ThomsonsLawyers

Competition & Consumer Law Alert
Price Signalling

June 2012

On 6 June 2012 the *Competition and Consumer Amendment Regulation 2012 (No.1)* (**the Regulations**) prohibited banks, credit unions and building societies from disclosing pricing and other information (**Price Signalling Prohibitions**). The Price Signalling Prohibitions are part of recent amendments to the *Competition and Consumer Act 2010* (Cth) (**the Act**). The Price Signalling Prohibitions may be extended to other industries by further regulation. Banks, credit unions and building societies must now give careful consideration to the disclosure of any pricing, availability of product and strategic information as the penalties for contravention of the Price Signalling Prohibitions are substantial.

Perceived problem

The Government has introduced the Price Signalling Prohibitions in response to a concern that some industries were allegedly engaging in price signalling and that this anticompetitive conduct is not caught by existing provisions that prohibit cartel conduct. In order to contravene the cartel provisions of the Act there must be a contract, arrangement or understanding between competitors. Where a corporation makes a unilateral statement as to its pricing intentions, it may not be possible to show that that statement is made as part of a contract, arrangement or understanding between one or more corporation.

It is the Government's view that corporations, in the absence of specific price signalling provisions, are legally able to engage in anticompetitive conduct. However, it is debatable whether there is (or ever was) a 'gap' in Australian competition law that has now been filled.

Framework

Two new prohibitions

The amendments introduce two new prohibitions that are supposed to address the government's concerns:

- a *per se* prohibition on making private disclosures of pricing information to competitors or potential competitors (**per se prohibition**); and
- a prohibition on making a disclosure of information for the purpose of substantially lessening competition (**general prohibition**). This includes the public disclosure of information including in interviews, conferences and business lunches.

The *per se* prohibition does not require the conduct to have the purpose or effect of substantially lessening competition. In contrast, a contravention of the general prohibition must have the effect of substantially lessening competition.

Application

The Price Signalling Prohibitions will initially only be felt by the banking sector. The Regulations commenced on 6 June 2012 and operate to apply the Price Signalling

Prohibitions to the services of taking money on deposit or making advances of money by a bank, building society or credit union.

The *per se* prohibition will prevent the private disclosure of any pricing information between competitors whether or not that disclosure has the effect of substantially lessening competition where those disclosures are not made in the ordinary course of business.

The *per se* prohibition includes disclosure to a competitor through an intermediary. Consequently, a disclosure may contravene the *per se* prohibition even where it is not directly from one competitor to another.

It is arguable that this conduct is already prohibited by the existing cartel provisions and there was no "gap" in the legislation as suggested by the Government. This point was advanced in submissions including from some of Australia's leading academics in the field on competition law, the Law Council of Australia, and various business groups in relation to an exposure draft of the Bill. While the legislative framework as passed includes new exceptions that were not in the exposure draft, it is not clear that all the concerns expressed in the submissions have been addressed.

The general prohibition will prohibit the disclosure of pricing or other information if the disclosure is made for the purpose of substantially lessening competition. The reference to "other information" includes information relating to a bank's capacity to supply or acquire in the market and its commercial strategy.

As observed above, the general prohibition will encompass public disclosures made during interviews, industry conferences and business lunches. Whether or not the disclosure is made for the purpose of substantially lessening competition will be determined by direct evidence or by inference of the subjective purpose of the bank.

Where the disclosure is made for more than one purpose, the bank will be deemed to have engaged in the conduct if a substantial purpose was to substantially lessen competition.

Exceptions

The amendments contain an extensive framework of exceptions which attempt to protect legitimate, competitive conduct. Those exceptions include:

- accidental disclosures;
- disclosures authorised by law;
- disclosures to related corporations;
- disclosures made for collective bargaining;
- disclosures that have the prior authorisation of the Australian Competition and Consumer Commission (**ACCC**);
- disclosures that are covered by a notice under the CCA exclusive dealing provisions; and
- disclosures made for the purpose of complying with the continuous disclosure obligations in the *Corporations Act 2001* (Cth).

The following exceptions apply exclusively to the *per se* prohibition:

- if the information disclosed relates to the supply or acquisition of goods or services to or from a competitor;
- where the corporation was not aware that the recipient of the disclosure was a competitor;
- disclosures between participants in joint ventures;
- disclosures in relation to the acquisition of shares or assets;
- certain disclosures relating to the provision of loans to the same person designed to protect syndicated lending;
- certain disclosures between a credit provider and a provider of a credit service; and
- certain disclosures that relate to a borrower in a 'borrower insolvency situation'.

Most notably, the *per se* prohibition does not apply to disclosures that are made in the 'ordinary course of business'. While it is clear that this exception is likely to substantially reduce the scope of the per se provision, the manner of its application is still unknown.

Penalties

The penalty for a contravention of the new provisions is the same as the penalty for the contravention of the existing cartel provisions: up to $10,000,000, or three times the value of the benefit gained by the contravention (or 10% of annual turnover if the Court cannot determine the value of the benefit) in the case of corporations. The penalty for an individual is up to $500,000.

Authorisation

The Regulations introduce a formal process by which a bank may seek authorisation from the ACCC to make disclosure of information, to which the Price Signalling Prohibitions would apply, where the disclosure has a net public benefit. The effect of an authorisation is to ensure that the party making the disclosure is immune to legal action in respect of that disclosure.

ThomsonsLawyers

Sydney
Melbourne
Brisbane
Adelaide

Conclusions

Following the introduction of the Regulations on 7 June 2012 the Price Signalling Prohibitions apply to all ADTIs (banks, credit unions and building societies). There is no grace period for disclosures from this date.

The nature of the amendments is such that even disclosures that are not anti-competitive can be prohibited. It is therefore important that banks give careful consideration to this legislation, and seek legal advice on whether disclosures of price information could be potentially caught by the new prohibitions. This is particularly so because the penalties for contravention of the Price Signalling Prohibition are substantial.

The Government indicated when introducing the draft bill that there is capacity for regulations to be made to expand the Price Signalling Prohibitions to other sectors after further review and detailed consideration. The Government has stated that the ability to apply the Price Signalling Prohibition by way of regulations will allow the Government to target the proposed prohibitions towards sectors where conduct of concern has been identified, without raising unintended consequences in other sectors. There is wide speculation that the fuel industry may be the next industry to be subject to the Price Signalling Prohibitions.

If you have any questions about the amendments or how they might affect your business, please contact us.

Written by:

Stephen Voss
Partner
+61 8 8236 1305
svoss@thomsonslawyers.com.au

Rebecca Halkett
Senior Associate
+61 8 8236 1162
rhalkett@thomsonslawyers.com.au

Matt Murphy
Senior Associate
+61 8 8236 1408
mmurphy@thomsonslawyers.com.au

James Gould
Lawyer
+61 8 8236 1447
jgould@thomsonslawyers.com.au

For further information, please contact:

John Howard
Partner
+61 2 8248 3401
jhoward@thomsonslawyers.com.au

Neil Hannan
Partner
+61 3 8080 3589
nhannan@thomsonslawyers.com.au

Stephen Voss
Partner
+61 8 8236 1305
svoss@thomsonslawyers.com.au

Tony Conaghan
Partner
+61 7 3338 7502
tconaghan@thomsonslawyers.com.au

www.thomsonslawyers.com.au