

Trade Practices

No. 111 of 1965

An Act to preserve Competition in Australian Trade and Commerce to the extent required by the Public Interest.

[Assented to 18 December, 1965]

BE it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

PART I.—PRELIMINARY.

Short title.

1. This Act may be cited as the *Trade Practices Act 1965*.

Commencement.

2.—(1.) Sections 1, 2, 5 and 8, and Parts II. and III., of this Act shall come into operation on the day on which this Act receives the Royal Assent.

(2.) The remaining provisions of this Act shall come into operation on a date to be fixed by Proclamation, and references in this Act to the date of commencement of this Act shall be read as references to the date so fixed.

3. This Act is divided into Parts, as follows:—**Parts.****Part I.—Preliminary (Sections 1–8).****Part II.—Constitution of the Trade Practices Tribunal (Sections 9–22).****Part III.—The Commissioner, the Registrar of the Tribunal and other Officers (Sections 23–34).****Part IV.—Examinable Agreements and Practices (Sections 35–39).****Part V.—Registration of certain Agreements (Sections 40–45).****Part VI.—Examination of Agreements and Practices by the Tribunal.****Division 1.—General (Sections 46–58).****Division 2.—Negative Clearances (Sections 59–61).****Division 3.—Review of Determinations, and Judicial Determination of Questions of Law (Sections 62–66).****Part VII.—Enforcement of Orders of Tribunal (Sections 67–69).****Part VIII.—Provisions relating to the Tribunal.****Division 1.—Procedure and Evidence (Sections 70–76).****Division 2.—General (Sections 77–81).****Division 3.—Offences in relation to the Tribunal (Sections 82–84).****Part IX.—Collusive Tendering and Collusive Bidding (Sections 85–87).****Part X.—Civil Remedies (Sections 88–90).****Part XI.—Interpretative Provisions (Sections 91–96).****Part XII.—Miscellaneous (Sections 97–106).**

4.—(1.) The *Australian Industries Preservation Act 1906–1950* shall be construed as if the references in sections 4, 7, 7A, 7B and 10 of that Act to trade and commerce referred only to trade and commerce by way of the carriage of goods by sea between Australia and places outside Australia.

Restriction of
application of
Australian
Industries
Preservation
Act.

(2.) The last preceding sub-section does not—

- (a) affect the operation of the *Australian Industries Preservation Act* 1906–1950 before the date of commencement of this Act, or anything duly done or suffered under that Act before that date;
- (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act before that date;
- (c) affect any penalty or punishment incurred in respect of any offence committed against that Act before that date; or
- (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty or punishment may be imposed, as if this Act had not been passed.

(3.) Section 6 of the *Seat of Government (Administration) Act* 1910–1963 is repealed.

(4.) Section 7 of the *Northern Territory (Administration) Act* 1910–1962, as amended by the *Northern Territory (Administration) Act* 1965, is repealed.

(5.) Section 1 of the *Northern Territory (Administration) Act* 1965 is amended by omitting sub-section (3.).

(6.) The *Seat of Government (Administration) Act* 1910–1963, as amended by this section, may be cited as the *Seat of Government (Administration) Act* 1910–1965.

(7.) The *Northern Territory (Administration) Act* 1910–1962, as amended by the *Northern Territory (Administration) Act* 1965 and by this section, may be cited as the *Northern Territory (Administration) Act* 1910–1965.

Definitions.

5. In this Act, unless the contrary intention appears—

- “business” includes a profession;
- “complementary State law” means a State Act that is specified in a Proclamation in force under section 8 of this Act;
- “consumer” includes a person to whom services are supplied;
- “deal with” means supply goods or services to, or acquire goods or services from, and other references to dealing or dealings have corresponding meanings;
- “Deputy President” means a Deputy President of the Tribunal, and includes a person appointed to act as a Deputy President of the Tribunal;

- “Deputy Registrar” means a Deputy Registrar of the Tribunal, and includes a person appointed to act as a Deputy Registrar of the Tribunal;
- “document” includes a book or writing;
- “goods” includes—
- (a) ships, aircraft and other vehicles;
 - (b) animals (including fish);
 - (c) minerals, trees and crops, whether on, under or attached to land or not; and
 - (d) gas and electricity;
- “member” means a member of the Tribunal, and includes the President and a person appointed to act as a member;
- “order” includes a refusal to make an order;
- “participating State” means a State that is a participating State for the purposes of this Act in accordance with a Proclamation under section 8 of this Act;
- “practice” includes a single act or transaction;
- “presidential member” means the President or a Deputy President;
- “price” includes a charge of any description;
- “relevant restriction”, in relation to an examinable agreement, means any of the restrictions under the agreement by reason of which the agreement is an examinable agreement, but does not include so much of the operation of a restriction as is required by this Act to be disregarded in determining whether the agreement is an examinable agreement;
- “restriction” includes any negative obligation, whether absolute or not and whether express or implied;
- “services” includes, without limiting the generality of the expression, the rights or benefits that are to be provided under an agreement for—
- (a) the performance of work (otherwise than under a contract of service), whether with or without the supply of goods;
 - (b) the provision of, or of the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (c) the conferring of rights or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

“ State Act ” includes—

- (a) a part of a State Act; and
- (b) a State Act as amended by another State Act;

“ supply ” includes—

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
- (b) in relation to services—provide, grant or confer, and “ supplied ” and “ supplier ” have corresponding meanings;

“ Territory ” means the Australian Capital Territory, the Territory accepted by the *Jervis Bay Territory Acceptance Act 1915* or the Northern Territory of Australia;

“ the Commissioner ” means the Commissioner of Trade Practices, and includes a person appointed to act as the Commissioner of Trade Practices;

“ the Court ” means the Commonwealth Industrial Court;

“ the President ” means the President of the Tribunal, and includes a person appointed to act as President of the Tribunal;

“ the Register ” means the Register of Trade Agreements established under this Act, and includes a part of that Register;

“ the Registrar ” means the Registrar of the Tribunal, and includes a person appointed to act as the Registrar of the Tribunal;

“ the Tribunal ” means the Trade Practices Tribunal established by this Act, and includes a member or Division of that Tribunal performing functions of that Tribunal.

Crown not bound.

6. This Act does not bind the Crown in right of the Commonwealth or of a State.

Operation of Act with reference to the Constitution.

7.—(1.) The restrictions referred to in section 35 of this Act, and the practices referred to in section 36 and Part IX. of this Act, include restrictions and practices that are (whether exclusively or not) applicable to, or engaged in in relation to, or that tend to prevent or hinder, transactions, acts or operations—

- (a) in the course of trade or commerce with other countries or among the States;
- (b) in or for the production, supply or acquisition of goods or services for, or goods or services required for, the purposes of any such trade or commerce;

- (c) in or for the production, supply, acquisition or disposal of goods or other property, or services, by or to the Commonwealth or any authority or instrumentality of the Commonwealth;
- (d) in a Territory, in respect of property in a Territory or in the course of any trade or commerce of a Territory; or
- (e) in or for the production, supply or acquisition of goods or services for, or goods or services required for, the purposes of any trade or commerce of a Territory.

(2.) The restrictions referred to in section 35 of this Act include restrictions, coming within the terms of that section, accepted under an agreement by a party to the agreement who is a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth.

(3.) The practices referred to in section 36 and Part IX. of this Act include practices on the part of a person who is a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth.

(4.) The preceding provisions of this section shall not be construed as—

- (a) limiting the operation of this Act; or
- (b) excluding the application of section 15A of the *Acts Interpretation Act 1901–1964* to this Act (including this section).

(5.) For the purpose of its operation by virtue of this Act but without affecting its operation by virtue of a complementary State law, a determination or order made by the Tribunal shall be construed subject to this Act and so as not to exceed the powers of the Tribunal, to the intent that where the determination or order would, but for this section, have been construed as being in excess of the powers conferred on the Tribunal, it shall nevertheless be a valid determination or order to the extent to which it is not in excess of those powers.

(6.) In this section, “trade or commerce of a Territory” means trade or commerce within a Territory, between a State and a Territory, between two Territories or between a Territory and a place outside Australia.

8.—(1.) The purpose of this section is the achievement of the orderly and convenient concurrent operation of this Act and complementary laws of the States, by means of co-operation between the Commonwealth and the States.

Complementary State legislation.

(2.) Where the Governor-General is satisfied that a State Act is complementary to this Act, the Governor-General may, by Proclamation, declare—

- (a) that that State Act is complementary to this Act; and
- (b) that that State shall, on and after a date specified in the Proclamation, be a participating State for the purposes of this Act.

(3.) Without prejudice to the generality of the last preceding sub-section, the State Acts that may be specified in a Proclamation under that sub-section include a State Act that applies, or provides for applying, any of the provisions of this Act, as amended from time to time and with any necessary modifications, as law of the State, to matters within the legislative power of the Parliament of the State (including matters that are also within the operation of this Act as a law of the Commonwealth).

(4.) Before making a Proclamation under this section, the Governor-General may make such arrangements as he considers necessary with the Governor of the State concerned.

(5.) It is hereby declared to be the intention of the Parliament that, except as provided by this section, this Act shall not exclude the concurrent operation of a complementary State law, including such a law in so far as it—

- (a) confers functions or powers, or imposes duties, on the Tribunal and its members and the officers appointed for the purposes of this Act;
- (b) confers jurisdiction on the Court; or
- (c) provides for the use of the Register or of other facilities or property of the Commonwealth.

(6.) Where an act or omission of a person is both an offence against this Act and an offence against a complementary State law—

- (a) if that person is convicted of the last-mentioned offence, he is not liable to be convicted of the first-mentioned offence; and
- (b) it is the intention of the Parliament that, if that person is convicted of the first-mentioned offence, this Act shall operate to the exclusion of so much of that State law as would make that person liable to be convicted of the last-mentioned offence.

(7.) Where an act or omission of a person gives rise to a cause of action both under this Act and under a complementary State law—

- (a) if the cause of action under the State law is extinguished, the cause of action under this Act shall be taken also to have been extinguished; and

- (b) it is the intention of the Parliament that, if the cause of action under this Act is extinguished, this Act shall operate to the exclusion of so much of that complementary State law as would otherwise continue in existence the cause of action under that State law.

(8.) The Governor-General may, by Proclamation, at any time revoke or amend a Proclamation under this section.

PART II.—CONSTITUTION OF THE TRADE PRACTICES TRIBUNAL.

9.—(1.) There is hereby established a Trade Practices Tribunal, which shall consist of a President and such number of Deputy Presidents and other members as are appointed in accordance with this section.

Constitution of Tribunal.

(2.) A member of the Tribunal shall be appointed by the Governor-General.

10.—(1.) A person shall not be appointed as a presidential member unless he is or has been a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

Qualifications of members.

(2.) A person shall not be appointed as a member other than a presidential member unless he appears to the Governor-General to be qualified for appointment by virtue of his knowledge of, or experience in, industry, commerce or public administration.

11.—(1.) Subject to this Part, a member holds office for such period, not exceeding seven years, as is specified in the instrument of his appointment, but is eligible for re-appointment.

Terms and conditions of appointment.

(2.) A member shall be paid remuneration at such rate as the Governor-General determines, but the rate shall not be diminished during a term of office.

(3.) A member shall be paid such allowances in respect of travelling expenses as the Attorney-General determines.

(4.) Subject to this Part, the Governor-General may, in the instrument of appointment of a member, specify terms and conditions of appointment, which may include terms and conditions making provision, to the exclusion of any other

provision that would be applicable, with respect to leave of absence and pensions or retiring allowances.

Rights of
public servant
appointed as
member.

12. If a person appointed to hold office as a member was, immediately before his appointment, an officer of the Public Service of the Commonwealth—

- (a) he retains his existing and accruing rights;
- (b) for the purpose of determining those rights, his service as a member shall be taken into account as if it were service in the Public Service of the Commonwealth; and
- (c) the *Officers' Rights Declaration Act 1928-1959* applies as if this Act and this section had been specified in the Schedule to that Act.

Acting
Appointments.

13.—(1.) Where the President is, or is expected to be, absent from duty, or there is a vacancy in the office of President, the Attorney-General may appoint a Deputy President or an acting Deputy President to act as President during the absence or until the filling of the vacancy.

(2.) Where a presidential member (including the President) is, or is expected to be, absent from duty, the Governor-General may appoint a person qualified to be appointed as a presidential member to act as a Deputy President during the absence from duty of the member.

(3.) Where a member other than a presidential member is, or is expected to be, absent from duty, the Governor-General may appoint a person qualified to be appointed as a member other than a presidential member to act as such a member during the absence from duty of the member.

(4.) Where a person has been appointed under sub-section (2.) or (3.) of this section, the Governor-General may, by reason of pending proceedings or other special circumstances, direct, before the absent member resumes duty, that the person so appointed shall continue to act under the appointment after the resumption of duty by the absent member until the Governor-General terminates the appointment, but a person shall not continue to act as a member by virtue of this sub-section for more than one year after the resumption of duty by the absent member.

(5.) Where a person has been appointed under this section to act as a member during the absence from duty of a member, and that member ceases to hold office without having resumed duty, the period of appointment of the person so appointed shall be deemed to continue until it is terminated by the Governor-General, or until the expiration of twelve months from the date on which the absent member ceases to hold office, whichever first happens.

14.—(1.) The Governor-General may suspend a member from office on the ground of misbehaviour or physical or mental incapacity.

Suspension and removal of members.

(2.) The Attorney-General shall cause a statement of the ground of the suspension to be laid before each House of the Parliament within seven sitting days of the House after the suspension.

(3.) Where such a statement has been laid before a House of the Parliament, that House may, within fifteen sitting days of that House after the day on which the statement has been laid before it, by resolution, declare that the member should be restored to office and, if each House so passes such a resolution, the Governor-General shall terminate the suspension.

(4.) If, at the expiration of fifteen sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General may remove the member from office.

(5.) If a member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit, the Governor-General shall remove him from office.

(6.) A member shall not be removed from office except as provided by this section.

15. A member may resign his office by writing signed by him and delivered to the Governor-General.

Resignation.

16.—(1.) A member shall, before proceeding to discharge the duties of his office, take an oath or make an affirmation in accordance with the form of oath or affirmation in the Schedule to this Act.

Oath or affirmation of office.

(2.) The oath or affirmation shall be taken or made before a Judge of a Federal Court or of the Supreme Court of a State.

17.—(1.) Except as otherwise provided by this Act, the Tribunal shall, for the purpose of hearing and determining proceedings, be constituted by a Division of the Tribunal consisting of a presidential member and two members who are not presidential members.

Constitution of Tribunal for particular matters.

(2.) Where, before the commencement of the hearing of proceedings to which the last preceding sub-section would be applicable, there is filed with the Registrar, in accordance with such requirements as to time or otherwise as are prescribed, a

notice signed by or on behalf of all the parties, other than the Commissioner, that they have agreed that the proceedings shall be dealt with by the Tribunal constituted by a single presidential member, the Tribunal shall be constituted for the purpose of those proceedings by a single presidential member.

(3.) The Tribunal as constituted in accordance with the last preceding sub-section may continue to deal with proceedings notwithstanding that a further party is added to the proceedings after the commencement of the hearing.

(4.) The validity of a determination or order of the Tribunal purporting to be constituted by one or more members in accordance with this Act shall not be affected or called in question by reason of any defect or irregularity in the constitution of the Tribunal by that member or those members.

Arrangement
of business.

18. The President may give directions as to the arrangement of the business of the Tribunal and the constitution of Divisions of the Tribunal.

Disclosure
of financial
interests of
members.

19. When a member, other than a presidential member, is informed by the President that the President proposes that the member shall be a member of a Division of the Tribunal in any proceedings, the member shall, to the best of his knowledge, disclose to the President any direct or indirect pecuniary interest that the member has in any business carried on in Australia, or in any corporation carrying on any such business, being an interest that could be in conflict with his duties as a member of the Tribunal in those proceedings.

Presidential
member to
preside.

20.—(1.) The President shall preside at proceedings of a Division of the Tribunal at which he is present.

(2.) At proceedings before a Division of the Tribunal at which the President is not present, the Deputy President present or, in the case of a Review Division, a Deputy President nominated by the President, shall preside.

Decision of
questions.

21.—(1.) Subject to Division 3 of Part VI., a question of law arising in a matter before a Division of the Tribunal other than a Review Division (including the question whether a particular question is one of law) shall be determined in accordance with the opinion of the presidential member presiding.

(2.) Subject to the last preceding sub-section, a question arising in proceedings before a Division of the Tribunal shall be determined in accordance with the opinion of a majority of the members constituting the Division.

Member
ceasing to be
available.

22.—(1.) This section applies where the hearing of any proceedings has been commenced or completed by the Tribunal but, before the matter to which the proceedings relate has been

determined, the member, or one of the members, constituting the Tribunal for the purposes of the proceedings has ceased to be a member of the Tribunal or has ceased to be available for the purposes of the proceedings.

(2.) Where the President is satisfied that this section applies in relation to proceedings, the President may direct that a specified member of the Tribunal shall take the place of the member referred to in the last preceding sub-section for the purposes of the proceedings.

(3.) Where this section applies in relation to proceedings that were being dealt with before the Tribunal constituted by three members, the President may, instead of giving a direction under the last preceding sub-section, direct that the hearing and determination, or the determination, of the proceedings be completed by the Tribunal constituted by the members other than the member referred to in sub-section (1.) of this section.

(4.) Where the President has given a direction under the last preceding sub-section, he may, at any time before the determination of the proceedings, direct that a third member be added to the Tribunal as constituted in accordance with the last preceding sub-section.

(5.) The Tribunal as constituted in accordance with any of the provisions of this section for the purposes of any proceedings may have regard to any record of the proceedings before the Tribunal as previously constituted.

PART III.—THE COMMISSIONER, THE REGISTRAR OF THE TRIBUNAL AND OTHER OFFICERS.

23. There shall be a Commissioner of Trade Practices, who shall be appointed by the Governor-General. Office of Commissioner.

24.—(1.) Subject to this Part, the Commissioner holds office for such period, not exceeding seven years, as is specified in the instrument of his appointment, but is eligible for re-appointment. Terms and conditions of appointment.

(2.) The Commissioner shall be paid salary at such rate as the Governor-General determines, but his salary shall not be diminished during a term of office.

(3.) The Commissioner shall be paid such allowances in respect of travelling expenses as the Attorney-General determines.

(4.) Subject to this Part, the Governor-General may, in the instrument of appointment of a person as the Commissioner, specify terms and conditions of appointment, which may include

terms and conditions making provision, to the exclusion of any other provision that would be applicable, with respect to leave of absence and pensions or retiring allowances.

Outside
employment
and interests.

25.—(1.) The Commissioner shall not engage in paid employment outside the duties of his office.

(2.) A person who is a director of a company shall not be appointed as the Commissioner, and the Commissioner shall not act as director of a company.

(3.) The Commissioner shall give written notice to the Attorney-General of all direct and indirect pecuniary interests that he has or acquires in any business carried on in Australia, or in any corporation carrying on any such business.

Rights of
public servant
appointed as
Commissioner.

26. If a person appointed to the office of Commissioner was, immediately before his appointment, an officer of the Public Service of the Commonwealth—

(a) he retains his existing and accruing rights;

(b) for the purpose of determining those rights, his service as the Commissioner shall be taken into account as if it were service in the Public Service of the Commonwealth; and

(c) the *Officers' Rights Declaration Act* 1928–1959 applies as if this Act and this section had been specified in the Schedule to that Act.

Acting
Commissioner.

27.—(1.) Where the Commissioner is, or is expected to be, absent from duty, or there is a vacancy in the office of Commissioner, the Governor-General may appoint a person to act as the Commissioner during the absence or until the filling of the vacancy, but a person so appointed by reason of a vacancy in the office of Commissioner shall not act as the Commissioner for more than twelve months.

(2.) Where a person has been appointed to act as the Commissioner during the absence from duty of the Commissioner and the Commissioner ceases to hold office without having resumed duty, the period of appointment of the person so appointed shall be deemed to continue until it is terminated by the Governor-General, or until the expiration of twelve months from the date on which the Commissioner ceases to hold office, whichever first happens.

Suspension
and removal of
Commissioner.

28.—(1.) The Governor-General may suspend the Commissioner from office for misbehaviour or physical or mental incapacity.

(2.) The Attorney-General shall cause a statement of the ground of the suspension to be laid before each House of the Parliament within seven sitting days of the House after the suspension.

(3.) Where such a statement has been laid before a House of the Parliament, that House may, within fifteen sitting days of that House after the day on which the statement has been laid before it, by resolution, declare that the Commissioner ought to be restored to office and, if each House so passes such a resolution, the Governor-General shall terminate the suspension.

(4.) If, at the expiration of fifteen sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General may remove the Commissioner from office.

(5.) If the Commissioner becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit, the Governor-General shall remove him from office.

(6.) The Commissioner shall not be removed from office except as provided by this section.

29. The Commissioner may resign his office by writing signed by him and delivered to the Governor-General. Resignation.

30.—(1.) The Commissioner shall, before proceeding to discharge the duties of his office, take an oath or make an affirmation in accordance with the form of oath or affirmation in the Schedule to this Act. Oath or affirmation of allegiance and office.

(2.) The oath or affirmation shall be taken or made before a justice of the peace or a commissioner for taking affidavits.

31. The staff necessary to assist the Commissioner shall be persons employed under, or whose services are made available in accordance with arrangements made under, the *Public Service Act* 1922–1964. Staff.

32.—(1.) The Commissioner may, by writing under his hand, delegate to a person doing duty under the last preceding section, either generally or as provided by the instrument of delegation, any of his powers and functions under this Act, except— Delegation by Commissioner.

(a) this power of delegation; or

(b) his powers and functions under sub-sections (1.) and (2.) of section 47 of this Act.

(2.) A power or function so delegated may be exercised or performed by the delegate in accordance with the instrument of delegation.

(3.) A delegation under this section is revocable at will and does not prevent the exercise of a power or the performance of a function by the Commissioner.

Staff of
Tribunal.

33.—(1.) There shall be a Registrar of the Tribunal and such Deputy Registrars of the Tribunal as are appointed in accordance with this section.

(2.) The Registrar and the Deputy Registrars shall be appointed by the Attorney-General and shall have such duties and functions as are provided by this Act and the regulations and such other duties and functions as the President directs.

(3.) The Registrar and the Deputy Registrars, and the staff necessary to assist them, shall be persons employed under, or whose services are made available in accordance with arrangements made under, the *Public Service Act 1922-1964*.

Secrecy.

34.—(1.) This section applies to every person who is or has been the Commissioner or a member of the staff assisting the Commissioner.

(2.) Subject to this section, a person to whom this section applies shall not, either directly or indirectly, except in the performance of a duty under or in connexion with this Act or a complementary State law—

(a) make a record of, or divulge or communicate to any person, any information concerning the affairs of any other person acquired by him by reason of his office or employment under or for the purposes of this Act; or

(b) produce to any person the Register or a document furnished for the purposes of this Act or of a complementary State law.

Penalty: One thousand dollars or imprisonment for three months.

(3.) A person to whom this section applies shall not be required to produce in a court the Register or any document relating to the affairs of any other person of which he has the custody, or to which

he has access, by virtue of his office or employment under or for the purposes of this Act, or to divulge or communicate to any court any information concerning the affairs of any other person obtained by him by reason of any such office or employment, except when it is necessary to do so for the purposes of, or of a prosecution under or arising out of, this Act or a complementary State law.

(4.) Nothing in this section applies in relation to—

- (a) the communication of information to, or the production of the Register or a document to, the Attorney-General, a Minister of State of a participating State having functions under a complementary State law or an officer acting on behalf of, and with the authority of, the Attorney-General or such a Minister; or
- (b) the communication or production to a person of, or of information or documents concerning, particulars furnished to the Commissioner of an agreement to which, according to those particulars, that person is or has been a party.

(5.) In this section—

- “court” includes any tribunal, authority or person having power to require the production of documents or the answering of questions; and
- “produce” includes permit access to, and “production” has a corresponding meaning.

PART IV.—EXAMINABLE AGREEMENTS AND PRACTICES.

35.—(1.) Subject to this Part, an agreement is an examinable agreement for the purposes of this Act if (either as originally made or by reason of a subsequent variation) it is an agreement the parties to which are or include two or more persons carrying on businesses that are competitive with each other and each of which is a business of the supply of goods or services, and is an agreement under which restrictions of any of the following kinds are accepted by one or more of those persons in relation to any such business, namely restrictions in respect of—

Agreements
between
competitors
containing
certain
restrictions.

- (a) the terms or conditions, whether as to prices or as to any other matter, upon or subject to which dealings may be engaged in;
- (b) the concessions or benefits, including allowances, discounts, rebates or credit, that may be given or allowed in connexion with, or by reason of, dealings;

- (c) the quantities, qualities, kinds or extent of goods or services that may be produced, acquired, held in stock or supplied, or the resources or methods that may be used, or the resources that may be acquired or maintained for use;
- (d) the places in, to or from which goods or services may be supplied; or
- (e) the persons or classes of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons may be dealt with.

(2.) For the purposes of this section, two or more businesses shall be deemed to be competitive with each other where the businesses are, in whole or in part, competitive with each other in relation to the supply or acquisition of goods or services (including acquisition of materials) or, but for any agreement of a kind referred to in the last preceding sub-section, would be, or would be likely to become, so competitive, whether or not the businesses relate to the same kind of goods or services.

(3.) The agreements referred to in sub-section (1.) of this section do not include an agreement the only parties to which are two or more corporations that are related to each other.

(4.) An agreement made before the date of commencement of this Act does not become an examinable agreement before the expiration of a period of thirty days from that date, and—

- (a) if such an agreement is determined, by effluxion of time or otherwise, within that period, it does not become an examinable agreement; and
- (b) if such an agreement is varied within that period, the variations shall be taken into account in determining whether the agreement becomes an examinable agreement at the expiration of that period.

Examinable
practices.

36.—(1.) Subject to this Part, practices of the following kinds are in this Act referred to as examinable practices:—

Obtaining
discrimination
in prices or
terms of
dealing.

- (a) in or in connexion with the acquisition, or possible acquisition, of goods by the person engaging in the practice from another person, inducing or attempting to induce that other person, by any express or implied threat or promise, to accept terms as to price or any other matter or conditions (including collateral conditions) that are more favourable to the person engaging in the practice than those upon or subject to which that other person is willing to supply goods

of the same kind and quantity to business competitors generally of the person engaging in the practice, where the more favourable terms or conditions are, or would be, likely substantially to lessen the ability of any person or persons to compete with the person engaging in the practice;

- (b) requiring, as a condition of the supply of goods or services to another person carrying on a business, that that person acquire all or a part of his requirements of goods or services of another class directly or indirectly from a particular third person; or
- (c) inducing or attempting to induce a person carrying on a business to refuse to deal with a third person, or to refuse to deal with a third person except on terms disadvantageous to the third person, where the person inducing or attempting to induce—
 - (i) is a trade association or is acting as a member of, or on behalf of, a trade association; or
 - (ii) is acting, in connexion with the carrying on of a business by him, in pursuance of an agreement with, or in concert with, another person carrying on a business.

Forcing
another
person's
product.

Inducing
refusal to deal.

(2.) Engaging in monopolization, within the meaning of the next succeeding section, is an examinable practice, for the purposes of this Act, on the part of the person or combination concerned.

Monopoliza-
tion.

(3.) For the purposes of paragraphs (a), (b) and (c) of subsection (1.) of this section, two or more persons being corporations that are related to each other shall be deemed to be one person.

37.—(1.) For the purposes of this Act, a person engages in monopolization if, being in a dominant position in the trade in goods of a particular description, or in the supply of services of a particular description, in Australia or in a part of Australia, he takes advantage of that position so as to—

Definition of
monopolization.

- (a) induce or attempt to induce a person carrying on a business to refuse to deal with a third person, or to refuse to deal with a third person except on terms disadvantageous to the third person;
- (b) engage in price-cutting with the object of substantially damaging the business of a competitor or preventing a possible competitor from entering into competition with him; or
- (c) impose prices or other terms or conditions of dealing that he would be unable to impose but for his dominant position.

(2.) The Tribunal shall not regard as a part of Australia for the purposes of this section an area that does not include the whole of a State or Territory unless it is satisfied that it is appropriate to do so having regard to the substantial size of the area and its significance as a market area.

(3.) The Tribunal shall not regard a description of goods or services as being a particular description of goods or services for the purposes of this section if the Tribunal considers that it would be unreasonable to do so having regard to the fact that other goods or services are competitive with goods or services that are included in the description, and to the extent to which those other goods or services are so competitive.

(4.) For the purposes of this section—

(a) a reference in this section to a person includes a reference to a combination, and, in the application of this section in relation to a combination, an act or thing done by a member of the combination as such a member shall be deemed to be done by the combination;

(b) the Tribunal shall regard a person as being in a dominant position in the trade in goods of a particular description, or in the supply of services of a particular description, in Australia or in a part of Australia if, and only if, the Tribunal is satisfied that that person is the supplier of not less than one-third, by quantity or value, of the goods (including imported goods) or services of that description that are supplied in Australia or in that part of Australia (whether, in the case of goods, the person supplies the goods by wholesale, by retail or otherwise);

(c) without limiting the meaning of the expression “combination”, two or more persons constitute a combination in relation to goods or services of any description if they so conduct their affairs as in any way to restrict or prevent competition between them in connexion with the supply of goods or services of that description; and

(d) two or more corporations that are related to each other are a combination, and each is included in any other combination in which any of them is included.

Exemptions
in respect of
agreements.

38. In determining whether an agreement is an examinable agreement, regard shall not be had—

(a) to any provision of the agreement that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act;

- (b) to any provision of the agreement that is, or is of a kind, specifically authorized or approved by, or by regulations under, a State Act or an Ordinance of a Territory, except to the extent that the provision gives rise to a restriction to be observed in another State or Territory;
- (c) to any provision of the agreement relating to the remuneration, conditions of employment, hours of work or working conditions of employees;
- (d) to any provision of the agreement obliging a person to comply with or apply standards prepared or approved by the Standards Association of Australia, or by any prescribed association or body;
- (e) in the case of an agreement for the sale of a business—to any provision of the agreement that is solely for the protection of the purchaser in respect of the goodwill of the business;
- (f) in the case of an agreement for or in respect of—
 - (i) a licence granted or to be granted by the proprietor, licensee or owner of a patent, registered design or copyright or by a person who has applied for a patent or for the registration of a design; or
 - (ii) an assignment of a patent, registered design or copyright or of the right to apply for a patent or for the registration of a design,to any condition of the licence or assignment relating exclusively to—
 - (iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;
 - (iv) goods in respect of which the design is or is proposed to be registered and to which it is applied; or
 - (v) the work to which the copyright relates;
- (g) in the case of an agreement authorizing the use of a certification trade mark—to any provision included in the agreement in accordance with rules applicable under Part XI. of the *Trade Marks Act 1955–1958*;

- (h) in the case of an agreement between the registered proprietor of a trade mark other than a certification trade mark and a person authorized by the agreement to use the trade mark subject to registration as a registered user under Part IX. of the *Trade Marks Act* 1955–1958—to any provision of the agreement with respect to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied; or
- (i) to any provision of an agreement to the extent that it gives rise to a restriction in relation to the carriage of goods by sea between Australia and places outside Australia.

Exemptions
in respect of
practices.

39.—(1.) In determining whether a person or combination has engaged, is engaging or proposes to engage in an examinable practice, regard shall not be had to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act.

(2.) In determining whether a person or combination has engaged, is engaging or proposes to engage in an examinable practice by reason of acts or things done or proposed to be done in a particular State or Territory, regard shall not be had to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act of that State or an Ordinance of that Territory.

(3.) In determining whether a person or combination has engaged, is engaging or proposes to engage in an examinable practice, regard shall not be had to any act or thing done or proposed to be done in relation to the carriage of goods by sea between Australia and places outside Australia.

(4.) In determining whether a person has engaged, is engaging or proposes to engage in an examinable practice other than a practice of monopolization, regard shall not be had to a provision or condition referred to in any of paragraphs (c) to (h) (inclusive) of the last preceding section or to any act or thing done in pursuance of such a provision or condition.

(5.) In determining whether a person or combination has engaged, is engaging or proposes to engage in an examinable practice of monopolization, regard shall not be had to a provision referred to in paragraph (c), (d) or (e) of the last preceding section or to any act or thing done in pursuance of such a provision.

(6.) In relation to monopolization, the reference in sub-section (1.) of this section to an Act does not include a reference to an Act relating to patents, trade marks, designs or copyrights.

PART V.—REGISTRATION OF CERTAIN AGREEMENTS.

40.—(1.) For the purposes of this Act, the Commissioner shall cause to be kept a register to be known as the Register of Trade Agreements. Register to be kept.

(2.) Subject to this Act and the regulations, the Register shall be kept in such form and manner as the Commissioner directs.

41.—(1.) Subject to this section, an agreement that is, when made, an examinable agreement becomes subject to registration under this Part upon the making of the agreement, and an agreement that becomes an examinable agreement at any time after the making of the agreement becomes at that time subject to registration under this Part. Agreements subject to registration.

(2.) If the only relevant restrictions under an examinable agreement relate exclusively to the supply or acquisition of services, the agreement is exempt from registration under this Part unless those services are or include services by way of—

- (a) the production, construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or of fixtures on land;
- (b) the alteration of the physical state of land;
- (c) the distribution of goods; or
- (d) the transportation of goods.

(3.) Where an agreement that is, by virtue of the last preceding sub-section, exempt from registration under this Part is so varied that, whilst remaining an examinable agreement, it ceases to be so exempt, the agreement becomes subject to registration under this Part on the day on which it is so varied.

42.—(1.) Where an agreement has become subject to registration under this Part, particulars of the agreement, in accordance with this section and verified as required by this section, shall be furnished to the Commissioner within the period of thirty days after the date on which the agreement became subject to registration. Particulars to be furnished of certain agreements, variations and determinations.

(2.) In the case of an agreement that becomes subject to registration on a date subsequent to the date of making of the agreement, the particulars required to be furnished are particulars of the agreement as varied (whether in respect of the parties or in respect of the terms) by any variations made up to and including the date on which the agreement becomes subject to registration.

(3.) The duty to furnish particulars under this section in respect of an agreement that has become subject to registration is not affected by any subsequent variation or determination of the agreement, and if, at any time after an agreement becomes subject to registration, the agreement is varied (whether in respect of the parties or in respect of the terms) or is determined otherwise than by effluxion of time, then, except as otherwise prescribed, particulars of the variation or determination, verified as required by this section, shall be furnished to the Commissioner within the period of thirty days from the day on which the variation or determination occurs.

(4.) The requirements of this section may be complied with—

- (a) in respect of an agreement—by any party to the agreement; or
- (b) in respect of a variation or determination of an agreement—by any person who was or is a party to the agreement immediately before, or immediately after, the variation or determination.

(5.) Subject to the regulations, the particulars to be furnished of an agreement are—

- (a) the names of the parties to the agreement and the date of the agreement; and
- (b) the whole of the terms of the agreement, whether or not relating to relevant restrictions.

(6.) The particulars to be furnished of an agreement, or of a variation or determination of an agreement, shall be furnished—

- (a) in so far as the particulars are contained in an instrument in writing by which the agreement, variation or determination was, in whole or in part, made or effected—by lodging a true copy of that instrument; and

- (b) in so far as the particulars are not contained in such an instrument (whether or not there is such an instrument)—by lodging a memorandum of those particulars,

verified as a true copy or a full and correct memorandum, as the case may require, by statutory declaration of the person by whom the particulars are furnished or of a competent person authorized by that person.

(7.) The regulations may provide for excluding any particulars from the particulars required to be furnished under this Part and, in particular, for excluding all or any of such details as to persons, prices, terms or other matters as are material for the purpose only of defining the particular application from time to time of continuing restrictions.

(8.) A person referred to in sub-section (4.) of this section may, before the expiration of the time within which, apart from this sub-section, the particulars are required to be furnished, apply in writing to the Commissioner for an extension of that time and, where such an application is made, the time within which the particulars are required to be furnished shall not be taken to expire—

- (a) whether or not the application is granted—before the expiration of fourteen days after the date on which the Commissioner informs the applicant in writing of his decision on the application; or
- (b) if the application is granted—before the expiration of the period of the extension granted by the Commissioner.

43.—(1.) If the requirements of the last preceding section are not complied with in respect of an agreement, every person who was a party to the agreement when it became subject to registration is guilty of an offence.

Failure to
furnish
particulars
an offence.

(2.) If the requirements of the last preceding section are not complied with in respect of a variation or determination of an agreement, every person who was a party to the agreement immediately before, or immediately after, the variation or determination is guilty of an offence.

(3.) The penalty for an offence against this section is a fine not exceeding Two thousand dollars.

(4.) It is a defence to a prosecution for an offence against this section if the person charged satisfies the Court that—

- (a) he did not, within the time allowed for the furnishing of the particulars, advert to the question whether particulars of the agreement, variation or determination were required by any law to be furnished to the Commissioner, and that his failure to advert to that question was not attributable to a desire to avoid, or to indifference to, his obligations;
- (b) he reasonably relied on another party, or on a trade association of which he was a member, to ensure that the required particulars were duly furnished; or
- (c) he believed in good faith that particulars of the agreement, variation or determination furnished to the Commissioner by him within the time allowed complied with the requirements of the law,

and that either the particulars, or the necessary further or amended particulars, were duly furnished (except as regards time) by himself or another party before the institution of the prosecution or he did not know or suspect, before the institution of the prosecution, that there had been default in compliance with the requirements of any law with respect to the furnishing to the Commissioner of particulars of the agreement, variation or determination.

(5.) In this section, “ law ” includes the law of a State.

Registration by
Commissioner.

44. Where particulars of an agreement, or of a variation or determination of an agreement, are duly furnished to the Commissioner in accordance with this Part, or where those particulars are duly furnished except that the time allowed for furnishing the particulars has expired, the Commissioner shall register the agreement, variation or determination by filing in the Register the document containing the particulars.

Register to
be evidence.

45. In proceedings under this Act before the Tribunal or the Court other than proceedings for an offence against section 43 of this Act, particulars of an agreement, or of a variation or

determination of an agreement, as appearing from the Register, are evidence of the agreement, variation or determination.

PART VI.—EXAMINATION OF AGREEMENTS AND PRACTICES BY
THE TRIBUNAL.

Division 1.—General.

46. In this Part, the expression “is contrary to the public interest” shall, so far as necessary, be read as including the expressions “was contrary to the public interest” and “would be contrary to the public interest”, and other expressions relating to the public interest shall be similarly construed. Interpretation.

47.—(1.) Subject to the next succeeding section, where—

*Institution of
proceedings.*

- (a) the Commissioner has reason to believe, on the basis of information available to him from the Register or from any other source, that an examinable agreement exists or has existed; and
- (b) the Commissioner is of opinion that any relevant restriction accepted under the agreement is contrary to the public interest,

he may institute proceedings in the Tribunal under this section in respect of that restriction.

(2.) Subject to the next succeeding section, where the Commissioner has reason to believe that a person or combination has, on or after the date of commencement of this Act, engaged, is engaging or proposes to engage in an examinable practice, and the Commissioner is of opinion that the practice is contrary to the public interest, he may institute proceedings in the Tribunal under this section in respect of the practice.

(3.) Proceedings under this section shall be instituted in the prescribed manner, and the Tribunal may, at any time, grant leave to the Commissioner to discontinue the proceedings.

(4.) The Attorney-General may, by writing under his hand, direct the Commissioner to investigate the facts and circumstances with respect to an examinable agreement or examinable

practice or an alleged examinable agreement or examinable practice with a view to deciding whether proceedings under this section should be instituted, and to report to the Attorney-General the results of the investigation.

(5.) In instituting proceedings under this section, the Commissioner shall file a document giving, as fully as he is able, particulars of the relevant agreement (if any) and of the restriction or practice to which the proceedings relate, but so that any particulars that are set out in a registered document may be given by appropriate reference to the Register.

(6.) Where proceedings have been instituted under this section, the Commissioner shall cause notice of the proceedings, together with a copy of the document referred to in the last preceding sub-section, to be served, as prescribed, on every other party to the proceedings.

(7.) The Commissioner may, at any stage of the proceedings, by leave of the Tribunal, amend the particulars referred to in sub-section (5.) of this section, whether by reason of a variation of the relevant agreement or practice, or otherwise.

Commissioner
to consult
parties with
a view to
avoiding
proceedings.

48.—(1.) The Commissioner shall not institute proceedings under the last preceding section unless he has first carried on, or endeavoured to carry on, either personally or through members of his staff with adequate knowledge of, or experience in, industry or commerce, consultations with the persons who would be the other parties to the proceedings, or with representatives of those persons, with a view to securing such undertaking or action by those persons, for or by way of determination, cessation or variation of the agreement or practice concerned or otherwise, as will render the proposed proceedings unnecessary.

(2.) In connexion with consultations under the last preceding sub-section, the Commissioner may agree to apply to the Tribunal for leave to file a certificate under section 59 of this Act in respect of any restriction or practice or proposed restriction or practice.

(3.) Where a person (other than the Commissioner) taking part in consultations under this section indicates his wish that the consultations, or any part of the consultations, be on a “without prejudice” basis, evidence of any statement, admission or offer made by any person (including the Commissioner) in the consultations, or in that part of the consultations, as the case may be, shall not be admitted in proceedings before the Tribunal under this Act or under a complementary State law except with the consent of all parties to the proceedings.

49.—(1.) In proceedings under section 47 of this Act, the Tribunal, after such inquiry as it considers appropriate having regard to the matters alleged by the Commissioner, if it is satisfied that an examinable agreement exists or has existed, or an examinable practice has been, is being or is proposed to be, engaged in, shall make a determination by which it—

*Inquiry and
determination
by Tribunal.*

- (a) records its findings as to those matters, including its findings as to the parties to, and terms of, the agreement, or the particulars of the examinable practice; and
- (b) determines, in accordance with its opinion, whether the relevant restrictions to which the proceedings relate are contrary to the public interest or, as the case may require, whether the examinable practice is contrary to the public interest.

(2.) Where the Tribunal makes a determination under this section, it shall state, and record in the records of the Tribunal, the reasons for its opinion that the restriction or practice is, or is not, contrary to the public interest.

(3.) The Tribunal shall not find that a practice of monopolization is proposed to be engaged in unless the Tribunal is satisfied that the person or combination concerned is already, within the meaning of section 37 of this Act, in a dominant position in the trade in goods of the particular description concerned, or in the supply of services of the particular description concerned, in Australia or in a part of Australia.

50.—(1.) In considering whether any restriction, or any practice other than a practice of monopolization, is contrary to the public interest, the Tribunal shall take as the basis of its consideration the principle that the preservation and encouragement of competition are desirable in the public interest, but shall weigh against the detriment constituted by any proved restriction of, or tendency to restrict, competition any effect of the restriction or practice as regards any of the matters referred to in the next succeeding sub-section if that effect tends to establish that, on balance, the restriction or the practice is not contrary to the public interest.

*The public
interest.*

(2.) The matters that are to be taken into account in accordance with the last preceding sub-section are—

- (a) the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors and investors;

- (b) the needs and interests of small businesses;
- (c) the promotion of new enterprises;
- (d) the need to achieve the full and efficient use and distribution of labour, capital, materials, industrial capacity, industrial know-how and other resources;
- (e) the need to achieve the production, provision, treatment and distribution, by efficient and economical means, of goods and services of such quality, quantity and price as will best meet the requirements of domestic and overseas markets; and
- (f) the ability of Australian producers and exporters to compete in overseas markets.

(3.) In considering the public interest in relation to a practice of monopolization, the Tribunal shall weigh against any detriment (including detriment constituted by any proved restriction of, or tendency to restrict, competition) that has resulted, or can be expected to result, from the practice any effect of the practice as regards any of the matters referred to in paragraphs (a) to (f) of the last preceding sub-section if that effect tends to establish that, on balance, the practice is not contrary to the public interest.

**Effect of
determinations.**

51.—(1.) Where the Tribunal determines that a restriction accepted under an examinable agreement is contrary to the public interest, the agreement (if in force) becomes, upon the date of the determination, unenforceable as regards observance of the restriction on and after that date.

(2.) Where the Tribunal determines that a practice is contrary to the public interest and finds that the practice is provided for by an agreement, the agreement (if in force) becomes, upon the date of the determination, unenforceable as regards engaging in the practice on and after that date.

(3.) Where the Tribunal determines that a restriction or practice is contrary to the public interest, a transaction entered into, whether before or after the making of the determination, in pursuance of the restriction or in accordance with the practice is not illegal or unenforceable by reason only of the making of that determination.

**Orders in
consequence of
determinations.**

52.—(1.) Where the Tribunal determines that a restriction accepted under an examinable agreement is contrary to the public interest, the Tribunal may make such orders as it thinks proper for restraining all or any of the parties to the agreement from—

- (a) giving effect to, or enforcing or purporting to enforce, the agreement in respect of that restriction or any restriction to the like effect; or

- (b) entering into any other agreement (whether with the same parties or with other parties) under which any restriction to the like effect is accepted.

(2.) Where the Tribunal determines that a practice is contrary to the public interest, it may make such orders as it thinks proper for restraining the person concerned, or the combination concerned or any of its members—

- (a) from engaging or further engaging in the practice;
- (b) from engaging in practices of a like kind; or
- (c) from doing acts or things that, in the opinion of the Tribunal, would, unless there were a change in circumstances, amount to, or contribute to, a continuance or repetition of the practice or engagement in a practice of a like kind.

(3.) Where the Tribunal determines that a restriction accepted under an agreement to which any member or members of a trade association are parties, or a practice on the part of any member or members of a trade association, is contrary to the public interest, the Tribunal may, in addition to making any other order, make such orders restraining the association or any person acting on its behalf from making or purporting to make any recommendation or doing or purporting to do any other act or thing as the Tribunal thinks necessary—

- (a) for ensuring the effective operation of any order arising out of the determination; or
- (b) for ensuring that further restrictions to the like effect do not become applicable under the agreement.

(4.) Where the Tribunal finds that a practice that it has determined to be contrary to the public interest is provided for by an agreement, the Tribunal may make such orders as it thinks proper for restraining all or any of the parties to the agreement from—

- (a) giving effect to, or enforcing or purporting to enforce, the agreement in respect of that practice; or
- (b) entering into any other agreement (whether with the same parties or with other parties) by which that practice, or any practice of a like kind, is provided for.

(5.) Where an order of the Tribunal under this section restrains a person from entering into an agreement of a specified description, the order shall, unless the contrary intention appears in the

order, be deemed to be expressed, and to operate, also to restrain that person from giving effect to, enforcing or purporting to enforce—

- (a) an agreement entered into by that person in contravention of the order; or
- (b) an agreement entered into by that person after the commencement of the proceedings and before the making of the order, being an agreement of the specified description,

in respect of any matter by reason of which the agreement is of the specified description.

(6.) In relation to an order or proposed order of the Tribunal, a reference in this section to any restriction to the like effect or to any practice of a like kind shall be read as including a reference to every restriction or practice (as the case may be) that is included in a class or description of restrictions or practices that is declared by the order to be, in the opinion of the Tribunal, a class or description of restrictions to the like effect or of practices of a like kind, as the case may be, but this sub-section shall not be construed as preventing the Tribunal from referring in an order in general terms to restrictions to the like effect or practices of a like kind.

(7.) Subject to section 57 of this Act, orders of the Tribunal have the force of law.

Date of
effect of
orders.

53. An order under the last preceding section, or an order varying such an order, takes effect on such date as is fixed by the Tribunal and, in fixing the date, the Tribunal shall, where it can do so without serious detriment to the public interest, allow reasonable time for the persons affected by the order to make orderly arrangements for the conduct of their businesses consistently with the order.

Interim
restraining
orders.

54.—(1.) Where proceedings instituted by the Commissioner under section 47 of this Act are pending and the Tribunal is satisfied that—

- (a) unless action is taken under this section, there is likely to be grave hardship to any person or irremediable injury to the public interest; and
- (b) it is reasonable to do so, having regard to decisions previously given by the Tribunal in relation to agreements or practices similar to the agreement or practice to which the proceedings relate,

the Tribunal may make such interim orders as it thinks fit, being orders of a kind that can be made under this Division where a restriction or practice is determined to be contrary to the public interest.

(2.) An order under this section has effect, unless it sooner ceases to have effect by virtue of its terms or is sooner revoked by the Tribunal, until the determination of the pending proceedings, but may, upon the determination of those proceedings, be continued by the Tribunal until an order (not being an interim order) made in those proceedings takes effect.

55.—(1.) Subject to this section, proceedings under section 47 of this Act in respect of an agreement shall relate to the agreement as in force immediately before the institution of the proceedings.

Effect of
variation or
determination
of agreement.

(2.) Where an agreement that was an examinable agreement has been determined, by effluxion of time or otherwise, or has been so varied that a restriction under the agreement has ceased to be in force, the Commissioner may, with the leave of the Tribunal constituted by a presidential member, institute proceedings under section 47 of this Act in respect of a restriction that was accepted under the determined agreement, or in respect of the restriction that has ceased to be in force, as the case may be.

(3.) Leave shall not be granted under the last preceding subsection for the institution of proceedings in respect of a restriction unless the Tribunal is satisfied that there are reasonable grounds for believing that the parties, or former parties, to the agreement or any of them have entered into, or are likely to enter into, another examinable agreement, or a further variation of the agreement, under which a restriction to the like effect is or may be accepted.

(4.) If, while proceedings under section 47 of this Act in respect of an agreement are pending, it is shown to the Tribunal that the agreement has been determined, by effluxion of time or otherwise, since the institution of the proceedings, the Tribunal may, if the Commissioner requests it to do so, continue the proceedings in respect of the determined agreement, but otherwise shall dismiss the proceedings.

(5.) If, while proceedings under section 47 of this Act in respect of an agreement are pending, it is shown to the Tribunal that the agreement has been varied since the institution of the proceedings, the Tribunal may, if the Commissioner requests it to do so, continue the proceedings—

(a) in respect of the agreement as it existed before the variation; or

(b) in respect of the agreement as varied,

or both, but otherwise shall dismiss the proceedings.

56.—(1.) The Commissioner shall not institute proceedings under section 47 of this Act in respect of a practice unless—

Effect of
variation or
abandonment
of practice.

(a) the proceedings relate to a practice that the Commissioner alleges is being, or is proposed to be, engaged in; or

(b) the Tribunal constituted by a presidential member has granted leave to institute the proceedings.

(2.) Leave shall not be granted under the last preceding sub-section for the institution of proceedings in respect of a practice unless the Tribunal is satisfied that there are reasonable grounds for believing that the person or combination concerned is likely to engage again in the practice or to engage in a practice of a like kind, or that a combination in which that person, or a member of that first-mentioned combination, is or will be included is likely to engage in a practice of a like kind.

(3.) If, while proceedings under section 47 of this Act in respect of a practice are pending, it is shown to the Tribunal that the practice has ceased to be engaged in since the institution of the proceedings, the Tribunal may, if the Commissioner requests it to do so, continue the proceedings in respect of the former practice, but otherwise shall dismiss the proceedings.

(4.) If, while proceedings under section 47 of this Act in respect of a practice are pending, it is shown to the Tribunal that the practice has been varied since the institution of the proceedings, the Tribunal may, if the Commissioner requests it to do so, continue the proceedings—

(a) in respect of the practice as it existed before the variation;
or

(b) in respect of the practice as varied,
or both, but otherwise shall dismiss the proceedings.

Duration and
operation of
orders.

57.—(1.) A determination or order of the Tribunal under this Division (other than an interim order) remains in force, subject to Division 3 of this Part and to any variation made in accordance with this Division, until rescinded by the Tribunal in accordance with the next succeeding section.

(2.) An order of the Tribunal under this Division is binding only on the persons on whom it is expressed to be binding.

(3.) Subject to the next succeeding sub-section, an order of the Tribunal under this Division shall not be expressed to be binding on a person unless that person, or a person appointed, in accordance with the regulations, to represent that person in the proceedings, was a party to the proceedings.

(4.) Where a trade association, an officer of a trade association or a person appointed, in accordance with the regulations, to represent all or any of the members of a trade association is a party to proceedings, an order under this Division in those proceedings may be expressed to bind all or any persons from time to time acting on behalf of the trade association.

58.—(1.) The Tribunal may, upon application made by leave granted in accordance with this section—

- (a) by order, rescind or vary an order made in consequence of a determination; or
- (b) by order, rescind a determination in respect of a restriction or practice and any order made in consequence of the determination, and substitute such other determination, and make such order in consequence of the substituted determination, as appears to the Tribunal to be proper.

Further consideration by Tribunal of determinations and orders upon change of circumstances.

(2.) Subject to the next succeeding sub-section, an application under this section may be made by the Commissioner or by any person affected by the previous determination or order.

(3.) An application under this section shall not be made except with the leave of the Tribunal constituted by a presidential member, and leave shall not be granted unless the presidential member is satisfied that there has been such a change in circumstances as to justify a re-consideration of the determination or order.

(4.) The circumstances to which regard is to be had for the purposes of the last preceding sub-section include later decisions of the Tribunal in analogous cases.

(5.) Where the Tribunal rescinds a determination by virtue of which an agreement has become, in whole or in part, unenforceable, the agreement becomes, in relation to matters arising after the rescinding order comes into operation, enforceable to the same extent as it would have been if the original determination had not been made.

(6.) This Act applies to and in relation to determinations and orders under this section in like manner as it applies to and in relation to determinations and orders under sections 49 and 52 of this Act.

Division 2.—Negative Clearances.

59.—(1.) Where the Commissioner is satisfied that a restriction under an examinable agreement, or an examinable practice, is not contrary to the public interest, he may, with the leave of the Tribunal constituted by a presidential member, file with the Registrar a certificate to that effect, giving particulars of the agreement, and of the particular restriction, to which the certificate relates, or particulars of the practice to which the certificate relates.

Certificate that agreement or practice not contrary to public interest.

(2.) While a certificate filed under this section remains unrevoked, proceedings under section 47 of this Act shall not be instituted in respect of the restriction or practice to which the certificate relates.

(3.) A certificate under this section may, with the leave of the Tribunal, be revoked by the Commissioner by notice of revocation filed with the Registrar.

(4.) Leave to revoke a certificate under this section shall not be granted unless the Tribunal is satisfied that there has been such a change in circumstances since the certificate was filed as to make it reasonable to permit a revocation of the certificate.

(5.) The circumstances to which regard is to be had for the purposes of the last preceding sub-section include decisions of the Tribunal in analogous cases since the date on which the certificate was filed.

(6.) In this section—

“examinable agreement” includes a proposed agreement that would be, or might be, an examinable agreement;

“examinable practice” includes a proposed practice that would be, or might be, an examinable practice;

“restriction” includes a proposed restriction.

Cases to be
considered by
the
Commissioner.

60. The Commissioner is not required to give consideration to the filing of a certificate under the last preceding section except where—

(a) the Tribunal gives a direction under the next succeeding section; or

(b) it is necessary to do so for the purposes of section 48 of this Act.

Proceedings
before
Tribunal.

61.—(1.) A person who is, or proposes to become, a party to an agreement that is or may be an examinable agreement, or a person who, or a member of a combination which, is engaged or proposes to engage in a practice that is or may be an examinable practice, may apply to the Tribunal constituted by a presidential member for an order under this section in respect of all or any restrictions accepted or proposed to be accepted under the agreement or in respect of the practice.

(2.) If, on an application under this section—

(a) the Tribunal is satisfied that the application arises out of a proposal for a new venture, or for a substantial extension of an existing venture, and there is furnished to the Tribunal a statutory declaration by the applicant, or by a person acting on behalf of the applicant and having, in the opinion of the Tribunal, sufficient means of knowledge, by which it is declared that—

(i) the restrictions or practice in respect of which the application is made are or is necessary to the success of the venture, or of the extension of the venture; and

- (ii) the proposal will not be, or is unlikely to be, carried out unless there is an assurance of the legality of the restrictions or practice; or
- (b) the Tribunal is satisfied that—
 - (i) the application relates to restrictions or a practice in respect of which consultations have been commenced in accordance with section 48 of this Act;
 - (ii) a reasonable period for the consultations has elapsed; and
 - (iii) the Commissioner has neither instituted proceedings under section 47 of this Act in respect of the restrictions or practice nor applied for leave to file a certificate under section 59 of this Act as a result of the consultations,

the Tribunal may, in its discretion, by order, direct the Commissioner to take action in accordance with this section in respect of the restrictions or practice.

(3.) Where a direction is given under the last preceding sub-section, the Commissioner shall, as expeditiously as practicable, make any necessary inquiries and either—

- (a) apply for leave to file a certificate under section 59 of this Act in respect of the restrictions or practice; or
- (b) institute proceedings in the Tribunal under section 47 of this Act in respect of the restrictions or practice.

(4.) Where—

- (a) the Tribunal gives a direction under sub-section (2.) of this section by reason of the provisions of paragraph (a) of that sub-section; and
- (b) as a result of the direction, the Commissioner applies for leave to file a certificate under section 59 of this Act,

the Commissioner shall state in his application for leave a proposed minimum period of operation of the certificate, not being less than five years, and, if leave to file a certificate is granted, the certificate filed shall specify that period as the minimum period of operation of the certificate, and an application for leave to revoke the certificate shall not be made before the period so specified has elapsed since the filing of the certificate.

(5.) Where—

- (a) the Tribunal gives a direction under sub-section (2.) of this section by reason of the provisions of paragraph (a) of that sub-section;
- (b) as a result of the direction, the Commissioner institutes proceedings in the Tribunal in respect of the restrictions or practice to which the direction relates; and

- (c) the Tribunal, in those proceedings, determines that a restriction or practice is not contrary to the public interest,

the determination shall specify a period, not being less than five years, as the minimum period of operation of the determination, and an application by the Commissioner under section 58 of this Act for leave to apply for rescission of the determination shall not be made before the period so specified has elapsed since the making of the determination.

(6.) In relation to proceedings instituted in pursuance of a direction under this section, the provisions of Division 1 of this Part have effect subject to such modifications as are necessary and, in particular, as if references to agreements included references to proposed agreements and to agreements as proposed to be varied.

(7.) The Tribunal may rescind a direction under this section on the application of the person on whose application the direction was given, and in that event the Commissioner is not required to take any further action in respect of the direction.

*Division 3.—Review of Determinations, and Judicial
Determination of Questions of Law.*

**Constitution
of Review
Division.**

62. A Review Division of the Tribunal shall be constituted by three presidential members, but shall not include the presidential member who heard, or presided at the hearing of, the proceedings in which the determination of which a reconsideration is sought was made.

**Application for
reconsideration
of determina-
tion.**

63.—(1.) Where the Tribunal has made a determination in any proceedings, a party to the proceedings may, within the time allowed by or under the regulations and in the prescribed manner, file with the Registrar an application for an order of a Review Division of the Tribunal directing a reconsideration of the determination on any of the following grounds:—

- (a) that the determination is based on reasons that are inconsistent with the reasons for another decision of the Tribunal;
- (b) that the determination is of such importance that, in the public interest, it should be reconsidered; or
- (c) that a material error of law was made by the Tribunal in the hearing or determining of the proceedings.

(2.) Where an application is filed under this section in relation to a determination that a restriction or practice is contrary to the public interest, the determination, and any orders made in consequence of the determination, shall be deemed not to have, or to have had, any effect at any time before the day next following—

- (a) the day on which the application is disposed of; or

- (b) if an order is made directing a reconsideration of the determination, the day on which the decision of the Tribunal on the reconsideration is made.

64.—(1.) An application under the last preceding section shall be heard and determined by a Review Division of the Tribunal. Hearing of application.

(2.) The Review Division shall not receive fresh evidence.

(3.) If the Review Division finds that the ground of the application has been established, it may, in its discretion, make an order directing a reconsideration of the determination.

(4.) Where a Review Division makes an order under this section, it shall indicate—

- (a) where the order is made on the ground referred to in paragraph (a) of sub-section (1.) of the last preceding section—the nature of the inconsistency;
- (b) where the order is made on the ground referred to in paragraph (b) of that sub-section—the matters that, in its opinion, should be considered, or further considered; or
- (c) where the order is made on the ground referred to in paragraph (c) of that sub-section—the error of law.

65.—(1.) Where the reconsideration of a determination has been directed under this Division, the Tribunal shall consider or further consider such matters as— Reconsideration by Tribunal.

- (a) appear from the order of the Review Division to require consideration or further consideration; or
- (b) in its opinion require consideration or further consideration as a consequence of the consideration or further consideration of the matters referred to in the last preceding paragraph,

and shall either confirm the determination, or make a determination having the effect of varying or reversing the previous determination.

(2.) In proceedings under this section, the Tribunal shall accept and act on all findings of fact that were made in the proceedings that resulted in the determination that is being reconsidered, except to the extent that it considers that the order of the Review Division makes it inappropriate to do so.

(3.) Where, under this section, the Tribunal confirms a determination, it may confirm, with or without variation, any order made in consequence of the determination, and where,

under this section, the Tribunal makes a determination having the effect of varying or reversing a previous determination, any orders made in consequence of the previous determination shall be deemed to be revoked.

(4.) Subject to such modifications as are necessary, the provisions of this Act apply as if proceedings under this section were proceedings under Part VI., and the Tribunal may make orders accordingly.

(5.) The Tribunal as constituted, in accordance with section 17 of this Act, for the purposes of proceedings under this section may consist of or include the member, or all or any of the members, who constituted the Tribunal in the proceedings in which the determination that is to be reconsidered was made.

Reference of
questions of
law to
Commonwealth
Industrial
Court.

66.—(1.) The Tribunal (other than the Tribunal constituted as a Review Division) may, of its own motion, or, if it thinks fit, on the application of a party, refer a question of law arising in proceedings before it for determination by the Court, but a decision so to refer a question shall not be made by a Division of the Tribunal without the concurrence of the presidential member presiding.

(2.) Jurisdiction is conferred on the Court to hear and determine a question of law referred to it under this section.

(3.) Where a question of law arising in any proceedings has been referred to the Court under this section, the Tribunal shall not, in those proceedings—

- (a) make a determination or order to which the question is relevant while the reference is pending; or
- (b) proceed in a manner, or make a determination or order, that is inconsistent with the opinion of the Court on the question.

(4.) A reference in this section to a question of law does not include a reference to a question whether there is sufficient evidence to justify a finding of fact by the Tribunal.

PART VII.—ENFORCEMENT OF ORDERS OF TRIBUNAL.

Contravention
of orders to be
contempt of
Tribunal.

67. A person who—

- (a) contravenes or fails to comply with an order of the Tribunal under section 52, 54, 58 or 65 of this Act or an undertaking given to the Tribunal;

- (b) aids, abets, counsels or procures, or is in any way directly or indirectly knowingly concerned in, or party to—
 - (i) a contravention of, or a failure to comply with, such an order of the Tribunal or an undertaking given to the Tribunal; or
 - (ii) the doing of an act outside Australia that would, if done within Australia, be such a contravention; or
- (c) does an act or thing with the intention of evading or frustrating such an order of the Tribunal or an undertaking given to the Tribunal or causing or encouraging the evasion or frustration of such an order or undertaking,

is guilty of a contempt of the Tribunal.

68.—(1.) A contempt of the Tribunal referred to in the last preceding section is punishable by the Court as if it were a contempt of the Court, and jurisdiction is conferred on the Court to hear and determine proceedings in respect of such a contempt. Punishment of contempt.

(2.) Subject to this section, a proceeding in respect of such a contempt shall be instituted, carried on, heard and determined in accordance with the laws applicable to and in relation to the punishment of contempts of the Court.

(3.) In so far as any such law is incapable of application, the Court may give a direction as to the manner of instituting, carrying on, hearing or determining a proceeding referred to in the last preceding sub-section.

(4.) For the purposes of proceedings under this section, the Court shall be constituted by not less than three Judges.

(5.) Proceedings before the Court in accordance with this section shall not be instituted except with the consent in writing of the Attorney-General.

(6.) A reference in a law of the Commonwealth to an offence against a law of the Commonwealth shall be read as including a reference to a contempt referred to in this Part.

69. Where a person enters into, or purports to enter into, a transaction that involves a contravention by him of, or a failure by him to comply with, an order of, or an undertaking given to, the Tribunal or a provision of Part IX., a person who is not bound by the order or undertaking, or was not guilty of an offence against Part IX. in relation to the transaction, as the case Protection of certain persons.

may be, has the same rights and title, whether as a party to the transaction or as a person claiming directly or indirectly under a party to the transaction, as he would have had if the transaction had not involved such a contravention or failure.

PART VIII.—PROVISIONS RELATING TO THE TRIBUNAL.

Division 1.—Procedure and Evidence.

Procedure
generally.

70.—(1.) In proceedings before the Tribunal—

- (a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
- (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
- (c) the Tribunal is not bound by the rules of evidence.

(2.) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by the Tribunal constituted by a presidential member.

Regulations as
to certain
matters.

71. The regulations may make provision—

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all parties to any proceedings, including the Commissioner; and
- (b) with respect to the representation in proceedings before the Tribunal of persons having a common interest in the proceedings.

Power to take
evidence on
oath.

72.—(1.) The Tribunal may take evidence on oath or affirmation, and for that purpose a member may administer an oath or affirmation.

(2.) A member may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

Hearings to be
in public except
in special
circumstances.

73.—(1.) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.

(2.) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may—

- (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or
- (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal (whether in public or in private) or of matters contained in documents filed in the Tribunal.

(3.) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

74. The Tribunal may, if it thinks fit, permit a person appearing as a witness before the Tribunal to give evidence by tendering, and verifying by oath or affirmation, a written statement, which shall be filed with the Registrar.

Evidence in
form of written
statement.

75. The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on its behalf, with such limitations (if any) as the Tribunal so constituted directs and, where such an authority is given—

Taking of
evidence by
single member.

- (a) that member may take evidence accordingly; and
- (b) for the purposes of this Act, that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

76. In proceedings before the Tribunal—

Representation.

- (a) a party or intervener other than a corporation or a trade association may appear in person or may be represented by an employee of the party or intervener approved by the Tribunal;
- (b) a party or intervener, being a corporation other than a trade association, may be represented by an employee, or a director or other officer, of the party or intervener approved by the Tribunal;
- (c) a party or intervener being a trade association or a member of a trade association may be represented by a member or officer of the trade association approved by the Tribunal; and
- (d) any party or intervener may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory of the Commonwealth or of the High Court.

*Division 2.—General.***Parties.**

77.—(1.) The regulations may make provision as to the parties to proceedings before the Tribunal.

(2.) The Tribunal may, in any proceedings, direct that a person shall be joined as a party, or that a party be dismissed from the proceedings.

(3.) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings.

Ancillary orders, &c.

78. The Tribunal has power—

- (a) to make orders incidental or ancillary to other orders of the Tribunal;
- (b) to make or vary determinations or orders by consent of the parties affected;
- (c) to make conditional determinations or orders; and
- (d) to suspend any order.

Undertakings to the Tribunal.

79.—(1.) The Tribunal may receive an undertaking to the Tribunal by a party to proceedings before the Tribunal with respect to a matter appearing to the Tribunal to be relevant to the operation of this Act, and the Tribunal shall cause every such undertaking to be recorded in the records of the Tribunal.

(2.) The Tribunal may, with the consent of the Commissioner, adjourn indefinitely proceedings under Part VI., or may grant leave to the Commissioner to discontinue any such proceedings, upon the giving of appropriate undertakings by parties other than the Commissioner.

(3.) An undertaking to the Tribunal shall not, unless the contrary intention appears expressly from the terms of the undertaking, be construed as an admission that any restriction or practice is contrary to the public interest or as an admission as to any other matter.

Protection of members, barristers and witnesses.

80.—(1.) A member of the Tribunal has, in the performance of his duty as a member, the same protection and immunity as a Justice of the High Court.

(2.) A barrister, solicitor or other person appearing before the Tribunal on behalf of a party or intervener has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

(3.) Subject to this Act, a person summoned to attend or appearing before the Tribunal as a witness has the same protection, and is, in addition to the penalties provided by this Act, subject to the same liabilities, in any civil or criminal proceedings as a witness in proceedings in the High Court.

81.—(1.) A person appearing as a witness before the Tribunal is not excused from answering a question, or producing a document, on the ground that the answer to the question, or the document, may tend to incriminate him.

Incriminating answers.

(2.) Evidence given by a person before the Tribunal is not admissible against him in any criminal proceedings other than—

- (a) proceedings for an offence arising out of falsity of the evidence; or
- (b) proceedings under this Act or under a complementary State law.

Division 3.—Offences in relation to the Tribunal.

82. A person served, as prescribed, with a summons to appear as a witness before the Tribunal shall not, without reasonable excuse—

Failure of witness to attend.

- (a) fail to attend as required by the summons; or
- (b) fail to appear and report himself from day to day unless excused, or released from further attendance, by a member.

Penalty: One thousand dollars or imprisonment for three months.

83. A person appearing as a witness before the Tribunal shall not, without reasonable excuse—

Refusal to be sworn or to answer questions.

- (a) refuse or fail to be sworn or to make an affirmation;
- (b) refuse or fail to answer a question that he is required to answer by the member presiding at the proceedings; or
- (c) refuse or fail to produce a document that he was required to produce by a summons under this Part served on him as prescribed.

Penalty: One thousand dollars or imprisonment for three months.

84. A person shall not—

Contempt of Tribunal, &c.

- (a) insult or disturb a member of the Tribunal in the exercise of his powers or functions as a member;
- (b) interrupt the proceedings of the Tribunal;
- (c) use insulting language towards a member;
- (d) create a disturbance or take part in creating or continuing a disturbance in or near a place where the Tribunal is sitting; or
- (e) do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court.

Penalty: One thousand dollars or imprisonment for three months.

PART IX.—COLLUSIVE TENDERING AND COLLUSIVE BIDDING.

Collusive
tendering.

85.—(1.) In this section—

“collusive tendering agreement” means—

(a) an agreement by two or more persons for the submission of identical tenders or a joint tender for the supply or acquisition of goods or services; or

(b) any other agreement that has the purpose or effect of preventing or restricting competition among all or any of the parties in respect of tendering for the supply or acquisition of goods or services,

whether the agreement was made before, or is made after, the commencement of this Part and whether or not the agreement relates expressly or exclusively to tendering;

“joint tender” means a tender by two or more persons jointly for the supply or acquisition of goods or services, and includes a tender (whether made in the name of one person or in the names of two or more persons) made with the intention that, if the tender is successful, the supply or acquisition of the goods or services, or the goods or services acquired, as the case may be, will or may be shared by two or more persons.

(2.) A person who—

(a) makes, or joins in the making of, a tender in accordance with a collusive tendering agreement; or

(b) in pursuance of a collusive tendering agreement, abstains from making a tender,

is guilty of an offence against this section.

(3.) The last preceding sub-section does not apply unless the invitation to tender required tenders submitted to be in writing.

(4.) It is a defence to a prosecution under sub-section (2.) of this section if the defendant satisfies the court that—

(a) the agreement concerned was not made for the purposes of a particular invitation to tender; and

(b) at the time of the alleged offence—

(i) full and accurate particulars of the agreement, and of any variation of the agreement, were contained in the Register; and

(ii) there was not in force an order of the Tribunal that was contravened by the conduct constituting the alleged offence.

(5.) Sub-section (2.) of this section does not apply in relation to the making of, or abstaining from making, a tender for—

- (a) the supply of goods to a person carrying on business outside Australia where the successful tenderer is required to export the goods, or where it is apparent from the terms or circumstances of the invitation to tender that the goods are to be exported for the purposes of that business; or
- (b) the supply of services outside Australia.

(6.) Sub-section (2.) of this section does not apply to making, or joining in the making of, a joint tender at the request of, or with the prior consent of, the person inviting tenders.

(7.) The penalty for an offence against this section is—

- (a) in the case of an offence committed by a corporation—
a fine not exceeding Ten thousand dollars; or
- (b) in any other case—a fine not exceeding Four thousand dollars or imprisonment for a term not exceeding six months.

86.—(1.) In this section—

Collusive
bidding.

“ auction ” means an auction in Australia at which any goods, land or other property, or any rights or privileges, is or are submitted to auction;

“ collusive bidding agreement ” means—

- (a) an agreement by two or more persons for the submission of a joint bid at an auction; or
- (b) any other agreement that has the purpose or effect of preventing or restricting competition among all or any of the parties in respect of bidding at an auction or auctions,

whether the agreement was made before, or is made after, the commencement of this Part and whether or not the agreement relates expressly or exclusively to bidding;

“ joint bid ” means a bid made by two or more persons jointly, and includes a bid (whether made in the name of one person or in the names of two or more persons) made with the intention that, if the bid is successful, the property, rights or privileges bid for will or may be shared by two or more persons.

(2.) A person who—

- (a) bids, or joins in the making of a bid, at an auction in accordance with a collusive bidding agreement; or

(b) in pursuance of a collusive bidding agreement, abstains from attending an auction or from bidding, or making a further bid, at an auction,
is guilty of an offence against this section.

(3.) The last preceding sub-section does not apply to making, or joining in the making of, a joint bid at the request of, or with the prior consent of, the auctioneer.

(4.) It is a defence to a prosecution under sub-section (2.) of this section if the defendant satisfies the Court that—

(a) the agreement concerned was not made for the purposes of a particular auction; and

(b) at the time of the alleged offence—

(i) full and accurate particulars of the agreement and of any variation of the agreement were contained in the Register; and

(ii) there was not in force an order of the Tribunal that was contravened by the conduct constituting the alleged offence.

(5.) For the purposes of this section, any act done by an agent in accordance with, or in pursuance of, an agreement made by his principal (including an agreement made by the agent within the scope of his agency) shall be deemed to have been done by the principal and not by the agent.

(6.) The penalty for an offence against this section is—

(a) in the case of an offence committed by a corporation—a fine not exceeding Ten thousand dollars; or

(b) in any other case—a fine not exceeding Four thousand dollars or imprisonment for a term not exceeding six months.

Exemptions.

87.—(1.) An agreement is not a collusive tendering agreement or collusive bidding agreement for the purposes of this Part to the extent that—

(a) the agreement is between corporations that are related to each other;

(b) the agreement is between partners, in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between a partner and the partnership;

(c) the agreement is between trustees, in relation to the conduct of a business carried on by them as trustees; or

(d) the agreement relates to tendering or bidding otherwise than in the course of, or in connexion with, a business.

(2.) An agreement is not a collusive tendering agreement or collusive bidding agreement for the purposes of this Part to the extent that the agreement is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act.

(3.) In relation to an invitation to submit tenders in a particular State or Territory or an auction held in a particular State or Territory, an agreement is not a collusive tendering agreement or collusive bidding agreement to the extent that the agreement is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act of that State or an Ordinance of that Territory, as the case may be.

(4.) An agreement is not a collusive tendering agreement or a collusive bidding agreement for the purposes of this Part by reason only of a provision or condition referred to in any of paragraphs (c) to (h) (inclusive) of section 38 of this Act or any act or thing done in pursuance of such a provision or condition.

PART X.—CIVIL REMEDIES.

88.—(1.) Subject to this section, a person who suffers loss or damage by an act of another person done in contravention of an order of the Tribunal in proceedings under Part VI. or in contravention of section 85 or 86 of this Act may recover the amount of the loss or damage by action against that other person.

Actions for damages.

(2.) Jurisdiction is conferred on the Court to hear and determine actions under this section, and that jurisdiction is exclusive of the jurisdiction of any other court, other than the jurisdiction of the High Court under section 75 of the Constitution.

(3.) In an action under this section in respect of an act in contravention of section 85 or 86 of this Act, the provisions of sub-section (4.) of section 85 or of sub-section (4.) of section 86, of this Act apply as if the reference to a prosecution were a reference to the action and as if the reference to the alleged offence were a reference to that act.

89. The court in which an action under this Part is instituted may, on the application of the Attorney-General, defer or adjourn the hearing of the action where it is satisfied that it is in the interests of justice to do so having regard to any pending or possible prosecution or proceedings in respect of a contempt of the Tribunal.

Deferment of action on application of Attorney-General.

Findings in
contempt
proceedings
to be evidence.

90. In proceedings against a person under this Part, a finding of any fact by the Court in proceedings under Part VII. in which that person has been found guilty of a contempt of the Tribunal is evidence of that fact, and any such finding may be proved by production of a document under the seal of the Court from which the finding appears.

PART XI.—INTERPRETATIVE PROVISIONS.

Provisions
relating to
agreements.

91.—(1.) The following provisions of this section have effect for the purposes of this Act and of any order of the Tribunal.

(2.) An arrangement or understanding, whether formal or informal and whether express or implied, shall be deemed to be an agreement.

(3.) A reference to an agreement shall be read as including a reference to an agreement made outside Australia or made at any time before the date of commencement of this Act.

(4.) A reference to an agreement shall be read as including a reference to every relevant restriction accepted under the agreement.

(5.) A reference to an agreement shall be read as including a reference to an agreement that is not enforceable by legal proceedings, whether or not it was intended to be so enforceable.

(6.) References to restrictions under an agreement, or the doing of any act or thing under or in pursuance of an agreement, shall, in relation to an agreement that is not enforceable, be construed as if the agreement were enforceable.

(7.) Where a person is a party to an agreement under which that person undertakes, or is or may be required to ensure, that a corporation which that person is in a position to control will do an act or thing, or which provides for the doing of an act or thing by such a corporation—

(a) that corporation shall be deemed to be a party to the agreement; and

(b) the agreement shall be deemed to require the corporation to do that act or thing,

and, for the purposes of this sub-section, a corporation that is the holding company of another corporation shall be deemed to be in a position to control that other corporation.

(8.) Where, under an agreement, a party is subject to an obligation, or may be subjected to a penalty or disadvantage, if he fails to comply with conditions, or privileges or benefits are or are to be conferred upon a party only if he complies with conditions, that person shall be deemed to be required by that agreement to comply with those conditions.

(9.) Without prejudice to the last preceding sub-section, an obligation on the part of a party to an agreement to make payments calculated by reference to—

- (a) the quantity of any goods produced or supplied by him or the extent of any services supplied by him; or
- (b) the quantity of any materials acquired by him for the purpose of, or used by him in, the production of any goods or the supply of any services,

being payments calculated, or calculated at an increased rate, in respect of goods, services or materials in excess of a quantity or extent specified in, or ascertained in accordance with, the agreement, shall be deemed to be a restriction in respect of the quantities of those goods that he may produce or supply, or the extent of those services that he may supply, as the case may be.

(10.) For the purposes of this Act, an act or thing done by a party to an agreement shall be deemed to have been done in pursuance of a requirement of the agreement where—

- (a) he would have contravened that requirement if he had not done that act or thing; or
- (b) that requirement was applicable in relation to the doing of that act or thing and the act or thing was done consistently with that requirement.

92.—(1.) In this Act, “trade association” means an association, body or organization (whether incorporated or not) formed, existing or conducted for the purpose of furthering, or for purposes that include or are conducive to the furthering of, the business or professional interests of all or any of its members, but does not include—

Special provisions relating to trade associations.

- (a) a partnership; or
- (b) an association, body or organization the only members of which are companies related to each other.

(2.) For the purposes of this Act—

- (a) where an association, body or organization (whether or not it is a trade association), or a person representing an association, body or organization, is a member of another association, body or organization, every member of the first-mentioned association, body or organization shall be deemed to be a member of the last-mentioned association, body or organization;
- (b) where a person is a member of an association, body or organization in the capacity of representative of another person (including a corporation), that other person shall be deemed to be a member of that association, body or organization;

- (c) the constitution of a trade association shall be deemed to be an agreement to which all persons who, for the time being, are members of the trade association are parties;
- (d) where a direction by or on behalf of a trade association has been given to, or was intended to affect the conduct of, all or any of its members, it shall be conclusively presumed that the direction was authorized by the constitution of the trade association and that those members were required by that constitution to comply with it; and
- (e) an agreement made by a trade association shall be deemed to be an agreement to which all members of the trade association from time to time are parties and by which those members agree to do all acts and things that, under the agreement, are to be done by them or the trade association is to cause, require or recommend them to do.

References to
restrictions.

93.—(1.) For the purposes of this Act, the general obligation of a party to comply with a provision of an agreement under which that party is or could be required to observe restrictions with respect to a matter (whether particulars of the restrictions are contained or referred to in the agreement or are to be defined by some later act or document) is a restriction with respect to that matter accepted by that party under the agreement.

(2.) Notwithstanding the last preceding sub-section, a reference in this Act to a restriction under an agreement includes a reference to a particular obligation arising under a provision referred to in that sub-section.

Supply,
acquisition and
production.

94. In this Act—

- (a) a reference to the supply or acquisition of goods shall be read as including a reference to agreeing to supply or acquire goods;
- (b) a reference to the acquisition of goods shall be read as including a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;
- (c) a reference to the supply or acquisition of services shall be read as including a reference to agreeing to supply or acquire services;
- (d) a reference to the supply or acquisition of goods shall be read as including a reference to the supply or acquisition of goods together with services; and
- (e) a reference to the production of goods shall be read as including a reference to the getting of minerals and the taking of animals (including fish).

95. For the purposes of this Act—

References to
acts.

- (a) refusing to do or refraining from doing an act or thing;
or
- (b) entering into an agreement, refusing to enter into an agreement, or refraining from entering into an agreement,

shall be deemed to be doing an act or thing.

96. Where this Act refers to a corporation being the holding company of another corporation or to corporations being related one to another, the reference shall be read as having the same meaning as a similar reference would have in the *Companies Ordinance* 1962 of the Australian Capital Territory or, if that Ordinance is amended, that Ordinance as so amended.

Related
companies.

PART XII.—MISCELLANEOUS.

97.—(1.) Subject to any direction under section 73 of this Act, a person may, on application in accordance with the regulations and on payment of the prescribed fee—

Inspection of,
furnishing
of copies of,
and evidence of,
documents.

- (a) inspect the document recording a determination or order of the Tribunal or any other document filed in the Tribunal or recorded in the records of the Tribunal in pursuance of this Act or the regulations; and
- (b) obtain a copy of any such document, certified to be a true copy under the hand of the Registrar or a Deputy Registrar.

(2.) A copy of a determination or order of, or undertaking given to, the Tribunal, certified to be a true copy under the hand of the Registrar or a Deputy Registrar, shall be received in all courts as evidence of the determination, order or undertaking.

98. In proceedings under Part VII. or Part X., a determination or order of the Tribunal out of which the proceedings arose is evidence of the facts stated in the determination or order to have been found by the Tribunal.

Determinations
and orders
evidence of
certain facts.

99. A certificate under the hand of the Commissioner certifying as to any matter relating to the contents of the Register shall be received in all courts as evidence of the matter certified.

Evidence of
Register.

Judicial
notice.

100.—(1.) All courts shall take judicial notice of—

(a) the official signature of any person who holds or has held the office of President, Deputy President, member, Commissioner, Registrar or Deputy Registrar, and of the fact that that person holds or has held that office; and

(b) the official seal of the Tribunal,

if the signature or seal purports to be attached or appended to an official document.

(2.) In this section, “court” includes any Federal or State Court or court of a Territory, and all persons authorized by the law of the Commonwealth, of a State or of a Territory or by consent of parties to receive evidence.

Prosecutions.

101.—(1.) Prosecutions for offences against this Act shall be brought only in the Court.

(2.) Jurisdiction is conferred on the Court to hear and determine prosecutions under this Act.

(3.) The jurisdiction of the Court under this section may be exercised by a single Judge.

(4.) Proceedings before the Court in accordance with this section—

(a) may be instituted by summons upon information; and

(b) shall not be instituted except with the consent in writing of the Attorney-General or a person authorized by the Attorney-General, by writing under his hand, to give such consents.

(5.) A prosecution for an offence against section 43, 85 or 86 of this Act may be commenced at any time after the commission of the offence.

Validity of
determinations
or orders.

102.—(1.) Subject to this section, the validity of a determination or order of the Tribunal shall not be challenged, reviewed or called in question in any proceedings, including proceedings under Part VII. or Part X.

(2.) The last preceding sub-section does not limit the exercise of any jurisdiction of the High Court to issue a writ of prohibition, mandamus or certiorari or an injunction.

Commissioner
may require
furnishing of
information and
production of
documents.

103.—(1.) Where the Commissioner has reason to believe that a person (including a corporation) is capable of giving information or producing documents relating to matters that constitute, or may constitute, an examinable agreement or examinable practice, he may, by notice in writing, require that person—

(a) to furnish to him, by writing signed by that person or, in the case of a corporation, by a competent officer of the corporation, within the time and in the manner specified in the notice, any such information; or

(b) to produce to him, or to a person specified in the notice acting on his behalf, in accordance with the notice, any such documents.

(2.) A person shall not—

(a) refuse or fail to comply with a notice under this section to the extent that he is capable of complying with it; or

(b) in purported compliance with such a notice, knowingly furnish information that is false or misleading.

Penalty: One thousand dollars or imprisonment for three months.

(3.) A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document might tend to incriminate him, but his answer to any question asked in the notice, or his furnishing of any other information in pursuance of the notice, is not admissible in evidence against him in any criminal proceedings, other than proceedings under this Act or under a complementary State law.

104.—(1.) The Commissioner, or a person authorized by him, may inspect all documents produced in pursuance of a notice under the last preceding section, and may make copies of or take extracts from those documents.

Copying and
impounding of
documents.

(2.) The Commissioner may, for the purposes of this Act, take, and retain for as long as is necessary for those purposes, possession of any document produced in pursuance of a notice under the last preceding section, but the person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by the Commissioner to be a true copy, and such a certified copy shall be received in all courts as evidence as if it were the original.

(3.) Until such a certified copy is supplied, the Commissioner shall, at such times and places as he thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorized by that person, to inspect and make copies of or take extracts from the document.

105.—(1.) The Commissioner shall, within sixty days after the end of each year, furnish to the Attorney-General, for presentation to the Parliament, a report with respect to his operations in that year.

Commissioner
to furnish
annual report.

(2.) In this section, “year” means a year ending on the thirtieth day of June, but does not include a year that ended before the date fixed by Proclamation under sub-section (2.) of section 2 of this Act.

Regulations.

106.—(1.) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for—

- (a) prescribing matters in connexion with the procedure of the Tribunal, and fees and expenses of witnesses in proceedings before the Tribunal;
- (b) prescribing matters in connexion with access to documents held by the Registrar, and the issue of certified copies of such documents;
- (c) requiring any document furnished or used for the purposes of this Act to be verified by statutory declaration; and
- (d) prescribing fees to be paid to the Registrar.

(2.) Regulations under this section may provide that all or any of the provisions of this Act shall not apply to or in relation to all or any agreements made by, or practices of, a specified organization or body that performs functions in relation to the marketing of primary products.

THE SCHEDULE.

Sections 16 and 30.

OATH.

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the office of _____ and that I will faithfully and impartially perform the duties of that office.

SO HELP ME GOD!

AFFIRMATION.

I, A.B., do solemnly and sincerely promise and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the office of _____ and that I will faithfully and impartially perform the duties of that office.