



Competition and Consumer Amendment Act (No. 1) 2011

No. 185, 2011

An Act to amend the *Competition and Consumer Act 2010*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Competition and Consumer Amendment Act (No. 1) 2011

No. 185, 2011

An Act to amend the *Competition and Consumer Act 2010*, and for related purposes

[Assented to 6 December 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Competition and Consumer Amendment Act (No. 1) 2011*.

Competition and Consumer Amendment Act (No. 1) 2011 No. 185, 2011 1

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	6 December 2011
2. Schedule 1	The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.	6 June 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Competition and Consumer Act 2010

1 Paragraph 6(2)(b)

Omit “44ZZRJ, 44ZZRK”, substitute “44ZZRJ and 44ZZRK, Division 1A of Part IV, and sections”.

2 After Division 1 of Part IV

Insert:

Division 1A—Anti-competitive disclosure of pricing and other information

44ZZS Definitions

In this Division:

disclose has a meaning affected by section 44ZZU.

Division 1A goods or services means goods or services to which this Division applies (see section 44ZZT).

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

intermediary: see subsection 44ZZU(3).

private disclosure to competitors: see section 44ZZV.

44ZZT Goods and services to which this Division applies

- (1) This Division applies to goods and services of the classes (however described) that are prescribed by the regulations for the purpose of this section.
- (2) Without limiting subsection (1), the regulations may limit the description of a class of goods or services by reference to any matters including (for example) any one or more of the following:

- (a) a kind of supplier of goods or services;
 - (b) a kind of industry or business in which goods or services are supplied;
 - (c) the circumstances in which goods or services are supplied.
- (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).

44ZZU Provisions affecting whether a corporation has disclosed information to a person

Disclosure to director, employee or agent etc. of another person

- (1) For the purpose of this Division:
 - (a) if a corporation makes a disclosure of information to a person in the person's capacity as a director, employee or agent of another body corporate, the disclosure is taken to have been made by the corporation to that body corporate; and
 - (b) if a corporation makes a disclosure of information to a person in the person's capacity as an employee or agent of another person (not being a body corporate), the disclosure is taken to have been made by the corporation to that other person.

Disclosure to discloser's own agent

- (2) For the purpose of this Division, the disclosure of information by a corporation to another person is to be disregarded if:
 - (a) the disclosure is made to the person in the person's capacity as an agent of the corporation; and
 - (b) subsection (3) does not apply to the disclosure.

Disclosure through intermediary

- (3) If:

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- (a) a corporation makes a disclosure of information to a person (the *intermediary*); and
 - (b) the corporation makes the disclosure to the intermediary for the purpose of the intermediary disclosing (or arranging for the disclosure of) the information to one or more other persons; and
 - (c) the information is so disclosed to one or more of those other persons (the *recipients*);
- then, for the purpose of this Division:
- (d) the disclosure of the information to the recipients is taken to have been made by the corporation; and
 - (e) the disclosure of the information to the intermediary is to be disregarded (unless the intermediary is a competitor or potential competitor of the corporation in a market).

Accidental disclosure

- (4) For the purpose of this Division, the disclosure of information by a corporation to a person (the *recipient*) is to be disregarded if the disclosure to the recipient is due to:
 - (a) an accident; or
 - (b) the default of a person other than the corporation; or
 - (c) some other cause beyond the control of the corporation.

Note: This subsection does not apply to a disclosure of information covered by subsection (3).

Section 84 not limited

- (5) This section does not limit section 84.

44ZZV Meaning of *private disclosure to competitors*

Main definition

- (1) 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 more competitors or potential competitors of the corporation in that market, and is not to any other person.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more competitors or potential competitors, and is not to any other person.

Anti-avoidance

- (2) For the purpose of determining whether a corporation has made a private disclosure to competitors in relation to a particular market, the fact that the disclosure is also made to a person who is not a competitor or potential competitor of the corporation in that market is to be disregarded if:
- (a) for a disclosure that is not made through an intermediary—the corporation made the disclosure to the person for the purpose of avoiding the application of section 44ZZW to the disclosure; or
 - (b) for a disclosure that is made through an intermediary—either:
 - (i) the corporation directed or requested the intermediary to disclose the information to the person for the purpose of avoiding the application of section 44ZZW to the disclosure; or
 - (ii) the intermediary disclosed the information to the person for the purpose of avoiding the application of section 44ZZW to the disclosure.

Fact that the information is otherwise available is not relevant

- (3) 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.

44ZZW Corporation must not make private disclosure of pricing information etc. 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); and
- (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.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(6A).

44ZZX Corporation must not make disclosure of pricing information etc. for purpose of substantially lessening competition

The prohibition

- (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.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(6A) or notified under subsection 93(1).

Determining whether disclosure made for purpose of substantially lessening competition

- (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.

44ZZY Exceptions that apply to sections 44ZZW and 44ZZX

Disclosure authorised by law: general exception for 10 years

- (1) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if:
- (a) the disclosure is authorised by or under a law of the Commonwealth, a State or a Territory; and
 - (b) 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.

Note: This subsection has effect in addition to:

- (a) subsection (6) (which covers compliance with continuous disclosure requirements of the *Corporations Act 2001*); and
- (b) subsection 51(1) (which covers things authorised by certain laws).

Disclosure to related bodies corporate

- (2) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if the disclosure is to one or more bodies corporate that are related to the corporation, and is not to any other person.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more bodies corporate that are related to the corporation, and is not to any other person.

Disclosure for collective bargaining

- (3) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if:
- (a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) or (1) setting out particulars of a contract or proposed contract; and

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- (b) the notice is in force; and
 - (c) the disclosure is to one or more of the other contracting parties, and is not to any other person; and
 - (d) the disclosure of the information:
 - (i) if the notice relates to a contract—is required by the contract; or
 - (ii) if the notice relates to a proposed contract—is made in the course of negotiations for the proposed contract or, if the proposed contract is entered into, is required by the contract.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more of the other contracting parties, and is not to any other person.

Disclosure in course of authorised conduct

- (4) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if:
 - (a) an authorisation under section 88 (other than subsection 88(6A)) applies to or in relation to the corporation; and
 - (b) the authorisation is in force; and
 - (c) the disclosure of the information is made in the course of engaging in conduct that is covered by the authorisation.

Note: A disclosure that would otherwise contravene section 44ZZW or 44ZZX can also be directly authorised under subsection 88(6A).

Disclosure covered by notification under section 93

- (5) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a corporation if:
 - (a) the corporation has given the Commission a notice under subsection 93(1) describing conduct; and
 - (b) the disclosure is conduct described in the notice; and
 - (c) the notice is in force under section 93.

Compliance with continuous disclosure requirements of the Corporations Act 2001

- (6) Sections 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 Chapter 6CA of the *Corporations Act 2001*.

44ZZZ Additional exceptions that only apply to section 44ZZW

Disclosure of information to acquirer or supplier of goods or services

- (1) Section 44ZZW does not apply to the disclosure of information by a corporation to a person (the ***recipient***) if:
- (a) the information relates to goods or services supplied or likely to be supplied, by the corporation to the recipient; or
 - (b) the information relates to goods or services acquired or likely to be acquired, by the corporation from the recipient.

Disclosure to unknown competitor

- (2) Section 44ZZW does not apply to the disclosure of information by a corporation to a person if:
- (a) the person is a competitor or potential competitor of the corporation in the market referred to in that section; and
 - (b) the corporation did not know, and could not reasonably be expected to have known, that the person was such a competitor or potential competitor.

Disclosure to participants in joint venture

- (3) Section 44ZZW does not apply to the disclosure of information by a corporation if:
- (a) either:
 - (i) the corporation is a participant in a joint venture for the production and/or supply of goods or services; or
 - (ii) the corporation proposes to enter into a joint venture with one or more other persons (the ***proposed participants***); and
 - (b) the disclosure is to one or more participants or proposed participants in the joint venture, and is not to any other person; and
 - (c) the disclosure is made for the purposes of the joint venture or in the course of negotiations for the joint venture.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more participants in the joint venture, and is not to any other person.

Disclosure relating to provision of loans etc. to same person

- (3A) Section 44ZZW does not apply to the disclosure of information between 2 or more corporations (the **relevant corporations**) if:
- (a) the information relates to services, being loans or credit, supplied, or likely to be supplied, by one or more of the relevant corporations; and
 - (b) 2 or more of the relevant corporations are, in relation to the same person (the **borrower**), doing either or both of the following:
 - (i) providing such services to the borrower;
 - (ii) considering whether to provide such services to the borrower;
 - (c) the disclosure is for the purpose of, or related to, providing services, or considering whether to provide services, to the borrower as mentioned in paragraph (b).

Disclosure between credit provider and provider of credit service

- (3B) Section 44ZZW does not apply to the disclosure of information by a corporation to another person if:
- (a) either:
 - (i) the corporation is a credit provider, and the other person provides a credit service, within the meaning of the *National Consumer Credit Protection Act 2009*; or
 - (ii) the corporation provides a credit service, and the other person is a credit provider, within the meaning of that Act; and
 - (b) the disclosure is made in the course of the relationship between the corporation and the other person in their capacities as credit provider and provider of a credit service.

Disclosure relating to acquisition of shares or assets

- (4) Section 44ZZW does not apply to the disclosure of information by a corporation in so far as the information is disclosed in connection with a contract, arrangement or understanding that provides, or a proposed contract, arrangement or understanding that would

provide, for the acquisition of any shares in the capital of a body corporate, or any assets of a person, by or from the corporation.

Note: For the meaning of acquisition of shares, and acquisition of assets, see subsection 4(4).

Disclosure if borrower insolvent etc.

- (5) Section 44ZZW does not apply to the disclosure of information between 2 or more corporations (the **relevant corporations**) if:
- (a) at least one of the relevant corporations:
 - (i) has provided a loan or credit to another corporation (the **borrower**); and
 - (ii) has been notified of a borrower insolvency situation (see subsection (6)); and
 - (b) the information relates to services, being loans or credit, supplied, or likely to be supplied, by one or more of the relevant corporations; and
 - (c) the disclosure is for the purpose of one or more of the relevant corporations considering whether to take measures to return the borrower to solvency, or to avoid or reduce the risk of the borrower becoming insolvent.
- (6) For the purpose of subsection (5), a relevant corporation is **notified of a borrower insolvency situation** if:
- (a) the corporation is notified that there are reasonable grounds for suspecting that one or more of the following may be or become insolvent:
 - (i) the borrower;
 - (ii) a person who has given a guarantee or indemnity in respect of loans or credit provided to the borrower by one or more of the relevant corporations; and
 - (b) the notification is given by the borrower, or by a person referred to in subparagraph (a)(ii).

44ZZZA Burden of proof

If:

- (a) proceedings are brought against a person in relation to section 44ZZW or 44ZZX; and
- (b) the person seeks to rely on subsection 44ZZU(2) or (4), or on a subsection of section 44ZZY or 44ZZZ;

the person bears an evidential burden in relation to the matters set out in that subsection on which the person seeks to rely.

44ZZZB Mere receipt of information does not constitute being knowingly involved in contravention

For the purpose of paragraph 76(1)(e), a person is not taken to be directly or indirectly knowingly concerned in, or party to, a contravention of section 44ZZW or 44ZZX merely because the person is a recipient of information disclosed in contravention of that section.

3 Paragraph 84(1)(b)

Omit “44ZZRJ, 44ZZRK,”, substitute “44ZZRJ or 44ZZRK, Division 1A of Part IV, section”.

4 Paragraph 84(3)(b)

After “44ZZRK”, insert “, Division 1A of Part IV,”.

5 After subsection 88(6)

Insert:

- (6A) Subject to this Part, the Commission may, on application by or on behalf of a corporation, grant an authorisation to the corporation to make a particular disclosure of information to which section 44ZZW or 44ZZX would or might apply. While the authorisation remains in force, that section does not apply in relation to the corporation making the disclosure.
- (6B) The Commission does not have power to grant an authorisation under subsection (6A) to a corporation to make a particular disclosure of information if the disclosure occurred before the Commission makes a determination in respect of the application.
- (6C) An application made to the Commission under subsection (6A) for an authorisation in relation to a particular disclosure of information may be expressed to be made also in relation to one or more other similar disclosures of information. If an application is so expressed, the Commission may grant a single authorisation in respect of all the disclosures or may grant separate authorisations in respect of any one or more of the disclosures.

6 After subsection 90(5B)

Insert:

- (5C) The Commission must not make a determination granting an authorisation under subsection 88(6A) in respect of a proposed disclosure of information to which section 44ZZW would or might apply, unless the Commission is satisfied in all the circumstances that the proposed disclosure would result, or be likely to result, in such a benefit to the public that the proposed disclosure should be allowed to be made.
- (5D) The Commission must not make a determination granting an authorisation under subsection 88(6A) in respect of a proposed disclosure of information to which section 44ZZX would or might apply, unless the Commission is satisfied in all the circumstances:
- (a) that the proposed disclosure would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the corporation so disclosed the information.

7 Subsection 91A(4)

After “(5B),”, insert “(5D),”.

8 Subsection 91A(5)

Omit “90(8)”, substitute “90(5C), (8)”.

9 Subsection 91B(5)

After “(5B),”, insert “(5C), (5D),”.

10 Subsection 91C(7)

After “(5B),”, insert “(5C), (5D),”.

11 Subdivision A of Division 2 of Part VII (heading)

Repeal the heading, substitute:

Subdivision A—Exclusive dealing and private disclosure of pricing information

12 Subsection 93(1)

After “referred to in”, insert “section 44ZZW or”.

Note: The heading to section 93 is altered by adding at the end “**or private disclosure of pricing information**”.

13 Paragraph 93(3A)(a)

After “described in”, insert “section 44ZZW,”.

14 Subsections 93(7A), (7B) and (7C)

After “referred to in”, insert “section 44ZZW,”.

15 Subsection 101(1A)

After “(5B),”, insert “(5C), (5D),”.

16 Subsection 101(2)

After “(5B),”, insert “(5C), (5D),”.

17 After Division 1 of Part 1 of Schedule 1

Insert:

Division 1A—Anti-competitive disclosure of pricing and other information

44ZZS Definitions

In this Division:

disclose has a meaning affected by section 44ZZU.

Division 1A goods or services means goods or services to which this Division applies (see section 44ZZT).

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

intermediary: see subsection 44ZZU(3).

private disclosure to competitors: see section 44ZZV.

44ZZT Goods and services to which this Division applies

This Division applies to goods and services of the classes prescribed by the regulations for the purpose of section 44ZZT of the *Competition and Consumer Act 2010*.

44ZZU Provisions affecting whether a person has disclosed information to another person

Disclosure to director, employee or agent etc. of another person

- (1) For the purpose of this Division:
- (a) if a person (the **first person**) makes a disclosure of information to another person (the **second person**) in the second person's capacity as a director, employee or agent of a body corporate, the disclosure is taken to have been made by the first person to the body corporate; and
 - (b) if a person (the **first person**) makes a disclosure of information to another person (the **second person**) in the second person's capacity as an employee or agent of another person (not being a body corporate), the disclosure is taken to have been made by the first person to that other person.

Disclosure to discloser's own agent

- (2) For the purpose of this Division, the disclosure of information by a person (the **first person**) to another person is to be disregarded if:
- (a) the disclosure is made to the other person in the other person's capacity as an agent of the first person; and
 - (b) subsection (3) does not apply to the disclosure.

Disclosure through intermediary

- (3) If:
- (a) a person (the **first person**) makes a disclosure of information to another person (the **intermediary**); and
 - (b) the first person makes the disclosure to the intermediary for the purpose of the intermediary disclosing (or arranging for the disclosure of) the information to one or more other persons; and

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- (c) the information is so disclosed to one or more of those other persons (the **recipients**);
- then, for the purpose of this Division:
- (d) the disclosure of the information to the recipients is taken to have been made by the first person; and
 - (e) the disclosure of the information to the intermediary is to be disregarded (unless the intermediary is a competitor or potential competitor of the first person in a market).

Accidental disclosure

- (4) For the purpose of this Division, the disclosure of information by a person (the **first person**) to another person (the **recipient**) is to be disregarded if the disclosure to the recipient is due to:
 - (a) an accident; or
 - (b) the default of a person other than the first person; or
 - (c) some other cause beyond the control of the first person.

Note: This subsection does not apply to a disclosure of information covered by subsection (3).

Section 84 not limited

- (5) This section does not limit section 84.

44ZZV Meaning of *private disclosure to competitors*

Main definition

- (1) A disclosure of information by a person is a ***private disclosure to competitors***, in relation to a particular market, if the disclosure is to one or more competitors or potential competitors of the person in that market, and is not to any other person.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more competitors or potential competitors, and is not to any other person.

Anti-avoidance

- (2) For the purpose of determining whether a person (the **first person**) has made a private disclosure to competitors in relation to a particular market, the fact that the disclosure is also made to

another person who is not a competitor or potential competitor of the first person in that market is to be disregarded if:

- (a) for a disclosure that is not made through an intermediary—the first person made the disclosure to the other person for the purpose of avoiding the application of section 44ZZW to the disclosure; or
- (b) for a disclosure that is made through an intermediary—either:
 - (i) the first person directed or requested the intermediary to disclose the information to the other person for the purpose of avoiding the application of section 44ZZW to the disclosure; or
 - (ii) the intermediary disclosed the information to the other person for the purpose of avoiding the application of section 44ZZW to the disclosure.

Fact that the information is otherwise available is not relevant

- (3) The question whether a disclosure of information by a person is a private disclosure to competitors is not affected by the information otherwise being or becoming available to competitors or potential competitors of the person in the market, or to other persons.

44ZZW Person must not make private disclosure of pricing information etc. to competitors

A person 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 person in a market (whether or not the information also relates to other matters); and
- (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.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(6A) or notified under subsection 93(1).

44ZZX Person must not make disclosure of pricing information etc. for purpose of substantially lessening competition*The prohibition*

- (1) A person 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 person;
 - (ii) the capacity, or likely capacity, of the person to supply or acquire Division 1A goods or services;
 - (iii) any aspect of the commercial strategy of the person that relates to Division 1A goods or services; and
 - (b) the person makes the disclosure for the purpose of substantially lessening competition in a market.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(6A).

Determining whether disclosure made for purpose of substantially lessening competition

- (2) In determining, for the purpose of this section, if a person 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 person.
- (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 person 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 person or of any other person or from other relevant circumstances.

44ZZY Exceptions that apply to sections 44ZZW and 44ZZX

Disclosure authorised by law: general exception for 10 years

- (1) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a person if:
- (a) the disclosure is authorised by or under a law of the Commonwealth, a State or a Territory; and
 - (b) 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.

Note: This subsection has effect in addition to:

- (a) subsection (6) (which covers compliance with continuous disclosure requirements of the *Corporations Act 2001*); and
- (b) subsection 51(1) (which covers things authorised by certain laws).

Disclosure to related bodies corporate

- (2) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a body corporate (the **first body corporate**) if the disclosure is to one or more other bodies corporate that are related to the first body corporate, and is not to any other person.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more bodies corporate that are related to the first body corporate, and is not to any other person.

Disclosure for collective bargaining

- (3) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a person if:
- (a) the person has given the Commission a collective bargaining notice under subsection 93AB(1A) or (1) setting out particulars of a contract or proposed contract; and
 - (b) the notice is in force; and
 - (c) the disclosure is to one or more of the other contracting parties, and is not to any other person; and

(d) the disclosure of the information:

- (i) if the notice relates to a contract—is required by the contract; or
- (ii) if the notice relates to a proposed contract—is made in the course of negotiations for the proposed contract or, if the proposed contract is entered into, is required by the contract.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more of the other contracting parties, and is not to any other person.

Disclosure in course of authorised conduct

(4) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a person if:

- (a) an authorisation under section 88 (other than subsection 88(6A)) applies to or in relation to the person; and
- (b) the authorisation is in force; and
- (c) the disclosure of the information is made in the course of engaging in conduct that is covered by the authorisation.

Note: A disclosure that would otherwise contravene section 44ZZW or 44ZZX can also be directly authorised under subsection 88(6A).

Disclosure covered by notification under section 93

(5) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a person if:

- (a) the person has given the Commission a notice under subsection 93(1) describing conduct; and
- (b) the disclosure is conduct described in the notice; and
- (c) the notice is in force under section 93.

Compliance with continuous disclosure requirements of the Corporations Act 2001

(6) Sections 44ZZW and 44ZZX do not apply to the disclosure of information by a person if the disclosure is made for the purpose of complying with Chapter 6CA of the *Corporations Act 2001*.

44ZZZ Additional exceptions that only apply to section 44ZZW

Disclosure of information to acquirer or supplier of goods or services

- (1) Section 44ZZW does not apply to the disclosure of information by a person (the **first person**) to another person (the **recipient**) if:
- (a) the information relates to goods or services supplied or likely to be supplied, by the first person to the recipient; or
 - (b) the information relates to goods or services acquired or likely to be acquired, by the first person from the recipient.

Disclosure to unknown competitor

- (2) Section 44ZZW does not apply to the disclosure of information by a person (the **first person**) to another person (the **recipient**) if:
- (a) the recipient is a competitor or potential competitor of the first person in the market referred to in that section; and
 - (b) the first person did not know, and could not reasonably be expected to have known, that the recipient was such a competitor or potential competitor.

Disclosure to participants in joint venture

- (3) Section 44ZZW does not apply to the disclosure of information by a person if:
- (a) either:
 - (i) the person is a participant in a joint venture for the production and/or supply of goods or services; or
 - (ii) the person proposes to enter into a joint venture with one or more other persons (the **proposed participants**); and
 - (b) the disclosure is to one or more participants or proposed participants in the joint venture, and is not to any other person; and
 - (c) the disclosure is made for the purposes of the joint venture or in the course of negotiations for the joint venture.

Note: The effect of section 44ZZU must be taken into account in working out whether the disclosure is to one or more participants in the joint venture, and is not to any other person.

Disclosure relating to provision of loans etc. to same person

- (3A) Section 44ZZW does not apply to the disclosure of information between 2 or more persons (the **relevant persons**) if:
- (a) the information relates to services, being loans or credit, supplied, or likely to be supplied, by one or more of the relevant persons; and
 - (b) 2 or more of the relevant persons are, in relation to the same person (the **borrower**), doing either or both of the following:
 - (i) providing such services to the borrower;
 - (ii) considering whether to provide such services to the borrower;
 - (c) the disclosure is for the purpose of, or related to, providing services, or considering whether to provide services, to the borrower as mentioned in paragraph (b).

Disclosure between credit provider and provider of credit service

- (3B) Section 44ZZW does not apply to the disclosure of information by a person to another person if:
- (a) one of the persons is a credit provider, and the other person provides a credit service, within the meaning of the *National Consumer Credit Protection Act 2009*; and
 - (b) the disclosure is made in the course of the relationship between the persons in their capacities as credit provider and provider of a credit service.

Disclosure relating to acquisition of shares or assets

- (4) Section 44ZZW does not apply to the disclosure of information by a person (the **first person**) in so far as the information is disclosed in connection with a contract, arrangement or understanding that provides, or a proposed contract, arrangement or understanding that would provide, for the acquisition of any shares in the capital of a body corporate, or any assets of a person, by or from the first person.

Note: For the meaning of acquisition of shares, and acquisition of assets, see subsection 4(4).

Disclosure if borrower insolvent etc.

- (5) Section 44ZZW does not apply to the disclosure of information between 2 or more persons (the **relevant persons**) if:
- (a) at least one of the relevant persons:
 - (i) has provided a loan or credit to another person (the **borrower**); and
 - (ii) has been notified of a borrower insolvency situation (see subsection (6)); and
 - (b) the information relates to services, being loans or credit, supplied, or likely to be supplied, by one or more of the relevant persons; and
 - (c) the disclosure is for the purpose of one or more of the relevant persons considering whether to take measures to return the borrower to solvency, or to avoid or reduce the risk of the borrower becoming insolvent.
- (6) For the purpose of subsection (5), a relevant person is **notified of a borrower insolvency situation** if:
- (a) the person is notified that there are reasonable grounds for suspecting that one or more of the following may be or become insolvent:
 - (i) the borrower;
 - (ii) a person who has given a guarantee or indemnity in respect of loans or credit provided to the borrower by one or more of the relevant persons; and
 - (b) the notification is given by the borrower, or by a person referred to in subparagraph (a)(ii).

44ZZZA Burden of proof

If:

- (a) proceedings are brought against a person in respect of section 44ZZW or 44ZZX; and
- (b) the person seeks to rely on subsection 44ZZU(2) or (4), or on a subsection of section 44ZZY or 44ZZZ;

the person bears an evidential burden in relation to the matters set out in that subsection on which the person seeks to rely.

44ZZZB Mere receipt of information does not constitute being knowingly involved in contravention

For the purpose of paragraph 76(1)(e), a person is not taken to be directly or indirectly knowingly concerned in, or party to, a contravention of section 44ZZW or 44ZZX merely because the person is a recipient of information disclosed in contravention of that section.

*[Minister's second reading speech made in—
House of Representatives on 24 March 2011
Senate on 18 August 2011]*

(53/11)
