

# COMPETITION LAW GUIDANCE

## FOR PARTICIPANTS IN MEETINGS CONVENED BY THE RESERVE BANK OF AUSTRALIA ("RBA")<sup>1</sup>

July 2018

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### General Guidance

The RBA convenes Australian Foreign Exchange Committee ("AFXC") meetings, Reserve Bank Information and Transfer System ("RITS") User Group forums and other meetings of financial institutions and other market participants (collectively, "RBA Convened Meetings").

The objectives of RBA Convened Meetings may include providing market participants with updates on notable developments, developing and promoting best practice, representing Australian interests in regional and global discussions and facilitating discussion of topical issues.

The RBA is committed to ensuring that RBA Convened Meetings are conducted in compliance with Australia's *Competition and Consumer Act 2010* (Cth) ("CCA") and all other applicable competition laws.

You should remember that participants in RBA Convened Meetings include active market participants who compete with each other as defined by competition laws. Consequently, particular care should be taken to ensure that there can be no suggestion that RBA Convened Meetings facilitate, or are the focal point of, any behaviour that could result in a breach of competition laws.

In particular, the CCA prohibits attempted cartel conduct and cartel conduct, irrespective of its effect on competition in markets.

The CCA also prohibits the sharing of commercially sensitive information if it has the purpose, effect or likely effect of substantially lessening competition in a market. Sharing information can reduce competitive uncertainty in a given market by providing information about a competitor's commercial strategy which is not available on the public record.

In certain circumstances, the mere giving or receiving of information (even in the absence of specific agreement and even if unsolicited) can result in one or more breaches of the CCA.

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<sup>1</sup> The Australian Competition and Consumer Commission ("ACCC") is the competition authority established under section 6A of the *Competition and Consumer Act 2010* (Cth). This Guidance has not been approved by the ACCC and should not be taken to represent the views of the ACCC.

That said, in the context of RBA Convened Meetings, the sharing of certain information is essential. Broad guidelines for the sharing of such information are set out below.<sup>2</sup>

RBA Convened Meetings may involve consideration and monitoring of issues that impact market participants and, in some cases, participants may propose positive actions to overcome possible market inefficiencies. As participants in RBA Convened Meetings, individuals should take care whenever they communicate with other participants to ensure that none of their conduct is, becomes or appears to be anti-competitive. This extends beyond the RBA Convened Meetings themselves to session breaks, related social events and conference calls or electronic communications that relate to those meetings or their subject matter. Competition laws apply to ALL contacts with competitors in ALL contexts.

Please review this Guidance carefully and share it with any of your staff involved in RBA Convened Meetings. Please note that this Guidance provides a summary only and is not designed to cover every aspect of this topic or deal with every situation. The RBA cannot provide advice to firms or individuals about their compliance with competition laws.

## Conduct Subject to Analysis

The following activities may or may not be permissible, depending on the circumstances. Competition law requires the positive and negative aspects of an activity to be weighed from a competition point of view in order to form an overall view.

- **Standard setting:** Development and setting of standards, codes of practice, best practice recommendations and industry guidance by industry participants may be pro-competitive. However, these activities may give rise to competition concerns in specific circumstances. In particular, activities where the particular standard, code, recommendation or guidance makes it more difficult for specific entities to compete in the market may be a problem and should be taken into account in the overall judgement. Any features that are added to a standard, code, recommendation or guidance should be supported by legitimate business reasons. Participation in these processes should be fair and transparent.
- **Information sharing:** Some information about a participant's business may be shared in order to contribute to the drafting of particular standards, codes, recommendations or guidance. The nature or scope of the information that can be exchanged should be limited to that strictly necessary for the intended purpose. The sharing of information about participants' businesses in an aggregated and anonymised form is generally permissible. However, care should be taken to ensure that the information sharing is not for an anti-competitive purpose and is not likely to have an anti-competitive effect. As further set out below, information-sharing between participants concerning commercially sensitive information such as a particular participant's pricing, business plans, marketing plans, new product development, future trading strategies and costs and profits that is not already publicly available, and which is competitively sensitive, must not occur.
- **Regulatory activities:** Competition law does not prohibit competing participants of a market from presenting a unified position to the RBA or government on issues impacting their market. Joint initiatives with other participants in relation to lobbying around legislative or other regulatory proposals will generally be legal. There are, however, limitations to what can

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<sup>2</sup> It is worth bearing in mind that in many cases (including, for example, foreign exchange markets) relevant financial or other markets may be global in scope, so jurisdiction of competition authorities may stretch beyond those of Australia. This Guidance is designed to be of general applicability but legal advice should be sought in relevant jurisdictions.

legitimately be done. While it is not necessarily problematic to discuss future regulatory developments with competitors with a view to shaping and understanding the requirements of future legislation or other regulation, discussions should not include individual firms' strategies for implementing legislative changes and explicit or implicit alignment of future conduct. As regards the implementation of new legislation or regulation, it is up to each individual participant to decide independently how to implement such changes. Further, it is important that participants do not share any additional information that is unrelated to lobbying efforts, such as prices, margins, commercial strategies etc. Participants are encouraged to seek legal advice in advance of any collaboration with other participants in respect of legislative or regulatory activities.

## Conduct to Avoid

Participants in RBA Convened Meetings should never engage in any of the following conduct or activities:

- **Fixing, Controlling or Maintaining Prices:** Participants should never discuss or agree between themselves to fix, control or maintain their prices, fees, commissions, or any other element of the price or terms of a good or service (including any transaction). They should also never make agreements that could have the effect of fixing, controlling or maintaining prices, fees, commissions, spreads or any other element of the price or terms of any good or service (including any transaction).
- **Sharing Pricing or Cost Information:** Participants should not discuss, share or compare information relating to their institution's past, current or future prices or fees (for banks this would include interest rates, commissions and charges), or the precise costs or policies that impact on their pricing, as this may be seen as an implicit attempt to co-ordinate prices, fees, or commissions.
- **Sharing Customer Information:** Participants should not discuss or share confidential customer information (e.g. their identity, the type and/or size of past and impending orders, trades or trading patterns) or strategies.
- **Sharing Other Commercially Sensitive Information:** Participants should refrain from sharing any other non-public information of a commercially sensitive nature including their current or future trading strategies, their plans to expand into, withdraw from or focus on particular markets or their supplier's terms and conditions. As a general rule, if you consider information to be confidential from a commercial perspective, it may also be the type of information which you should not discuss with your competitors from a competition law perspective.
- **Boycotts:** Participants should not agree, or discuss agreeing, either to treat a particular individual, company, customer, or group of customers in a prescribed manner, or to boycott any individual, company, customer, or group of customers.
- **Allocation of Customers or Territories:** Participants should not agree, or discuss agreeing, to allocate customers or territories among themselves. Discussions concerning plans to expand into or withdraw from certain geographic or product markets should be avoided.
- **Coordination on bids:** Participants should not disclose confidential information with a view to coordinating their individual responses to competitive bids for a client's business.
- **Discussing Trading Strategies:** Participants should not discuss or disclose any information regarding their institution's trading strategies or trading intentions.

- **Manipulating rates:** Participants should not share confidential information relating to their trading volumes, details of order book (including size and type of trades), times of execution or otherwise coordinate their trading activity around financial benchmark fixing windows. Any such exchange may be considered an attempt to manipulate such financial benchmark rates.

## Procedures in Place Which Help to Ensure Compliance

- All RBA Convened Meetings have a written agenda circulated in advance and, in most cases, minutes are recorded and reviewed by participants.
- All new participants in RBA Convened Meetings should receive this Guidance in advance of their first attendance at an RBA Convened Meeting. New and existing participants will also be reminded of this Guidance at the commencement of each RBA Convened Meeting.
- A representative of the RBA's in-house legal team may, on occasion, attend RBA Convened Meetings if it is expected that competition law issues are likely to arise.

## What to do if a Concern Arises

If, during an RBA Convened Meeting, a participant has concerns about the discussion from a competition law and compliance perspective, the participant should make their concerns known to the RBA chair of the RBA Convened Meeting and the discussion giving rise to such concerns should immediately cease. This should be minuted. If the discussion does not cease, the concerned participant(s) should leave the meeting and ask for their departure to be minuted. Competition law advice should then be taken by participants, prior to any subsequent discussion of the topic.

4 July 2018

DISCLAIMER: The information provided in this Guidance is for general information purposes only. The information may not be applicable in all situations and may not, after the date of this Guidance, reflect the most current authority. It is not intended as and should not be construed as legal advice and should not be relied or acted upon without the benefit of independent competition law advice.