an issue for the courts. The broad coverage of the legislation inevitably will give rise to other, unforseen situations in future which may not fall squarely within these specific exceptions.

There is considerable public interest in commentary by banks and other commentators in the current circumstances of high volatility in international funding markets, the mix of funding needs of banks both local and internationally, the impacts on lending interest rates and the availability of finance generally. There is the public expectation that banks should be able to share their views publicly about these and other matters affecting the Australian economy without facing the risk of prosecution for what the observer may choose to regard as inimical to competition.

It is reasonable to expect that our members and other ADIs may adopt a more conservative approach to public comments either through the media or in other forums that is likely inevitably to lead to less information in the public domain from the banking sector.

If Treasury wishes to discuss these matters with us the writer would welcome that contact.

Yours sincerely,