AUSTRALIAN INSTITUTE OF PETROLEUM

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

Dear Mr Tilley

CONSULTATION DRAFT - COMPETITION AND CONSUMER AMENDMENT REGULATIONS (2012)

I am writing in response to Treasury's invitation for interested organisations to make submissions on the *Competition and Consumer Amendment Regulations (2012)* accompanying the Government's 'price signalling law' (ie. the *Competition and Consumer Amendment Act (No. 1) 2011*).

AIP was established in 1976 as a non-profit making industry association. AIP's mission is to promote and assist in the development of a sustainable, internationally competitive petroleum products industry, operating efficiently, economically and safely, and in harmony with the environment and community standards. AIP's four core member companies are BP Australia Pty Ltd, Caltex Australia Ltd, Mobil Oil Australia Pty Ltd and The Shell Company of Australia Ltd.

AIP has previously made detailed submissions to Treasury and Parliament on the Government's price signalling legislation at:
http://www.treasury.gov.au/documents/1941/PDF/Australian_Institute_of_Petroleum.pdf; and
http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs/Sub009a.pdf.

These submissions expressed significant concerns with the basis for, and specific provisions in, the Bills and also the industry's broader concern about the potential extension of the 'price signalling' law to the Australian petrol retailing and fuels industry.

AIP acknowledges that the Government has taken account of some of the issues identified by AIP and its member companies in the Act now passed. However, some major industry concerns remain with the law and with the proposed process for applying the law to other industries, and AIP would therefore like to make the following comments in relation Regulation 48 and 49 in the Draft Regulations.

AIP Views on Regulation 48 ('the goods' to be covered by the Act)

While the price signalling law will apply initially to the banking sector under Regulation 48, the ACCC has repeatedly called for this law to apply more broadly to other industries including petrol retailing. AIP notes there have been recent public statements from relevant Ministers indicating that the Government has "no plans to extend the laws to other sectors of the economy". Notwithstanding these assurances, AIP remains concerned about potential extension to the Australian petrol retailing and fuels industry, particularly in relation to significant unintended consequences and the likelihood of regulatory overreach in terms of impeding legitimate and pro-competitive commercial behaviour.

As AIP has previously indicated, if the price signalling laws were applied to the Australian fuels industry, we believe they would neither be practical nor workable. There could be unintended consequences impacting on the efficient commercial operation of the fuel supply chain, potentially reducing Australia's high level of fuel supply reliability. This will be a result of industry uncertainty surrounding the provision of information relating to 'fuel supply' which is essential to most day-to-day operations in the market and legitimate and economically efficient commercial cooperation that has no anti-competitive implications. Fuel companies may need to adopt new or modified business and fuel supply practices to remove this legal risk. Almost inevitably, these practices are likely to be costly for the fuels industry, and could impact on consumers either in terms of supply reliability or price.

The ACCC has previously indicated that industry practices that have no anti-competitive effect or intent could be excluded from the law by way of the new authorisation and notification regimes. AIP considers that such regimes, as proposed, will not provide workable remedies to alleviate business uncertainty in the fuels industry, particularly on more general, but essential, day-to-day information disclosures and also if comprehensive and clear new ACCC guidelines and a more streamlined authorisation process was not available. Moreover, AIP is of the strong view that seeking authorisation of industry practices or conduct that has no anti-competitive effect or intent is not appropriate nor efficient (as it imposes unnecessary compliance costs on business for no benefit), and such practices should be excluded in the law itself. **Since the Act is now passed, AIP recommends that this should be achieved under Regulation 48 through a comprehensive definition of the specific goods and services in any sector to which the Act will apply.**

We are also concerned that application of the law to the fuels sector may still create uncertainty around the provision of information to government agencies, consumers and the media regarding historical fuel prices, 'ability to supply' or 'commercial strategy'. While the Explanatory Memorandum to the law provides some qualified guidance related to disclosures not intended to be covered by the law (eg. submissions to Government/Parliamentary inquiries) we do not believe this provides sufficient detail or certainty to clearly remove the legal risks of such activities being caught by the law's prohibitions. Fundamentally, it is essential that oil companies retain their dialogue with governments, agencies and others on supply reliability and other policy issues including environmental and occupational health and safety matters.

More broadly, AIP considers that no competition or consumer case has been established by the ACCC or the Government for extension of the law to the fuels sector. As Treasury is aware, the ACCC has analysed millions of fuel industry transactions over four successive years under the Government's Formal Price Monitoring of the petroleum industry. This extensive and ongoing analysis has not resulted in any evidence being produced that information disclosures by fuel companies in Australia have led to a lessening of competition within the industry or, more importantly, to an adverse impact on fuel consumers. There is also no evidence that countries with broadly based price signalling or coordinated conduct legislation enjoy more competitive fuel prices than Australia.

While the statements from the Government indicating no intention for broader application of the law are encouraging and welcomed by industry, AIP considers such statements do not remove the need for a comprehensive and accountable consultation and decision-making process to be clearly established in the law, and applied, prior to any extension to other industry sectors.

AIP Views on Regulation 49 ('the process' to be followed if the Act is applied to other sectors)

The Treasurer has made public statements that the Government is prepared to consider application to other sectors subject to several criteria including *"strong evidence of anti competitive behaviours, the avoidance of unintended consequences, and after further review and detailed consideration".*

AIP supports such thresholds and process criteria as an appropriate starting point, but is very concerned that they are not reflected in the current Draft Regulations themselves. The current effect of Regulation 49 is that the only requirement or undertaking required to extend the law to another sector is that the Minister or his delegate follow an appropriate and reasonably practical consultation process in the view of the Minister. That is, the 'appropriateness' of the consultation is at the Minister's discretion, rather than clearly defined by independent and transparent criteria. While Regulation 49 provides some general guidance on a consultation process that "could" be followed by the Minister, it does not clearly stipulate what consultation and review undertakings 'should' occur as a minimum by the Minister/Government. In particular, there are no specific thresholds or net-benefit assessment and competition tests that must be undertaken to underpin and support any consultation process.

Fundamentally, AIP does not support Regulations which allow any Minister or Government to unilaterally apply a significant change to the competition law, with potentially significant impacts on market and consumer outcomes and efficient commercial operations, simply at the Minister's discretion and without a case for intervention being clearly and rigorously demonstrated and the basis or reasons for the Government's decision being openly tested with key stakeholders and the community prior to implementation.

AIP therefore makes the following **Recommendations** in relation to Regulation 49:

(1) That the criteria previously announced by the Minister should be included in the Regulations to more clearly define the scope and focus of 'appropriate consultation', as there is currently no guidance on these important matters. In addition to these criteria, AIP considers that other commonly used competition, consumer and public policy considerations and impact assessments be established in the Regulations to provide clearer guidance to both Government and business and a more robust and informed basis for any future changes to the Regulations. These criteria should include, for example, the requirement for consultation to:
   - document the structure, conduct and performance of the particular sector, and the features of the sector that might warrant extension of the law to that sector;
   - establish strong evidence of current anti-competitive behaviours in the sector;
   - assess how competition and market outcomes will be impacted (including the avoidance of unanticipated consequences) and whether demonstrably better outcomes for consumers will result from an extension of the law; and
   - establish how the costs and benefits of extension to any additional sector/s should be measured and reviewed over time to evaluate the performance of any such move by Government.

(2) While the general form of 'appropriate consultation' currently outlined in clauses (3) and (4) of the Draft Regulation is appropriate, AIP recommends these proposed consultation undertakings be a firm requirement of the Minister/Government (ie. "will' or "should" involve, rather "could" as currently). In addition to these consultation requirements in Clauses (a) to (c), AIP considers that the Minister, following appropriate consultation and the receipt and consideration of stakeholder submissions, should publish a 'Statement of Reasons' for proceeding or otherwise with the extension of the regulations to the proposed sector/s.

(3) AIP notes that Regulation 49 invests all decision making and consultation responsibility with the relevant Minister or the Minister's delegate. A significant number of submissions and informed legal opinion offered during the consultation process on the price signalling law has recommended Parliamentary review and oversight of any proposal for extension to other industries. AIP also supports this view, as any extension is likely to have significant and wide-ranging market, competition and consumer impacts which would be of particular interest to Parliament and the wider community and given the significant scope in AIP's view for unintended consequences.

AIP considers that implementation of the above recommendations will better satisfy business and the community that appropriate consultation, scrutiny and oversight will be conducted by Government before any extension of the price signalling law to other industry sectors.

Thank you for the opportunity to provide our views to Treasury on the Draft Regulations. AIP is happy for our submission to be made publicly available on the Treasury website.

Yours sincerely

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13 February 2012