COMPETITION LAW

POLICY & GUIDELINES

Australian Financial Markets Association

www.afma.com.au

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1. POLICY

The Australian Financial Markets Association (AFMA) is the leading industry association promoting efficiency, integrity and professionalism in Australia's financial markets and provides leadership in advancing the interests of all market participants. AFMA represents over 130 financial market participants, including Australian and international banks, leading brokers, securities companies, state government treasury corporations, fund managers, traders in electricity and other specialised markets and industry service providers.

AFMA promotes best practice in financial markets and provides support and services to members to this end. The reputation of AFMA as an organisation and the industry we represent is of importance to us and the wider community.

The propose of the document is to set out AFMA's policy on competition law issues and give guidance to AFMA staff and its members to assist them with conforming to competition law in the context of the forum we provide as a trade association for members to come together to consider issues of common interest.

It is AFMA's policy to comply with competition law and to put in place procedures to ensure compliance with the law. AFMA will not participate in nor facilitate any activity or agreement which is contrary to competition law rules.

Each member of AFMA staff and each member representative participating in AFMA business (including meetings, calls, events and other discussions) must be mindful of compliance with competition law.

While this policy and guidelines provide a high level overview of competition law issues that might be relevant to AFMA staff and AFMA members, it is not possible to anticipate all factors which might give rise to competition law issues. These guidelines does not constitute legal advice and where necessary specific legal advice should be sought from a qualified legal adviser.

2. SUMMARY

AFMA staff are not to facilitate and AFMA members are not to come to arrangements or understandings between yourselves that:

1) Fix prices by charging the same prices.

2) Restrict the production or supply of goods or services, or to restrict the supply to particular persons. This may also take the form of boycotts, that is, agreeing that a particular business will only be able to supply or obtain goods or services at a particular set price, or not at all.

3) To share a market by allocating clients, suppliers or territories with which each party will deal.

4) Rig the outcome of a tender process, such as by agreeing not to enter a bid or to enter a bid with the intention that it is rejected.

5) Disclose prices to competitors in private where doing so is not in the ordinary course of business.

6) Disclose information (in public or in private) for the purpose of substantially lessening competition in a market.

3. OVERVIEW OF COMPETITION LAW

3.1. Agreements with Competitors

In order to ensure they do not breach the *Competition and Consumer Act 2010* (CCA) the Australian Competition & Consumer Commission (ACCC) advises industry associations to be careful not to impede competition by imposing rules about membership, industry standards and other types of conduct that are overly restrictive. Members must not use the association network and meetings as an opportunity and venue to make anti-competitive agreements—such as those relating to cartel conduct by way of price fixing, output restrictions, market sharing or bid rigging.

Cartel provisions which are found in *Part IV, Division 1* of the CCA contains a parallel civil and criminal regime for cartel conduct. The prohibitions against entering into agreements with competitors are broadly categorised into 4 types of cartel conduct, which are subject to both civil and criminal penalties, and apply to both organisations and individuals.

This cartel conduct includes:

1) Price fixing: agreeing with a competitor to charge the same prices.

2) Output restrictions: agreeing with a competitor to restrict the production or supply of goods or services, or to restrict the supply to particular persons. This may also take the form of boycotts, that is, agreeing that a particular business will only be able to supply or obtain goods or services at a particular set price, or not at all.

3) Market sharing: agreeing with a competitor to allocate customers, suppliers or territories with which each party will deal.

4) Bid-rigging: making an agreement with a competitor that has the effect of rigging the outcome of a tender process, such as by agreeing not to enter a bid or to enter a bid with the intention that it is rejected.

These arrangements or understandings do not need to be in writing - any communication with another person which is or may be a competitor and from which each party has an expectation of how the other will act is sufficient.

3.2. Other anti-competitive conduct

Laws prohibiting anti-competitive price-signalling and information disclosures apply only specifically to the banking sector, and only in relation to the taking of money on deposit and making advances of money or loans.

In addition to the specific instances of cartel conduct detailed above, any contract, arrangement or understanding which has the purpose, or has or is likely to have the effect, of substantially lessening competition is prohibited.

Such unlawful conduct here includes:

1) Third line forcing: supplying goods or services, or offering a discount, to a customer (including a student) on condition that the customer buys goods or services from a third person. It is acceptable to recommend the product of a third person to a customer but not to force those other products on your customer as a condition of dealing with you (on preferential terms or otherwise).

2) Misuse of market power: using a substantial degree of power in a market (geographical or in a particular course area) to eliminate or damage a competitor, prevent a competitor from entering the market, or deter or prevent competitive conduct in that market. Particularly relevant here, would be to provide goods or services at below cost for a sustained period in order to prevent or deter a potential competitor.

3) Exclusive dealing: involves either (a) supplying goods or services on the condition that a person does not acquire goods or services from another supplier, or (b) purchasing goods or services on the condition that the supplier does not supply goods or services to a competitor.

4) Resale price maintenance (preventing discounting): supplying goods or services on condition that the purchaser will not re-sell them below a price specified by the supplier (or refusing to supply the goods or services if the purchaser refuses to accept such a condition). This would include offering an incentive to a purchaser (such as a discount) if the purchaser agrees not to re-sell below the specified price. A recommended price is acceptable but there must be no obligation to comply with the recommendation.

5) Anti-competitive share acquisitions (including mergers): acquiring (directly or indirectly) shares or assets of a company if it is likely to substantially lessen competition in a market.

4. CONCEPTS

4.1. Contract, Arrangement or Understanding

Contracts, arrangements or understandings need not be in writing, nor be legally enforceable. All there need be is communication with another person from which each person has an expectation of how the other will act.

An arrangement or understanding involves a meeting of the minds between parties. Examples include parallel conduct, collusion, similar pricing, evidence of opportunities for parties to arrive at an understanding or evidence that parties are acting according to a plan.

4.2. Purpose or Effect

The purpose need not be a sole purpose but must be a substantial purpose which can be inferred from the nature of the arrangement, the circumstances in which it was made and its likely effect.

Conduct that is conditionally prohibited is only prohibited if it has the "purpose, effect or likely effect" of substantially lessening competition in the relevant market. These words are very wide and cover situations where an entity:

- intends to substantially lessen competition and succeeds;
- intends to substantially lessen competition and fails; or
- does not intend to substantially lessen competition but its actions have that effect.

An entity's conduct might consist of more than one purpose and only one purpose might be anti-competitive. The CCA will be breached if the anti-competitive purpose is a substantial one.

5. CONDUCT UNACCEPTABLE IN AFMA

5.1. No price fixing

For members of a trade association such as AFMA where collaborative meetings occur on a regular basis about market issues and conditions particular attention should be paid to the price fixing provisions.

One type of cartel conduct occurs where competitors make a provision of a contract, arrangement or understanding which has the purpose, effect, or likely effect of fixing, controlling or maintaining the price, or a component of the price, of goods or services that each of the competitors supply, or acquire.

Another, related, type of cartel conduct, as defined, occurs where competitors give effect to a provision of a contract, arrangement or understanding which has the purpose, effect, or likely effect

of fixing, controlling or maintaining the price, or a component of the price, of goods or services that each of the competitors supply, or acquire.

Potential consequences of a price fixing breach, or an attempted breach, of the prohibitions on price fixing may have potentially serious consequences.

For individuals who are found to have intentionally participated in each of the elements necessary for a finding of a breach or an attempted breach of the prohibitions, the potential consequences (for each instance) include up to 10 years imprisonment, orders banning them from being involved in the management of companies, and pecuniary penalties of up $500,000.

For companies which are found to have breached, or attempted to breach the prohibitions, the potential consequences (for each instance) include pecuniary penalties of up to the greater of $10 million, 3 x the gain from the breach or, if the gain from the breach cannot be ascertained, up to 10% of the group's Australian turnover in the previous year.

In addition, individuals and companies may be ordered to pay legal costs and civil damages.

Price fixing

- Discussions and, most importantly, agreements with competitors about prices are not to be engaged in by members in AFMA forums.
- Take care to ensure that financial product prices are established through market mechanisms and not through discussion among AFMA members.
- Importantly, each of these prohibitions – the making of a price fixing provision and the giving effect to a price fixing provision – requires "a commitment to act" in accordance with the provision. That is, it is necessary for the competitors who are party to the price fixing provision to commit to set their prices in accordance with the provision. A mere hope that something might be done, or that other members of AFMA might act in a similar way, is not a commitment to act in accordance with the resolution.

5.2. No market sharing

When competitors agree to divide or allocate consumers, suppliers or territories between themselves, they are engaging in market sharing. This conduct is prohibited as it results in businesses sheltering from competition and denying clients the benefit of choice.

Such actions include:

1) allocating clients by geographic area
2) dividing contracts within an area
3) agreeing not to compete for established consumers

4) agreeing not to produce each others' products or services

5) agreeing not to expand into a competitor's market.

Market sharing

- Agreements between competitors to divide or allocate any consumers, suppliers or territories are prohibited and are not to be proposed or considered within AFMA forums.
- Markets should operate freely, and should be driven by competition, not agreements between competing members.

5.3. Bid rigging

Where competitors agree to ensure that bids for a tender are submitted (or withheld) in a particular way, they are engaging in bid rigging. This type of conduct is also known as collusive tendering. It breaches the cartel provisions of the CCA.

There are a number of different types of bid rigging behaviour to be aware of and avoid.

These include:

- Cover bidding—where competitors agree that one member of the group will 'win' the tender, as all the other competitors agree to bid over a certain amount.
- Bid suppression—where one or more competitors agree not to submit a tender.
- Bid withdrawal—where a business withdraws a winning bid so another will be successful.
- Bid rotation—where businesses agree to take turns at winning tenders so that each business receives an equal amount of jobs.
- Non-conforming bids—where one or more competitors deliberately include unacceptable terms and conditions so that their tender will be excluded and another will be successful.

Bid-rigging

- Members are not to make any agreements in AFMA forums with competitors about how you will tender for bids through AFMA forums.

5.4. No output restrictions

Output restrictions are when competitors agree to prevent, restrict or limit the supply of goods and/or services, with the purpose or effect of driving the price of these items higher due to their lack of availability. The cartel rules are breached where a coordinated agreement is made between businesses to collectively control the supply of goods or services.

Output restrictions

- Agreements with between members about controlling (including limiting) the supply of goods or services to clients are not permitted.

5.5. No boycotts—exclusionary agreements

If an agreement is made between competitors that prevents, restricts or limits dealings with an individual supplier or client, or group of suppliers or clients, those competitors are engaging in exclusionary behaviour in breach of the CCA. This also applies where one business attempts to induce other businesses to enter into such an agreement.

The CCA also prohibits secondary boycotts if they are engaged in for the purpose and would have, or are likely to have, the effect of causing substantial loss or damage to a business or competitor. As the name suggests, a secondary boycott could, for example, involve conduct by two businesses to hinder or prevent another business from supplying to, or acquiring goods or services from, a fourth person.

Boycotts

- Do not make boycott agreements with your competitors for the purpose of preventing, restricting or limiting your dealings with suppliers or consumers.
- Do not attempt to induce anyone to limit their dealings with other businesses.
- Set the terms and conditions of your agreements with suppliers and consumers independently, while taking care that they comply with the CCA more broadly.

5.6. No agreements to deal exclusively

Exclusive dealing arrangements involve the imposition of limitations by one business on the supply or acquisition of products or services by another business or consumer. These limitations often take the form of restrictive anti-competitive conditions. While a business is, of course, able to decide who it would like to do business with, including who it will use as a supplier, it is illegal for one party to impose certain types of restrictions on the other. It is also illegal to refuse to supply or acquire, or cease supplying or acquiring, goods or services from a business because that business has not accepted the restrictions.

The types of arrangements that involve exclusive dealing are where a business:

- supplies goods or services on the condition that the purchaser does not acquire items from a competitor
- only acquires goods or services on the condition that the supplier accepts restrictions on supplying third party businesses

- supplies goods or services on the condition that the purchaser acquires other goods or services from a third party. This, also known as third line forcing, is strictly prohibited by the competition rules.

Some of these types of conduct require a substantial lessening of competition to occur if they are to be considered a breach of the CCA. For others, just the existence of the arrangement will be a breach.

Exclusive dealing

- AFMA members are not to use its forums to attempt to impose restrictions on their suppliers or clients in their dealings with other businesses.

- AFMA members are not to impose through its forums a requirement on their suppliers or clients that they must deal with a specific third party business in order to deal with them.

6. PRICE-SIGNALLING

Given that a significant number of AFMA members are authorised deposit-taking institutions (ADIs), AFMA must also pay close attention to compliance with the price-signalling prohibition.

Broadly, it is illegal for ADIs to

1) Disclose prices to competitors in private where doing so is not in the ordinary course of business (the per se prohibition).

2) Disclose information (in public or in private) for the purpose of substantially lessening competition in a market (the general prohibition).

6.1. Per se prohibition

The per se prohibition is confined to a narrow range of private disclosures, relating to price, whereas the general prohibition encompasses disclosures relating to price, capacity and commercial strategy.

It is illegal for an ADI to disclose information to a competitor in private where the information relates to a price for a deposit or loan supplied or acquired (or that is likely to be supplied or acquired) by the firm.

The prohibition does not draw a distinction between past, current and future price information, and does not require proof of an anti-competitive purpose or effect.

Generally, any pricing information given to one or more competitors, but not to any other person, is a private disclosure for the purposes of the per se prohibition.

Anti-avoidance provisions in the CCA ensure that the per se prohibition will still apply even if a business uses an intermediary to pass on pricing information to a competitor, or if the business provides the pricing information to a non-competitor as well, for the purpose of circumventing the prohibition.

The private disclosure prohibition applies to all pricing information. The nature of the information and its potential to damage competition is irrelevant under the private disclosure prohibition. Accordingly, it is illegal for competitors to discuss:

- historical industry pricing information, even if this is discussed for a legitimate purpose such as identifying opportunities for improvements in industry competitiveness or lobbying governments;

- information of no competitive significance. For example, pricing information that is stale due to the passage of time, and of no relevance to future price competition, could not be discussed between competitors; and

- information that is already in the public domain. Competitors will not be able to avoid liability by limiting communications to public domain information, since this also is captured by the private disclosure prohibition.

The prohibition does not require a link to be demonstrated between the signalling conduct and any form of collusion or facilitative practice, in order to determine competitive harm is likely to result. As a consequence, the prohibition does not distinguish between conduct which may cause harm to the market and that which may not.

6.2. General prohibition

The second prohibition covers both private and public disclosure of pricing, capacity or commercial strategy information. For a breach to occur it must be established that the disclosure was made for the dominant purpose of substantially lessening competition. Whether or not the information is up to date or commercially sensitive is irrelevant (though where a disclosure is of historical information or details that are already in the public domain the requirement for an impact on competition is likely to be difficult to satisfy).

The ACCC has indicated that the general prohibition does not seek to prohibit statements that 'genuinely' describe market reality; the advertising of the prices of a business' products or services; or a company's disclosure to its shareholders regarding intended changes in pricing policies. On the other hand, disclosure of information that is aimed at facilitating coordinated conduct is considered to have an anti-competitive purpose and is therefore prohibited.

Price-signalling

Given the breadth of the law, members should take care not only in private discussions within in AFMA forums with competitors but also in making public statements. For example, a presentation at a conference where market conditions are described would need to be carefully considered to ensure that it cannot be seen as providing guidance as to the commercial strategy of the relevant ADI, particularly in relation to pricing, whether of deposits or loan products.

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