Law Council
OF AUSTRALIA

22 March 2012

General Manager
Infrastructure, Competition and Consumer Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: competitionlaw@treasury.gov.au

Dear Sir or Madam,

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

1. Executive Summary

1.1 The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide a submission to Treasury on the draft *Competition and Consumer Regulations 2012 (No.)* (Cth) (**Regulations**).

1.2 The Committee submits that:

(a) given the 'sector specific' design of the new Division 1A, which is a major change from the principle that the *Competition and Consumer Act 2010* (Cth) (**CCA**) should have universal application across all Australian markets, the Regulations should set out a more prescriptive process of consultation over any proposal to apply the new Division 1A to a new sector of the economy, including a requirement for consultation with persons likely to be affected by the proposal; and

(b) the Regulations should ensure that confidentiality is required or mandatory for disclosure notifications given to the ACCC under s.93, where the notification deals with private communications.

1.3 The Committee remains of the view that any prohibition on price signalling should be in an appropriate form and apply universally and not just to selected business sectors. Competition law seeks to prohibit particular types of conduct in every market on account of their detrimental impact on competition. The object of the CCA is to enhance the welfare of Australians generally, not only those in selected markets[1]. Selective application of the proposed prohibitions conflicts with that object and undermines the general application of the CCA across all industries on a basis of competitive neutrality.

[1] Section 2

1.4 The possible extension of the prohibitions to additional specified classes of goods or services would be a major step for the affected sector. Although it is likely that the Government would publicly consult with the relevant sector before doing so, this should be specified as a requirement in the Regulations, before a new sector is to be brought under Division 1A.

1.5 The Committee notes that the Explanatory Memorandum to the Bill declared that regulations would be made to apply the prohibitions to other sectors "***after further review and detailed consideration***"[2]; if so, there appears to be no good reason why that 'detailed consideration' should not be a public process and why such a requirement should not be embedded into the Regulations.

Division 1A is very 'bank specific' in design

1.6 It is also apparent that the new Division 1A has evolved, through the drafting and previous consultation phase, into a highly 'bank specific' model, particularly focussed on disclosures about lending rates and exemptions relevant to such disclosures.

1.7 Application of Division 1A to some other sector is likely to throw up other unforeseen consequences that may require the exceptions in the Division to be revisited and expanded.

1.8 A full and public consultation process will therefore greatly assist in identifying and preventing unintended consequences that might arise through a simple extension of the Division to a completely different industry sector with its own practices and engagement between competitors.

1.9 The Committee notes that the Regulations go further than the scope of application of the new Division 1A anticipated by many parties at the time they considered the Bill, because the application of the new Division to disclosures about deposit rates was not appreciated by many parties at that time. While the Committee does not at this stage make any submission on this aspect of the Regulations, the Committee encourages the Government to consult if it plans to broaden the existing legislation.

Notifications to the ACCC should not be Public

1.10 The Committee also remains of the view that there is an inherent tension in using a public notification or authorisation process to seek exemptions for proposed private communications. Further, there is some possibility that notifications themselves could be used as part of a signalling strategy in certain circumstances, given the range of information they are currently intended to contain and to convey publicly.

1.11 The Committee submits that the confidentiality and assessment process currently used by the ACCC in relation to notification and authorisation applications was never designed for new Division 1A and its public approach, which is welcome for its current powers, throws up genuine problems under new Division 1A.

1.12 The form of notification therefore needs a considerable overhaul to address the very different issues raised by the notification of disclosures which otherwise will

[2] Ex Memo, page 68, comments box under heading "*Sector Specific application and regulation making power*"

be caught by the Division 1A prohibitions. For example, communications by financial institutions are very sensitive in the context of workouts and other arrangements where a notification may be sought. Confidentiality should be mandatory for such notifications, including in appropriate cases the identity of the parties and the description of the notified conduct.

1.13 The Committee has previously raised with Treasury the insolvent trading difficulties that will face corporations (and their directors) which may participate in rearranging finance and related terms in a work out or related circumstance. This is becoming an even higher priority area for ASIC. Attention needs to be focused on not facilitating insolvent trading arguments being raised, in particular, by protecting confidentiality for notifications of disclosures for the purposes of such arrangements.

1.14 As this is a brand new area of regulation, to seek to address these significant issues the Committee submits that the prescribed forms should not merely replicate the existing forms (for example those used to notify third line forcing conduct) but should allow parties flexibility, where appropriate, in the description of conduct or a class or category of conduct the subject of a notification or authorisation application.

1.15 In addition, it would be appropriate to provide that any information included in a notification or a notice given under Section 44ZZZ(6) should not be admissible against the persons lodging the notification in any legal proceedings for a contravention under some other law such as the Corporations Act.

1.16 The Committee notes that many of the views expressed in its submission to Treasury on the Exposure Draft of the *Competition and Consumer Amendment Bill (No. 1) 2011* (Cth) in January 2011 and its submission to the House of Representatives Standing Committee on Economics on the *Competition and Consumer Amendment Bill 2011* (Cth) in May 2011 continue to be relevant to the Regulations. Copies of those submissions are attached.

2. Process for Sector Specific Application and Regulation Making Power

2.1 The Committee maintains its position that selective application of competition law is a fundamentally undesirable development under the CCA. This undesirable feature has possibly led to the issues identified in paragraphs 1.6-1.9 of this submission and is exacerbated by permitting the extension of Division 1A by regulation.

2.2 The extension by regulation of the new law to a new sector, and the possible subsequent disallowance of that regulation will have major ramifications for companies and persons carrying on business in that sector, considering the broad reach of the new Division 1A and the heavy penalties which apply for contravention.

2.3 In order to ensure that the application of the prohibitions in Division 1A to a new industry sector does not have any unintended consequences within the relevant industry, the Committee believes the Regulations should provide for a consultative process in relation to the proposed application of Division 1A to the proposed new sector.

2.4 The Committee submits that the process set out in clause 49 of the Regulation for the purpose of prescribing a class of goods or services to be subject to Division 1A should be amended to include:

(a) criteria relating to the features of a product market that warrant it being brought under the prohibition should be developed and stated in the Regulation;

(b) publication by the Minister of a draft proposal to include a class of goods or services under the new Division 1A, with appropriate definition of the class and the basis for the inclusion;

(c) a review and public consultation period should apply to all proposed new regulations; and

(d) publication by the Minister of reasons for proceeding with the regulation, after taking into account the submissions received.

2.5 The need for such a process arises because of the potential for some information exchanges and disclosures to be pro-competitive, and the potential for unintended consequences to arise in the context of a blanket prohibition, as set out in the Committee's May 2011 submission.

2.6 The need for such consultation is evident from the considerable discussion of such potential consequences of the application of the prohibitions to the banking sector and the amendments made to Division 1A as a result, many of which specifically addressed those issues (for example, section 44ZZZ(3A) (disclosure relating to provision of loans etc to same person), section 44ZZZ(3B) (disclosure between credit provider and provider of credit service), section 44ZZZ(5) (disclosure if borrower insolvent).

3. Exemptions for Notifications

3.1 Division 1A makes provision for the existing notification and authorisation provisions in Part VII of the CCA to apply to disclosures that would otherwise contravene section 44ZZW or 44ZZX.

3.2 However, there is an inherent tension in using what is inherently a public process in Part VII to deal with private communications that could contravene section 44ZZW.

3.3 The notification procedure itself should not be used by persons lodging notifications to achieve the proposed disclosure which is described in the notification.

3.4 In addition, it is likely that a person filing a notification or authorisation application in respect of a proposed private disclosure may have important commercial reasons to request confidentiality for the entire notice (quite apart from any concern that early disclosure could tip off the recipients as to the "intended disclosure").

3.5 For example, in a workout scenario, the early disclosure of the reasons for the lenders exchanging information could have serious adverse commercial consequences for the borrower - and potentially threaten the continued business of the affected borrower before a workout arrangement is agreed. In

such a case, the CCA should allow the entire notification or authorisation application to be kept confidential.

3.6 Confidentiality of submissions and documents provided to the ACCC in relation to a notification or authorisation is subject to section 95(7). That provision does not permit the ACCC to exclude from the public register the notification or authorisation itself but rather, applies only to:

(a) a document referred to in subsection 95(1)(d) (documents accompanying the notification or authorisation application) or

(b) particulars under subsection 95(1)(e) (which concern oral submissions).

3.7 Section 95 allows for applicants, notifying parties and interested parties providing information about an authorisation or merger clearance application or notification to ask that the information, or parts of it, be excluded from the relevant public register.

3.8 When a request to exclude information from the public register is made, the ACCC must exclude the information from the public register if it contains the details of:

(a) a secret formula or process;

(b) the cash consideration offered for the acquisition of shares or assets; and

(c) the current costs of manufacturing, producing or marketing goods or services (eg see subsection 95(3)).

3.9 Otherwise, the ACCC has a discretion under the CCA to exclude material from the public register if it is satisfied that it is desirable to do so, either because of the confidential nature of the material or for any other reason (eg see subsection 95 (3)(b)).

3.10 The Committee remains of the view that the confidentiality provisions in Part VII should be amended to empower the ACCC to:

(a) exclude a notification or authorisation application in respect of a private communication from any public register; and

(b) make a decision on such a notification without necessarily disclosing the notification to persons likely to be affected by it.

3.11 At minimum, the Committee submits that the prescribed forms required to be completed and submitted to the ACCC for a valid notification or authorisation application should be amended to permit the exclusion of sensitive information, which in some circumstances might include the identity of the parties and the description of the relevant conduct.

3.12 The prescribed forms BA and GAA in the draft Regulation are in substantially the same form as the existing prescribed forms for notifications and authorisations and require particulars of the parties, the conduct, persons affected etc. The public disclosure of such information in the context of a notice or authorisation application for a private disclosure would in many

circumstances be inappropriate. For example, the publication of financing arrangements for a distressed company and the identity of that company would give rise to the disclosure and insolvent trading risks previously identified by the Committee.

3.13 The Committee also submits that the ACCC will need to develop a new policy concerning the confidentiality of the information set out in such notification and authorisation applications as they raise different issues to those arising for other notifications of exclusive dealing conduct under section 93.

3.14 The standard ACCC approach to confidentiality as explained in its Guidelines[3] is to require the party lodging a notice to request confidentiality and then to require that party to meet a standard set out in the CCA in justifying a claim for confidentiality. The Committee submits that the ACCC should provide specific guidance as to its intended treatment of confidentiality claims for this unusual notification process.

Yours faithfully,

Margery Nicoll
Acting Secretary-General

Enclosure

---

[3] ACCC, Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes