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Commercial Law e-alert

Not just for banks? The new Price Signalling Bill

Who will this affect (if the bill is passed)?

- Banks
- Sectors other than the banking sector if extended by regulation

Key features of the bill

Two new prohibitions on price signalling, being:

- a strict prohibition on private disclosures of pricing information by companies to their competitors; and
- a general prohibition on private or public disclosures of pricing and other information which have the purpose of substantially lessening competition.

On 24 March 2011, the Treasurer Wayne Swan introduced into Parliament the *Competition and Consumer Amendment Bill (No. 1) 2011*. If enacted in its current form – which is very uncertain given that the bill has only just been introduced – the bill will amend the *Competition and Consumer Act 2010* (“Act”) and could result in sweeping restrictions on the disclosure of pricing information in Australia.

The bill has been championed by the Treasurer as a means of preventing the banks from giving each other a “nod and a wink” that they will raise interest rates together, in the face of purported “strong evidence of banks signalling their pricing intentions to each other in a bid to undermine competition”.

New Prohibitions

There are two key prohibitions, being:

- a “per se” (strict) prohibition on private disclosure of pricing information by companies to their competitors; and
- a broader prohibition on companies disclosing – in private or in public – pricing information or other information as to the capacity of the company to supply or acquire goods and services, or aspects of the company’s commercial strategy where it has the purpose, or appears to a court to have the purpose, of substantially lessening competition.

The penalties will be the same as the penalties for other restrictive trade practices under Part IV of the Act, being civil penalties of up to \$10 million, 10 per cent of a business’s annual turnover or three times the benefit of the conduct, whichever is the greater. The bill does not impose criminal penalties.

Controversy

There are several controversial issues which have been raised regarding the bill, including:

- **It overreaches the current prohibitions in the Act** – currently, the Act requires the existence of a “contract, arrangement or understanding” for conduct to be characterised as restrictive trade practices, which is the same structure as in several other countries. This bill removes this requirement and unilateral communications by a single company can be caught.
- **The potential for it to apply to other industries besides banking** – while the reform has been touted as affecting the banking sector only, the Federal Government is able to extend the prohibitions to other industries by regulation. None of those other industries have been identified at this stage.

Exceptions

The bill sets out numerous specific exceptions to the prohibitions (there are 10 exceptions in total), including where the disclosure is related to a potential acquisition, accidental, required by law or between related companies. The bill also allows an exception where the conduct has been notified to or authorised by the ACCC.

The Way Forward

As mentioned, the bill has only recently been introduced and it will need to pass both houses of parliament. We will keep you updated on the progress of the bill. If you have questions about the likely impact of the passage of the bill on your business, please contact:

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