



The continual regulation of continuous disclosure: Information disclosure under the Competition and Consumer Amendment Bill (No 1) 2011

*Brent Fisse and Caron Beaton-Wells**

When the Competition and Consumer Amendment Bill (No 1) 2011 is enacted it will add another layer of complexity to the challenges associated with continuous disclosure by public companies in Australia. This legislation will prohibit various forms of information disclosure. It will apply initially to the banking sector but may be extended by regulation. There is an exception for disclosures made for the purpose of complying with continuous disclosure obligations under the Corporations Act 2001. This article explains the political genesis of the legislation and outlines the statutory scheme. Using practical examples, it analyses the continuous disclosure exception, identifying traps for the unwary and possible loopholes. It highlights the uncertainty regarding the potential extension of the legislation to other sectors of the economy and counsels the adoption of additional precautions by way of compliance and liability control. The inescapable conclusion is that the legislative drafters have failed to address adequately the implications of the information disclosure prohibitions for continuous disclosure.

1 The new layer of information disclosure regulation under the Competition and Consumer Act 2010 (CCA)

The difficulties of continuous disclosure regulation in Australia today¹ are compounded by the new layer of information disclosure regulation imposed by the Competition and Consumer Amendment Bill (No 1) (Information Disclosure Bill).² This Bill was passed by the House of Representatives on 7 July 2011 and is expected to be passed by the Senate in the next sittings.

* Brent Fisse is the principal of Brent Fisse Lawyers, Sydney. Caron Beaton-Wells is Associate Professor and Director of Studies, Competition Law, Melbourne Law School. An earlier abbreviated version of this paper was presented at the LCA Corporations Workshop, 30 July 2011, Kingscliff, NSW. Thanks are due to Bob Baxt and others for their comments on early drafts and to Kathryn Tomasic for research assistance. The usual disclaimers apply.

1 See generally R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, 14th ed, LexisNexis, Sydney, 2010, pp 570–690; G North, 'A Call for a Bold and Effective Corporate Disclosure Regulatory Framework' (2010) 28 *C&SLJ* 331.

2 For critiques, see B Fisse and C Beaton-Wells, *The Competition and Consumer Amendment Bill (No 1) 2011*, Submission to the House of Representatives Economics Committee, 25 May 2011, at <<http://www.brentfisse.com/publications.html>> (accessed 1 August 2011); Law Council of Australia, *Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth)*, 25 May 2011, at <<http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>> (accessed 1 August 2011). For critiques of the Exposure Draft Bill released in December 2010, see B Fisse and C Beaton-Wells, 'The Competition and Consumer Amendment Bill (No 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure' (2011) 39 *ABLR* 28; Law Council of Australia, *Submission on the Exposure Draft of the Competition and Consumer*

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The Information Disclosure Bill prohibits the unilateral disclosure of price-related and other information by a competitor. The various exceptions include disclosure of information by a corporation if the disclosure is made 'for the purpose of complying with Ch 6CA of the Corporations Act 2001' (see s 44ZZY(6)). Chapter 6CA prescribes the circumstances in which listed entities are required to disclose information to a market operator and the penalties for failure to satisfy the requirement.³

This article surveys the implications of the Information Disclosure Bill for corporations that need to comply with Australian and overseas continuous disclosure obligations. The prohibitions under the Information Disclosure Bill are subject to severe civil penalties and will need to be heeded when making disclosures to the market. The prohibitions will apply only to the banking sector initially.⁴ However, they could be extended to other sectors more or less according to political whim.

To set the scene, assume that Bank A makes an announcement to the ASX that it will increase home interest rates by 1% in 1 month's time as part of a 'Fightback' strategy to increase the 'quality' of its customers and to stop competing in areas where the margins are very low. It expects to suffer a loss of well over 5% market share in the home loan sector in the short term but implementation of the fightback strategy is calculated to make it much better off in the long term. The announcement is partly for the substantial purpose⁵ of substantially lessening competition in the market for home loans and is subject to prohibition under s 44ZZX. However, Bank A will not be liable given that the announcement to the ASX is made for the purpose of complying with Ch 6CA and hence comes within the s 44ZZY(6) exception. By contrast, if the announcement is later repeated to the media, the s 44ZZY(6) exception will not apply (the announcement to the media is not for the purpose of complying with Ch 6CA) and Bank A will be liable under s 44ZZX unless it has successfully gone through the impractical process of applying for authorisation by the ACCC.⁶

The s 44ZZY(6) exception may thus be pivotal to ensuring that continuous disclosure announcements are not caught by the Information Disclosure Bill. However, this exception is more limited in scope than first meets the eye and

Amendment Bill (No 1) 2011 (Cth), 20 January 2011, at <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>> (accessed 1 August 2011).

³ The disclosure obligation is in s 674(2). Failure to comply with this subsection is an offence (see s 1311(1)). Section 674(2) is also a civil penalty provision (see s 1317E) and an infringement notice may be issued for an alleged contravention of this subsection (see s 1317DAC). A person involved in a listed entity's contravention of s 674(2) will also be subject to civil penalties (see s 674(2A), s 1317E).

⁴ Treasury, *Competitive and Sustainable Banking System*, December 2010, at <http://www.treasury.gov.au/banking/content/report/report_06.htm> (accessed 1 August 2011). See also Treasury, Competition and Consumer Amendment Bill (No 1) 2011 Explanatory Note, pp 1 and 3, at <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918>> (accessed 1 August 2011).

⁵ See CCA s 4F(1)(b).

⁶ See Sections 4.1 and 4.2 below. As explained there, the exception of notification (s 44ZZY(5)) is not available in relation to conduct referred to in s 44ZZX (see s 93(1)).

has not been designed to meet the reasonable expectations of corporations and their advisers.⁷

Section 2 below sets out the genesis of the Information Disclosure Bill and Section 3 outlines the prohibitions and exceptions. Section 4 raises the following questions for discussion in relation to the continuous disclosure exception:

- What is meant by the wording ‘*for the purpose of complying* with Ch 6CA of the Corporations Act 2001’ in s 44ZZY(6)? Does the s 44ZZY(6) exception create any traps for the unwary? Does it create any possible loophole? (Section 4.1 below)
- Is the exception under s 44ZZY(6) wide enough to cover a disclosure made in compliance with overseas continuous disclosure or similar obligations? (Section 4.2 below)
- The prohibitions apply in relation to goods and services specified by regulation and will apply only to the banking sector initially. What process will govern the selection of other sectors of the economy? What dangers arise? (Section 4.3 below)
- What additional precautions are advisable by way of compliance and liability control in light of the Information Disclosure Bill? (Section 4.4 below).

2 The genesis of the Information Disclosure Bill

Prompted largely by political concern regarding competition in the banking sector,⁸ in November 2010 the Coalition introduced a Bill on price signalling.⁹ In December 2010 the government responded by releasing an Exposure Draft Bill as part of a broader package of banking reforms.¹⁰ The Exposure Draft Bill met with widespread criticism during the brief period allowed for submissions during Christmas and New Year in 2010–2011.¹¹ The Information Disclosure Bill purportedly responded to those submissions but was much criticised for not doing so.¹² The Senate Economic References Committee issued a report in May 2011 criticising many features of the Information Disclosure Bill.¹³ The House Economics Committee report in June 2011 was split 4:4 on whether or not the Bill should be enacted but, the Bill being one

7 Contrast the statement at p 2 of the Explanatory Note to the Competition and Consumer Amendment Bill (No 1) (Exposure Draft): ‘Of course, all publicly listed companies will be able to comply with their continuous disclosure requirements in full.’ See Sections 3.1–3.4 below.

8 In fact, the price signalling proposals can be traced to the ACCC’s losses in price fixing litigation and its subsequent proposal to amend the meaning of ‘understanding’ in the cartel prohibitions in 2007. For an outline of this history, see B Fisse and C Beaton-Wells, ‘The Competition and Consumer Amendment Bill (No 1) (Exposure Draft): A Problematic Attempt to Prohibit Information Disclosure’ (2011) 39 *ABLR* 28 at 31.

9 Competition and Consumer (Price Signalling) Bill 2010, 22 November 2010.

10 Competition and Consumer Amendment Bill (No 1) 2011 (Exposure Draft).

11 See the submissions made to Treasury, at: <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>> (accessed 1 August 2011).

12 See the submissions made to the House of Representatives Economics Committee, at: <<http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>> (accessed 1 August 2011).

13 Senate, Economics References Committee, *Competition Within the Australian Banking*

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introduced by the government, the recommendation of the government members of the committee prevailed.¹⁴ The Bill was passed on 7 July 2011 after amendments were made pursuant to an agreement reached at the 11th hour by the Coalition and the government.¹⁵

The objective of the Information Disclosure Bill is 'to prohibit anti-competitive price signalling and information exchanges'.¹⁶ As a matter of established economic principle, price signalling and information exchanges are anti-competitive insofar as they either evidence collusion or facilitate or sustain coordination of conduct by competitors in a market, thereby removing the necessity for competitors to collude explicitly. It is well recognised in economic theory that such 'facilitating practices' present a competition problem.¹⁷ Devising satisfactory legal approaches to regulating such practices is not straightforward. However, overseas approaches recognise that, in regulating such conduct, the focus must be on its relation to coordination between competitors, achieved either through explicit collusion or by other means that circumvent the need for explicit collusion.¹⁸ These other means are sometimes referred to as 'tacit' collusion. In the European Union (EU), they are captured by the concept of 'concerted practices'.¹⁹ In the absence of some relation to collusion or coordination more generally, price signalling or information disclosure represents unilateral conduct. In accordance with economic theory, unilateral conduct is anti-competitive when it is undertaken by a firm with market power. Moreover, on one view, unilateral acts 'always pose a lower antitrust threat than horizontal combinations'.²⁰

The most fundamental criticism of the Information Disclosure Bill is that it

Sector, May 2011, Ch 8, at <http://www.aph.gov.au/senate/committee/economics_ctte/banking_comp_2010/report/index.htm> (accessed 1 August 2011).

14 House of Representatives, Standing Committee on Economics, *Advisory Report on the Competition and Consumer (Price Signalling) Bill 2010 and the Competition and Consumer Amendment Bill (No 1) 2011*, June 2011, at <<http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/report.htm>> (accessed 1 August 2011).

15 House of Representatives, *Hansard*, 7 July, pp 26–38.

16 Department of Finance and Deregulation, *Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange*, 21 December 2010, p 9. The discussion set out below is adapted from Fisse and Beaton-Wells, Submission to the House of Representatives Economics Committee, above n 2.

17 See, eg, J Kattan, 'Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment' (1994) 63 *Antitrust LJ* 133; S C Salop, 'Practices that (Credibly) Facilitate Oligopoly Coordination', in J E Stiglitz and G F Mathewson (Eds), *New Developments in the Analysis of Market Structure*, MIT Press, Cambridge, Massachusetts, 1986, p 271; G A Hay, 'Facilitating Practices' in ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, Vol 2, Ch 50, p 1189; M D Blechman, 'Conscious Parallelism, Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws' (1979) 24 *New York Law School L Rev* 881.

18 See OECD Policy Roundtable, *Information Exchanges between Competitors 2010*, 11 July 2011, p 9, at <www.oecd.org/dataoecd/12/52/48379006.pdf> (accessed 12 July 2011).

19 See Art 101(1) of the Treaty on the Functioning of the European Union. For a summary of the approaches in the United States and European Union, see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, Cambridge University Press, Melbourne, 2011, section 3.4.1, pp 47–52.

20 P E Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p 212 [1902b]; H Hovenkamp, *Antitrust Enterprise*, Harvard University Press, Cambridge, Massachusetts, 2005, p 24.

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prohibits the unilateral disclosure by a competitor of certain types of information and does not formulate the prohibitions in terms of collusion or the facilitation of anti-competitive coordination between competitors in a market. Nor does it incorporate elements of substantial market power or taking advantage of that power (thereby requiring a nexus between the impugned conduct and the power), unlike the approach taken under s 46.²¹ As a consequence, the prohibitions are over-reaching and the over-reach is only partially off-set by a thicket of exceptions. This approach is novel and unprecedented. It is not supported by economic theory and is inconsistent with overseas approaches.²²

Moreover, information disclosure is only one type of facilitating practice. The Information Disclosure Bill does not squarely address the much wider important subject of facilitating practices.²³ It is widely recognised that facilitating practices can often be used instead of collusion to prevent or inhibit competition.²⁴ Facilitating practices do not always take the form of information exchange or information disclosure. The Bill fails to see the wood for the trees and the explanation given for focusing on price signalling is unpersuasive.²⁵

The outcome of disregarding economic principle and international precedent is that the Information Disclosure Bill suffers from overreach, underreach, uncertainty and undue complexity.²⁶ The Bill arguably represents international worst practice in the area of information exchanges and facilitating practices by competitors.²⁷

21 For example, an announcement of a proposed new product in advance for the purpose of deterring competitors could be caught by s 44ZZX whether or not the announcement involved any taking advantage of market power. Consider the different analyses under ss 44ZZX and 46 respectively in 'premature' announcement scenarios of the kind discussed in F M Fisher, J J McGowan and J E Greenwood, *Folded, Spindled, and Mutilated: Economic Analysis and US vs IBM*, MIT Press, Cambridge, Massachusetts, 1983, pp 289–9.

22 See the discussion in OECD Policy Roundtable, Information Exchanges between Competitors 2010, 11 July 2011, at <www.oecd.org/dataoecd/12/52/48379006.pdf> (accessed 12 July 2011). The departure from overseas approaches was a point of criticism in a significant number of submissions made to Treasury in relation to the Exposure Draft Bill. See, eg, the submissions of the Law Council of Australia (pp 12–15), Allan & Overy (pp 3–4), Gilbert + Tobin on behalf of the Australian Banking Association (pp 8–10) and Christopher Jose (pp 7–9). The submissions are available at <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=037>> (accessed 1 February 2011).

23 See further Beaton-Wells and Fisse, above n 19, section 3.2. The authors are not aware of any empirical studies that have compared the relative economic effects of such practices. However, there is literature to support the view that mechanisms such as Most Favoured Nation Clauses and Meeting Competition Clauses can be highly effective as facilitating practices: see, eg, Salop, above n 17, p 265.

24 See the references in n 17 above.

25 See Department of Finance and Deregulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, 21 December 2010, p 2.

26 See Fisse and Beaton-Wells, Submission to the House of Representatives Economics Committee, above n 2, at [2.1]–[2.2].

27 For one particularly instructive comparison see EC, Guidelines on horizontal cooperation between competitors, 2011, at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114%2804%29:EN:NOT>> (accessed 1 August 2011).

3 Outline of the prohibitions and exceptions under the Information Disclosure Bill

3.1 The information disclosure prohibitions

The Information Disclosure Bill inserts Div 1A into Pt IV of the CCA. This Division applies to goods or services of classes prescribed by regulation (s 44ZZT) (Div 1A goods and services).

There are two prohibitions. One is against the private disclosure of price-related information to competitors (s 44ZZW). The other is against the public or private disclosure of pricing or other specified kinds of information for the purpose of substantially lessening competition in a market.

3.1.1 Private disclosure of price-related information to competitors (s 44ZZW)

Section 44ZZW prohibits the private disclosure of price-related information to competitors:

A corporation must not make a disclosure of information if:

- (a) the information relates to a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation in a market (whether or not the information also relates to other matters);
- (b) the disclosure is a private disclosure to competitors in relation to that market; and
- (c) the disclosure is not in the ordinary course of business.

The addition of para (c) (excluding disclosure in the ordinary course of business) was a last minute amendment negotiated by the Coalition. The qualification is remarkably vague and likely to give rise to disputation as to what is 'in the ordinary course of business'.²⁸ Moreover, what is in the ordinary course of business might still be anti-competitive in purpose, effect or likely effect. Conceivably, a competitor may make an information disclosure in the ordinary course of business where the disclosure is likely to coordinate the pricing of a competitor.²⁹

The concept of disclosure of information to a person is delimited by s 44ZZU. Disclosure of information to someone in their capacity as a director, employee or agent of another body corporate is caught as a disclosure to that body corporate (s 44ZZU(1)). So too is disclosure through an intermediary where the disclosure was for the purpose of disclosure by the intermediary to one or more other persons (s 44ZZU(3)). Disclosure to a discloser's own agent is excluded (s 44ZZU(2)). Accidental disclosure is excluded (s 44ZZU(4)).

The meaning of the term 'private disclosure to competitors' is prescribed by s 44ZZV. A disclosure of information by a corporation is a private disclosure to competitors, in relation to a particular market, if the disclosure is to one or

²⁸ Contrast the safeguard in s 209(c) of the Australian Consumer Law.

²⁹ See B Fisse and C Beaton-Wells, 'Private Disclosure of Price Related Information to a Competitor "In the Ordinary Course of Business": A New Slippery Dip in the Political Playground of Australian Competition Law', forthcoming (2011) 39 *ABLR*.

more competitors or potential competitors of the corporation in that market, and is not to any other person (s 44ZZV(1)). Disclosures made through an intermediary are subject to anti-avoidance provisions (s 44ZZV(2)). The question whether a disclosure of information by a corporation is a private disclosure to competitors is not affected by the information otherwise being or becoming available to competitors or potential competitors of the corporation in the market, or to other persons (s 44ZZV(3)). Thus, the vice is seen to lie in the private rather than the confidential nature of the disclosure. This is despite the fact that where the pricing information that is disclosed is known already or is available in the market, the degree of anticompetitive harm is likely to be ambiguous and warrants assessment on a case-by-case basis.

The s 44ZZW prohibition does not distinguish between disclosures depending on the attributes of the information disclosed. Provided the disclosure relates to a price (or discount, allowance, rebate or credit), the prohibition will apply irrespective of the currency, specificity, or verifiability of the information.³⁰ A particular concern is that the prohibition is not limited to information about future pricing but also applies to current and even historical pricing information. There is no apparent justification for imposing per se liability in relation to the disclosure of current or historical pricing information, except where it is shown to facilitate collusion or coordination. The focus of any prohibition should be, not on the nature or age of the information of itself, but on its potential to facilitate coordinated conduct amongst competitors in a market. Past, current and future information disclosure each have the potential to facilitate collusion or coordination, albeit in different ways. While communication of future intentions may be relevant in reaching a collusive arrangement,³¹ exchange of recent past or current data may be relevant as a tool for monitoring the conduct of competitors and detecting deviations from a collusive arrangement.³²

3.1.2 Disclosure of pricing or other specified kinds of information for the purpose of substantially lessening competition (s 44ZZX)

Section 44ZZX prohibits disclosure of pricing or other specified kinds of information for the purpose of substantially lessening competition (SLC) in a market:

30 The extensive economic literature in point highlights the significance of such attributes in assessing the collusive potential of information disclosure: see, eg, K U Kuhn and X Vives, *Information Exchanges among Firms and their Impact on Competition*, Office of the Official Publications of the European Communities, Luxembourg, 1995; D Carlton, R Gertner and A Rosenfield, 'Communication among Competitors: Game Theory and Antitrust' (1997) 5(3) *George Mason L Rev* 423; M Kandori and H Matsushima, 'Private Observation, Communication and Collusion' (1998) 66(3) *Econometrica* 627; K Kuhn, 'Fighting Collusion: Regulation of Communication between Firms' (2001) 32 *Economic Policy* 1; R Nitsche and N von Hinten-Reed, *Competitive Impacts of Information Exchange*, 2004, at <http://iec.europa.eu/competition/antitrust/others/maritime/elaa_proposal?note_on_information_exchange_en.pdf> (accessed 2 February 2011); X Vives, 'Information Sharing Among Firms' in S Durlauf and L Blume (Eds), *The New Palgrave Dictionary of Economics*, 2nd ed, Palgrave Macmillan, London, 2006.

31 M Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, Cambridge, 2004, pp 151, 153.

32 D W Carlton, R H Gertner and A M Rosenfield, 'Communication among Competitors: Game Theory and Antitrust' (1997) 5 *George Mason L Rev* 423 at 434.

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- (1) A corporation must not make a disclosure of information if:
 - (a) the information relates to one or more of the following (whether or not it also relates to other matters):
 - (i) a price for, or a discount, allowance, rebate or credit in relation to, Division 1A goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation;
 - (ii) the capacity, or likely capacity, of the corporation to supply or acquire Division 1A goods or services;
 - (iii) any aspect of the commercial strategy of the corporation that relates to Division 1A goods or services; and
 - (b) the corporation makes the disclosure for the purpose of substantially lessening competition in a market.
- (2) In determining, for the purpose of this section, if a corporation has made a disclosure for the purpose of substantially lessening competition in a market, the matters to which the court may have regard include (but are not limited to):
 - (a) whether the disclosure was a private disclosure to competitors in relation to that market; and
 - (b) the degree of specificity of the information; and
 - (c) whether the information relates to past, current or future activities; and
 - (d) how readily available the information is to the public; and
 - (e) whether the disclosure is part of a pattern of similar disclosures by the corporation.
- (3) Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have made a disclosure of information for the purpose of substantially lessening competition in a market even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

The s 44ZZX prohibition extends to disclosure of information that relates to the capacity to supply goods or services or 'any aspect of the commercial strategy' of a corporation that relates to Div 1A goods or services. The effect of this is to cast the liability net extraordinarily wide with the assumption that the requirement of a SLC purpose provides a suitable safeguard. The requirement of a SLC purpose does significantly limit the potential scope of liability under s 44ZZX.³³ However, this requirement has limitations. First, the test is not one of purpose to reduce consumer welfare: the purpose test relates to competition and efficiencies are relevant to a SLC purpose test only to a limited extent.³⁴ Second, the SLC purpose need not be the sole or dominant purpose: it is sufficient if information within s 44ZZX(1)(a) is disclosed for a

33 See further Fisse and Beaton-Wells, above n 8, at 43. Foresight of likelihood does not amount to 'purpose': *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563; 200 ALR 157; [2003] HCA 45; BC200304465 at [216] per Callinan J (*South Sydney*). Query whether or not foresight of practical certainty that a substantial lessening of competition will occur, or awareness that a substantial lessening of competition will occur in the ordinary course of events, is sufficient. Query also whether or not a conditional intention is sufficient to amount to a 'purpose' under s 44ZZX given that s 44ZZRD(7) does not apply to s 44ZZX.

34 See Beaton-Wells and Fisse, above n 19, p 87.

SLC purpose that is a 'substantial' purpose.³⁵ Third, purpose may be inferred from all the circumstances³⁶ and a corporation is liable for the conduct and state of mind of an employee or agent acting within the scope of their authority.³⁷ Fourth, what amounts to a substantial lessening of competition is notoriously uncertain, a difficulty highlighted by the suggestion in *Rural Press* that the substantiality test requires merely a lessening of competition that is 'meaningful or relevant to the competitive process'.³⁸ Finally, the SLC purpose test does not necessarily exclude cases of publicity used for the purpose of aggressive competition calculated to wipe out one or more competitors. As the Law Council pointed out in its submission to Treasury on the Exposure Draft Bill, a SLC purpose test fails to recognise the gales of creative destruction that are to be expected in a vibrant competitive economy:

... Vigorous competitors may often legitimately wish to harm each other's interests or reduce other firms' ability to compete and may have an 'end in view' that involves a reduced number of competitors in the market or an increased level of market power. This purpose may be non-collusive, privately held, or even completely unachievable. However if such a purpose could be established or inferred as a substantial purpose in the release of information, such disclosure would be prohibited under the Signalling Prohibition. For example, a business adopting and announcing an aggressive price-beating strategy would no doubt have the dual purposes of appealing to its customers and warning off competitors from attempting to undercut them.³⁹

3.1.3 Penalties and orders applicable to contraventions (Pt VI)

Contravention of the prohibitions under ss 44ZZW and 44ZZX is subject to the civil penalty regime under s 76. Other orders under Pt VI also apply, including an order under s 86E disqualifying a person from managing a corporation.

Penalties and orders apply to contravention of the prohibitions as well as to involvement in a contravention (on account of being knowingly concerned in a contravention, for example). However, 'mere receipt' of information does not constitute being knowingly concerned in a contravention (s 44ZZZB).

The rights of private persons to seek compensatory or other related orders under ss 82 and 87 of the CCA are also available in respect of a breach of s 44ZZW or s 44ZZX.

35 CCA s 4F(1)(b). 'Substantial' has been variously interpreted in this context, including as meaning 'considerable or large', 'real and not imaginary' and as a purpose 'that loom[ed] large among the objects the corporation sought to achieve by the conduct in question': see *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants* (2002) 122 FCR 110; (2002) ATPR 41-879; [2002] FCAFC 197; BC200203308 at [97] per Heerey J; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160; 262 ALR 160; [2009] FCAFC 166; BC200910812 at [858].

36 The list of factors to which a court may have regard in s 44ZZX(2) is non-exhaustive and s 44ZZX(3) allows for the impugned purpose to be 'inferred from the conduct of the corporation or of any other person or from other relevant circumstances'.

37 CCA s 84(1)(2). See also Information Disclosure Bill s 44ZZU(5).

38 *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71; 203 ALR 217; [2003] HCA 75; BC200307578 at [41] per Gummow, Hayne and Heydon JJ.

39 Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), p 35, at <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>> (accessed 1 August 2011).

Apart from penalties and orders in the event of contravention, the prohibitions under the Information Disclosure Bill will give the ACCC a wider opportunity to exercise its compulsory powers of information gathering under s 155 of the CCA.⁴⁰

3.2 Exceptions to the information disclosure prohibitions

3.2.1 Exceptions to the s 44ZZW prohibition and the s 44ZZX prohibition (s 44ZZY)

The following exceptions apply to both the s 44ZZW prohibition and the s 44ZZX prohibition:

- disclosure authorised by or under a law of the Commonwealth, a state or territory if the disclosure occurs before the end of 10 years after the day on which the Competition and Consumer Amendment Act (No 1) 2011 receives the Royal Assent (s 44ZZY(1));⁴¹
- disclosure to a related body corporate (s 44ZZY(2));
- disclosure in connection with a contract or proposed contract that is subject to a collective bargaining notice (s 44ZZY(3));
- disclosure in the course of authorised conduct (s 44ZZY(4)) or disclosure that is authorised under s 88(6A);
- disclosure described in a notification in force under s 93 (s 44ZZY(5)) but, contrary to the misleading suggestion of the heading to s 44ZZY, the s 93 notification procedure is limited to conduct referred to in s 44ZZW — public disclosure of information as referred to in s 44ZZX is not the valid subject matter of a notification (except to the extent that it falls within s 44ZZW);⁴²
- disclosure made for the purpose of complying with Ch 6CA of the Corporations Act 2001 (s 44ZZY(6)) — see Section 3.2.3 below.

3.2.2 Exceptions to the s 44ZZW prohibition (s 44ZZZ)

The following exceptions apply only to the s 44ZZW prohibition against private disclosure of price-related information to competitors:

- disclosure of information to acquirer or supplier of goods or services (s 44ZZZ(1));
- disclosure to an unknown competitor (s 44ZZZ(2));
- disclosure to participants in a joint venture (s 44ZZZ(3));
- disclosure relating to the acquisition of shares or assets (s 44ZZZ(4));
- disclosure relating to an insolvent borrower (s 44ZZZ(5) and (6));
- disclosure relating to the provision of loans to the same person (s 44ZZZ(3A));

40 See Law Council of Australia, Submission on Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 20 January 2011, p 22, at <www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file>. Arguably that power is already over-extended: see I Wylie, 'When too much power is barely enough — s 155 of the Trade Practices Act and noblesse oblige' (2009) 16 *CCLJ* 414.

41 For criticism of this sunset provision see Fisse and Beaton-Wells, above n 8, at 45.

42 In the schedule of amendments to s 93, only s 44ZZW is mentioned as being subject to notification. Cf para [1.95] of the Explanatory Memorandum which lists notification under s 93 as one of the 'exceptions from both the private disclosure of pricing information prohibition and the substantial lessening of competition prohibition'.

- disclosure between a credit provider and a provider of credit service (s 44ZZZ(3B)).

These exceptions raise their own complications. They have been provided because the prohibition under s 44ZZW is very broadly defined and is not limited to information disclosure geared to achieving collusion or coordination of market conduct with a competitor or information disclosure involving misuse of market power. Moreover, several of the exceptions relate to the banking sector. If and when the s 44ZZW prohibition is extended to other sectors (see Section 4.3 below) a further set of sector-specific exceptions seems likely to ensue; the dog of prohibition of unilateral information disclosure can be expected to keep on chasing its own tail. A simpler and more effective alternative to creating a new regime of prohibitions and exceptions under the Information Disclosure Bill would have been to amend s 45(2) to cover concerted practices and to replace the joint venture defence under s 76C with a collaborative venture exception.⁴³

3.2.3 The s 44ZZY(6) exception

As noted earlier, ss 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if the disclosure is ‘made for the purpose of complying with Ch 6CA of the Corporations Act 2001’ (s 44ZZY(6)).

The s 44ZZY(6) exception is needed given the breadth of the prohibitions under the Information Disclosure Bill. There is no need for such an exception in relation to the cartel prohibitions under Div 1 of s 45(2) of the CCA. A necessary element for liability under those sections is that a cartel or exclusionary provision be contained in a contract, arrangement or understanding where two or more of the parties to the contract, arrangement or understanding are competitors or likely competitors. By contrast, the prohibitions under the Information Disclosure Bill are defined in terms of unilateral information disclosure and do not require a contract, arrangement or understanding or a cartel provision. The prohibition against price signalling under s 45A of the Competition and Consumer (Price Signalling) Amendment Bill 2010 introduced by the Coalition did not necessitate an exception like that under s 44ZZY(6): liability under the proposed s 45A in that Bill would require a communication of pricing information ‘for the purpose of inducing or encouraging the competitor to vary the price at which it supplies or acquires, offers to supply or acquire, or proposes to supply or acquire, goods or services’.

The s 44ZZY(6) exception is a response to criticisms made of the Government’s Exposure Draft Bill (December 2010).⁴⁴ Under s 44ZZY(1) of the Exposure Draft Bill, a disclosure of information was excepted if ‘authorised by or under’ a relevant law. That exception remains under s 44ZZY(1) of the Information Disclosure Bill. The s 44ZZY(1) exception is too narrow to cover situations where more information than necessary is

43 See Fisse and Beaton-Wells, Submission to the House of Representatives Economics Committee, above n 2, at [3.1]–[3.7].

44 See further Fisse and Beaton-Wells, above n 8, at 44–5.

disclosed out of abundant caution,⁴⁵ to avoid contravention of the prohibition against misleading conduct under s 1041H(1) of the Corporations Act, or pursuant to self-regulatory guidelines that may go beyond the minimum required to meet the continuous disclosure obligations under the Corporations Act.⁴⁶ Continuous disclosure is driven by not only the provisions of the Corporations Act but also the broader regimes for continuous disclosure through the Australian Securities Exchange Corporate Governance Council, and in other ways. Given the *Fortescue* case (in which the mining company was held to have breached s 674 for failing to correct misleading statements about whether it has reached binding agreements with Chinese companies)⁴⁷ and the general focus of ASIC on continuous disclosure,⁴⁸ s 44ZZY(1) of the Exposure Draft Bill was never a proximate attempt to carve out continuous disclosure.

Nor was there any apparent justification for limiting the exception of continuous disclosure to a 10 year sunset period.⁴⁹

The s 44ZZY(6) exception reflects the suggestion made in a critique of the Exposure Draft Bill that: '[a] much less oblique approach would be to except disclosures made for the purpose of complying with a disclosure obligation under a relevant law.'⁵⁰ However, as discussed in Section 3.1 below, and as warned in the same critique, any such approach risks creating a loophole.

The Explanatory Memorandum to the Information Disclosure Bill does not seek to clarify the scope and application of s 44ZZY(6) but merely recites that: 'A disclosure made for the purpose of complying with the continuous disclosure obligations within Ch 6CA the Corporations Act 2001 is exempt from the prohibitions.'⁵¹ Nor has any useful guidance emerged from the four

45 For example, corrective disclosure may be made whether or not there is a legal obligation to do so under Ch 6CA.

46 See ASX Corporate Governance Council, *ASX Corporate Governance Principles and Recommendations*, 2nd ed, ASX Corporate Governance Council, 2010, pp 29–30. Recollect *Australian Securities & Investments Commission (ASIC) v Chemeq Ltd* (2006) 234 ALR 511; 58 ACSR 169; [2006] FCA 936; BC200605606 at [87] per French J:

It must be accepted that there will be differing opinions in particular instances about what requires disclosure and what does not. From the point of view of proper risk management against the possibility of contravention, a conservative approach which favours disclosure is to be preferred.

Contrast the grudging concession made in Department of Finance and Deregulation, Implementation Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, 4 April 2011, p 8:

Some stakeholders requested a specific and ongoing exception to the prohibitions for conduct engaged in compliance with the continuous disclosure obligations of the Corporations Act 2001. These obligations were already exempt through the operation of the "authorised by law" exception, however a specific exception has been incorporated to provide an ongoing exception for this conduct.

47 *ASIC v Fortescue Metal Group Ltd* (2011) 190 FCR 364; 274 ALR 731; [2011] FCAFC 19; BC201100543.

48 See, eg, G Medcraft, Chairman, ASIC, Speech to Australian Prudential Regulation Authority leadership team, 30 June 2011.

49 For criticism of the sunset clause in s 44ZZY(1) see Fisse and Beaton-Wells, above n 8, at 45.

50 Fisse and Beaton-Wells, above n 8, at 45.

51 Competition and Consumer Amendment Bill (No 1) 2011, Explanatory Memorandum, [1.119].

Regulation Impact Statements that relate to the Exposure Draft Bill or the Information Disclosure Bill.⁵²

As discussed in Sections 4.1 and 4.2 below, the s 44ZZY(6) exception is far from satisfactory and can create practical problems where there is full compliance with Ch 6CA and offshore continuous disclosure obligations. There is no adequate guarantee that legitimate continuous disclosure will not be snared by the Information Disclosure Bill.

4 Continuous disclosure and questions arising from the Information Disclosure Bill

4.1 What is meant by the wording ‘for the purpose of complying with Ch 6CA of the Corporations Act 2001’ in s 44ZZY(6)? Does the s 44ZZY(6) exception create any traps for the unwary? Does it create any possible loophole?

What exactly is meant by the wording ‘*for the purpose of complying with Ch 6CA of the Corporations Act 2001*’ in s 44ZZY(6)? This is an important question because the s 44ZZY(6) exception will be pivotal to compliance with the Information Disclosure Bill when corporations and their advisers engage in continuous disclosure.

The following possible interpretation is advanced:

- The word ‘purpose’ means the subjective purpose attributable to a corporate defendant. This interpretation is consistent with the subjective interpretation of purpose by the High Court in the context of s 4D of the CCA.⁵³
- In order to be attributable to a corporate defendant, the subjective purpose of complying with the continuous disclosure obligations under Ch 6CA needs to be entertained by the director, employee or agent who made the disclosure on behalf of the corporation. See

52 The first RIS was published on 21 December 2010; see Department of Finance and Regulation, Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange, 21 December 2010. Two further RIS were published on 24 March 2010 as part of the Explanatory Memorandum for the CCA Bill. A fourth RIS was published on 4 April 2011, at <<http://ris.finance.gov.au/2011/04/04/non-compliance-with-best-practice-regulation-requirements-%E2%80%93-anti-competitive-price-signalling-treasury/>> (accessed 1 August 2011). The covering statement to the fourth RIS gives this bureaucratic explanation:

On 24 March 2011, the Treasurer introduced legislation to Parliament to address anti-competitive price signalling and information exchange. . . . A regulation impact statement (RIS) was prepared for this legislation and was assessed as adequate. The RIS published here, however, excludes information that was contained in the RIS considered by the decision-maker, and we have assessed Treasury as not being compliant with the best practice regulation requirements at the transparency stage. This RIS follows on from the policy RIS, which was published on 21 December 2010.

53 *South Sydney* (2003) 215 CLR 563; 200 ALR 157; [2003] HCA 45; BC200304465 at [18] per Gleeson CJ, [46] per McHugh J (but with reservations), [65] per Gummow J, [216] per Callinan J.

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s 84(1) of the CCA.⁵⁴ It is insufficient that the *objective* purpose⁵⁵ of the disclosure was to comply with Ch 6CA.

- It is sufficient that the subjective purpose of complying with Ch 6CA is a ‘substantial purpose’. That purpose need not be the sole or dominant purpose of the disclosure. See s 4F(1) of the CCA.

On the interpretation set out above, the s 44ZZY(6) exception lays potential traps for the unwary.

Continuous disclosure announcements will comply with Ch 6CA of the Corporations Act whether or not the director, employee or agent making the disclosure does so with the subjective purpose of complying with Ch 6CA. Moreover, where a complying announcement is made to the ASX, concurrent or subsequent announcements made privately to analysts or other parties will not breach the continuous disclosure requirements under Ch 6CA: the material information has been made available to the market. By contrast, the test under s 44ZZY(6) is not whether the disclosure of information complies with Ch 6CA but whether the disclosure is made ‘for the purpose of’ complying with Ch 6CA’. As illustrated below, material information that has been announced to the ASX in compliance with Ch 6CA may later be communicated in circumstances that are caught by s 44ZZW or s 44ZZX and are not exempt under s 44ZZY(6).

Assume that Bank B, an ASX listed entity, decides to wind down its operations in Australia in response to the aggressive marketing campaign of its major competitors. The exit strategy is announced to the ASX. Tom Jones, Bank B’s CEO, later issues a news release about the strategy and tells the press that:

We’re not loved any more. It’s impossible for us to compete in this market. We’ve decided on a strategy of fast exit. Fortunately, this won’t hurt us too much. We have good opportunities offshore. And by lessening competition in Australia we will be better off. We have significant shareholdings in the other banks. It is inevitable that they will increase their market shares and profits after we go.

The news release and Tom Jones’ statement are reported widely in the media. Bank B has complied with s 674 of the Corporations Act. However, the prohibition under s 44ZZX will apply if, as is likely, the news release and the accompanying statement are made partly for the purpose of substantially lessening competition in the market/s from which Bank B will exit.⁵⁶ The exception under s 44ZZY(6) will not apply because the news release and the

⁵⁴ See further Beaton-Wells and Fisse, above n 19, section 7.4.6.

⁵⁵ Ibid, p 91.

⁵⁶ It may be argued that the only substantial purpose in a situation like this is an underlying strategy as distinct from the purpose of the disclosure itself and that s 44ZZX does not apply unless the disclosure itself is made for a SLC purpose; see further Fisse and Beaton-Wells, above n 8, at 43. However, the legislative purpose appears to be that s 44ZZX is to apply where a disclosure is made by a corporation in furtherance of an underlying strategy that involves a substantial SLC purpose. See s 44ZZX(3) (‘inference from the conduct of the corporation’); Competition and Consumer Amendment Bill (No 1) 2011, Explanatory Memorandum, [1.88] (‘A list of factors the court may have regard to in determining whether the corporation had the purpose of substantially lessening competition when making the disclosure is provided for in the Bill’). Difficulties in distinguishing between purposes have arisen in the context of s 4D of the CCA: see *South Sydney* (2003) 215 CLR 563; 200 ALR

accompanying statement by Tom Jones are not made for the purpose of complying with Ch 6CA: they are public relations comments that are made after the fact of compliance with Ch 6CA.

Potential traps of this nature should be removed by amending s 44ZZY(6) to exclude a disclosure of information where the disclosure is made 'in compliance with Ch 6CA of the Corporations Act 2001'⁵⁷ or where the information disclosed has been disclosed publicly in compliance with Ch 6CA, subject to an anti-avoidance safeguard of the kind discussed below.

On the interpretation suggested above, the s 44ZZY(6) exception also creates a loophole. It is conceivable that a continuous disclosure statement made in order to comply with Ch 6CA of the Corporations Act could also be used for the purpose of price signalling or some other form of information disclosure that is subject to the s 44ZZX prohibition under the Information Disclosure Bill.⁵⁸

Assume next that Bank A makes an announcement to the ASX that, if any customer or potential customer finds an interest rate or fee that is lower than a rate or fee advertised by Bank A, Bank A will offer a lower rate or price and better the competitor's offer by a 5% discount on the amount quoted by the competitor.⁵⁹ There is a significant risk that this pricing strategy (MFC strategy) could backfire but the hope and intention of Bank A is that it will give competitors a strong incentive not to engage in price competition. The information is treated as being material by Bank A given the fuzziness of the test of materiality under s 674.⁶⁰ The announcement is published widely and prominently in the print media, which is free advertising expected and deployed by Bank A.⁶¹ Given that one substantial purpose of the announcement to the ASX is to substantially lessen competition in the markets addressed by the MFC strategy, the s 44ZZX prohibition will apply assuming that the relevant goods and services have been prescribed as Div 1A goods and services. However, if another substantial purpose of the announcement is to comply with Ch 6CA, the exception under s 44ZZY(6) seems to apply in relation to the s 44ZZX prohibition.⁶² Under s 4F(1)(b) of the CCA, a person is taken to have engaged in conduct for a particular purpose if the conduct was engaged in for purposes that included that purpose and the purpose was a substantial purpose. The wording does not exclude the exception where the

157; [2003] HCA 45; BC200304465 at [18] per Gleeson CJ, [46] per McHugh J, [65] per Gummow J, [216] per Callinan J and the discussion in Beaton-Wells and Fisse, above n 19, section 4.4.1.

57 The possible wording 'in accordance with Ch 6CA' would be too narrow. If the wording 'in compliance with . . .' is too narrow or at risk of being interpreted too narrowly, alternative possible wording would be 'in the course of compliance . . .'.

58 Consistently with M Porter, *Competitive Strategy*, The Free Press, New York, 1980, Chs 2–4.

59 MFC offers are not necessarily anti-competitive but are one of a number of facilitating practices that can be used by competitors in order to coordinate prices without making a contract or arrangement or arriving at an understanding with a competitor. See further Beaton-Wells and Fisse, above n 19, section 3.2.

60 See Austin and Ramsay, above n 1, pp 620–1; J R Brown Jr, *The Regulation of Corporate Disclosure*, 3rd ed, Wolters Kluwer, New York, 2008, Ch 5.

61 Paid advertising by Bank A would of course involve separate information disclosures to which the s 44ZZX prohibition would apply but not the s 44ZZY(6) exception.

62 The s 44ZZY(6) exception does not apply in relation to s 45(2) or s 46 of the CCA.

disclosure is made partly for the substantial purpose of substantially lessening competition or even where the dominant purpose is to substantially lessen competition.⁶³

If s 44ZZY(6) creates this loophole, how should it be closed? Inserting a sole purpose test in s 44ZZY(6) would hardly be a sensible amendment given that disclosures by way of continuous disclosure are often made for public relations and other legitimate reasons additional to that of complying with Ch 6CA of the Corporations Act. An alternative possibility would be a 'but for' test of the kind adopted by the FTC in *In re Valassis Communications Inc.*⁶⁴ The CEO of Valassis stated in an analyst call that Valassis would end a 3 year price war with News America and would quote customers of News America the same price as that in effect 3 years earlier and would not go below that price. The FTC complained that there was a breach of s 5 of the Federal Trade Commission Act (US) and obtained a consent decree.⁶⁵ The FTC's case proceeded partly on the footing that the statement in question would not have been publicly communicated, even to investors and analysts interested in Valassis' business strategy, 'but for' Valassis' attempt to induce collusion.⁶⁶ Such a test is questionable because a 'but for' test at most establishes a bare cause in fact and not a substantial contributing influence.⁶⁷ Another option would be to insert an anti-avoidance safeguard that limits the exception under s 44ZZY(6) to situations where the disclosure is not for the dominant purpose of lessening competition with a competitor or likely competitor.⁶⁸

63 A similar problem arises from the wording 'for the purposes of a joint venture' in ss 44ZZRO, 44ZZRP and 76C of the CCA; see Beaton-Wells and Fisse, above n 19, section 8.3.4.2.

64 *In re Valassis Communications Inc* File No 051 0008 (FTC 14 March 2006).

65 There have been two US cases where public disclosure of information to securities analysts was challenged under FTC Act s 5. Both cases were settled by consent order. One is *Valassis*, *ibid*. The other is *U-Haul International*, FTC 081-0157 (14 July 2010). Public disclosures of information to securities analysts has also been cited as evidence of an agreement in breach of s 1 of the Sherman Act 15 USC §1: see, eg, *In re Potash Antitrust Litigation II*, Direct Purchaser Amended Consolidated Class Action, MDL Docket No 1996, Civil No 1:108-cv-6910 (3 April 2009). For a discussion of the risk of antitrust liability in this context, see, eg, J Roberti and D E Jones, 'The New Realm of Antitrust from Public Disclosures', *Antitrust and Competition Review*, Winter 2010, pp 4–6, at <<http://www.mayerbrown.com/publications/article.asp?id=10126&nid=6>> (accessed 5 September 2011); R Steuer, J Simala and J Roberti, 'Avoid the Traps in Investor and Analyst Calls', *New York LJ*, 8 March 2010, at <<http://www.mayerbrown.com/antitrust/article.asp?id=8689&nid=112>> (accessed 5 September 2011); M Brown, 'New Complaint Provides an Important Reminder about Antitrust Risks from Statements in Analyst Calls', 3 June 2009, at <<http://www.mayerbrown.com/news/article.asp?id=6867&nid=5>> (accessed 5 September 2011). See also L Fullerton, 'FTC Challenges "Invitations to Collude"' (2011) *Antitrust* 30 at 32–3.

66 *In re Valassis Communications Inc*, Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed Reg 13976, 13978–79 (20 March 2006).

67 On the limitations of a but for test for determining causation in law, see further H L A Hart and T Honoré, *Causation in the Law*, 2nd ed, 1985, Oxford University Press, Ch V.

68 A safeguard closely akin to that for the collaborative activity exemption to cartel prohibitions proposed in the Exposure Draft amendments to the Commerce Act 1986 (NZ) s 31(2)(b), released by the NZ Ministry of Economic Development in June 2011; see at <http://www.med.govt.nz/templates/MultipageDocumentTOC_46015.aspx> (accessed 1 August 2011). For a discussion of this type of safeguard see Beaton-Wells and Fisse, above n 19, section 8.3.4.2.

4.2 Is the continuous disclosure exception under s 44ZZY(6) wide enough to cover a disclosure made in compliance with overseas continuous disclosure or similar obligations?

Is the continuous disclosure exception under s 44ZZY(6) wide enough to cover a disclosure made in compliance with overseas continuous disclosure or similar obligations? There are many situations where material information is subject to a disclosure obligation not only in Australia but also overseas.⁶⁹ For example, dual-listed companies need to disclose material information not only in Australia but in other jurisdictions where they are listed.⁷⁰

The short answer is: 'No'. If protection is needed, authorisation by the ACCC will be necessary.

A disclosure made overseas by a body corporate incorporated in Australia or carrying on business in Australia will come within the territorial reach of the prohibitions under the Information Disclosure Bill (see s 5(1)). However, the disclosure must relate to the price etc of goods or services supplied or acquired in a market in Australia (ss 44ZZW, 4E) or be for the purpose of substantially lessening competition in a market in Australia (ss 44ZZX, 4E). A disclosure made offshore by a related corporation may be amount to a disclosure through an intermediary (s 44ZZU(3); note the breadth of s 44ZZU(3)(b). A disclosure made offshore to a regulatory agency where the disclosure is to be published by the agency may also be a disclosure through an intermediary under s 44ZZU(3).

Attention was drawn to the implications of overseas disclosure requirements in a submission by the Australian Bankers' Association on the Exposure Draft Bill:

certain disclosures may be required by banks in accordance with foreign laws, as a requirement of doing business, such as issuing debt or equity in those markets. Given the global nature of communications, a disclosure made in any other country will also be available in Australia. While some of these disclosures may be authorised (or required) under Australian law, to the extent that the foreign law disclosures may differ or be more extensive, those disclosures would be not be covered by the exception as currently drafted.⁷¹

The s 44ZZY(6) exception does not address the concerns raised by that submission.

⁶⁹ See generally M Fox, 'The Securities Globalization Disclosure Debate' (2000) 78 *Wash ULQ* 567; C A Frost, E A Gordon and A F Hayes, 'Stock Exchange Disclosure and Market Development: An Analysis of 50 International Exchanges' (2006) 44 *Jnl of Accounting Research* 437.

⁷⁰ See ASX, Guidance Note 8, *Continuous Disclosure: Listing Rule 3.1*, at [63]–[65], at <http://www.asxgroup.com.au/media/PDFs/gn08_continuous_disclosure.pdf> (accessed 1 August 2011).

⁷¹ Submission on the Exposure Draft — Competition and Consumer Amendment Bill (No 1) 2011 (Government Bill), January 20, 2011, Ann B, p 15, at <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>> (accessed 1 August 2011). See also The Westpac Group, Submission on the Exposure Draft — Competition and Consumer Amendment Bill (No 1) 2011, 20 January 2011, p 4, at <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>> (accessed 1 August 2011) and the submission by the National Australia Group in its letter dated

Assume that a global financial crisis impels Bank C to try to consolidate its operations in Australia and the United Kingdom (where it is dual-listed) by merging with Bank D. Given that the merger plainly will substantially lessen competition in several markets in Australia, authorisation by the ACCC will be sought. The proposed merger is announced simultaneously to the ASX and the LSE.⁷² The announcement to the ASX and the announcement to LSE are each made partly for the substantial purpose of substantially lessening competition in several markets in Australia if regulatory approval can be obtained.⁷³ Each announcement will therefore be subject to the s 44ZZX prohibition. The announcement to the ASX will be exempt from that prohibition because it is partly for the substantial purpose of complying with Ch 6CA of the Corporations Act. But is the announcement to the LSE exempt under s 44ZZY(6)? Presumably not. It is made for the substantial purpose of complying with the continuous disclosure requirements under the UK Listing Authority listing rules⁷⁴ and not also for the substantial purpose of complying with Ch 6CA — that is insufficient under s 44ZZY(6).

Banks or other listed entities should not be left exposed to the unnecessarily narrow exception under s 44ZZY(6). Amendment is required to cover disclosures made in compliance with disclosure requirements in other jurisdictions, subject to a safeguard against the possible misuse of the exception as camouflage for invitations to collude or attempts to collude.⁷⁵

The most obvious need for an amendment is in the area of disclosure requirements under corporations and securities laws.⁷⁶ However, the

18 January 2011 to Treasury (see paras 1.1, 2.2, 3.3 of Attachment 1) at <http://www.treasury.gov.au/documents/1941/PDF/National_Australia_Bank.pdf> (accessed 1 August 2011).

72 See ASX, Guidance Note 8, Continuous Disclosure: Listing Rule 3.1, at [63].

73 As noted in Section 4.1, the legislative purpose appears to be that s 44ZZX is to apply where a disclosure is made by a corporation in furtherance of an underlying strategy that involves a substantial SLC purpose and that the disclosure itself need not necessarily be made for a substantial SLC purpose.

74 See at <<http://fsahandbook.info/FSA/html/handbook/LR>> (accessed 1 August 2011).

75 Public disclosure of information to securities analysts has been challenged as an invitation to collude in breach of s 5 of the *Federal Trade Commission Act*, 15 USC §45: see *In the Matter of Valassis Communications Inc* FTC 051-0008; *U-Haul International* FTC 081-0157 (14 July 2010). Both of these cases were settled by consent orders. For a discussion of recent consent agreements entered into by the FTC in relation to public communications in contexts such as briefings of securities analysts, see J Thomas Rosch, Commissioner, Federal Trade Commission, 'Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission', Speech delivered at George Mason Law Review's 14th Annual Symposium on Antitrust Law, Washington DC, 9 February 2011, pp 9–10. See also L Fullerton, 'FTC Challenges "Invitations to Collude"' (2011) *Antitrust* 30 at 32–3. On the development of s 5 in relation to invitations to collude, see generally W E Kovacic and M Winerman, 'Competition Policy and Section 5 of the Federal Trade Commission Act' (2010) 76 *Antitrust LJ* 929; R H Lande, 'Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis' (2009) *Antitrust Source* (February 2009) 1; V G Kaye, 'Section 5 of the FTC Act: Not All Gaps Need Filling' (2004) 49 *Antitrust Bulletin* 783.

76 Corporate market disclosure in the European Union and United States is regulated by EU-wide and US federal law and the rules of individual exchanges. See, eg, *Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the Harmonisation of Transparency Requirements in relation to Information about Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Amending Directive*

amendment should also cover disclosures in compliance with any other types of disclosure or reporting requirements, whether under Australian or overseas laws.⁷⁷

The Information Disclosure Bill seems to assume that those who are worried about the need to comply with s 44ZZW or s 44ZZX in the context of continuous disclosure or other disclosure requirements can protect themselves by means of the notification procedure under s 93 (see s 44ZZY(5)) or by applying for an authorisation from the ACCC under s 88(6A).

Notification under s 93 is not a solution where, as almost invariably will be the position, the continuous disclosure or other disclosure is made as a public statement.⁷⁸ Where the disclosure is public, the relevant prohibition under the Information Disclosure Bill will be that under s 44ZZX. The notification procedure under s 93 applies to conduct of the kind referred to in s 44ZZW but not to conduct of the kind referred to in s 44ZZX (to the extent that the conduct falls within s 44ZZW). The heading to s 44ZZY suggests that notification provides an exception to conduct prohibited by s 44ZZX. That signal is misleading. Furthermore, the Notes to ss 44ZZW and 44ZZX area are incorrect and misleading. Section 93 requires amendment to cover conduct that would otherwise be prohibited by s 44ZZW or s 44ZZX.

Authorisation by the ACCC is available and perhaps advantage can be taken of the amendment to s 88 that allows authorisation in relation to not only a particular disclosure of information but also 'other similar disclosures of information' (s 88(6C)).⁷⁹ However, in many situations timing constraints

2001/43/EC, OJ L 390/38; Securities Exchange Act of 1934, 15 USC §78a. For an overview of the US, EU/Germany and UK regimes, see A Cahn and D C Donald, *Comparative Company Law*, Cambridge, Cambridge, 2010, pp 513–28. On US corporate disclosure requirements, see J R Brown Jr, *The Regulation of Corporate Disclosure*, 3rd ed, Wolters Kluwer, New York, 2008.

77 Potential exposure under s 44ZZX might arise in connection with disclosure in the United States where, eg, notice of a proposed major acquisition is given in compliance with the Hart-Scott-Rodino Act; or where commercially damaging information about clinical drug trials must be disclosed to the FDA. Potential exposure under s 44ZZX might arise in connection with disclosure in Australia in the event of, eg, a product safety recall; an adverse drug reaction to a pharmaceutical drug regulated by the Therapeutic Drugs Administration; a notice to APRA under s 62A(1B) of the Banking Act 1959 (Cth) of a significant breach of a prudential standard; or carbon emissions reporting. In some cases a disclosure may be partly for a SLC purpose or at least raise that issue. In many situations the extent of disclosure is likely to exceed what is required for minimum compliance with a disclosure obligation as a matter of law. Where that is the case, the disclosure will not be 'authorised by or under' a law of the Commonwealth, a state or a territory and the exception under s 44ZZY(1) will not apply. On continuous disclosure and other disclosure obligations in the context of biotech companies, see ASX and AusBiotech, *Code of Practice for Reporting by Life Science Companies*, 2005, at <http://www.asx.com.au/documents/research/biotech_best_practice.pdf> (accessed 1 August 2011).

78 For an extensive criticism of the impracticalities and risks of notification in this context, see Law Council of Australia, Submission on the Competition and Consumer Amendment Bill (No 1) 2011 (Cth), 25 May 2011, at [6.1]–[6.38], at <<http://www.aph.gov.au/house/committee/economics/1BillPriceSignalling/subs.htm>> (accessed 1 August 2011). However, that submission did not address the problem under s 93 that a valid notification cannot be made to in relation to conduct referred to in s 44ZZX.

79 For criticisms of authorisation in this context, see Law Council of Australia, Submission on the Exposure Draft of the Competition and Consumer Amendment Bill (No 1) 2011 (Cth),

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alone will make the authorisation process impractical and a highly theoretical option. Moreover, how useful is the possibility of making an umbrella application under s 88(6C) when the authorisation tests under s 90 have not been relaxed? The persuasive burden of satisfying those tests rests on the applicant, and that burden will be difficult to meet unless the disclosures of information covered by an umbrella application are described with sufficient particularity to make an informed assessment of their public benefit or public detriment. Further disincentives to reliance on the authorisation process include the need to give public notice of one's plans, and the lack of control over the possible imposition of unduly onerous conditions by the ACCC. In these as well as in other respects, the Information Disclosure Bill is out of touch with international best practice. For instance, the United States, the European Union and the United Kingdom have no authorisation process and rely on self-assessment.⁸⁰

4.3 The prohibitions apply in relation to goods and service specified by regulation and initially will apply only to the banking sector. What process will govern the selection of other sectors of the economy? What dangers arise?

The prohibitions under the Information Disclosure Bill prohibitions apply only to classes of goods and services prescribed by regulation. Initially, the Bill will apply only to the banking sector.⁸¹ Other sectors may possibly be prescribed after 'further detailed consideration'.⁸² The uncertainty surrounding the future application of the ss 44ZZW and 44ZZX prohibitions is unprecedented in Australian competition law. By contrast, the Coalition Bill on price signalling would apply across the economy.

The piecemeal discriminatory approach taken under the Information Disclosure Bill is highly unsatisfactory.⁸³ As a general policy, competition laws should apply across all sectors of the economy and competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided. That policy, as adopted and applied by the Swanson Committee⁸⁴ and the Hilmer Committee,⁸⁵ and

20 January 2011, at [5.4], at <<http://www.treasury.gov.au/contentitem.asp?ContentID=1941&NavID=014>> (accessed 1 August 2011).

80 See further Beaton-Wells and Fisse, above n 19, section 8.13.3.

81 Treasury, *Competitive and Sustainable Banking System*, December 2010, at <http://www.treasury.gov.au/banking/content/report/report_06.htm> (accessed 1 August 2011). See also Treasury, Competition and Consumer Amendment Bill (No 1) 2011 Explanatory Note, pp 1 and 3, at <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1918>> (accessed 1 August 2011).

82 Second reading speech, 24 March 2011.

83 The discussion to follow is derived largely from Fisse and Beaton-Wells, above n 8, at 32–4.

84 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, 1976, p 84.

85 National Competition Policy Review Committee, *National Competition Policy*, 1993, pp 85 et seq.

strongly endorsed by the Dawson Committee,⁸⁶ is reflected in all of the other prohibitions under Pt IV of the CCA. It is perverse that a prohibition may be applied to a particular sector by regulation when an exemption of a particular sector from a Pt IV prohibition by regulation is impermissible under the CCA (s 172(2)). Further, making selected goods or services subject to the ss 44ZZW and 44ZZX prohibitions by regulation is problematic. Regulations are not subject to the same Parliamentary scrutiny to which legislation is subject.⁸⁷ The criteria for determining which sectors should be prescribed have not been articulated and are likely to be difficult to formulate in practice.

The Senate Standing Committee for the Scrutiny of Bills expressed this criticism of the Information Disclosure Bill:

it is of concern that this scope of the prohibitions introduced by this bill are to be determined entirely through delegated legislation. Regrettably, the explanatory memorandum merely states the effect of the provisions rather than justifying the need to leave the scope of operation of these new provisions to be determined by the regulations. The Committee therefore *seeks the Treasurer's advice about this approach and in particular whether consideration has been given to the possibility of defining the scope of operation of the laws (such as the intended areas of operation, guidance as to the types of industries to which it will apply or relevant considerations that will be examined before a decision is made) in the primary legislation.*⁸⁸

The following amendments were made to s 44ZZT at the last minute:

- (3) The regulations must prescribe a process to be gone through before regulations are made, for the purpose of subsection (1), prescribing a class of goods or services. Before the Governor-General makes regulations, for the purpose of subsection (1), prescribing a class of goods or services, the Minister must be satisfied that the prescribed process has been complied with.
- (4) Subsection (3) does not apply in relation to the first regulations made for the purpose of subsection (1).

This is political window-dressing. Allowing for the process to be prescribed by regulation suffers from the same objections as allowing for the scope of the prohibitions to be prescribed by regulation.⁸⁹

It is impossible to predict what categories of goods and services are next in line for attention under the Information Disclosure Bill (although some obvious candidates, such as petrol, have been canvassed in the media).⁹⁰ There is no evidence that the banking sector is the area of the economy where prohibitions against price signalling and other types of competition-related

⁸⁶ Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, 2003, pp 35–7.

⁸⁷ The provisions relating to consultation, tabling and disallowance of regulations under the Legislative Instruments Act 2003 (Cth) are not an adequate substitute for the full glare of Parliamentary debate.

⁸⁸ Senate Standing Committee for the Scrutiny of Bills, Alert Digest No 4 of 2011, 11 May 2011, pp 19–20 (emphasis in original).

⁸⁹ The interference with freedom of expression is criticised in Fisse and Beaton-Wells, above n 8, at 42.

⁹⁰ See, eg, P Martin, 'Bank Price Law has "Wider Use"', *The Age*, Melbourne, 25 March 2011; M Drummond, 'Price Signalling Laws May be Widened', *The Australian Financial Review*, Sydney, 4 April 2011.

information disclosure are most needed.⁹¹ If evidence of the need for such prohibitions is not the operative criterion of selection, it seems that any class of goods and services could be selected for s 44ZZW and s 44ZZX ‘treatment’ depending on what may be politically opportune at any given time.

It is salutary to recollect the incident that engaged the interest of the Treasurer and other politicians and that fostered the Information Disclosure Bill and the selection of the banking sector as the first target of the ss 44ZZW and 44ZZX prohibitions. In October 2009, the CEO of the ANZ Bank (Mike Smith) made the following comment to the media:

I have said I would be reluctant to move beyond a [RBA] rate increase. I’m not saying that I would not move outside of the RBA. But I’m not going to be stuck on my own. If every one else moves, then I would have to react to that.⁹²

It is difficult to see what harm there is in a competitor stating the obvious fact that it will react to prices charged by other competitors in the market. However, the example shows that CEOs and other managers supplying products that to date have escaped prescription under s 44ZZT as Div 1A goods and services need to be careful not to arouse political interest by making statements to the media that sound in any way like possible price signalling. This constraint on freedom of expression is unfortunate but arises from the risk of potential exposure to the discriminatory application of the ss 44ZZW and 44ZZX prohibitions by regulation under s 44ZZT.⁹³

The practical implication for corporate lawyers as well as competition lawyers is that vigilance will be necessary to help guard against the danger of sudden opportunistic extensions of the prohibitions under ss 44ZZW and 44ZZX to further Div 1A classes of goods and services. See Section 4.4 below.

4.4 What additional precautions are advisable by way of compliance and liability control in light of the Information Disclosure Bill?

What additional precautions are advisable by way of compliance and liability control? Precautions need to be tailored to suit the particular risks faced by an organisation and the particular management environment in which it operates, but the main implications of the Information Disclosure Bill seem worth identifying as a starting point.

The framework of inquiry adopted here is compliance and liability control, not merely compliance. This framework is discussed in detail elsewhere.⁹⁴

The following basic considerations seem relevant to the need or otherwise for additional precautions, or the particular nature of precautions that may warrant adoption:

- Corporations that deal with Div 1A goods and services will be subject to the application of the prohibitions under the Information Disclosure Bill. The initial set of Div 1A goods and services will be

⁹¹ See further Fisse and Beaton-Wells, above n 8, at 34.

⁹² ‘Lenders should talk more about price structures’, *Sydney Morning Herald*, 26 January 2011.

⁹³ The interference with freedom of expression is criticised in Fisse and Beaton-Wells, above n 8, at 42.

⁹⁴ Beaton-Wells and Fisse, above n 19, Ch 12.

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in the banking sector but the classes to be prescribed remain unknown. The classes of Div 1A goods and services may be extended from time to time by regulation. No guidance has yet been given about the process of determining what those further classes will be or what the likely targets will be.

- Corporations that deal with Div 1A goods and services will need to revise their policies and procedures so as to manage the risk of liability under ss 44ZZW and 44ZZX.
- Corporations that deal with Div 1A goods and services and that are also subject to the requirements of Ch 6CA of the Corporations Act, may find it prudent to ensure that:
 - statements made by way of continuous disclosure do not show any trace of a purpose to substantially lessen competition in any market;
 - statements made by way of continuous disclosure and that might possibly be challenged as being made for a SLC purpose are made by a director, employee or agent who entertains the subjective purpose of complying with Ch 6CA of the Corporations Act;
 - statements made in order to comply with overseas continuous disclosure or similar requirements and that might possibly be challenged as being made for a SLC purpose are covered by an ACCC authorisation;
 - statements made in order to comply with Australian or overseas disclosure requirements in areas other than corporations and securities regulation and that might possibly be challenged as being made for a SLC purpose are covered by an ACCC authorisation;
 - statements made by way of continuous disclosure or other disclosure in Australia or overseas and that relate to the price of Div 1A goods or services are not discussed with any competitor in an Australian market — if they are there will be exposure to liability under the per se s 44ZZW prohibition — it is irrelevant that the information is or soon will be in the public domain (see s 44ZZV(3)).
- Corporations that do not currently deal with Div 1A goods and services and hence may be targeted by a future regulation under s 44ZZT may wish to consider taking proactive steps to minimise the risk of being targeted; the more obvious proactive steps are:
 - guarding against CEOs or other executives making politically provocative statements about prices, competition in the market or future market reactions;
 - lobbying and making submissions about the unsatisfactory power under s 44ZZT to extend the application of ss 44ZZW and 44ZZX by regulation;
 - monitoring developments under s 44ZZRT closely so as not to be caught by surprise;

- being ready at short notice and armed to mount a challenge to a regulation under s 44ZZT that would bring one's corporation within the clutches of ss 44ZZW and 44ZZX.

Corporations subject to s 44ZZX and Ch 6CA of the Corporations Act may need more detailed guidance about the implications of s 44ZZX for statements to analysts or other disclosures that relate to continuous disclosure. Robert Steuer and colleagues have distilled recent experience in the United States by offering these tips to help avoid the antitrust traps in public analyst and investor conference calls:⁹⁵

- Know the danger zones. In general, the highest risk statements are those that discuss future prices or output levels.
- Be only as specific as you need to be. Many times, it will be possible to provide the necessary information to the investing public without providing too much in the way of details to competitors. For example, if information about prices, output or costs is aggregated, the antitrust risk can be reduced.
- Focus on your own company. Don't try to speak for 'the market' or 'the industry'. Avoid statements such as, 'The industry as a whole needs to be more disciplined in pricing'. Justify price increases based on the company's own costs, capacity and customer demand, not those of 'the industry'. Don't discuss the effect of competitive decisions, such as reductions in capacity, on prices, competitors or market conditions.
- Be definitive in explaining future actions. It is unwise to announce conditional market strategies based on the actions of a company's competitors.
- Some things are better left unsaid. The best course is to avoid speculating about how competitors or the market may react. For example, it would be best to avoid discussions about whether a potential price increase will stick, or what the company might do if a competitor does or does not respond to the company's actions. If asked: 'Are you going to take a price increase after Labor Day and by how much?' the best answer may be: 'I cannot comment on specific price decisions before they are announced to our customers but we will take whatever steps are necessary to assure both our competitiveness and our profitability'.

Tom McGrath and Sarah Lee have suggested these Dos and Don'ts:

- To the extent possible, limit commentary to your own business.
- Avoid a very detailed description of future pricing. Pricing to individual customers is the most sensitive.
- Remember that it's not only price. All elements of price — margin, rebate, discounts — and production, capacity and terms of credit are all sensitive topics.
- Do not comment on what competitors should do, or what you hope they will do.

⁹⁵ R Steuer, J Simala and J Roberti, 'Avoid the Traps in Investor and Analyst Calls', *New York Law Journal*, 8 March 2010.

- Consider whether you typically have provided similar information in the past, and whether analysts have a need for specific pricing data.
- Use extra caution in highly concentrated, oligopolistic markets. Where there are few competitors, few need to respond favourably to achieve a successful price increase.
- Do not refer to the industry moving toward rational pricing or capacity or to a particular company or the market engaging in market discipline.
- Emphasise that the plans or reactions of competitors is not known and likely response cannot be speculated on.
- If describing a change in pricing strategy, explain the business reason for the strategy, particularly if tied to an external change in your cost structure.
- Appearances count. A competitor publicly announcing a price change should not tie your hands, but consider how the timing of any response might look.⁹⁶

5 Conclusion: continuous responses to the continual regulation of continuous disclosure

The Information Disclosure Bill adds a new layer of regulation to continuous disclosure. The layer lacks policy substance and is problematic. Fundamental criticisms made by the Law Council and many others have not been heeded. Four Regulation Impact Statements have been released by officialdom but none address the actual impacts on continuous disclosure. Continuous responses are necessary.

The s 44ZZY(6) exception lays potential traps for the unwary and creates a possible loophole in the prohibitions under ss 44ZZW and 44ZZX. Several possible traps have been highlighted in Sections 4.1 and 4.2. Amendments to s 44ZZY(6) are necessary to remove them.

As set out in Sections 4.3 and 4.4, additional compliance precautions and liability controls may be needed not only in the banking sector but also as proactive measures in other sectors that could all too easily become political targets of the prohibitions against unilateral information disclosure under ss 44ZZW and 44ZZX. Such additional precautions and controls are prudent given the Information Disclosure Bill. However, from a public interest standpoint, they are a wasteful diversion caused by political excess.

⁹⁶ T A McGrath and S B Lee, 'Setting Sail from the Safe Harbor — When and Analyst Call Triggers an Antitrust Probe', *Corporate Counsel*, 21 January 2011.