Of course, at all times it will be necessary for firms to ensure their statements are truthful and are not false or misleading.

The new laws include a range of factors to assist a Court to determine whether a firm has made a disclosure for the purpose of substantially lessening competition under the general prohibition. These factors are:

- whether the disclosure was a private disclosure to competitors
- the degree of specificity of the information
- whether the information relates to past, current or future activities
- how readily available the information is to the public
- whether the disclosure is part of a pattern of similar disclosures by the corporation.

The Court may also have regard to other matters. For example, where the disclosure is made by way of a public announcement of future conduct, it may also be relevant to consider whether the disclosure relates to an effective price or strategy change (i.e. one that the firm is fully committed to implement) or whether the firm is tipping its price or strategy to competitors and testing how they might respond, without committing itself to action. Public announcements of future conduct involving an effective price change can generate efficiencies, allowing customers to plan ahead. However, public price signalling via 'uncommitted' announcements may raise concerns that the disclosure was made for an anti-competitive purpose.

The following types of disclosures raise concerns in relation to the general prohibition because they suggest that the disclosure may be made for the purpose of substantially lessening competition.

Signalling to facilitate coordinated conduct

- Bank A devises a campaign to signal its intention not to reduce its rates and test rivals' willingness to do the same. In doing so, it wants to reduce the pressure of competition. The campaign includes Bank A executives making a series of public statements indicating its reluctance to pass through (or fully pass through) reductions in the cash rate ahead of an announcement by the Reserve Bank.
- An Australian banking executive announces at an industry conference that they would be reluctant to lift rates beyond that of the Reserve Bank cash rate or introduce new fees, but if the others did, they would be prepared to follow.

This conduct will raise concerns under the general prohibition.

When a disclosure can be attributed to the company

The *Competition and Consumer Act 2010* recognises that businesses work through their staff. Broadly, the conduct of directors and employees, and their state of mind, will be attributed to the company, when the person is acting in the scope of their actual or apparent authority.

For information about preparing an application for authorisation or notification, please see *Authorising and notifying disclosure of pricing and other information*. For further information on the new laws and the ACCC's approach to their enforcement, please see *ACCC priorities in enforcing competition law* or call the ACCC on 1300 302 502.

ACCC contacts

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Australian Competition & Consumer Commission

BUSINESS SNAPSHOT

Anti-competitive price signalling and information disclosures

New laws prohibiting anti-competitive price signalling and information disclosures came into effect on 6 June 2012. The new provisions in the *Competition and Consumer Act 2010* initially apply only to the banking sector, and only in relation to the taking of money on deposit and making advances of money or loans.

The law can be extended, by regulation, to other sectors of the economy.

Broadly, it is illegal for companies to:

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

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

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

A range of exceptions have been created to prevent legitimate business activities from falling within the prohibitions. They include exceptions to the per se prohibition for private disclosures between parties in a joint venture, to an acquirer or supplier, in relation to an acquisition of shares or assets, or as part of a corporate work out. Exceptions to both the prohibitions exist for disclosures that are covered by an authorisation or notification or made to comply with a company's continuous disclosure obligations.

The per se prohibition—section 44ZZW

Section 44ZZW is an outright prohibition against the private disclosure of pricing information to one or more actual or potential competitors where the disclosure does not occur in the ordinary course of business.

- It is illegal for an authorised deposit-taking institution within the meaning of the *Banking Act 1959*, such as a bank, building society or credit union, to disclose information to a competitor ***in private*** where the information relates to a price for a deposit or loan supplied or acquired (or that is likely to be supplied or acquired) by the firm.

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

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

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

Operation of the anti-avoidance provisions

- **Pricing discussions through an intermediary**—Bank A intends to provide future pricing information to its competitors Banks B and C. Bank A provides the information to Corporation D as an intermediary in order to facilitate and coordinate disclosures amongst competitors. Corporation D passes the information to Banks B and C at the request of Bank A.

This conduct will raise concerns under the per se prohibition.

- **Disclosure of price to an information service provider**—A number of banks provide their current pricing information to an information service provider to generate business for their bank by allowing potential consumers to use the price comparison service of the information service provider.

Given the information is disclosed to non-competitors, and there is no attempt to circumvent the law, the conduct will not raise concerns under the per se prohibition.

- **Offering a product to a consumer**—A customer obtains a quote from Bank A for a loan. The customer subsequently shows the quote to a representative of Bank B to negotiate more favourable terms (e.g. a lower interest rate). The purpose of the disclosure by Bank A is to obtain the business of the potential customer and not to disclose information through an intermediary.

This conduct will not raise concerns under the per se prohibition.

Private disclosures to competitors which are in the 'ordinary course of business' are not caught by the per se prohibition. Conduct that would be entirely unremarkable to an objective bystander is likely to be in the ordinary course of business and will not fall within the per se prohibition.

Disclosure in the ordinary course of business

- Bank A seeks a loan from Bank B. Bank B discloses its fees and conditions to Bank A to provide that loan.

This conduct will not raise concerns under the per se prohibition. It is in the ordinary course of business. Separately, it is subject to an exception as a disclosure to an acquirer.

- Bank A discloses its current pricing information to a mortgage broker, who acts as a broker for Bank A and other banking businesses, and who can also issue loans.

The disclosure of product pricing by Bank A, to facilitate sales of its products by a broker, is likely to be regarded as in the ordinary course of business and therefore, not raise concerns under the per se prohibition.

The ACCC is of the view that an objective observer would regard the covert sharing of prospective pricing information—between competitors—as *not* in the ordinary course of business.

Disclosures not in the ordinary course of business

- Bank A privately discloses future pricing information to Bank B. The information is communicated using code words in order to avoid the disclosure being detected.
- Employees from competing banks meet at a social occasion. An employee of Bank A discloses current and future specific pricing information to employees of Bank B and C.

This conduct will raise concerns under the per se prohibition.

The general prohibition—section 44ZZX

Section 44ZZX prohibits companies making certain disclosures for the purpose of substantially lessening competition. This general prohibition applies to public or private disclosures of information relating to the:

(i) *Price* of goods or services (supplied or acquired by the firm)

(ii) *Capacity* or likely capacity of the firm to supply or acquire, or

(iii) *Commercial Strategy* of the firm

for prescribed goods or services, for the purpose of substantially lessening competition.

Statements that genuinely describe market reality are unlikely to raise concerns under the general prohibition. The prohibition will not impede a firm from advertising their price to customers, such as via billboards, newspaper or television advertisements. Further it will not impede a firm from disclosing an intended change in pricing policies to shareholders.

Statements promoting products and expertise, or describing general market conditions

- Bank A publishes current pricing information on its website. The purpose of the disclosure is to inform customers and investors.
- Bank A announces on its website it will end a discounted price offering in one month's time. The purpose of the disclosure is to encourage more customers to sign up to the offer before it ends.
- A representative of Bank B provides comments on general market conditions, cost pressures and other industry issues to a television news program.
- Bank C announces its intention to keep its lending interest rate unchanged other than to move in line with changes to the Reserve Bank's overnight cash rate where the purpose of the announcement is to retain existing customers and attract new customers, and not to lessen competition.

In the absence of an anti-competitive purpose, this conduct will not raise concerns under the general prohibition.