Ban on price signals no easy task

22/11/10 p 55

Many countries have tried but none has succeeded, writes **Brent Fisse**.

Smoke signals have been emitted by various players in Canberra about a legislative clampdown on "price signalling". The first deposit from this smoke will be the Coalition's Competition and Consumer (Price Signalling) Bill, due to materialise today.

The government has yet to say how it will amend the Competition and Consumer Act. Treasury has not published a discussion paper explaining the perceived need to change the law or assessing the legislative options. The Australian Competition and Consumer Commission has complained about price signalling on various occasions, but has yet to advance any workable statutory proposal.

There are no simple solutions. Distinguishing between oligopolistic interdependence and unjustified co-ordination of market activity by competitors is the toughest challenge in competition law.

Satisfactory approaches have yet to emerge anywhere in the world. The United States has muddled through with general prohibitions against "unreasonable restraint of trade" and "unfair competition", the application of which is often contentious and the subject of much litigation. The European Union and the United Kingdom prohibit anti-competitive "concerted practices", an opaque concept that needs to be fleshed out case by case.

The Organisation for Economic Co-operation and Development has restated the issues without finding convincing practical answers.

Some seem to think it is possible and desirable to target price signalling by introducing a new prohibition against price signalling. That will soon be exposed to at least three inconvenient truths:

You can bank on it . . . there are many ways to get around any bans on price signalling. Photo: JIM

■ Price signalling takes many forms and many are pro-competitive. Communications about price by competitors to customers are crucial to an informed market. But competitors in concentrated markets can communicate their prices to each other without entering into an agreement and in ways designed to co-ordinate their conduct and reduce or avoid price competition.

Detecting such cases and proving liability is a big challenge. Competitors that co-ordinate their conduct strategically take care to cover themselves by making sure there is a commercial justification for any communications about price. This kind of practice is often called a "facilitating practice". It is a martial art in modern commerce.

■ Attempts to define and prohibit particular types of communications about price are unlikely to work. For example, a prohibition against public notification by a competitor of a future price increase could be side-stepped by notifying customers privately and letting the media report it. A ban on private communications between competitors about prices could be run around similarly.

■ A prohibition wide enough to catch the various types of communications that could be used to co-ordinate pricing has to be qualified by a competition test. One proposal is that facilitating practices be banned if they could substantially lessen competition in a market.

While a competition test may make sense in theory, it raises major practical concerns. One is the complexity and difficulty of proving a pricing signal was likely to substantially lessen competition in a market. If a bank announces a future mortgage rate rise, there would not be a substantial lessening of competition if it was likely that the information about the future price would have become known to the market in other ways (e.g. through a private communication to the bank's customers and the reporting of th by the media). Another concern is uncertainty: the substantial lessen of competition test is notoriously vague.

Finally, changing the law could futile, as companies are likely to react in ways that pursue their rational self-interest while avoidir liability. For every legislative acti there are corporate counteraction Many types of facilitating practic are conceivable. The fundamenta underlying problem of oligopolist interdependence will remain. Wo if corporations are backed into a corner, they are likely to reassess strategies available to them.

It would be a bitter irony if an inept clampdown on price signall were to facilitate the increased exploitation of other strategic opportunities (e.g. price-matchin most favoured customer clauses).

■ *Brent Fisse is a Sydney-based competition lawyer.*