

## **Explanatory Note - *Competition and Consumer Amendment Regulations 2012 (No. )***

*The Competition and Consumer Amendment Act (No. 1) 2011* (the Amendment Act), inserts a new Division 1A into Part IV of the *Competition and Consumer Act 2010* (the CCA) to prohibit anti-competitive price signalling and other information disclosures.

The Amendment Act received Royal Assent on 6 December 2011 meaning that the substantive provisions will commence on 6 June 2012.

The Treasury has compiled this explanatory note on draft Regulations, the *Competition and Consumer Amendment Regulations 2012 (No. )*, which will accompany the Amendment Act. The purpose of this explanatory note is to provide stakeholders supplementary information on the key elements of the draft Regulations.

### **Preliminary**

Regulation 1 specifies the name of the Regulations as the *Competition and Consumer Amendment Regulations 2012 (No. )*.

Regulation 2 provides that the Regulations would commence on the commencement of Schedule 1 to the *Competition and Consumer Amendment Act (No. 1) 2011*.

Regulation 3 provides that Schedule 1 of the Regulations amends the *Competition and Consumer Regulations 2010*.

## **Amendments to Schedule 1 of the Competition and Consumer Regulations (2010)**

### **Application of the price signalling prohibitions to the banking sector**

The Amendment Act inserts a new division – Division 1A – into Part IV (the anti-competitive conduct provisions) of the CCA.

Division 1A of the CCA will only apply to classes of goods and services, or types of suppliers of goods or services that are prescribed by regulations for the purpose of the prohibitions (subsections 44ZZT (1) and (2) of the Amendment Act).

The Government has decided that the banking sector be subject to the prohibitions initially.<sup>1</sup>

An institution seeking to be prudentially regulated as an Authorised Deposit-taking Institution (ADI) is required to be authorised under the *Banking Act 1959* by the Australian Prudential Regulation Authority (APRA).<sup>2</sup> To receive authorisation, the institution must be carrying on ‘banking business’.

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<sup>1</sup> See for example: [http://www.treasury.gov.au/banking/content/reports/announcement/report\\_06.asp](http://www.treasury.gov.au/banking/content/reports/announcement/report_06.asp).

<sup>2</sup> A current list of ADIs can be found at: <http://www.apra.gov.au/adi/Pages/adilist.aspx>.

Section 5 of the *Banking Act 1959* defines ‘banking business’ as both taking deposits (other than as part-payment for identified goods or services) and making advances of money, as well as other financial activities prescribed by regulations under the *Banking Act 1959*.

ADIs currently include credit unions, building societies, banks, specialist credit card institutions, providers of purchased payment facilities and authorised non-operating holding companies.

### Regulation 48

Item 5 inserts Regulation 48 which prescribes that goods and services provided by ADIs consisting, to any extent, of either the taking of money on deposit or making advances of money are subject to the prohibitions in the Amendment Act.

Regulation 48 is intended to recognise that ADIs may carry on a wider range of activities than just ‘banking business’ activities. Therefore the prohibitions within the Amendment Act will only apply to an ADI when they are taking money on deposit or making advances of money.

- A disclosure made by an ADI related to an activity outside of banking, for example a disclosure related to the provision of travel insurance products is not intended to be captured by Regulation 48 (and therefore the prohibitions in the Amendment Act).

‘Banking business’ in the *Banking Act 1959* is defined as both the taking of money on deposit *and* making advances of money. Given that a single banking good or service provided by an ADI is likely to consist of either taking money on deposit *or* making an advance of money (not both concurrently), Regulation 48 specifies that a good or a service consisting of either taking money on deposit *or* making an advance of money by an ADI is prescribed for the purposes of the prohibitions in the Amendment Act.

The activities prescribed by the *Banking Regulations 1966* to be ‘banking business’ are not covered by Regulation 48. It is intended that a disclosure by an ADI in relation to activities covered in the *Banking Regulations 1966* will not be covered by Regulation 48 (and therefore the prohibitions in the Amendment Act).

A good or service consisting of taking money on deposit or making an advance of money is likely considered to be a ‘service’ rather than a ‘good’. However to remain consistent with the CCA, which generally refers to both goods and services, Regulation 48 covers both a ‘good or service’.

### **Process to be followed if price signalling prohibitions applied to a sector outside of banking**

Subsections 44ZZT (3) and (4) of the Amendment Act outline that the Governor-General will prescribe by regulation the process which the Minister will follow when making regulations in the future which extend the application of Division 1A beyond the banking sector.

## Regulation 49

Item 5 inserts Regulation 49 which outlines that, before the Governor-General makes any regulation for the purpose of subsection 44ZZT (1) of the Amendment Act (other than the first regulation made), the Minister must be satisfied that any consultation that is considered appropriate and that is reasonably practicable to undertake, has been undertaken. To be satisfied, the Minister may have regard to whether the consultation:

- drew on the knowledge of the persons having expertise in fields relevant to the proposed regulation;
- ensured that the persons likely to be affected by the proposed regulation had an opportunity to comment on its proposed content; and
- if appropriate, involved an invitation of submissions to be made by a specified date, or consultation involving an invitation of participation in public hearings held concerning the proposed regulation.

## **Immunity from the price signalling prohibitions**

### **Authorisation**

Section 88 of the CCA enables the Australian Competition and Consumer Commission (ACCC) to authorise a corporation to engage in conduct that may otherwise breach the prohibitions in Part IV, other than those relating to the misuse of market power. The ACCC may only do so if it determines that the matters subject to authorisation will generate a net public benefit, consistent with the tests applied by the ACCC under section 90 of the CCA. The effect of the authorisation is to provide a party with immunity from action under the relevant provision.

The Amendment Act extends the authorisation regime in the CCA by enabling the ACCC to authorise a disclosure a party proposes to make which may breach either prohibitions in the Amending Act.

### **Notification**

Notification is a process under the CCA which allows parties who propose to engage in certain conduct that may otherwise be prohibited under the CCA, to obtain immunity from legal action, if that conduct provides a net public benefit. Compared to authorisation, the notification process is a more cost effective and timely process.

The Amendment Act amends the CCA so that a party may notify the ACCC of conduct that may be prohibited under section 44ZZW of the Amendment Act.

The following Regulations build on the notification and authorisation provisions in the Amendment Act. Consequently, they are largely technical in nature, to be read in conjunction with the corresponding notification and authorisation forms (Forms BA and GAA), to be inserted in Schedule 1 of the Regulations.

## Regulation 9

Item 1 amends Regulation 9 so that a party wishing to notify the ACCC of conduct that may contravene section 44ZZW of the Amendment Act must do so in accordance with Form GAA.

Item 1 also amends Regulation 9 so that if a party lodges a valid notice with the ACCC, the party will obtain immunity to engage in the conduct described in that notice after a 14 day period has elapsed.

## Paragraph 26 (2) (b)

Items 2 and 3 insert references to Forms BA and GAA so that parties must state an address (in appropriate terms) in Australia at which documents under the CCA or the Regulations may be served. Failure to do so may prevent the ACCC from proceeding with the matter to which the form relates.

## Subregulation 28 (7), definition of *additional notice*, paragraphs (a) and (b)

Under subregulation 28 (6A), a concessional fee is payable to the ACCC for an additional notice lodged by a party to the ACCC if certain criteria are met.

Item 4 inserts section 44ZZW into paragraphs (a) and (b) of subregulation 28 (7) so that an additional notice in relation to section 44ZZW can be lodged with the ACCC in conjunction with a concessional fee.

## Regulation 70, table, after item 2

Item 6 inserts a reference to Form BA ‘Anti-competitive disclosure of pricing and other information: application for authorisation’ so that Form BA can be inserted within Part 2 of Schedule 1 of the Regulations.

## Regulation 71, heading

Item 7 amends the heading of Regulation 71 to ‘Forms for exclusive dealing, private disclosure of pricing information and collective bargaining notifications’.

## Regulation 71, after item 1

Item 8 inserts a reference to Form GAA ‘Notification of private disclosure of pricing information’ so that Form GAA can be inserted within Part 3 of Schedule 1 of the Regulations.

## Schedule 1, after Form B

A party wishing to obtain immunity from the prohibitions in the Amendment Act via the authorisation process is required to lodge a form with the ACCC. Item 9 inserts Form BA ‘Anti-competitive disclosure of pricing and other information: application for authorisation’ into Schedule 1 of the Regulations for this purpose.

### Schedule 1, after Form G

Item 10 inserts Form GAA 'Notification of private disclosure of pricing information' into Schedule 1 of the Regulations.

### Schedule 1B, after item 2

Schedule 1B outlines the fees parties must pay when lodging either an application for authorisation or a notice.

Consistent with the fees for authorisation for conduct that may breach other prohibitions within Part IV of the CCA, item 11 outlines that the fee parties are required to pay the ACCC for lodging Form BA is \$7 500. The concessional fee is \$1 500

### Schedule 1B, after item 9

Consistent with the fees for lodgement of an exclusive dealing notice, item 12 outlines that the fee parties are required to pay the ACCC for lodging Form GAA is \$ 100. The concessional fee is \$ 100.