



Australian Payments
Clearing Association

Submission on the Exposure Draft - Competition and Consumer Amendment Bill (No.1) 2011

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About this document

This is the submission of the Australian Payments Clearing Association to the Exposure Draft - Competition and Consumer Amendment Bill (No.1) 2011.

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The Association has no objection to publication of its submission.

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1. Executive Summary

This submission concerns possible unintended consequences arising from the current form of the *Competition and Consumer Amendment Bill (No. 1) 2011* on work undertaken by industry bodies such as the Australian Payments Clearing Association (APCA). APCA's work is essential to the functioning of the payments system in Australia and any measures which could impede the free flow of information to APCA from its members might undermine its ability to represent the industry and to liaise with regulators.

Specifically, Sections 44ZZW and 44ZZX may inhibit the ability of APCA to collect data and information from members that are necessary for APCA to carry out its role as payments self-regulator.

2. The Exposure Draft Bill and APCA's role

The Australian Payments Clearing Association Limited (APCA) is pleased to make this submission to the Commonwealth Treasury on the exposure draft legislation.

On 12 December 2010, the Deputy Prime Minister announced the Competitive and Sustainable Banking System Package of which this exposure draft legislation is part of. The draft legislation sets out proposed amendments to the *Trade Practices Act 1974* (to be referred to as the *Competition and Consumer Act 2010* from 1 January 2011) to address anti-competitive price signalling and information exchanges.

Treasury has indicated that it is seeking comments on this draft by 14 January 2011.

APCA provides an industry venue and framework for payment system policy, self-regulation and coordinated industry change management. Its core purpose is to improve the safety, reliability, equity, convenience and efficiency of the Australian payments system. Membership is open to payment service providers, regardless of institutional form.

APCA's role means that it often acts as a collector and consolidator of member data and other information in order to undertake analysis and develop industry-wide positions on certain matters relating to the efficient operations of the payments system in Australia. In some instances, this collection of information is made at the request of regulators.

APCA's comments on the Exposure Draft Bill are confined to unintended consequences of the proposed amendments that may restrict APCA's ability to work effectively as an industry body and self-regulator.

3. Specific issues

APCA's concerns are associated with Sections 44ZZW and 44ZZX of the Exposure Draft.

Section 44ZZW prohibits private disclosure of *pricing information etc. to competitors*. Under Section 44ZZU, this is deemed to include 'intermediaries', within the scope of which APCA, as a non-competitor, would arguably fall.

Section 44ZZX states:

Corporation must not make disclosure of pricing information etc. for purpose of substantially lessening competition

This includes disclosure of any aspect of the commercial strategy of the corporation as well as that corporation's capacity or intention to supply services. In determining whether the conduct of a corporation is deemed to lessen competition, the courts may have regard to a wide range of circumstances from which such action need only be inferred, including private disclosures and past activities.

The only exceptions to this prohibition are those disclosures authorised by the Commonwealth, States or territories or where such authorised actions occur ten years after the implementation of the Act.

The nature of private disclosures covering 'pricing information etc.' is very vague and potentially broad. For example, discussions within APCA on systemic development and associated costs facing the industry that need to be addressed on a collective basis could breach this definition due to the need for APCA to collate essential data from its members. APCA is therefore concerned Sections 44ZZW and 44ZZX could have the unintended consequences of impeding the work done by industry bodies such as APCA. APCA often collects confidential information from members. This includes statistics about clearing system activity, levels of fraud, information about adverse events and other data regularly collected to support APCA's activities. This data underpins APCA self-regulatory role, enabling APCA to represent members on certain critical issues and to provide information on payment system development to third parties, including regulators. APCA occasionally handles pricing information but more often the information we do handle concerns capacity and often provides an insight into commercial strategy.

The broadly worded nature of both proposed sections could raise serious concerns amongst APCA members about their exposure in continuing to provision such information by members to APCA. Concerns about possible breaches of these provisions could erode APCA's ability to effectively coordinate the industry and provide valuable information to industry and regulators.

Though for there to be a breach of the provision the dealings are to have been undertaken for the purpose of substantially lessening competition (under Section 44ZZX), we believe that concerns over legal exposure from APCA members could be enough to stifle the flow of information to APCA.

If the legislation is intended to view industry bodies such as APCA as joint ventures and therefore subject to exclusion from the prohibitions under the Exposure Draft, APCA would welcome express confirmation of this in order to ensure the flow of information to APCA is not impeded.

4. Coordination in the Payments System

The distinguishing characteristic of payment services amongst the broader category of banking services is their networked nature. That is, some coordination is required amongst payments service providers to ensure that payments move efficiently between them, even as they compete to provide payment services to their customers. In Australia, payments infrastructure is largely owned, maintained and developed privately - by large and small financial institutions, major retailers, specialist payments service providers, and payment scheme operators such as EPAL, SWIFT, AMEX, Visa, MasterCard, BPAY and PayPal.

The need for coordination amongst competitors in the supply of critical economic infrastructure has led to extensive policy oversight of payment services, including competition, innovation and access in payments. Since 1998, the Reserve Bank of Australia's Payments System Board (PSB) has carried out this function. Like APCA, the PSB has a strong focus on promotion of competition as the best means of achieving efficiency and innovation in payments over the long term. The 2010 PSB Annual Report provides a summary of industry efforts to enhance competition, innovation and access (pp21 -25). Major developments identified in that Report include:

- The formation by APCA in 2009 of EFTPOS Payments Australia Limited as the business development vehicle for the EFTPOS system as a competitor with international card payments schemes;
- The commitment of major banks to support MAMBO, a new system to be operated by BPAY. This will provide, among other things, a new option for online payments alongside cards, internet "pay anyone" services through financial institutions and direct services such as PayPal, Paymate and POLi;
- A new Common Payments Network being introduced by APCA and its members during 2011, which combined with other access improvements APCA is undertaking, will enhance access arrangements for competitors in payment services.

These projects have relied on the ability of competitors to provide sensitive data to APCA on a confidential basis for consolidation and presentation as aggregated information. In particular, the need for APCA to be informed of its member's strategic objections in order to be able to identify or synthesise a cross-industry position is paramount. Such work will be made more difficult in the future if the proposed changes outlined in the Exposure Draft become legislation without appropriate comfort is given to financial institutions and payment system providers that ordinarily work with APCA.

APCA also undertakes research which relies on information on the operations of its members in order to identify policy positions on certain issues relevant to the efficient operation of the payments system.

An example is the work currently being undertaken into the future of cheques in Australia. The Reserve Bank of Australia has already flagged that the future of cheques will form an important part of its current Strategic Review of Payments Innovation, and APCA's members have also identified this work as being of strategic importance. In order to ascertain the current status and future of paper payments in Australia, APCA has collected confidential data from its members on the costs and benefits of cheques as well as their views on future strategic plans. This data is held by APCA on a confidential basis. This type of data collection enables APCA to have a broad cross-industry understanding and provide sufficient empirical and strategic data to develop industry policy positions.

APCA has built up the trust of its members to hold confidential information without disclosure to competitors or the public and to only provide consolidated data when releasing analysis, research or policy papers.

The measures outlined in the Exposure Draft might make members more reluctant to release such data to APCA in the future and inhibit the ability of APCA to provide accurate research and coordinate cross-industry work.

5. Conclusion

APCA is concerned the measures outlined in the Exposure Draft may have unintended consequences for industry bodies such as APCA, which rely on the provision of sensitive data by members to be able to develop comprehensive and accurate research on the industry and encourage discussion and debate on areas that impact on the industry as a whole.

It is acknowledged that to the extent that information disclosed to APCA and its members is considered to constitute price-signalling information and is proven to be disclosed for the purpose of substantially lessening competition in any market, such conduct may nevertheless be authorised by the ACCC under section 88(6) of the Act if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. This has been the basis upon which APCA has previously obtained authorisation of its clearing system activity. However, such a process would cause a significant burden on the time and resources of all parties involved if this had to be proven on every occasion there was a questionable disclosure. APCA is concerned that members would be likely to err on the side of caution and be reluctant to engage in any form of discussion with APCA and fellow members if there was a threat of action under the proposed provision.

APCA therefore seeks comfort and clarity with regard to the issues raised above be reflected in the Exposure Draft Bill or any accompanying regulations or guidance with respect to industry bodies such as APCA.