THE COMPETITION AND CONSUMER AMENDMENT BILL (NO. 1) 2011: INTERNATIONAL WORST PRACTICE ON INFORMATION EXCHANGES BETWEEN COMPETITORS

Abstract

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The Competition and Consumer Amendment Bill (No. 1) 2011 (**CCA Bill**) was introduced into Parliament on 24 March 2011. Some amendments have been made to the Exposure Draft released by the Government on 12 December 2010, but the fundamental problems with the Exposure Draft have not been addressed and the changes that have been made raise further objections and questions.

The purpose of this commentary is to summarise and illustrate the problems created by the CCA Bill. The thrust of the summary and examples is that the Bill represents international worst practice in the use of competition law to regulate information exchanges between competitors. Alternative approaches consistent with international best practice are outlined in the Conclusion.

There are eleven main reasons why the CCA Bill represents international worst practice on information exchanges between competitors:

- the CCA Bill focuses on information disclosure instead of the relevant harm or danger, which is collusion between competitors or unjustified coordination of their conduct in the market (see Section 2.1)

- the focus on information disclosure instead of on collusion or unjustified coordination of market conduct is inconsistent with the approach taken in major jurisdictions with extensive experience of information exchanges between competitors and how best to regulate them (see Section 2.2)

- the focus on information disclosure rather than on collusion and coordination of market conduct is not supported by the economic literature on oligopolistic conduct, information exchanges or facilitating practices (see Section 2.3)

- the approach taken in the CCA Bill is not based on any persuasive analysis of the perceived weaknesses in the present law or the best means of overcoming those weaknesses (see Section 2.4)

- the CCA Bill adopts a sector-specific approach that is discriminatory and

devoid of rational or workable criteria for determining whether or not any particular sector warrants subjection to prohibitions against information disclosure (see Section 2.5)

- the prohibitions are over-reaching – they apply in many situations where the conduct is pro-competitive or harmless (see Section 2.6)

- the prohibitions and the exceptions to them create considerable uncertainty for those seeking to comply with the law (see Section 2.7)

- no attempt has been made to reconcile and align the prohibitions against unilateral disclosure of information with the prohibition against misuse of market power under s 46 (see Section 2.8)

- much doubt surrounds the efficacy of the prohibitions under the CCA Bill given the difficulties of proving contravention and the vulnerability of the prohibitions and exceptions to loopholes (see Section 2.9)

- the CCA Bill relies heavily on authorisation and notification as ways of minimising the hazards of overreach and uncertainty but these mechanisms are bureaucratic, impractical and inconsistent with the approach taken in major jurisdictions (see Section 2.10)

- the process adopted for the development of the CCA Bill has been rushed, inadequately transparent, half-attentive to concerns raised in submissions to Treasury and governed by political opportunism (see Section 2.11).

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