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Association of Building Societies and Credit Unions

Abacus
Australian Mutuals

30 March 2012

Mr Paul Tilley
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The Treasury
Langton Crescent
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Dear Paul

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

Thank you for the opportunity to comment on these draft regulations imposing anti-price signalling laws on the banking sector.

***Abacus – Australian Mutuals* is the industry body for customer-owned Authorised Deposit-taking Institutions (ADIs). The mutual banking sector comprises 93 credit unions, 7 mutual building societies and 5 mutual banks, with total assets of $85 billion and 4.5 million customers. Collectively, mutual banking institutions hold 11.4 per cent of the household deposits market and 7.5 per cent of the new home loans market.**

Abacus seeks changes to the draft regulations to precisely focus the anti-price signalling laws on their actual target: the major banks.

Each one of the four major banks holds a bigger share of the household deposits market and the new home loans market than the entire mutual banking sector. The banking market in Australia is oligopolistic.

The *Competition and Consumer Amendment Act (No 1) 2011* Explanatory Memorandum says anti-competitive price signalling and other information exchange:

> **"…most typically arise and have the greatest detriment in markets which exhibit oligopolistic features and can be as harmful to competition and consumers as explicit cartel behaviour. In an oligopolistic market businesses are not 'price takers', as they have a degree of market power and impact on market outcomes and the decisions of competitors. Accordingly, oligopolists are able to take advantage of increased transparency as it enables them to better predict or anticipate the conduct of their competitors and thus align themselves to it, to the detriment of consumers and the economy."**

The Explanatory Memorandum also notes that the ACCC had expressed concern regarding the public signalling of future interest rate pricing intentions between "major banks".

> **"On 18 October 2010, the Chairman of the ACCC indicated that price signalling by major banks was of concern as, in his view, it provided businesses who sought to raise**

their own interest rates with an amount of comfort that their competitors will not undercut them."

The regulations will subject not just the major banks but all banks and a much wider group of ADIs to new laws that should apply only to major banks.

The Government's *Competitive and Sustainable Banking System* statement said tough new laws were needed "to prevent banks from engaging in anti-competitive price signalling that is designed to keep interest rates or other fees higher than they would otherwise be." This indicates that the objective is to prevent price signalling about the price of loans, but the only lenders covered are ADIs. Why not subject all lenders to the new laws? According to ASIC's 2010-11 Annual Report there are 6,081 credit licensees and 24,000 credit representatives.

The reason not to subject all lenders, or even all ADIs, to the new laws is that to do so is a clear case of excessive coverage and regulatory creep.

The Productivity Commission's December 2011 report *Identifying and Evaluating Regulation Reforms* says a 'regulatory creep' is a feature of regulations that contribute to compliance burdens on business that are not justified by the intent of the regulation:

"Excessive coverage, including 'regulatory creep' - Regulations that appear to influence more activity than originally intended or warranted, overly prescriptive, or where the reach of regulation impacting on business, including smaller businesses, has become more extensive over time."

If the regulations are introduced unamended, all ADIs will be subject to the following prohibitions:

A corporation must not make a disclosure of information if:
(a) the information relates to a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation in a market (whether or not the information also relates to other matters); and
(b) the disclosure is a private disclosure to competitors in relation to that market; and
(c) the disclosure is not in the ordinary course of business.

A corporation must not make a disclosure of information if:
(a) the information relates to one or more of the following (whether or not it also relates to other matters):
(i) a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation;
(ii) the capacity, or likely capacity, of the corporation to supply or acquire Division 1A goods or services;
(iii) any aspect of the commercial strategy of the corporation that relates to Division 1A goods or services; and
(b) the corporation makes the disclosure for the purpose of substantially lessening competition in a market.

Non-major bank ADIs will be subject to new and unwarranted regulatory risk and will have to commit resources and time to ensure compliance with a new regime that is not targeted at them.

Mutual ADIs frequently meet to discuss market and regulatory developments in a wide range of forums, including forums based on regional or industrial affiliations or asset size. These forums assist the competitive capacity of small customer-owned ADIs to compete against the major banks. If the regulations are introduced unamended, participants in these forums will have to consider whether any disclosures they make may be related to a price, discount, allowance, rebate or credit in relation to their core activities: lending and deposit-taking.

This is likely to have a chilling effect on information exchanges in the mutual ADI sector. These information exchanges, far from being anti-competitive, assist the competitive capacity of smaller banking institutions.

More effective targeting of the anti-price signalling regime could be achieved by replacing the term 'authorised deposit-taking institution' with 'major bank' and defining 'major bank' by reference to market share, market capitalisation, asset size or some other threshold. Alternative, 'major bank' could be defined by a schedule naming the four major banks.

If the Government is unwilling to restrict the application of the regime to major banks, Abacus seeks a specific exemption from 44ZZW and 44ZZX in cases of ADI business transfers of ADIs under the *Financial Sector (Business Transfer and Group Restructure) Act 1999.*

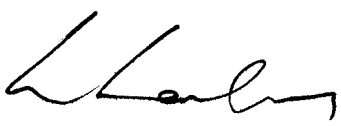
Mutual ADIs exchange rate and pricing information as part of the due diligence assessment they undertake for deciding if a business transfer is in the interests of their respective members. This could be considered as "not in the ordinary course of business" (section 44ZZW(c)). Also, it may not be excluded by section 44ZZY (disclosures authorised by or under law) because the *Financial Sector (Business Transfer and Group Restructure) Act 1999* and the Transfer Rules do not spell out that such an exchange of information is required to occur.

We request provision of a specific exemption from both 44ZZW and 44ZZX where the information is given to a competitor in the course of negotiating or pursuing a business transfer under the Transfer Act. The "joint venture" exemption in section 44ZZZ(3) does not capture that circumstance and the exemption in section 44ZZZ(4) appears to be limited to Schemes of Arrangement and the acquisition of shares (which does not happen in a business transfer involving mutuals) or the "acquisition of assets". Under the Transfer Act there is normally no "acquisition" of assets but a statutory vesting of assets and liabilities.

This problem cannot be dealt with on a case-by-case basis through an authorisation process because the process is a public application and discussions about mergers between ADIs are confidential.

I can be contacted on 02 6232 6666 to discuss any aspect of this submission.

Yours sincerely,



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