Trade Practices Act 1974

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This compilation is in 2 volumes

Volume 1: **sections 1-110**
Volume 2: sections 10.01-173
Schedule
Endnotes

Each volume has its own contents

This compilation was rectified to take into account retrospective amendments made by Act No. 69, 2000 and Act No. 63, 2002. The original compilation and any other previous compilations for this point in time are available in the replacement history on the Federal Register of Legislation.

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About this compilation

This compilation

This is a compilation of the *Trade Practices Act 1974* that shows the text of the law as amended and in force on 22 December 1999 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. Any uncommenced amendments affecting the law are accessible on the Register (www.legislation.gov.au).

Application, saving and transitional provisions

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Presentational changes

The *Legislation Act 2003* provides for First Parliamentary Counsel to make presentational changes to a compilation. Presentational changes are applied to give a more consistent look and feel to legislation published on the Register, and enable the user to more easily navigate those documents.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. Any modifications affecting the law are accessible on the Register.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act relating to certain Trade Practices

Part I—Preliminary

1 Short title

This Act may be cited as the *Trade Practices Act 1974*.

2 Object of this Act

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

2A Application of Act to Commonwealth and Commonwealth authorities

(1) Subject to this section and section 44E, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

(2) Subject to the succeeding provisions of this section, this Act applies as if:

(a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and

(b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business,

were a corporation.

(3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

(3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.

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(4) Part IV does not apply in relation to the business carried on by the Commonwealth in developing, and disposing of interests in, land in the Australian Capital Territory.

2B Application of Act to States and Territories

(1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:

(a) Part IV;

(aa) Part VB;

(b) Part XIB;

(c) the other provisions of this Act so far as they relate to the above provisions.

(2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.

(3) The protection in subsection (2) does not apply to an authority of a State or Territory.

2C Activities that are not business

(1) For the purposes of sections 2A and 2B, the following do not amount to carrying on a business:

(a) imposing or collecting:

(i) taxes; or

(ii) levies; or

(iii) fees for licences;

(b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions);

(c) a transaction involving:

(i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of the

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Commonwealth or an authority of a State or Territory); or

(ii) only persons who are all acting for the same authority of the Commonwealth; or

(iii) only persons who are all acting for the same authority of a State or Territory; or

(iv) only the Crown in right of the Commonwealth and one or more non-commercial authorities of the Commonwealth; or

(v) only the Crown in right of a State or Territory and one or more non-commercial authorities of that State or Territory; or

(vi) only non-commercial authorities of the Commonwealth; or

(vii) only non-commercial authorities of the same State or Territory;

(d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:

(i) the body chooses to acquire the products; or

(ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.

(2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of sections 2A and 2B.

(3) In this section:

acquisition of primary products by a government body under legislation includes vesting of ownership of primary products in a government body by legislation;

government body means the Commonwealth, a State, a Territory, an authority of the Commonwealth or an authority of a State or Territory;

licence means a licence that allows the licensee to supply goods or services;

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primary products means:

(a) agricultural or horticultural produce; or

(b) crops, whether on or attached to the land or not; or

(c) animals (whether dead or alive); or

(d) the bodily produce (including natural increase) of animals.

(4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is ***non-commercial*** if:

(a) it is constituted by only one person; and

(b) it is neither a trading corporation nor a financial corporation.

2D Exemption of certain activities of local government bodies from Part IV

(1) Part IV does not apply to:

(a) the refusal to grant, or the granting, suspension or variation of, licences (whether or not they are subject to conditions) by a local government body; or

(b) a transaction involving only persons who are acting for the same local government body.

(2) In this section:

licence means a licence that allows the licensee to supply goods or services;

local government body means a body established by or under a law of a State or Territory for the purposes of local government, other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.

3 Repeal

The *Restrictive Trade Practices Act 1971* and the *Restrictive Trade Practices Act 1972* are repealed.

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4 Interpretation

(1) In this Act, unless the contrary intention appears:

acquire includes:

(a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and

(b) in relation to services—accept.

arrive at, in relation to an understanding, includes reach or enter into.

authorisation means an authorisation under Division 1 of Part VII granted by the Commission or by the Tribunal on a review of a determination of the Commission.

authority**,** in relation to a State or Territory (including an external Territory), means:

(a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory; or

(b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest.

authority of the Commonwealth means:

(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or

(b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest.

banker includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

business includes a business not carried on for profit.

Chairperson means the Chairperson of the Commission.

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commencing date means 1 October 1974.

Commission means the Australian Competition and Consumer Commission established by section 6A, and includes a member of the Commission or a Division of the Commission performing functions of the Commission.

competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.

Competition Principles Agreement means the Competition Principles Agreement made on 11 April 1995 between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, being that agreement as in force from time to time.

Conduct Code Agreement means the Conduct Code Agreement made on 11 April 1995 between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, being that agreement as in force from time to time.

corporation means a body corporate that:

(a) is a foreign corporation;

(b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;

(c) is incorporated in a Territory; or

(d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

Council means the National Competition Council established by section 29A.

Councillor means a member of the Council, including the Council President.

Council President means the Council President referred to in subsection 29C(1).

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covenant means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land), and ***proposed covenant*** has a corresponding meaning.

debenture includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a body corporate, whether constituting a charge on property of the body corporate or not.

Deputy Chairperson means the Deputy Chairperson of the Commission.

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.

document includes:

(a) a book, plan, paper, parchment or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them; and

(b) a disc, tape, paper or other device from which sounds or messages are capable of being reproduced.

Family Court Judge means a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

financial corporation means a financial corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned).

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financial product has the same meaning as in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 1989*.

financial service has the same meaning as in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 1989*.

foreign corporation means a foreign corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that is incorporated in an external Territory.

fully-participating jurisdiction means a State or Territory that:

(a) is a participating jurisdiction as defined in section 150A; and

(b) is not named in a notice in operation under section 150K.

give effect to, in relation to a provision of a contract, arrangement or understanding, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce.

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 of the Commission includes the Chairperson and a person appointed to act as a member of the Commission but does not include an associate member of the Commission.

member of the Tribunal includes the President and a person appointed to act as a member of the Tribunal.

New Zealand Commerce Commission means the Commission established by section 8 of the Commerce Act 1986 of New Zealand.

New Zealand Crown corporation means a body corporate that is an instrument of the Crown in respect of the Government of New Zealand.

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organisation of employees means an organisation that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment.

practice of exclusive dealing means the practice of exclusive dealing referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9).

practice of resale price maintenance means the practice of resale price maintenance referred to in Part VIII.

President means the President of the Tribunal and includes a person appointed to act as President of the Tribunal.

presidential member or ***presidential member of the Tribunal*** means President or a Deputy President.

price includes a charge of any description.

provision, in relation to an understanding, means any matter forming part of the understanding.

Registrar means the Registrar of the Tribunal.

require, in relation to the giving of a covenant, means require or demand the giving of a covenant, whether by way of making a contract containing the covenant or otherwise, and whether or not a covenant is given in pursuance of the requirement or demand.

send includes deliver, and ***sent*** and ***sender*** have corresponding meanings.

services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(a) a contract for or in relation to:

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(i) the performance of work (including work of a professional nature), whether with or without the supply of goods;

(ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance;

(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(d) any contract for or in relation to the lending of moneys,

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

share includes stock.

supply, when used as a verb, 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, when used as a noun, has a corresponding meaning, and ***supplied*** and ***supplier*** have corresponding meanings.

Territory means:

(a) an internal Territory; or

(b) the Territory of Christmas Island; or

(c) the Territory of Cocos (Keeling) Islands.

the Court or ***the Federal Court*** means the Federal Court of Australia.

the Family Court means the Family Court of Australia.

trade or commerce means trade or commerce within Australia or between Australia and places outside Australia.

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trading corporation means a trading corporation within the meaning of paragraph 51(xx) of the Constitution.

Tribunal means the Australian Competition Tribunal, and includes a member of that Tribunal or a Division of that Tribunal performing functions of that Tribunal.

unsolicited goods means goods sent to a person without any request made by him or her or on his or her behalf.

unsolicited services means services supplied to a person without any request made by him or her or on his or her behalf.

(2) In this Act:

(a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;

(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), shall be read as a reference to the doing of or the refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;

(c) a reference to refusing to do an act includes a reference to:

(i) refraining (otherwise than inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

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(3) Where a provision of this Act is expressed to render a provision of a contract, or to render a covenant, unenforceable if the provision of the contract or the covenant has or is likely to have a particular effect, that provision of this Act applies in relation to the provision of the contract or the covenant at any time when the provision of the contract or the covenant has or is likely to have that effect notwithstanding that:

(a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or

(b) the provision of the contract or the covenant will not or may not have that effect at a later time.

(4) In this Act:

(a) a reference to the acquisition of shares in the capital of a body corporate shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares; and

(b) a reference to the acquisition of assets of a person shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such assets but does not include a reference to an acquisition by way of charge only or an acquisition in the ordinary course of business.

4A Subsidiary, holding and related bodies corporate

(1) For the purposes of this Act, a body corporate shall, subject to subsection (3), be deemed to be a subsidiary of another body corporate if:

(a) that other body corporate:

(i) controls the composition of the board of directors of the first-mentioned body corporate;

(ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first-mentioned body corporate; or

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(iii) holds more than one-half of the allotted share capital of the first-mentioned body corporate (excluding any part of that allotted share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first-mentioned body corporate is a subsidiary of any body corporate that is that other body corporate's subsidiary (including any body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).

(2) For the purposes of subsection (1), the composition of a body corporate's board of directors shall be deemed to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if:

(a) a person cannot be appointed as a director without the exercise in his or her favour by that other body corporate of such a power; or

(b) a person's appointment as a director follows necessarily from his or her being a director or other officer of that other body corporate.

(3) In determining whether a body corporate is a subsidiary of another body corporate:

(a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d), any shares held or power exercisable:

(i) by any person as a nominee for that other body corporate (except where that other body corporate is concerned only in a fiduciary capacity); or

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(ii) by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity,

shall be treated as held or exercisable by that other body corporate;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any allotment of such debentures, shall be disregarded; and

(d) any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) A reference in this Act to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.

(5) Where a body corporate:

(a) is the holding company of another body corporate;

(b) is a subsidiary of another body corporate; or

(c) is a subsidiary of the holding company of another body corporate,

that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

(6) In proceedings under this Act, whether in the Court or before the Tribunal or the Commission, it shall be presumed, unless the contrary is established, that bodies corporate are not, or were not at a particular time, related to each other.

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4B Consumers

(1) For the purposes of this Act, unless the contrary intention appears:

(a) a person shall be taken to have acquired particular goods as a consumer if, and only if:

(i) the price of the goods did not exceed the prescribed amount; or

(ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, or the goods consisted of a commercial road vehicle,

and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

(b) a person shall be taken to have acquired particular services as a consumer if, and only if:

(i) the price of the services did not exceed the prescribed amount; or

(ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

(2) For the purposes of subsection (1):

(a) the prescribed amount is $40,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;

(b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;

(c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been:

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(i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time;

(d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been:

(i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and

(e) without limiting by implication the meaning of the expression ***services*** in subsection 4(1), the obtaining of credit

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by a person in connection with the acquisition of goods or services by him or her shall be deemed to be the acquisition by him or her of a service and any amount by which the amount paid or payable by him or her for the goods or services is increased by reason of his or her so obtaining credit shall be deemed to be paid or payable by him or her for that service.

(3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

(4) In this section, ***commercial road vehicle*** means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

4C Acquisition, supply and re-supply

In this Act, unless the contrary intention appears:

(a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;

(b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;

(c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both;

(d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both;

(e) a reference to the re-supply of goods acquired from a person includes a reference to:

(i) a supply of the goods to another person in an altered form or condition; and

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(ii) a supply to another person of goods in which the first-mentioned goods have been incorporated;

(f) a reference to the re-supply of services (the ***original services***) acquired from a person (the ***original supplier***) includes a reference to:

(i) a supply of the original services to another person in an altered form or condition; and

(ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.

4D Exclusionary provisions

(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and

(b) the provision has the purpose of preventing, restricting or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions,

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

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(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

4E Market

For the purposes of this Act, unless the contrary intention appears, ***market*** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

4F References to purpose or reason

(1) For the purposes of this Act:

(a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:

(i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose; and

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

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(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason.

(2) This section does not apply for the purposes of subsections 45D(1), 45DA(1), 45DB(1), 45E(2) and 45E(3).

4G Lessening of competition to include preventing or hindering competition

For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

4H Application of Act in relation to leases and licences of land and buildings

In this Act:

(a) a reference to a contract shall be construed as including a reference to a lease of, or a licence in respect of, land or a building or part of a building and shall be so construed notwithstanding the express references in this Act to such leases or licences;

(b) a reference to making or entering into a contract, in relation to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and

(c) a reference to a party to a contract, in relation to such a lease or licence, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

4J Joint ventures

In this Act:

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(a) a reference to a joint venture is a reference to an activity in trade or commerce:

(i) carried on jointly by two or more persons, whether or not in partnership; or

(ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate; and

(b) a reference to a contract or arrangement made or understanding arrived at, or to a proposed contract or arrangement to be made or proposed understanding to be arrived at, for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate as mentioned in subparagraph (a)(ii), be read as including a reference to the memorandum and articles of association, rules or other document that constitute or constitutes, or are or is to constitute, that body corporate.

4K Loss or damage to include injury

In this Act:

(a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and

(b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.

4L Severability

If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 87 or 87A, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.

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4M Saving of law relating to restraint of trade and breaches of confidence

This Act does not affect the operation of:

(a) the law relating to restraint of trade in so far as that law is capable of operating concurrently with this Act; or

(b) the law relating to breaches of confidence,

but nothing in the law referred to in paragraph (a) or (b) affects the interpretation of this Act.

4N Extended application of Part IIIA

(1) Part IIIA, and the other provisions of this Act so far as they relate to Part IIIA, extend to services provided by means of facilities that are, or will be, wholly or partly within:

(a) an external Territory; or

(b) the adjacent area in respect of a State, of the Northern Territory, or of an external Territory, as specified in section 5A of the *Petroleum (Submerged Lands) Act 1967*.

(2) For the purposes of subsection (1), the adjacent area in respect of Queensland is to be taken, in accordance with subsection 5A(8) of the *Petroleum (Submerged Lands) Act 1967*, to include the Coral Sea area as defined in subsection 5A(7) of that Act.

(3) Nothing in subsection (1) affects the operation of section 15B of the *Acts Interpretation Act 1901* in respect of the application of Part IIIA, and of the other provisions of this Act so far as they relate to Part IIIA, in any part of:

(a) the coastal sea of Australia; or

(b) the coastal sea of an external Territory,

that is on the landward side of each of the adjacent areas referred to in that subsection.

(4) For the purposes of this section:

service includes proposed service covered by Subdivision C of Division 2 of Part IIIA.

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5 Extended application of Parts IV, IVA, V and VB

(1) Part IV, Part IVA, Part V (other than Division 1AA) and Part VB extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

(1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:

(a) New Zealand and New Zealand Crown corporations; or

(b) bodies corporate carrying on business within New Zealand; or

(c) persons ordinarily resident within New Zealand.

(2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

(3) Where a claim under section 82 is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(4) A person other than the Minister or the Commission is not entitled to make an application to the Court for an order under subsection 87(1) or (1A) in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

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(b) it is not in the national interest that the consent be given.

6 Extended application of Parts IV, IVA, V and VB

(1) Without prejudice to its effect apart from this section, this Act also has effect as provided by this section.

(2) This Act, other than Parts IIIA and X, has, by force of this subsection, the effect it would have if:

(a) any references in this Act other than in section 45DB or section 55 to trade or commerce were, by express provision, confined to trade or commerce:

(i) between Australia and places outside Australia;

(ii) among the States;

(iii) within a Territory, between a State and a Territory or between two Territories; or

(iv) by way of the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth;

(b) sections 45, 45B, 45D to 45EB (other than section 45DB), 46, 46A, 53B, 60 and 61, subsections 64(3) and (4), sections 75A, 75AU, 75AV, 75AW, 75AX and 75AY and Part VIII were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:

(i) trade or commerce between Australia and places outside Australia;

(ii) trade or commerce among the States;

(iii) trade or commerce within a Territory, between a State and a Territory or between two Territories; or

(iv) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth;

(c) any reference in Division 2 of Part V to a contract for the supply of goods or services and any reference in Division 2A of that Part or in Part VA to the supply of goods, were, by express provision, confined to a contract made, or the supply of goods, as the case may be:

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(i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia;

(ii) in the course of, or in relation to, trade or commerce among the States; or

(iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between two Territories;

(d) in subsection 45(1) and subparagraph 87(3)(a)(i) the words "in so far as it confers rights or benefits or imposes duties or obligations on a corporation" were omitted;

(e) in subsection 45B(1) and subparagraph 87(3)(a)(ii) the words "in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation" were omitted;

(ea) subsections 45D(3), 45D(4) and 45DA(3) were repealed, the words "In the circumstances specified in subsections (3) and (4)" were omitted from subsection 45D(1) and the words "In the circumstances specified in subsection (3)" were omitted from subsection 45DA(1);

(eb) the second sentence in subsection 45E(1) were omitted;

(g) subsection 96(2) were omitted; and

(h) subject to paragraphs (d), (e), (ea), (eb) and (g), a reference in this Act to a corporation, except a reference in section 4, 48, 50, 50A, 81, 151AE or 151AJ, included a reference to a person not being a corporation.

(2A) So far as subsection (2) relates to Part IV, that subsection has effect in relation to a participating Territory as if the words "within a Territory," were omitted from subparagraphs (2)(a)(iii) and (2)(b)(iii). For this purpose, ***participating Territory*** means a Territory that is a participating Territory within the meaning of Part XIA but is not named in a notice in operation under section 150K.

(2B) So far as subsection (2) relates to Part VB, that subsection has effect in relation to a Part XIAA scheme Territory as if the words "within a Territory," were omitted from subparagraph (2)(b)(iii). For this purpose, a ***Part XIAA scheme Territory*** is a Territory that

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has a law applying the New Tax System Price Exploitation Code (see Part XIAA), either with or without modifications, as a law of the Territory.

(3) In addition to the effect that this Act, other than Parts IIIA and X, has as provided by subsection (2), the provisions of Part IVA and of Divisions 1, 1A and 1AA of Part V have, by force of this subsection, the effect they would have if:

(a) those provisions (other than section 55) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and

(b) a reference in those provisions to a corporation included a reference to a person not being a corporation.

(4) In addition to the effect that this Act, other than Parts IIIA and X, has as provided by subsections (2) and (3), the provisions of Part IVA and of Division 1 (other than sections 53A, 55 and 61) and Division 1AA of Part V also have, by force of this subsection, the effect they would have if:

(a) those provisions were, by express provision, confined in their operation to engaging in conduct in a Territory; and

(b) a reference in those provisions to a thing done by a corporation in trade or commerce included a reference to a thing done in the course of the promotional activities of a professional person.

(5) In the application of section 73 in relation to a supplier who is a natural person, that section has effect as if there were substituted for paragraph 73(6)(a) the following paragraph:

" (a) the supplier had died or is an undischarged bankrupt or a person whose affairs are being dealt with under Part X of the *Bankruptcy Act 1966*; or".

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Part II—The Australian Competition and Consumer Commission

6A Establishment of Commission

(1) The Australian Competition and Consumer Commission is established by this section.

(2) The Commission:

(a) is a body corporate, with perpetual succession;

(b) shall have an official seal;

(c) may acquire, hold and dispose of real and personal property; and

(d) may sue or be sued in its corporate name.

7 Constitution of Commission

(1) The Commission shall consist of a Chairperson and such number of other members as are from time to time appointed in accordance with this Act.

(2) The members of the Commission shall be appointed by the Governor-General and shall be so appointed as full-time members.

(3) Before the Governor-General appoints a person as a member of the Commission or as Chairperson, the Minister must:

(a) be satisfied that the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection; and

(b) consider whether the person has knowledge of, or experience in, small business matters; and

(c) if there is at least one fully-participating jurisdiction—be satisfied that a majority of such jurisdictions support the appointment.

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(4) At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection.

8 Terms and conditions of appointment

(1) Subject to this Part, a member of the Commission holds office for such period, not exceeding 5 years, as is specified in the instrument of his or her appointment and on such terms and conditions as the Governor-General determines, but is eligible for re-appointment.

8A Associate members

(1) The Minister may appoint persons to be associate members of the Commission.

(1A) If there is at least one fully-participating jurisdiction, the Minister must not appoint a person as an associate member unless the Minister is satisfied that a majority of such jurisdictions support the appointment.

(2) An associate member of the Commission shall be appointed for such period not exceeding 5 years as is specified in the instrument of his or her appointment, but is eligible for re-appointment.

(3) Subject to this Part, an associate member of the Commission holds office on such terms and conditions as the Minister determines.

(4) The Chairperson may, by writing signed by him or her, direct that, for the purposes of the exercise of the powers of the Commission under this Act in relation to a specified matter, not being an exercise of those powers by a Division of the Commission, a specified associate member of the Commission or specified associate members of the Commission shall be deemed to be a member or members of the Commission and, in that case, unless the contrary intention appears, a reference in this Act to a member of the Commission shall, for the purposes only of the exercise of the powers of the Commission in relation to that matter, be construed as including a reference to that associate member of the

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Commission or each of those associate members of the Commission, as the case may be.

(5) Associate members of the Commission shall be deemed to be members of the Commission for the purposes of section 19.

(6) For the purpose of the determination by the Commission of an application for an authorisation or the making by the Commission of any decision for the purposes of subsection 93(3) or (3A), the Chairperson shall consider:

(a) whether he or she should give a direction under subsection (4) of this section; or

(b) in the case of a matter in relation to which the Chairperson proposes to give a direction under subsection 19(1), whether he or she should direct that the Division concerned is to include an associate member of the Commission or associate members of the Commission.

(7) Nothing in subsection (4) or (5) deems an associate member of the Commission to be a member of the Commission for any purpose related to the preparation of a report by the Commission under section 171.

9 Remuneration

(1) A member of the Commission shall be paid such remuneration as is determined by the Remuneration Tribunal, but, until that remuneration is so determined, he or she shall be paid such remuneration as is prescribed.

(2) Subject to the *Remuneration Tribunal Act 1973*, a member of the Commission shall be paid such allowances as are prescribed.

(3) In this section, ***member of the Commission*** includes an associate member of the Commission.

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10 Deputy Chairperson

(1) The Governor-General may appoint a person who is, or is to be, a member of the Commission to be the Deputy Chairperson of the Commission.

(1A) If there is at least one fully-participating jurisdiction, the Governor-General must not appoint a person as the Deputy Chairperson unless the Governor-General is satisfied that a majority of such jurisdictions support the appointment.

(2) A person appointed under this section holds office as Deputy Chairperson until the expiration of his or her period of appointment as a member of the Commission or until he or she sooner ceases to be a member of the Commission.

(3) Where a member of the Commission appointed as Deputy Chairperson is, upon ceasing to be Deputy Chairperson by virtue of the expiration of the period of his or her appointment as a member, re-appointed as a member, he or she is eligible for re-appointment as Deputy Chairperson.

(4) The Deputy Chairperson may resign his or her office of Deputy Chairperson by writing signed by him or her and delivered to the Governor-General.

11 Acting Chairperson

(1) Where there is, or is expected to be, a vacancy in the office of Chairperson, the Governor-General may appoint a person to act as Chairperson until the filling of the vacancy.

(1A) A person appointed under subsection (1) to act during a vacancy shall not continue so to act for more than 12 months.

(2) Where the Chairperson is absent from duty or from Australia:

(a) the Deputy Chairperson shall act as Chairperson during the absence; or

(b) if there is no Deputy Chairperson or the Deputy Chairperson is not available to act as Chairperson, the Minister may

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appoint a member of the Commission to act as Chairperson during the absence of the Chairperson, but any such appointment ceases to have effect if a person is appointed as Deputy Chairperson or the Deputy Chairperson becomes available to act as Chairperson.

(3) A person acting as Chairperson shall act in that capacity on such terms and conditions as the Governor-General determines and has all the powers and duties, and shall perform all the functions, conferred on the Chairperson by this Act.

12 Leave of absence

(1) A member of the Commission has such recreation leave entitlements as are determined by the Remuneration Tribunal.

(2) The Minister may grant a member of the Commission leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

13 Termination of appointment of members of the Commission

(1) The Governor-General may terminate the appointment of a member of the Commission for misbehaviour or physical or mental incapacity.

(2) If a member of the Commission:

(a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;

(b) fails to comply with his or her obligations under section 17;

(c) without the consent of the Minister engages in any paid employment outside the duties of his or her office; or

(d) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months,

the Governor-General shall terminate the appointment of that member of the Commission.

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14 Termination of appointment of associate members of the Commission

(1) The Minister may terminate the appointment of an associate member of the Commission for misbehaviour or physical or mental incapacity.

(2) If an associate member of the Commission:

(a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit; or

(b) fails to comply with his or her obligations under section 17,

the Minister shall terminate the appointment of that associate member of the Commission.

15 Resignation

(1) A member of the Commission may resign his or her office by writing signed by him or her and delivered to the Governor-General.

(2) An associate member of the Commission may resign his or her office by writing signed by him or her and delivered to the Minister.

16 Arrangement of business

The Chairperson may give directions as to the arrangement of the business of the Commission.

17 Disclosure of interests by members

(1) Where a member of the Commission other than the Chairperson is taking part, or is to take part, in the determination of a matter before the Commission and the member has or acquires any pecuniary interest that could conflict with the proper performance

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of his or her functions in relation to the determination of the matter:

(a) the member shall disclose the interest to the Chairperson; and

(b) the member shall not take part, or continue to take part, in the determination of the matter if:

(i) the Chairperson gives a direction under paragraph (2)(a) in relation to the matter; or

(ii) all of the persons concerned in the matter do not consent to the member taking part in the determination of the matter.

(2) Where the Chairperson becomes aware that a member of the Commission is taking part, or is to take part, in the determination of a matter and that the member has in relation to the determination of the matter such an interest:

(a) if the Chairperson considers that the member should not take part, or should not continue to take part, in the determination of the matter—the Chairperson shall give a direction to the member accordingly; or

(b) in any other case—the Chairperson shall cause the interest of the member to be disclosed to the persons concerned in the matter.

(3) The Chairperson shall give written notice to the Minister of all pecuniary interests that the Chairperson has or acquires in any business carried on in Australia or in any body corporate carrying on any such business.

(4) In this section, ***member of the Commission*** includes an associate member of the Commission.

18 Meetings of Commission

(1) Subject to this section, the Chairperson shall convene such meetings of the Commission as he or she thinks necessary for the efficient performance of the functions of the Commission.

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(2) Meetings of the Commission shall be held at such places as the Chairperson determines.

(3) The Chairperson shall preside at all meetings of the Commission at which he or she is present.

(4) In the absence of the Chairperson from a meeting of the Commission, the Deputy Chairperson shall preside.

(5) Subject to this Act and the regulations, the member presiding at a meeting of the Commission may give directions regarding the procedure to be followed at or in connection with the meeting.

(6) At a meeting of the Commission:
  (a) three members (including the Chairperson or the Deputy Chairperson) form a quorum;
  (b) all questions shall be decided by a majority of votes of the members present and voting; and
  (c) the member presiding has a deliberative vote and, in the event of an equality of votes, also has a casting vote.

(7) If the Commission so determines, a member or members may participate in, and form part of a quorum at, a meeting of the Commission or a Division of the Commission by means of any of the following methods of communication:
  (a) telephone;
  (b) closed circuit television;
  (c) another method of communication determined by the Commission.

(8) A determination made by the Commission under subsection (7) may be made in respect of a particular meeting or meetings of the Commission or a Division of the Commission or in respect of all meetings of the Commission or a Division of the Commission.

19 Chairperson may direct Commission to sit in Divisions

(1) The Chairperson may, by writing signed by him or her, direct that the powers of the Commission under this Act in relation to a matter

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shall be exercised by a Division of the Commission constituted by the Chairperson and such other members (not being less than two in number) as are specified in the direction.

(2) Where the Chairperson has given a direction under subsection (1), he or she may, by writing signed by him or her, at any time before the Division of the Commission specified in the direction has made a determination in relation to the matter, revoke the direction or amend the direction in relation to the membership of the Division or in any other respect, and where the membership of a Division of the Commission is changed, the Division as constituted after the change may complete the determination of the matter.

(3) For the purposes of the determination of a matter specified in a direction given under subsection (1), the Commission shall be deemed to consist of the Division of the Commission specified in the direction.

(4) The Chairperson is not required to attend a meeting of a Division of the Commission if he or she does not think fit to do so.

(5) At a meeting of a Division of the Commission at which neither the Chairperson nor the Deputy Chairperson is present, a member of the Commission nominated for the purpose by the Chairperson shall preside.

(6) Notwithstanding section 18, at a meeting of a Division of the Commission, two members form a quorum.

(7) A Division of the Commission may exercise powers of the Commission under this Act notwithstanding that another Division of the Commission is exercising powers of the Commission at the same time.

25 Delegation by Commission

(1) The Commission may, by resolution, delegate to a member of the Commission, either generally or otherwise as provided by the instrument of delegation, any of its powers under this Act, the *Telecommunications Act 1997*, the *Telecommunications (Consumer*

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Protection and Service Standards) Act 1999 or Rules of Conduct under Part 20 of the *Telecommunications Act 1997*, other than this power of delegation and its powers to grant, revoke or vary an authorisation.

(2) A power 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 by the Commission.

26 Delegation by Commission in relation to unconscionable conduct and consumer protection

(1) The Commission may, by resolution, delegate any of its functions and powers under or in relation to Parts IVA, V and VI and any of its powers under Part XII that relate to those Parts, to a staff member of the Australian Securities and Investments Commission within the meaning of section 5 of the *Australian Securities and Investments Commission Act 1989*.

(2) The Commission must not delegate a function or power under subsection (1) unless the Chairperson of the Australian Securities and Investments Commission has agreed to the delegation in writing.

27 Staff of Commission

(1) The staff necessary to assist the Commission shall be persons engaged under the *Public Service Act 1999*.

(2) For the purposes of the *Public Service Act 1999*:

(a) the Chairperson of the Commission and the APS employees assisting the Chairperson together constitute a Statutory Agency; and

(b) the Chairperson is the Head of that Statutory Agency.

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27A Consultants

(1) On behalf of the Commonwealth, the Commission may engage persons to give advice to, and perform services for, the Commission.

(2) The terms and conditions of engagement are as determined by the Commission.

28 Functions of Commission in relation to dissemination of information, law reform and research

(1) In addition to any other functions conferred on the Commission, the Commission has the following functions:

(a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under this Act;

(b) to examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in respect of matters referred to the Commission by the Minister, being matters with respect to which the Parliament has power to make laws;

(c) to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;

(ca) to conduct research and undertake studies on matters that are referred to the Commission by the Council and that relate to the Commission's other functions;

(d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;

(e) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.

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(2) Where a matter of a kind mentioned in paragraph (1)(b) is referred by the Minister to the Commission for examination and report:

(a) the Commission shall cause to be published in the *Gazette* and in such newspapers and other journals as the Commission considers appropriate a notice:

(i) stating that the reference has been made and specifying the matter to which the reference relates; and

(ii) inviting interested persons to furnish to the Commission their views on that matter and specifying the time and manner within which those views are to be furnished;

(b) the Commission shall not furnish its report to the Minister until a reasonable opportunity has been given to interested persons to furnish to the Commission their views on the matter to which the reference relates; and

(c) the Commission shall include in its report to the Minister any recommendations that it considers desirable with respect to the reform of the law relating to the matter to which the reference relates, whether those recommendations relate to the amendment of existing laws or the making of new laws.

(3) The Minister shall cause a copy of each report furnished to him or her by the Commission in relation to a matter referred to the Commission under paragraph (1)(b) to be laid before each House of the Parliament as soon as practicable after the report is received by him or her.

29 Commission to comply with directions of Minister and requirements of the Parliament

(1) The Minister may give the Commission directions connected with the performance of its functions or the exercise of its powers under this Act.

(1A) The Minister must not give directions under subsection (1) relating to:

(a) Part IIIA, IV, VII, XIB or XIC; or

(b) section 65J, 65K, 65M or 65N in relation to individual cases.

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(1B) The Commission must comply with a direction.

(2) Any direction given to the Commission under subsection (1) shall be in writing and the Minister shall cause a copy of the direction to be published in the *Gazette* as soon as practicable after the direction is given.

(3) If either House of the Parliament or a Committee of either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the functions of the Commission under this Act, the Commission shall comply with the requirement.

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Part IIA—The National Competition Council

29A Establishment of Council

The National Competition Council is established by this section.

29B Functions and powers of Council

(1) The Council's functions include:

(a) carrying out research into matters referred to the Council by the Minister; and

(b) providing advice on matters referred to the Council by the Minister.

(2) The Council may:

(a) perform any function conferred on it by a law of the Commonwealth, or of a State or Territory; and

(b) exercise any power:

(i) conferred by that law to facilitate the performance of that function; or

(ii) necessary or convenient to permit the performance of that function.

(2A) The Council must not, under subsection (2):

(a) perform a function conferred on it by a law of a State or Territory; or

(b) exercise a power that is so conferred,

unless the conferral of the function or power is in accordance with the Competition Principles Agreement.

(3) In performing its functions, the Council may co-operate with a department, body or authority of the Commonwealth, of a State or of a Territory.

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29C Membership of Council

(1) The Council consists of the Council President and up to 4 other Councillors.

(2) Each Councillor is to be appointed by the Governor-General, for a term of up to 5 years.

(3) The Governor-General must not appoint a person as a Councillor or Council President unless the Governor-General is satisfied that:

(a) the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration; and

(b) a majority of the States and Territories that are parties to the Competition Principles Agreement support the appointment.

29D Terms and conditions of office

(1) A Councillor may be appointed to hold office on either a full-time or a part-time basis.

(2) A Councillor holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as the Governor-General determines.

29E Acting Council President

(1) The Minister may appoint a Councillor to act as the Council President:

(a) if there is a vacancy in the office of Council President, whether or not an appointment has previously been made to the office; or

(b) during any period, or during all periods, when the Council President is absent from duty or absent from Australia or is, for any reason, unable to perform the duties of the office.

(2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:

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(a) the occasion for appointment had not arisen;
(b) there was a defect or irregularity in the appointment;
(c) the appointment had ceased to have effect;
(d) the occasion to act had not arisen or had ceased.

29F Remuneration of Councillors

(1) A Councillor is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of the Remuneration Tribunal is in operation, the Councillor is to be paid the remuneration that is prescribed.

(2) A Councillor is to be paid such allowances as are prescribed.

(3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

29G Leave of absence

(1) A full-time Councillor has such recreation leave entitlements as are determined by the Remuneration Tribunal.

(2) The Minister may grant a full-time Councillor leave of absence, other than recreation leave, on such terms and conditions as the Minister determines. The terms and conditions may include terms and conditions relating to remuneration.

29H Termination of appointment of Councillors

(1) The Governor-General may terminate the appointment of a Councillor for misbehaviour or for physical or mental incapacity.

(2) The Governor-General must terminate the appointment of a Councillor who:
(a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;
(b) fails to comply with his or her obligations under section 29K;

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(c) in the case of a full-time Councillor—engages in any paid employment outside the duties of the Councillor's office without the consent of the Minister;

(d) in the case of a full-time Councillor—is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.

29I Resignation of Councillors

A Councillor may resign by giving the Governor-General a signed resignation notice.

29J Arrangement of Council business

(1) Subject to subsection (2), the Council President may give directions about the arrangement of the Council's business.

(2) The Council must not carry out any work (other than work relating to a function under Part IIIA of this Act or under the *Prices Surveillance Act 1983*) except in accordance with a program agreed to by:

(a) a majority of the parties to the Competition Principles Agreement; or

(b) if the parties to the Agreement are evenly divided on the question of agreeing to a program—the Commonwealth.

29K Disclosure of interests by Councillors

(1) If a Councillor (except the Council President) is taking part, or is to take part, in the Council's consideration of a matter and the Councillor has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions relating to the matter:

(a) the Councillor must disclose the interest to the Council President; and

(b) the Councillor must not take part, or continue to take part, in the consideration of the matter if:

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(i) all of the persons concerned in the matter do not consent to the Councillor taking part in the consideration of the matter; or

(ii) the Council President gives a direction to the member under paragraph (2)(b).

(2) If the Council President becomes aware that a Councillor is taking part, or is to take part, in the Council's consideration of a matter and that the Councillor has such an interest relating to the matter:

(a) the Council President must cause the Councillor's interest to be disclosed to the persons concerned in the matter; or

(b) if the Council President considers that the Councillor should not take part or continue to take part in the consideration of the matter—the Council President must direct the Councillor accordingly.

(3) The Council President must give the Minister written notice of all pecuniary interests that the Council President has or acquires in any business carried on in Australia or in any body corporate carrying on such business.

29L Council meetings

(1) The Council President must convene the meetings that the Council President thinks are necessary to perform the Council's functions efficiently.

(2) The meetings must be held in places determined by the Council President.

(3) The Council President must preside at any meeting that he or she attends.

(4) If the Council President is absent from a meeting, a Councillor chosen by the Councillors at the meeting must preside.

(5) The Councillor presiding at a meeting may give directions on the procedure to be followed in relation to the meeting.

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(6) The quorum for a meeting is 3 Councillors (including the Council President).

(7) At a meeting, a question must be decided by a majority of votes of the Councillors present and voting. The Councillor presiding has a deliberative vote, and a casting vote if the deliberative votes are equally divided.

29M Staff to help Council

(1) The staff needed to help the Council are to be persons engaged under the *Public Service Act 1999.*

(2) For the purposes of the *Public Service Act 1999*:

(a) the Council President and the APS employees assisting the Council President together constitute a Statutory Agency; and

(b) the Council President is the Head of that Statutory Agency.

29N Consultants

(1) On behalf of the Commonwealth, the Council may engage persons to give advice to, and perform services for, the Council.

(2) The terms and conditions of engagement are as determined by the Council.

29O Annual report

Within 60 days after the end of each financial year, the Councillors must give a report on the Council's operations during that year to the Minister for presentation to the Parliament.

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Part III—The Australian Competition Tribunal

30 Constitution of Tribunal

(1) The Trade Practices Tribunal that existed immediately before this subsection commenced continues to exist as the Australian Competition Tribunal.

(2) The Tribunal so continued in existence shall consist of a President and such number of Deputy Presidents and other members as are appointed in accordance with this section.

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

31 Qualifications of members of Tribunal

(1) A person shall not be appointed as a presidential member of the Tribunal unless he or she is a Judge of a Federal Court, not being the High Court or a court of an external Territory.

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

31A Appointment of Judge as presidential member of Tribunal not to affect tenure etc.

The appointment of a Judge of a Federal Court as a presidential member of the Tribunal, or service by a Judge of a Federal Court as a presidential member of the Tribunal, whether the appointment was or is made or the service occurred or occurs before or after the commencement of this section, does not affect, and shall be deemed never to have affected, his or her tenure of office as a Judge of a Federal Court or his or her rank, title, status,

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precedence, salary, annual or other allowances or other rights or privileges as the holder of his or her office as a Judge of a Federal Court and, for all purposes, his or her service, whether before or after the commencement of this section, as a presidential member of the Tribunal shall be taken to have been, or to be, service as the holder of his or her office as a Judge of a Federal Court.

32 Terms and conditions of appointment

Subject to this Part, a member of the Tribunal holds office for such period, not exceeding 7 years, as is specified in the instrument of his or her appointment and on such terms and conditions as the Governor-General determines, but is eligible for re-appointment.

33 Remuneration and allowances of members of Tribunal

(4) A member of the Tribunal other than a presidential member shall be paid such remuneration as is determined by the Remuneration Tribunal.

(5) A member of the Tribunal other than a presidential member shall be paid such allowances as are prescribed.

(6) Subsections (4) and (5) have effect subject to the *Remuneration Tribunal Act 1973*.

34 Acting appointments

(1) Where:

(a) the President is, or is expected to be, absent from duty; or

(b) there is, or is expected to be, a vacancy in the office of President,

the Minister may appoint a Deputy President or an acting Deputy President to act as President during the absence, or while there is a vacancy in the office of President, as the case may be.

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

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as a presidential member to act as a Deputy President during the absence from duty of the member.

(3) Where a member of the Tribunal 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 of the Tribunal 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 subsection (2) or (3), the Governor-General may, by reason of pending proceedings or other special circumstances, direct, before the absent member of the Tribunal 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 of the Tribunal by virtue of this subsection for more than 12 months after the resumption of duty by the absent member.

(5) Where a person has been appointed under this section to act as a member of the Tribunal during the absence from duty of a member of the Tribunal, 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 12 months from the date on which the absent member ceases to hold office, whichever first happens.

35 Suspension and removal of members of Tribunal

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

(2) The Minister shall cause a statement of the ground of the suspension to be laid before each House of the Parliament within 7 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 15 sitting days of that House

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after the day on which the statement has been laid before it, by resolution, declare that the member of the Tribunal should be restored to office and, if each House so passes a resolution, the Governor-General shall terminate the suspension.

(4) If, at the expiration of 15 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 of the Tribunal from office.

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

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

(7) A presidential member of the Tribunal ceases to hold office if he or she no longer holds office as a Judge of a Federal Court, not being the High Court or a court of an external Territory.

36 Resignation

A member of the Tribunal may resign his or her office by writing signed by him or her and delivered to the Governor-General.

37 Constitution of Tribunal for particular matters

The Tribunal shall, for the purpose of hearing and determining proceedings, be constituted by a Division of the Tribunal consisting of a presidential member of the Tribunal and two members of the Tribunal who are not presidential members.

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38 Validity of determinations

The validity of a determination of the Tribunal shall not be affected or called in question by reason of any defect or irregularity in the constitution of the Tribunal.

39 Arrangement of business

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

40 Disclosure of interests by members of Tribunal

(1) Where a member of the Tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and the member has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions in relation to the proceedings:

(a) the member shall disclose the interest to the President; and

(b) the member shall not take part, or continue to take part, in the proceedings if:

(i) the President gives a direction under paragraph (2)(a) in relation to the proceedings; or

(ii) all of the persons concerned in the proceedings do not consent to the member taking part in the proceedings.

(2) Where the President becomes aware that a member of the Tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and that the member has in relation to the proceedings such an interest:

(a) if the President considers that the member should not take part, or should not continue to take part, in the proceedings—the President shall give a direction to the member accordingly; or

(b) in any other case—the President shall cause the interest of the member to be disclosed to the persons concerned in the proceedings.

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(3) In this section:

(a) a reference to proceedings shall be read as including a reference to proceedings by way of an inquiry by the Tribunal under this Act; and

(b) a reference to a person concerned in proceedings, being an inquiry conducted by the Tribunal under section 132, shall be read as a reference to a person entitled, or granted leave, to be represented in the inquiry.

41 Presidential member to preside

The presidential member who is a member of a Division shall preside at proceedings of that Division.

42 Decision of questions

(1) A question of law arising in a matter before a Division of the Tribunal (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 subsection (1), 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.

43 Member of Tribunal ceasing to be available

(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, 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 subsection (1) for the purposes of the proceedings.

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(3) Where this section applies in relation to proceedings that were being dealt with before the Tribunal, the President may, instead of giving a direction under subsection (2), 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 subsection (1).

(4) Where the President has given a direction under subsection (3), he or she 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 subsection (3).

(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.

43A Counsel assisting Tribunal

(1) The President may, on behalf of the Commonwealth, appoint a legal practitioner to assist the Tribunal as counsel, either generally or in relation to a particular matter or matters.

(2) In this section:

legal practitioner means a legal practitioner (however described) of the High Court or of the Supreme Court of a State or Territory.

43B Consultants

The Registrar may, on behalf of the Commonwealth, engage persons as consultants to, or to perform services for, the Tribunal.

44 Staff of Tribunal

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

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(2) The Registrar and the Deputy Registrars shall be appointed by the Minister 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 engaged under the *Public Service Act 1999*.

44A Acting appointments

(1) The Minister may appoint a person who is engaged under the *Public Service Act 1999* to act as the Registrar or as a Deputy Registrar during any period, or during all periods, when:

(a) the Registrar or that Deputy Registrar, as the case may be, is absent from duty or from Australia or is, for any other reason, unable to perform the duties and functions of his or her office; or

(b) there is a vacancy in the office of Registrar or in that office of Deputy Registrar, as the case may be.

(2) A person acting as the Registrar or as a Deputy Registrar by reason of a vacancy in the office of Registrar or of that Deputy Registrar shall not continue so to act after the expiration of 12 months after the occurrence of the vacancy.

(3) A person appointed to act as the Registrar or as a Deputy Registrar has, while acting as the Registrar or as that Deputy Registrar, as the case may be, all the duties and functions of the Registrar or of that Deputy Registrar, and references in this Act to the Registrar or to a Deputy Registrar shall:

(a) if a person is acting as the Registrar—be read as a reference to the person so acting; or

(b) if a person is acting as a Deputy Registrar—be read as including a reference to the person so acting.

(4) The Minister may at any time terminate an appointment of a person to act as the Registrar or as a Deputy Registrar.

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(5) A person who holds an appointment to act as the Registrar or as a Deputy Registrar may resign his or her appointment by writing under his or her hand delivered to the Minister.

(6) The validity of an act done by a person appointed to act as the Registrar or as a Deputy Registrar shall not be questioned in any proceeding on a ground arising from the fact that the occasion for the appointment, or for him or her to act under the appointment, had not arisen or that the appointment had ceased to have effect or the occasion for him or her to act under the appointment had passed.

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Part IIIA—Access to services

Division 1—Preliminary

44B Definitions

In this Part, unless the contrary intention appears:

access code means a code referred to in section 44ZZAA;

access undertaking means an undertaking under section 44ZZA;

Commonwealth Minister means the Minister;

constitutional trade or commerce means any of the following:

(a) trade or commerce among the States;

(b) trade or commerce between Australia and places outside Australia;

(c) trade or commerce between a State and a Territory, or between 2 Territories;

declaration means a declaration made by the designated Minister under Division 2;

declaration recommendation means a recommendation made by the Council under section 44F;

declared service means a service for which a declaration is in operation;

designated Minister has the meaning given by section 44D;

determination means a determination made by the Commission under Division 3;

director has the same meaning as in the Corporations Law;

entity means a person, partnership or joint venture;

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modifications includes additions, omissions and substitutions;

officer has the same meaning as in the Corporations Law;

party means:

(a) in relation to an arbitration of an access dispute—a party to the arbitration, as mentioned in section 44U;

(b) in relation to a determination—a party to the arbitration in which the Commission made the determination;

provider, in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service;

responsible Minister means:

(a) the Premier, in the case of a State;

(b) the Chief Minister, in the case of a Territory;

revocation recommendation means a recommendation made by the Council under section 44J;

service means a service provided by means of a facility and includes:

(a) the use of an infrastructure facility such as a road or railway line;

(b) handling or transporting things such as goods or people;

(c) a communications service or similar service,

but does not include:

(d) the supply of goods; or

(e) the use of intellectual property; or

(f) the use of a production process,

except to the extent that it is an integral but subsidiary part of the service;

State or Territory body means:

(a) a State or Territory;

(b) an authority of a State or Territory;

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***third party*,** in relation to a service, means a person who wants access to the service or wants a change to some aspect of the person's existing access to the service.

44C How this Part applies to partnerships and joint ventures

(1) This section applies if the provider of a service is a partnership or joint venture that consists of 2 or more corporations. Those corporations are referred to in this section as the ***participants***.

(2) If this Part requires or permits something to be done by the provider, the thing may be done by one or more of the participants on behalf of the provider.

(3) If a provision of this Part refers to the provider bearing any costs, the provision applies as if the provision referred to any of the participants bearing any costs.

(4) If a provision of this Part refers to the provider doing something, the provision applies as if the provision referred to one or more of the participants doing that thing on behalf of the provider.

(5) If:

(a) a provision of this Part requires the provider to do something, or prohibits the provider from doing something; and

(b) a contravention of the provision is an offence,

the provision applies as if a reference to the provider were a reference to any person responsible for the day-to-day management and control of the provider.

(6) If:

(a) a provision of this Part requires a provider to do something, or prohibits a provider doing something; and

(b) a contravention of the provision is not an offence,

the provision applies as if the reference to provider were a reference to each participant and to any other person responsible for the day-to-day management and control of the provider.

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44D Meaning of *designated Minister*

(1) The Commonwealth Minister is the designated Minister unless subsection (2) or (3) applies.

(2) In relation to declaring a service in a case where:

(a) the provider is a State or Territory body; and

(b) the State or Territory concerned is a party to the Competition Principles Agreement,

the responsible Minister of the State or Territory is the designated Minister.

(3) In relation to revoking a declaration that was made by the responsible Minister of a State or Territory, the responsible Minister of that State or Territory is the designated Minister.

44DA The principles in the Competition Principles Agreement have status as guidelines

(1) For the avoidance of doubt:

(a) the requirement, under subsection 44G(3), that the Council apply the relevant principles set out in the Competition Principles Agreement in deciding whether an access regime is an effective access regime; and

(b) the requirement, under subsection 44H(5), that the designated Minister apply the relevant principles set out in the Agreement in deciding whether an access regime is an effective access regime; and

(c) the requirement, under subsection 44M(4), that the Council apply the relevant principles set out in the Agreement in deciding whether to recommend to the Commonwealth Minister that he or she should decide that an access regime is, or is not, an effective access regime; and

(d) the requirement, under subsection 44N(2), that the Commonwealth Minister, in making a decision on a recommendation received from the Council, apply the relevant principles set out in the Agreement,

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are obligations that the Council and the relevant Ministers must treat each individual relevant principle as having the status of a guideline rather than a binding rule.

(2) An effective access regime may contain additional matters that are not inconsistent with Competition Principles Agreement principles.

44E This Part binds the Crown

(1) This Part binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.

(2) Nothing in this Part makes the Crown liable to be prosecuted for an offence.

(3) The protection in subsection (2) does not apply to an authority of the Commonwealth or an authority of a State or Territory.

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Division 2—Declared services

Subdivision A—Recommendation by the Council

44F Person may request recommendation

(1) The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend under section 44G that a particular service be declared.

(2) After receiving the application, the Council:

(a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and

(b) must recommend to the designated Minister:

(i) that the service be declared; or

(ii) that the service not be declared.

(3) If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.

(4) In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.

(5) The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

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44G Limits on the Council recommending declaration of a service

(1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.

(2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

(3) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:

(a) must apply the relevant principles set out in that agreement; and

(b) must, subject to section 44DA, not consider any other matters.

(4) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister's decision was published, there have

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been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

Note: The period for which a decision is in force is determined under subsection 44N(3) and paragraph 44P(a).

Subdivision B—Declaration by the designated Minister

44H Designated Minister may declare a service

(1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.

(2) In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not.

(3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under section 44ZZA.

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

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(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

(5) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Minister:

(a) must apply the relevant principles set out in that agreement; and

(b) must, subject to section 44DA, not consider any other matters.

(6) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the designated Minister must follow that decision, unless the designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

Note: The period for which a decision is in force is determined under subsection 44N(3) and paragraph 44P(a).

(7) The designated Minister must publish the declaration or his or her decision not to declare the service. At the same time, the designated Minister must give reasons for the decision and a copy of the declaration recommendation to the provider and to the person who applied for the declaration recommendation.

(8) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.

(9) If the designated Minister does not publish under subsection (7) within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period, to have decided not to declare the service and to have published that decision not to declare the service.

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44I Duration and effect of declaration

(1) Subject to this section, a declaration begins to operate at a time specified in the declaration. The time cannot be earlier than 21 days after the declaration is published.

(2) If an application for review of a declaration is made within 21 days after the declaration is published, the declaration does not begin to operate until the Tribunal makes its decision on the review.

(3) A declaration continues in operation until its expiry date, unless it is earlier revoked.

(4) The expiry or revocation of a declaration does not affect:
  (a) the arbitration of an access dispute that was notified before the expiry or revocation; or
  (b) the operation or enforcement of any determination made in the arbitration of an access dispute that was notified before the expiry or revocation.

44J Revocation of declaration

(1) The Council may recommend to the designated Minister that a declaration be revoked.

(2) The Council cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation, subsection 44H(4) would prevent the designated Minister from declaring the service concerned.

(3) On receiving a revocation recommendation, the designated Minister must either revoke the declaration or decide not to revoke the declaration.

(4) The designated Minister must publish the decision to revoke or not to revoke.

(5) If the designated Minister decides not to revoke, the designated Minister must give reasons for the decision to the provider of the

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declared service when the designated Minister publishes the decision.

(6) The designated. Minister cannot revoke a declaration without receiving a revocation recommendation.

44K Review of declaration

(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.

(2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister's decision may be made by the person who applied for the declaration recommendation.

(3) An application for review must be made within 21 days after publication of the designated Minister's decision.

(4) The review by the Tribunal is a re-consideration of the matter.

(5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.

(6) The member of the Tribunal presiding at the review may require the Council to give information and other assistance and to make reports, as specified by the member for the purposes of the review.

(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:
   (a) affirm the designated Minister's decision; or
   (b) set aside the designated Minister's decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).

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44L Review of decision not to revoke a declaration

(1) If the designated Minister decides not to revoke a declaration, the provider may apply in writing to the Tribunal for review of the decision.

(2) An application for review must be made within 21 days after publication of the designated Minister's decision.

(3) The review by the Tribunal is a re-consideration of the matter.

(4) For the purposes of the review, the Tribunal has the same powers as the designated Minister.

(5) The member of the Tribunal presiding at the review may require the Council to give information and other assistance and to make reports, as specified by the member for the purposes of the review.

(6) The Tribunal may either:
  (a) affirm the designated Minister's decision; or
  (b) set aside the designated Minister's decision and revoke the declaration.

Subdivision C—Miscellaneous

44M Recommendation for a Ministerial decision on effectiveness of access regime

(1) This section applies if a State or Territory that is a party to the Competition Principles Agreement has established at any time a regime for access to a service or a proposed service.

(2) The responsible Minister for the State or Territory may make a written application to the Council asking the Council to recommend that the Commonwealth Minister decide that the regime for access to the service or proposed service is an effective access regime.

(3) The Council must recommend to the Commonwealth Minister:

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(a) that he or she decide that the access regime is an effective access regime for the service, or proposed service; or

(b) that he or she decide that the access regime is not an effective access regime for the service, or proposed service.

(4) In deciding what recommendation it should make, the Council:

(a) must assess whether the access regime is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement; and

(b) must, subject to section 44DA, not consider any other matters.

(5) When the Council recommends that the Commonwealth Minister make a particular decision, the Council must also recommend the period for which the decision should be in force.

44N Ministerial decision on effectiveness of access regime

(1) On receiving a recommendation, the Commonwealth Minister must:

(a) decide that the access regime is an effective access regime for the service or proposed service; or

(b) decide that the access regime is not an effective access regime for the service or proposed service.

(2) In making a decision, the Commonwealth Minister:

(a) must apply the relevant principles set out in the Competition Principles Agreement; and

(b) must, subject to section 44DA, not consider any other matters.

(3) The decision must specify the period for which it is in force.

(4) The Commonwealth Minister must publish his or her decision. At the same time, the Commonwealth Minister must give his or her reasons for the decision, and a copy of the Council's recommendation, to the responsible Minister for the State or Territory who applied for the recommendation.

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44O Review of Ministerial decision on effectiveness of access regime

(1) The responsible Minister of the State or Territory who applied for a recommendation that the Commonwealth Minister decide that the access regime is an effective access regime may apply to the Tribunal for review of the Commonwealth Minister's decision.

(2) An application for review must be made within 21 days after publication of the Commonwealth Minister's, decision.

(3) The review by the Tribunal is a reconsideration of the matter.

(4) For the purposes of the review, the Tribunal has the same powers as the Commonwealth Minister.

(5) The member of the Tribunal presiding at the review may require the Council to give information and other assistance, and to make reports, as specified by the member for the purposes of the review.

(6) The Tribunal may affirm, vary or reverse the Commonwealth Minister's decision.

(7) A decision made by the Tribunal is to be taken to be a decision of the Commonwealth Minister for all purposes of this Part (except this section).

44P State or Territory ceasing to be a party to Competition Principles Agreement

If a State or Territory that has established a regime for access to a service or proposed service ceases to be a party to the Competition Principles Agreement:

(a) a decision by the Commonwealth Minister that the regime is an effective access regime ceases to be in force; and

(b) the Council, the Commonwealth Minister and the Tribunal need not take any further action relating to an application for a decision by the Commonwealth Minister that the regime is an effective access regime.

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44Q Register of decisions and declarations

The Commission must maintain a public register that includes:

(a) each decision of the Commonwealth Minister that a regime established by a State or Territory for access to a service is an effective access regime for the service or proposed service; and

(b) each declaration (including a declaration that is no longer in force).

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Division 3—Access to declared services

Subdivision A—Scope of Division

44R Constitutional limits on operation of this Division

This Division does not apply in relation to a third party's access to a service unless:

(a) the provider is a corporation (or a partnership or joint venture consisting wholly of corporations); or

(b) the third party is a corporation; or

(c) the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

Subdivision B—Notification of access disputes

44S Notification of access disputes

(1) If a third party is unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the Commission in writing that an access dispute exists.

Note: An example of one of the things on which a provider and third party might disagree is whether a previous determination ought to be varied.

(2) On receiving the notification, the Commission must give notice in writing of the access dispute to:

(a) the provider, if the third party notified the access dispute;

(b) the third party, if the provider notified the access dispute;

(c) any other person whom the Commission thinks might want to become a party to the arbitration.

44T Withdrawal of notifications

(1) A notification may be withdrawn as follows (and not otherwise):

(a) if the provider notified the dispute:

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(i) the provider may withdraw the notification at any time before the Commission makes its determination;

(ii) the third party may withdraw the provider's notification at any time after the Commission issues a draft determination, but before it makes its determination;

(b) if the third party notified the dispute, the third party may withdraw the notification at any time before the Commission makes its determination.

(2) Despite subparagraph (1)(a)(ii), if the provider notified a dispute over variation of a determination, the third party may not withdraw the provider's notification.

(3) If the notification is withdrawn, it is taken for the purposes of this Part never to have been given.

Subdivision C—Arbitration of access disputes

44U Parties to the arbitration

The parties to the arbitration of an access dispute are:

(a) the provider;

(b) the third party;

(c) any other person who applies in writing to be made a party and is accepted by the Commission as having a sufficient interest.

44V Determination by Commission

(1) Unless it terminates the arbitration under section 44Y, the Commission must make a written determination on access by the third party to the service.

(2) The determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:

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(a) require the provider to provide access to the service by the third party;
(b) require the third party to accept, and pay for, access to the service;
(c) specify the terms and conditions of the third party's access to the service;
(d) require the provider to extend the facility;
(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(3) The determination does not have to require the provider to provide access to the service by the third party.

(4) Before making a determination, the Commission must give a draft determination to the parties.

(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

44W Restrictions on access determinations

(1) The Commission must not make a determination that would have any of the following effects:
(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;
(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;
(c) depriving any person of a protected contractual right;
(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;
(e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility.

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(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.

(3) A determination is of no effect if it is made in contravention of subsection (1).

(4) If the Commission makes a determination that has the effect of depriving a person (the ***second person***) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:

(a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and

(b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference between the total amount of service the person was entitled to under a pre-notification right and the amount that the person actually needs to meet his or her actual requirements.

(5) In this section:

existing user means a person (including the provider) who was using the service at the time when the dispute was notified;

pre-notification right means a right under a contract, or under a determination, that was in force at the time when the dispute was notified;

protected contractual right means a right under a contract that was in force at the beginning of 30 March 1995.

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44X Matters that the Commission must take into account

(1) The Commission must take the following matters into account in making a determination:

(a) the legitimate business interests of the provider, and the provider's investment in the facility;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility.

(2) The Commission may take into account any other matters that it thinks are relevant.

44Y Commission may terminate arbitration in certain cases

(1) The Commission may at any time terminate an arbitration (without making a determination) if it thinks that:

(a) the notification of the dispute was vexatious; or

(b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or

(c) the party who notified the dispute has not engaged in negotiations in good faith; or

(d) access to the service should continue to be governed by an existing contract between the provider and the third party.

(2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

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Subdivision D—Procedure in arbitrations

44Z Constitution of Commission for conduct of arbitration

For the purposes of a particular arbitration, the Commission is to be constituted by 2 or more members of the Commission nominated in writing by the Chairperson.

44ZA Member of the Commission presiding at an arbitration

(1) Subject to subsection (2), the Chairperson is to preside at an arbitration.

(2) If the Chairperson is not a member of the Commission as constituted under section 44Z in relation to a particular arbitration, the Chairperson must nominate a member of the Commission to preside at the arbitration.

44ZB Reconstitution of Commission

(1) This section applies if a member of the Commission who is one of the members who constitute the Commission for the purposes of a particular arbitration:
  (a) stops being a member of the Commission; or
  (b) for any reason, is not available for the purpose of the arbitration.

(2) The Chairperson must either:
  (a) direct that the Commission is to be constituted for the purposes of finishing the arbitration by the remaining member or members; or
  (b) direct that the Commission is to be constituted for that purpose by the remaining member or members together with one or more other members of the Commission.

(3) If a direction under subsection (2) is given, the Commission as constituted in accordance with the direction must continue and finish the arbitration and may, for that purpose, have regard to any

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record of the proceedings of the arbitration made by the Commission as previously constituted.

44ZC Determination of questions

If the Commission is constituted for an arbitration by 2 or more members of the Commission, any question before the Commission is to be decided:

(a) unless paragraph (b) applies—according to the opinion of the majority of those members; or

(b) if the members are evenly divided on the question—according to the opinion of the member who is presiding.

44ZD Hearing to be in private

(1) Subject to subsection (2), an arbitration hearing for an access dispute is to be in private.

(2) If the parties agree, an arbitration hearing or part of an arbitration hearing may be conducted in public.

(3) The member of the Commission who is presiding at an arbitration hearing that is conducted in private may give written directions as to the persons who may be present.

(4) In giving directions under subsection (3), the member presiding must have regard to the wishes of the parties and the need for commercial confidentiality.

44ZE Right to representation

In an arbitration hearing before the Commission under this Part, a party may appear in person or be represented by someone else.

44ZF Procedure of Commission

(1) In an arbitration hearing about an access dispute, the Commission:

(a) is not bound by technicalities, legal forms or rules of evidence; and

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(b) must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and

(c) may inform itself of any matter relevant to the dispute in any way it thinks appropriate.

(2) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods.

(3) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.

(4) The Commission may determine that an arbitration hearing is to be conducted by:

(a) telephone; or

(b) closed circuit television; or

(c) any other means of communication.

44ZG Particular powers of Commission

(1) The Commission may do any of the following things for the purpose of arbitrating an access dispute:

(a) give a direction in the course of, or for the purposes of, an arbitration hearing;

(b) hear and determine the arbitration in the absence of a person who has been summoned or served with a notice to appear;

(c) sit at any place;

(d) adjourn to any time and place;

(e) refer any matter to an expert and accept the expert's report as evidence;

(f) generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the access dispute.

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(2) A person must not do any act or thing in relation to the arbitration of an access dispute that would be a contempt of court if the Commission were a court of record.

Penalty: Imprisonment for 6 months.

(3) Subsection (1) has effect subject to any other provision of this Part and subject to the regulations.

(4) The Commission may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration unless the person has the Commission's permission.

(5) A person who contravenes an order under subsection (4) is guilty of an offence, punishable on conviction by imprisonment for a term not exceeding 6 months.

44ZH Power to take evidence on oath or affirmation

(1) The Commission may take evidence on oath or affirmation and for that purpose a member of the Commission may administer an oath or affirmation.

(2) The member of the Commission who is presiding may summon a person to appear before the Commission to give evidence and to produce such documents (if any) as are referred to in the summons.

(3) The powers in this section may be exercised only for the purposes of arbitrating an access dispute.

44ZI Failing to attend as a witness

A person who is served, as prescribed, with a summons to appear as a witness before the Commission must not, without reasonable excuse:

(a) fail to attend as required by the summons; or

(b) fail to appear and report himself or herself from day to day unless excused, or released from further attendance, by a member of the Commission.

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Penalty: Imprisonment for 6 months.

44ZJ Failing to answer questions etc.

(1) A person appearing as a witness before the Commission must not, without reasonable excuse:

(a) refuse or fail to be sworn or to make an affirmation; or

(b) refuse or fail to answer a question that the person is required to answer by the Commission; or

(c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part served on him or her as prescribed.

Penalty: Imprisonment for 6 months.

(2) It is a reasonable excuse for the purposes of subsection (1) for an individual to refuse or fail to answer a question or produce a document on the ground that the answer or the production of the document might tend to incriminate the individual or to expose the individual to a penalty. This subsection does not limit what is a reasonable excuse for the purposes of subsection (1).

44ZK Intimidation etc.

A person must not:

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person,

because that other person:

(c) proposes to produce, or has produced, documents to the Commission; or

(d) proposes to appear or has appeared as a witness before the Commission.

Penalty: Imprisonment for 12 months.

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44ZL Party may request Commission to treat material as confidential

(1) A party to an arbitration hearing may:

(a) inform the Commission that, in the party's opinion, a specified part of a document contains confidential commercial information; and

(b) request the Commission not to give a copy of that part to another party.

(2) On receiving a request, the Commission must:

(a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and

(b) ask the other party or parties whether there is any objection to the Commission complying with the request.

(3) If there is an objection to the Commission complying with a request, the party objecting may inform the Commission of its objection and of the reasons for it.

(4) After considering:

(a) a request; and

(b) any objection; and

(c) any further submissions that any party has made in relation to the request,

the Commission may decide not to give to the other party or parties a copy of so much of the document as contains confidential commercial information that the Commission thinks should not be so given.

44ZM Sections 18 and 19 do not apply to the Commission in an arbitration

Sections 18 and 19 do not apply to the Commission, as constituted for an arbitration.

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44ZN Parties to pay costs of an arbitration

The regulations may provide for the Commission to:

(a) charge the parties to an arbitration for its costs in conducting the arbitration; and

(b) apportion the charge between the parties.

Subdivision E—Effect of determinations

44ZO Operation of determinations

(1) If none of the parties to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's determination, the determination has effect 21 days after the determination is made.

(2) If a party to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's determination, the determination is of no effect until the Tribunal makes its determination on the review.

Subdivision F—Review of determinations

44ZP Review by Tribunal

(1) A party to a determination may apply in writing to the Tribunal for a review of the determination.

(2) The application must be made within 21 days after the Commission made the determination.

(3) A review by the Tribunal is a re-arbitration of the access dispute.

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give information and other assistance and to make reports, as specified by the member for the purposes of the review.

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(6) The Tribunal may either affirm or vary the Commission's determination.

(7) The determination, as affirmed or varied by the Tribunal, is to be taken to be a determination of the Commission for all purposes of this Part (except this section).

(8) The decision of the Tribunal takes effect from when it is made.

44ZQ Provisions that do not apply in relation to a Tribunal review

Sections 37, 39 to 43 (inclusive) and 103 to 110 (inclusive) do not apply in relation to a review by the Tribunal of a determination made by the Commission.

44ZR Appeals to Federal Court from determinations of the Tribunal

(1) A party to an arbitration may appeal to the Federal Court, on a question of law, from the decision of the Tribunal under section 44ZP.

(2) An appeal by a person under subsection (1) must be instituted:
  (a) not later than the 28th day after the day on which the decision of the Tribunal is made or within such further period as the Federal Court (whether before or after the end of that day) allows; and
  (b) in accordance with the Rules of Court made under the *Federal Court of Australia Act 1976*.

(3) The Federal Court must hear and determine the appeal and may make any order that it thinks appropriate.

(4) The orders that may be made by the Federal Court on appeal include (but are not limited to):
  (a) an order affirming or setting aside the decision of the Tribunal; and

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(b) an order remitting the matter to be decided again by the Tribunal in accordance with the directions of the Federal Court.

44ZS Operation and implementation of a determination that is subject to appeal

(1) Subject to this section, the fact that an appeal is instituted in the Federal Court from a decision of the Tribunal does not affect the operation of the decision or prevent action being taken to implement the decision.

(2) If an appeal is instituted in the Federal Court from a decision of the Tribunal, the Federal Court or a judge of the Federal Court may make any orders staying or otherwise affecting the operation or implementation of the decision of the Tribunal that the Federal Court or judge thinks appropriate to secure the effectiveness of the hearing and determination of the appeal.

(3) If an order is in force under subsection (2) (including an order previously varied under this subsection), the Federal Court or a judge of the Federal Court may make an order varying or revoking the first-mentioned order.

(4) An order in force under subsection (2) (including an order previously varied under subsection (3)):

(a) is subject to any conditions that are specified in the order; and

(b) has effect until:

(i) the end of any period for the operation of the order that is specified in the order; or

(ii) the giving of a decision on the appeal,

whichever is earlier.

44ZT Transmission of documents

If an appeal is instituted in the Federal Court:

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(a) the Tribunal must send to the Federal Court all documents that were before the Tribunal in connection with the matter to which the appeal relates; and

(b) at the conclusion of the proceedings before the Federal Court in relation to the appeal, the Federal Court must return the documents to the Tribunal.

Subdivision G—Variation of determinations

44ZU Variation of determinations

(1) The Commission may vary a determination on the application of any party to the determination. However, it cannot vary the determination if any other party objects.

Note: If the parties cannot agree on a variation, a new access dispute can be notified under section 44S.

(2) Sections 44W and 44X apply to a variation under this section as if:

(a) an access dispute arising out of the determination had been notified when the application was made to the Commission for the variation of the determination; and

(b) the variation were the making of a determination in the terms of the varied determination.

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Division 4—Registered contracts for access to declared services

44ZV Constitutional limits on operation of this Division

This Division does not apply to a contract unless:

(a) the contract provides for access to a declared service; and

(b) the contract was made after the service was declared; and

(c) the parties to the contract are the provider of the service and a third party; and

(d) at least one of the following conditions is met:

(i) the provider is a corporation (or a partnership or joint venture consisting wholly of corporations);

(ii) the third party is a corporation;

(iii) the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

44ZW Registration of contract

(1) On application by all the parties to a contract, the Commission must:

(a) register the contract by entering the following details on a public register:

(i) the names of the parties to the contract;

(ii) the service to which the contract relates;

(iii) the date on which the contract was made; or

(b) decide not to register the contract.

(2) In deciding whether to register a contract, the Commission must take into account:

(a) the public interest, including the public interest in having competition in markets (whether or not in Australia); and

(b) the interests of all persons who have rights to use the service to which the contract relates.

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(3) The Commission must publish a decision not to register a contract.

(4) If the Commission publishes a decision not to register a contract, it must give the parties to the contract reasons for the decision when it publishes the decision.

44ZX Review of decision not to register contract

(1) If the Commission decides not to register a contract, a party to the contract may apply in writing to the Tribunal for review of the decision.

(2) An application for review must be made within 21 days after publication of the Commission's decision.

(3) The review by the Tribunal is a re-consideration of the matter.

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give information and other assistance and to make reports, as specified by the member for the purposes of the review.

(6) The Tribunal may either:
  (a) affirm the Commission's decision; or
  (b) register the contract.

44ZY Effect of registration of contract

The parties to a contract that has been registered:
  (a) may enforce the contract under Division 7 as if the contract were a determination of the Commission under section 44V and they were parties to the determination; and
  (b) cannot enforce the contract by any other means.

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Division 5—Hindering access to declared services

44ZZ Prohibition on hindering access to declared services

(1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.

(2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).

(3) In this section, a ***user*** of a service includes a person who has a right to use the service.

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Division 6—Access undertakings for non-declared services

44ZZA Access undertakings by providers

(1) A person who is, or expects to be, the provider of a service may give a written undertaking to the Commission in connection with the provision of access to the service.

Note: The following are examples of the kinds of things that might be dealt with in the undertaking:

(a) terms and conditions of access to the service;

(b) procedures for determining terms and conditions of access to the service;

(c) an obligation on the provider not to hinder access to the service;

(d) an obligation on the provider to implement a particular business structure;

(e) an obligation on the provider to provide information to the Commission or to another person;

(f) an obligation on the provider to comply with decisions of the Commission or another person in relation to matters specified in the undertaking;

(g) an obligation on the provider to seek a variation of the undertaking in specified circumstances.

(2) The undertaking must specify the expiry date of the undertaking.

(3) The Commission may accept the undertaking, if it thinks it appropriate to do so having regard to the following matters:

(a) the legitimate business interests of the provider;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of persons who might want access to the service;

(d) whether access to the service is already the subject of an access regime;

(da) whether the undertaking is in accordance with an access code that applies to the service;

(e) any other matters that the Commission thinks are relevant.

(3A) The Commission must not accept the undertaking unless:

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(a) the provider, or proposed provider, is a corporation (or a partnership or joint venture consisting wholly of corporations); or

(b) the undertaking provides for access only to third parties that are corporations; or

(c) the undertaking provides for access that is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

(4) The Commission must not accept the undertaking unless the Commission has first:

(a) published the undertaking and invited people to make submissions to the Commission on the undertaking; and

(b) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking.

(4A) The Commission may accept the undertaking without complying with subsection (4) if the Commission is satisfied that the undertaking is in accordance with an access code that is in operation at the time of acceptance.

(5) If the Commission accepts the undertaking:

(a) the undertaking comes into operation at the time of acceptance; and

(b) the undertaking continues in operation until its expiry date, unless it is earlier withdrawn.

(6) If the undertaking provides for disputes about the undertaking to be resolved by the Commission, then the Commission may resolve the disputes in accordance with the undertaking.

(6A) If the undertaking provides for the Commission to perform functions or exercise powers in relation to the undertaking, the Commission may perform those functions and exercise those powers. If the Commission decides to do so, it must do so in accordance with the undertaking.

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(7) The provider may withdraw or vary the undertaking at any time, but only with the consent of the Commission.

44ZZAA Access codes prepared by industry bodies

(1) An industry body may give a written code to the Commission setting out rules for access to a service.

(2) The code must specify the expiry date of the code.

(3) The Commission may accept the code, if it thinks it appropriate to do so having regard to the following matters:
  (a) the legitimate business interests of providers who might give undertakings in accordance with the code;
  (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
  (c) the interests of persons who might want access to the service covered by the code;
  (d) whether access to the service is already the subject of an access regime;
  (e) any matters specified in regulations made for the purposes of this subsection;
  (f) any other matters that the Commission thinks are relevant.

(4) The Commission must not accept the code unless the Commission has first:
  (a) published the code and invited people to make submissions to the Commission on the code; and
  (b) considered any submissions that were received within the time limit specified by the Commission when it published the code.

(5) If the Commission accepts the code:
  (a) the code comes into operation at the time of acceptance; and
  (b) the code continues in operation until its expiry date, unless it is earlier withdrawn.

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(6) The industry body may withdraw or vary the code at any time, but only with the consent of the Commission.

(7) If the industry body that gave the code to the Commission has ceased to exist, a withdrawal or variation under subsection (6) may be made by a body or association prescribed by the regulations as a replacement for the original industry body.

(8) In this section:

code means a set of rules (which may be in general terms or detailed terms).

industry body means a body or association prescribed by the regulations for the purposes of this section.

44ZZB Undertakings cannot be accepted in certain cases

The Commission cannot accept an undertaking given under section 44ZZA if the service concerned is a declared service.

44ZZC Register of access undertakings and access codes

(1) The Commission must maintain a public register that includes all access undertakings and access codes that have been accepted by the Commission, including those that are no longer in operation.

(2) The register must include all variations of access undertakings and access codes.

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Division 7—Enforcement and remedies

44ZZD Enforcement of determinations

(1) If the Federal Court is satisfied, on the application of a party to a determination, that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination, the Court may make all or any of the following orders:

(a) an order granting an injunction on such terms as the Court thinks appropriate:

(i) restraining the other party from engaging in the conduct; or

(ii) if the conduct involves refusing or failing to do something—requiring the other party to do that thing;

(b) an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;

(c) any other order that the Court thinks appropriate.

(2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.

(3) A reference in this section to a person involved in the contravention is a reference to a person who has:

(a) aided, abetted, counselled or procured the contravention; or

(b) induced the contravention, whether through threats or promises or otherwise; or

(c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or

(d) conspired with others to effect the contravention.

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44ZZE Enforcement of prohibition on hindering access

(1) If the Federal Court is satisfied, on the application of any person, that another person (the ***obstructor***) has engaged, is engaging, or is proposing to engage in conduct constituting a contravention of section 44ZZ, the Court may make all or any of the following orders:

(a) an order granting an injunction on such terms as the Court thinks appropriate:

(i) restraining the obstructor from engaging in the conduct; or

(ii) if the conduct involves refusing or failing to do something—requiring the obstructor to do that thing;

(b) an order directing the obstructor to compensate a person who has suffered loss or damage as a result of the contravention;

(c) any other order that the Court thinks appropriate.

(2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.

(3) The grounds on which the Court may decide not to make an order under this section include the ground that Divisions 2 and 3 provide a more appropriate way of dealing with the issue of the applicant's access to the service concerned.

(4) A reference in this section to a person involved in the contravention is a reference to a person who has:

(a) aided, abetted, counselled or procured the contravention; or

(b) induced the contravention, whether through threats or promises or otherwise; or

(c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or

(d) conspired with others to effect the contravention.

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44ZZF Consent injunctions

On an application for an injunction under section 44ZZD or 44ZZE, the Federal Court may grant an injunction by consent of all of the parties to the proceedings, whether or not the Court is satisfied that the section applies.

44ZZG Interim injunctions

(1) The Federal Court may grant an interim injunction pending determination of an application under section 44ZZD or 44ZZE.

(2) If the Commission makes an application under section 44ZZE to the Federal Court for an injunction, the Court must not require the Commission or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

44ZZH Factors relevant to granting a restraining injunction

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE restraining a person from engaging in conduct may be exercised whether or not:

(a) it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or

(b) the person has previously engaged in conduct of that kind; or

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

44ZZI Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE requiring a person to do a thing may be exercised whether or not:

(a) it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing; or

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(b) the person has previously refused or failed to do that thing; or

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

44ZZJ Enforcement of access undertakings

(1) If the Commission thinks that the provider of an access undertaking in operation under section 44ZZA has breached any of its terms, the Commission may apply to the Federal Court for an order under subsection (2).

(2) If the Federal Court is satisfied that the provider has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the provider to comply with that term of the undertaking;

(b) an order directing the provider to compensate any other person who has suffered loss or damage as a result of the breach;

(c) any other order that the Court thinks appropriate.

(3) The Federal Court cannot make an order under this section unless:

(a) the provider is a corporation; or

(b) the breach relates to access to the service by a third party that is a corporation; or

(c) the breach involves access to the service in the course of, or for the purposes of, constitutional trade or commerce.

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44ZZK Discharge or variation of injunction or other order

The Federal Court may discharge or vary an injunction or order granted under this Division.

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Division 8—Miscellaneous

44ZZL Register of determinations

The Commission must maintain a public register that specifies the following information for each determination:

(a) the names of the parties to the determination;

(b) the service to which the determination relates;

(c) the date on which the determination was made.

44ZZM Commission may perform functions and exercise powers under other access regimes

(1) The Commission may:

(a) perform any function conferred on it by, and for the purposes of, a law of the Commonwealth, or of a State or Territory, that establishes an access regime; and

(b) exercise any power:

(i) conferred by that law to facilitate the performance of that function; or

(ii) necessary or convenient to permit that function to be performed.

(2) The Commission must not, under subsection (1):

(a) perform a function conferred on it by a law of a State or Territory; or

(b) exercise a power that is so conferred,

unless the conferral of the function or power is in accordance with any relevant agreement between the Commonwealth and the State or Territory concerned.

44ZZN Compensation for acquisition of property

(1) If:

(a) a determination would result in an acquisition of property; and

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(b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated,

the Commonwealth must pay that person:

(c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or

(d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.

(2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:

(a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;

(b) compensation awarded under a determination.

(3) In this section, ***acquisition of property*** has the same meaning as in paragraph 51(xxxi) of the Constitution.

44ZZNA Operation of Parts IV and VII not affected by this Part

This Part does not affect the operation of Parts IV and VII.

44ZZO Conduct by directors, servants or agents

(1) If, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and

(b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or

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(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent,

is taken for the purposes of this Part to have been engaged in also by the body corporate, unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

(3) If, in a proceeding under this Part in respect of conduct engaged in by an individual, it is necessary to establish the state of mind of the individual, it is sufficient to show:

(a) that the conduct was engaged in by a servant or agent of the individual within the scope of his or her actual or apparent authority; and

(b) that the servant or agent had the relevant state of mind.

(4) Conduct engaged in on behalf of an individual:

(a) by a servant or agent of the individual within the scope of the actual or apparent authority of the servant or agent; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the individual, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent,

is taken, for the purposes of this Part, to have been engaged in also by that individual, unless that individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

(5) If:

(a) an individual is convicted of an offence; and

(b) the individual would not have been convicted of the offence if subsections (3) and (4) had not been enacted,

the individual is not liable to be punished by imprisonment for that offence.

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(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

44ZZOA Tribunal may perform functions and exercise powers under other access regimes

(1) The Tribunal may:

(a) perform any function:

(i) conferred on it by, and for the purposes of, a law of the Commonwealth, or of a State or Territory, that establishes an access regime; and

(ii) relating to the review of particular decisions under that law; and

(b) exercise any power:

(i) conferred by that law to facilitate the performance of that function; or

(ii) necessary or convenient to permit that function to be performed.

(2) Without limiting the generality of subsection (1), a law made for the purposes of that subsection may:

(a) specify the persons by whom, and the circumstances in which, such a review may be sought; and

(b) specify the procedures to be followed by the Tribunal in conducting such a review.

(3) The Tribunal must not, under subsection (1):

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(a) perform a function conferred on it by, and for the purposes of, a law of a State or Territory; or

(b) exercise a power that is so conferred,

unless the conferral of the function or power is in accordance with any relevant agreement between the Commonwealth and the State or Territory concerned.

44ZZP Regulations about review by the Tribunal

The regulations may make provision about the following matters in relation to the functions of the Tribunal under this Part:

(a) the constitution of the Tribunal;

(b) the arrangement of the business of the Tribunal;

(c) the disclosure of interests by members of the Tribunal;

(d) determining questions before the Tribunal and questions that arise during a review;

(e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report).

44ZZQ Regulations about fees for inspection etc. of registers

The regulations may make provision about the inspection of registers maintained under this Part (including provision about fees).

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Part IV—Restrictive trade practices

45 Contracts, arrangements or understandings that restrict dealings or affect competition

(1) If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977*:

(a) is an exclusionary provision; or

(b) has the purpose, or has or is likely to have the effect, of substantially lessening competition,

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.

(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section and section 45A, ***competition***, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to

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the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party,

together have or are likely to have that effect.

(5) This section does not apply to or in relation to:

(a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;

(b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or

(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:

(i) conduct that contravenes section 48; or

(ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or

(iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at

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which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorisation under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement

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or understanding, the only parties to which are or would be bodies corporate that are related to each other.

(9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:

(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorisation to give effect to the provision; and

(b) the corporation applies for the grant of such an authorisation within 14 days after the contract is made,

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

45A Contracts, arrangements or understandings in relation to prices

(1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

(2) Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

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(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person.

(4) Subsection (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:

(a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or

(b) for the joint advertising of the price for the re-supply of goods or services so acquired.

(5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or

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maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

(a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or

(b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.

(6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

(7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract,

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arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

(8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

45B Covenants affecting competition

(1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the convenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the convenant, supply or acquire, or be likely to supply or acquire, goods or services.

(2) A corporation or a person associated with a corporation shall not:

(a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:

(i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or

(ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the

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covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the corporation;

(b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or

(c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has. failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(3) Where a person:

(a) issues an invitation to another person to enter into a contract containing a covenant;

(b) makes an offer to another person to enter into a contract containing a covenant; or

(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms,

the first-mentioned person shall, by issuing that invitation, making that offer or making that fact known, be deemed to require the giving of the covenant.

(4) For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which:

(a) a corporation that, or person who, is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or

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(b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragraph,

is or would be, or but for subsection (1) would be, entitled.

(5) The requiring of the giving of, or the giving of, a covenant does not constitute a contravention of this section by reason that giving effect to the covenant would, or would but for the operation of subsection 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to engaging in conduct in relation to a covenant by way of:

(a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorisation under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.

(7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:

(a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether

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formal or informal, to act in accordance with directions, instructions or wishes of the corporation in relation to the covenant or proposed covenant; or

(b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A(1)(a)(ii).

(8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:

(a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorisation to require the giving of, or to give, the covenant; and

(b) the person applies for the grant of such an authorisation within 14 days after the covenant is given,

but nothing in this subsection affects the application of paragraph (2)(b) or (c) in relation to the covenant.

(9) This section does not apply to or in relation to a covenant or proposed covenant if:

(a) the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;

(b) the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution; or

(c) the covenant was or is required to be given in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

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45C Covenants in relation to prices

(1) In the application of subsection 45B(1) in relation to a covenant that has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who are, or but for that subsection would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them, in competition with each other, that subsection has effect as if the words 'if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services' were omitted.

(2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words "require the giving of a covenant, or give a covenant" were omitted.

(3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

(a) the form of the covenant or proposed covenant; or

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(b) any description given to the covenant by any of the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant or any description given to the proposed covenant by any of the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant.

(4) For the purposes of the preceding provisions of this section, but without limiting the generality of those provisions:

(a) a covenant shall be deemed to have, or to be likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the covenant has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them; and

(b) a proposed covenant shall be deemed to have the purpose, or to have, or to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (2) if the proposed covenant has the purpose, or would have or be likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant,

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or by any of them, or by any persons associated with any of them.

(5) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

45D Secondary boycotts for the purpose of causing substantial loss or damage

(1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

(3) Subsection (1) applies if the fourth person is a corporation.

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(4) Subsection (1) also applies if:

(a) the third person is a corporation and the fourth person is not a corporation; and

(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

45DA Secondary boycotts for the purpose of causing substantial lessening of competition

(1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

(3) Subsection (1) applies if:

(a) the third person or the fourth person is a corporation, or both of them are corporations; and

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(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

45DB Boycotts affecting trade or commerce

(1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

45DC Involvement and liability of employee organisations

Certain organisations taken to be acting in concert

(1) If 2 or more persons (the ***participants***), each of whom is a member or officer of the same organisation of employees, engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with another person, then, unless the organisation proves otherwise, the organisation is taken for the purposes of sections 45D, 45DA and 45DB:

(a) to engage in that conduct in concert with the participants; and

(b) to have engaged in that conduct for the purposes for which the participants engaged in it.

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Consequences of organisation contravening subsection 45D(1), 45DA(1) or 45DB(1)

(2) The consequences of an organisation of employees engaging, or being taken by subsection (1) to engage, in conduct in concert with any of its members or officers in contravention of subsection 45D(1), 45DA(1) or 45DB(1) are as set out in subsections (3), (4) and (5).

Loss or damage taken to have been caused by organisation's conduct

(3) Any loss or damage suffered by a person as a result of the conduct is taken, for the purposes of this Act, to have been caused by the conduct of the organisation.

Taking proceedings if organisation is a body corporate

(4) If the organisation is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organisation in respect of the conduct.

Taking proceedings if organisation is not a body corporate

(5) If the organisation is not a body corporate:

(a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all the persons who were members of the organisation at the time when the conduct was engaged in; and

(b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and

(c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and

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(d) except as provided by paragraph (a), a proceeding in respect of the conduct must not be brought under section 77 or 82 against any of the members or officers of the organisation; and

(e) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in paragraph (a) that was brought under section 77 or 82, process may be issued and executed against the following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:

(i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or however otherwise held;

(ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or however otherwise held;

(iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity as members, whether vested in trustees or however otherwise held; and

(f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

45DD Situations in which boycotts permitted

Dominant purpose of conduct relates to employment matters—conduct by a person

(1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

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Dominant purpose of conduct relates to employment matters—conduct by employee organisation and employees

(2) If:

(a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:

(i) an organisation of employees; or

(ii) an officer of an organisation of employees; and

(b) the conduct is only engaged in by the persons covered by paragraph (a); and

(c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a),

the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in the conduct.

Dominant purpose of conduct relates to environmental protection or consumer protection

(3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and

(b) engaging in the conduct is not industrial action.

Note 1: If an environmental organisation or a consumer organisation is a body corporate:

(a) it is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption; and

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(b) each of its members is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

Note 2: If an environmental organisation or a consumer organisation is not a body corporate:

(a) it is not a "person" and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but

(b) each of its members is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

*Meaning of **industrial action**—basic definition*

(4) In subsection (3), ***industrial action*** means:

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:

(i) the terms and conditions of the work are prescribed, wholly or partly, by an industrial instrument or an order of an industrial body; or

(ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or

(b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by an industrial instrument or by an order of an industrial body; or

(c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or

(d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

For this purpose, ***industrial body***, ***industrial dispute*** and ***industrial instrument*** have the meanings given by subsection 298B(1) of the *Workplace Relations Act 1996*.

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*Meaning of **industrial action**—further clarification*

(5) For the purposes of subsection (3):

(a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and

(b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Subsections (1), (2) and (3) do not protect people not covered by them

(6) In applying subsection 45D(1), 45DA(1) or 45DB(1) to a person who is not covered by subsection (1), (2) or (3) in respect of certain conduct, disregard the fact that other persons may be covered by one of those subsections in respect of the same conduct.

Defences to contravention of subsection 45DB(1)

(7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:

(a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or

(b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

Each person to prove defence

(8) If:

(a) a person engages in conduct in concert with another person; and

(b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct,

in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

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Note: Section 170MT of the *Workplace Relations Act 1996* limits the right to bring actions under this Act in respect of industrial action that is protected action for the purposes of that section.

45E Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services

Situations to which section applies

(1) This section applies in the following situations:

(a) a ***supply situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to supply goods or services to another person (the ***second person***); or

(b) an ***acquisition situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to acquire goods or services from another person (the ***second person***).

Despite paragraphs (a) and (b), this section does not apply unless the first or second person is a corporation or both of them are corporations.

Note : For the meanings of ***accustomed to supply*** and ***accustomed to acquire***, see subsections (5) and (7).

Prohibition in a supply situation

(2) In a supply situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or

(b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:

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(i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

Prohibition in an acquisition situation

(3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or

(b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:

(i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

No contravention if second person gives written consent to written contract etc.

(4) Subsections (2) and (3) do not apply to a contract, arrangement or understanding if it is in writing and was made or arrived at with the written consent of the second person.

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*Meaning of **accustomed to supply***

(5) In this section, a reference to a person who has been ***accustomed to supply*** goods or services to a second person includes (subject to subsection (6)):

(a) a regular supplier of such goods or services to the second person; or

(b) the latest supplier of such goods or services to the second person; or

(c) a person who, at any time during the immediately preceding 3 months, supplied such goods or services to the second person.

Exception to subsection (5)

(6) If:

(a) goods or services have been supplied by a person to a second person under a contract between them that required the first person to supply such goods or services over a period; and

(b) the period has ended; and

(c) after the end of the period, the second person has been supplied with such goods or services by another person and has not also been supplied with such goods or services by the first person,

then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to supply such goods or services to the second person.

*Meaning of **accustomed to acquire***

(7) In this section, a reference to a person who has been ***accustomed to acquire*** goods or services from a second person includes (subject to subsection (8)):

(a) a regular acquirer of such goods or services from the second person; or

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(b) a person who, when last acquiring such goods or services, acquired them from the second person; or

(c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

Exception to subsection (7)

(8) If:

(a) goods or services have been acquired by a person from a second person under a contract between them that required the first person to acquire such goods or services over a period; and

(b) the period has ended; and

(c) after the end of the period, the second person has refused to supply such goods or services to the first person,

then, for the purposes of the application of this section in relation to anything done after the second person has refused to supply goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to acquire such goods or services from the second person.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

45EA Provisions contravening section 45E not to be given effect

A person must not give effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person:

(a) contravened subsection 45E(2) or (3); or

(b) would have contravened subsection 45E(2) or (3) if:

(i) section 45E had been in force when the contract or arrangement was made, or the understanding was arrived at; and

(ii) the words “is in writing and” and “written” were not included in subsection 45E(4).

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Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

45EB Sections 45D to 45EA do not affect operation of other provisions of Part

Nothing in section 45D, 45DA, 45DB, 45DC, 45DD, 45E or 45EA affects the operation of any other provision of this Part.

46 Misuse of market power

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1A) For the purposes of subsection (1):

(a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

(b) the reference in paragraphs (1)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(2) If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market,

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the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.

(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(4) In this section:

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

(5) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that it acquires plant or equipment.

(6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, by reason that an authorisation is in force or by reason of the operation of section 93.

(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference

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from the conduct of the corporation or of any other person or from other relevant circumstances.

46A Misuse of market power—corporation with substantial degree of power in trans-Tasman market

(1) In this section:

conduct, in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market;

impact market means a market in Australia that is not a market exclusively for services;

market power, in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market;

trans-Tasman market means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

(2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or

(b) preventing the entry of a person into an impact market; or

(c) deterring or preventing a person from engaging in competitive conduct in an impact market.

(2A) For the purposes of subsection (2):

(a) the reference in paragraph (2)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

(b) the reference in paragraphs (2)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

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(3) If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of market power in a trans-Tasman market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to the corporation, together have a substantial degree of market power in a trans-Tasman market,

the corporation is taken, for the purposes of this section, to have a substantial degree of market power in the trans-Tasman market.

(4) In determining for the purposes of this section the degree of market power that a body corporate or bodies corporate has or have in a trans-Tasman market, the Federal Court is to have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate, or of any of those bodies corporate, in the trans-Tasman market; or

(b) persons to whom or from whom the body corporate, or any of those bodies corporate, supplies or acquires goods or services in the trans-Tasman market.

(5) Without extending by implication the meaning of subsection (2), a corporation is not taken to contravene that subsection merely because it acquires plant or equipment.

(6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, because an authorisation is in force or because of the operation of section 93.

(7) Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its market

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power for a purpose referred to in subsection (2) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

(8) It is the intention of the Parliament that this section, and the provisions of Parts VI and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the Commonwealth and authorities of the Commonwealth.

(9) Subsection (8) has effect despite section 9 of the *Foreign States Immunities Act 1985*.

46B No immunity from jurisdiction in relation to certain New Zealand laws

(1) It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 36A, 98H and 99A of the Commerce Act 1986 of New Zealand.

(2) This section applies in and outside Australia.

47 Exclusive dealing

(1) Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.

(2) A corporation engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

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(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation,

on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:

(d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) will not, or will not except to a limited extent, re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) in the case where the corporation supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services to a person at a particular price; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a person,

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate:

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(d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(4) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) acquires, or offers to acquire, goods or services; or

(b) acquires, or offers to acquire, goods or services at a particular price,

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

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(5) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to acquire goods or services from a person; or

(b) to acquire goods or services at a particular price from a person,

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has supplied, or has not agreed not to supply, goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(6) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation,

on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person.

(7) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services at a particular price to a person; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a person,

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has not acquired, or

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has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person.

(8) A corporation also engages in the practice of exclusive dealing if the corporation grants or renews, or makes it known that it will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

(a) will not, or will not except to a limited extent:

(i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(9) A corporation also engages in the practice of exclusive dealing if the corporation refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

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(a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(c) has supplied goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a corporation engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:

(a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

(10A) Subsection (1) does not apply to a corporation engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:

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(a) the corporation has given the Commission a notice under subsection 93(1) describing the conduct; and

(b) the notice is in force under section 93.

(11) Subsections (8) and (9) do not apply with respect to:

(a) conduct engaged in by, or by a trustee for, a religious, charitable or public benevolent institution, being conduct engaged in for or in accordance with the purposes or objects of that institution; or

(b) conduct engaged in in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

(12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.

(13) In this section:

(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;

(b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate,

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supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and

(c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

48 Resale price maintenance

A corporation or other person shall not engage in the practice of resale price maintenance.

50 Prohibition of acquisitions that would result in a substantial lessening of competition

(1) A corporation must not directly or indirectly:

(a) acquire shares in the capital of a body corporate; or

(b) acquire any assets of a person,

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(2) A person must not directly or indirectly:

(a) acquire shares in the capital of a corporation; or

(b) acquire any assets of a corporation,

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of

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substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

(4) Where:

(a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;

(b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorisation to acquire the shares or assets; and

(c) the person applied for the grant of such an authorisation before the expiration of 14 days after the contract was entered into,

the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:

(d) the application for the authorisation is disposed of; or

(e) the contract ceases to be subject to the condition,

whichever first happens.

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(5) For the purposes of subsection (4), an application for an authorisation shall be taken to be disposed of:

(a) in a case to which paragraph (b) of this subsection does not apply—at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation; or

(b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the authorisation—at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.

(6) In this section:

market means a substantial market for goods or services in Australia, in a State or in a Territory.

50A Acquisitions that occur outside Australia

(1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the ***first controlling interest***) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest (the ***second controlling interest***) in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:

(a) the person's obtaining the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and

(b) the person's obtaining the second controlling interest would not, in all the circumstances, result, or be likely to result, in such a benefit to the public that the obtaining should be disregarded for the purposes of this section,

make a declaration accordingly.

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(1A) Without limiting the matters that may be taken into account in determining whether the obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the matters mentioned in subsection 50(3) must be taken into account for that purpose.

(1B) In determining whether the obtaining of the second controlling interest would result, or be likely to result, in such a benefit to the public that it should be disregarded for the purposes of this section:

(a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(2) Where an application under subsection (1) is made:

(a) the Tribunal shall give to:

(i) each corporation in relation to which the application relates; and

(ii) the Minister and the Commission,

a notice in writing stating that the application has been made; and

(b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person are entitled to appear, or be represented, at the proceedings following the application.

(3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.

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(4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under subsection (1).

(5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).

(6) After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market to which the declaration relates.

(7) Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.

(8) For the purposes of this section:

(a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and

(b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate:

(i) controls the composition of the board of directors of another body corporate;

(ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or

(iii) holds shares in the capital of another body corporate,

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the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.

(9) In this section:

market means a substantial market for goods or services in Australia, in a State or in a Territory.

51 Exceptions

(1) In deciding whether a person has contravened this Part, the following must be disregarded:

(a) anything specified in, and specifically authorised by:

(i) an Act (not including an Act relating to patents, trade marks, designs or copyrights); or

(ii) regulations made under such an Act;

(b) anything done in a State, if the thing is specified in, and specifically authorised by:

(i) an Act passed by the Parliament of that State; or

(ii) regulations made under such an Act;

(c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:

(i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988*; or

(ii) regulations made under such an enactment;

(d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:

(i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or

(ii) regulations made under such an enactment;

(e) anything done in another Territory, if the thing is specified in, and specifically authorised by:

(i) an Ordinance of that Territory; or

(ii) regulations made under such an Ordinance.

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(1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:

(a) a licence or other instrument issued or made under the law specifies one or both of the following:

(i) the person authorised to engage in the conduct;

(ii) the place where the conduct is to occur; and

(b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).

For this purpose, ***law*** means an Act, State Act, enactment or Ordinance.

(1B) Subsections (1) and (1A) apply regardless of when the Acts, State Acts, enactments, Ordinances, regulations or instruments referred to in those subsections were passed, made or issued.

(1C) The operation of subsection (1) is subject to the following limitations:

(a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;

(b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;

(c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;

(d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations:

(i) referred to in the subparagraph concerned; and

(ii) that came into operation more than 2 years before the particular thing happened;

(e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:

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(i) at the time of the alleged contravention referred to in subsection (1) the State or Territory was a fully-participating jurisdiction and a party to the Competition Principles Agreement; or

(ii) all of the following conditions are met:

(A) the Minister published a notice in the *Gazette* under subsection 150K(1) in relation to the State or Territory, or the State or Territory ceased to be a party to the Competition Principles Agreement, within 12 months before the alleged contravention referred to in subsection (1);

(B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the Minister published the notice or the State or Territory ceased to be a party;

(C) the law authorising the thing was in force immediately before the Minister published the notice or the State or Territory ceased to be a party;

(f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things are prescribed by regulations made under this Act for the purposes of this paragraph.

(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

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(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia International Limited or by a prescribed association or body;

(d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he or she is, or after he or she ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business—to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

(2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or

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commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(3) A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of:

(a) the imposing of, or giving effect to, a condition of:

(i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or

(ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design,

to the extent that the condition relates 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;

(v) the work or other subject matter in which the copyright subsists; or

(vi) the eligible layout in which the EL rights subsist;

(b) the inclusion in a contract, arrangement or understanding authorising the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between:

(i) the registered proprietor of a trade mark other than a certification trade mark; and

(ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorised by the contract to use the trade mark

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subject to his or her becoming registered as such a registered user,

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

(4) This section applies in determining whether a provision of a contract is unenforceable by reason of subsection 45(1), or whether a covenant is unenforceable by reason of subsection 45B(1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.

(5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

51AAA Concurrent operation of State and Territory laws

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part

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Part IVA—Unconscionable conduct

51AAB Part does not apply to financial services

(1) Section 51AA does not apply to conduct engaged in in relation to financial services.

(2) Section 51AB does not apply to the supply, or possible supply, of services that are financial services.

51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories

(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

51AB Unconscionable conduct

(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the ***consumer***), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

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(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:

(a) the Court shall not have regard to any circumstances that were not reasonably forseeable at the time of the alleged contravention; and

(b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

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(7) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

51AC Unconscionable conduct in business transactions

(1) A corporation must not, in trade or commerce, in connection with:
   (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
   (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company),

engage in conduct that is, in all the circumstances, unconscionable.

(2) A person must not, in trade or commerce, in connection with:
   (a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
   (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company),

engage in conduct that is, in all the circumstances, unconscionable.

(3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the ***supplier***) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the ***business consumer***), the Court may have regard to:
   (a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
   (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
   (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
   (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the

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supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

(i) any intended conduct of the supplier that might affect the interests of the business consumer; and

(ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

(k) the extent to which the supplier and the business consumer acted in good faith.

(4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the ***acquirer***) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the ***small business supplier***), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and

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(b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:

(i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and

(ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and

(j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and

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(k) the extent to which the acquirer and the small business supplier acted in good faith.

(5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:

(a) the supply or possible supply of goods or services to another person; or

(b) the acquisition or possible acquisition of goods or services from another person,

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

(6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):

(a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

(7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or

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possible supply of goods or services at a price in excess of $1,000,000, or such higher amount as is prescribed.

(10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of $1,000,000, or such higher amount as is prescribed.

(11) For the purposes of subsections (9) and (10):

(a) subject to paragraphs (b), (c), (d) and (e), the price for:

(i) the supply or possible supply of goods or services to a person; or

(ii) the acquisition or possible acquisition of goods or services by a person;

is taken to be the amount paid or payable by the person for the goods or services; and

(b) paragraph 4B(2)(c) applies as if references in that paragraph to the purchase of goods or services by a person were references to:

(i) the supply of goods or services to a person pursuant to a purchase; or

(ii) the acquisition of goods or services by a person by way of purchase;

as the case requires; and

(c) paragraph 4B(2)(d) applies as if:

(i) the reference in that paragraph to a person acquiring goods or services otherwise than by way of purchase included a reference to a person being supplied with goods or services otherwise than pursuant to a purchase; and

(ii) a reference in that paragraph to acquisition included a reference to supply; and

(d) paragraph 4B(2)(e) applies as if references in that paragraph to the acquisition of goods or services by a person, or to the acquisition of services by a person, included references to the supply of goods or services to a person, or the supply of services, to a person, as the case may be; and

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(e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

(12) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

(13) Expressions used in this section that are defined for the purpose of Part IVB have the same meaning in this section as they do in Part IVB.

(14) In this section, ***listed public company*** has the same meaning as it has in the *Income Tax Assessment Act 1997*.

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Part IVB—Industry codes

51ACA Definitions

(1) In this Part:

applicable industry code, in relation to a corporation that is a participant in an industry, means:

(a) the prescribed provisions of any mandatory industry code relating to the industry; and

(b) the prescribed provisions of any voluntary industry code that binds the corporation.

consumer, in relation to an industry, means a person to whom goods or services are or may be supplied by participants in the industry.

industry code means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

mandatory industry code means an industry code that is declared by regulations under section 51AE to be mandatory.

voluntary industry code means an industry code that is declared by regulations under section 51AE to be voluntary.

(2) For the purposes of this Part, a voluntary industry code binds a person who has agreed, as prescribed, to be bound by the code and who has not subsequently ceased, as prescribed, to be bound by it.

(3) To avoid doubt, it is declared that:

(a) franchising is an industry for the purposes of this Part; and

(b) franchisors and franchisees are participants in the industry of franchising, whether or not they are also participants in another industry.

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51AD Contravention of industry codes

A corporation must not, in trade or commerce, contravene an applicable industry code.

51AE Regulations relating to industry codes

The regulations may:

(a) prescribe an industry code, or specified provisions of an industry code, for the purposes of this Part; and

(b) declare the industry code to be a mandatory industry code or a voluntary industry code; and

(c) for a voluntary industry code, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be so bound (by reference to provisions of the code or otherwise).

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Part V—Consumer protection

Division 1—Unfair Practices

51AF Part does not apply to financial services

(1) This Part does not apply to the supply, or possible supply, of services that are financial services.

(2) Without limiting subsection (1):

(a) sections 52 and 55A do not apply to conduct engaged in in relation to financial services; and

(b) if a security (within the meaning of the Corporations Law) consists of or includes an interest in land, section 53A does not apply to that interest; and

(c) section 63A does not apply to a debit card that allows access to an account that is a financial product.

(3) In subsection (2):

debit card has the same meaning as in section 63A.

51A Interpretation

(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

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(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

52 Misleading or deceptive conduct

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Division 1AA (sections 65AA to 65AN).

53 False or misleading representations

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;

(aa) falsely represent that services are of a particular standard, quality, value or grade;

(b) falsely represent that goods are new;

(bb) falsely represent that a particular person has agreed to acquire goods or services;

(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

(d) represent that the corporation has a sponsorship, approval or affiliation it does not have;

(e) make a false or misleading representation with respect to the price of goods or services;

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(ea) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;

(eb) make a false or misleading representation concerning the place of origin of goods;

(f) make a false or misleading representation concerning the need for any goods or services; or

(g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Note: For rules relating to representations as to the country of origin of goods, see Division 1AA (sections 65AA to 65AN).

53A False representations and other misleading or offensive conduct in relation to land

(1) A corporation shall not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:

(a) represent that the corporation has a sponsorship, approval or affiliation it does not have;

(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or

(c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

(2) A corporation shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land.

(2A) Nothing in this section shall be taken as implying that other provisions of this Division do not apply in relation to the supply or

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acquisition, or the possible supply or acquisition, of interests in land.

(3) In this section, ***interest***, in relation to land, means:

(a) a legal or equitable estate or interest in the land;

(b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or

(c) a right, power or privilege over, or in connection with, the land.

53B Misleading conduct in relation to employment

A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

53C Cash price to be stated in certain circumstances

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the corporation also specifies the cash price for the goods or services.

54 Offering gifts and prizes

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered.

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55 Misleading conduct to which Industrial Property Convention applies

A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

55A Certain misleading conduct in relation to services

A corporation shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

56 Bait advertising

(1) A corporation shall not, in trade or commerce, advertise for supply at a specified price, goods or services if there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

(2) A corporation that has, in trade or commerce, advertised goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

(3) In a prosecution of a corporation under Part VI in relation to a failure to offer goods or services to a person (in this subsection referred to as the ***customer***) in accordance with subsection (2), it is a defence if the corporation establishes that:

(a) it offered to supply, or to procure another person to supply, goods or services of the kind advertised to the customer

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within a reasonable time, in a reasonable quantity and at the advertised price; or

(b) it offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services to the customer in a reasonable quantity and at the price at which the first-mentioned goods or services were advertised,

and, in either case, where the offer was accepted by the customer, the corporation has so supplied, or procured another person to supply, goods or services.

57 Referral selling

A corporation shall not, in trade or commerce, induce a consumer to acquire goods or services by representing that the consumer will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission or other benefit in return for giving the corporation the names of prospective customers or otherwise assisting the corporation to supply goods or services to other consumers, if receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

58 Accepting payment without intending or being able to supply as ordered

A corporation shall not, in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance:

(a) the corporation intends:

(i) not to supply the goods or services; or

(ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted; or

(b) there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to supply the goods or services

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within the period specified by the corporation or, if no period is specified, within a reasonable time.

59 Misleading representations about certain business activities

(1) A corporation shall not, in trade or commerce, make a representation that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that the corporation has represented as one that can be, or can be to a considerable extent, carried on at or from a person's place of residence.

(2) Where a corporation, in trade or commerce, invites, whether by advertisement or otherwise, persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring the performance by the persons concerned of work, or the investment of moneys by the persons concerned and the performance by them of work associated with the investment, the corporation shall not make, with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in a material particular.

60 Harassment and coercion

A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

61 Pyramid selling

(1) A corporation contravenes this section if:

(a) the corporation is the promoter of, or (if there are more than one) one of the promoters of, or is a participant in, a trading scheme to which this section applies; and

(b) a person who is a participant in that trading scheme, or has applied or been invited to become a participant in that trading scheme, makes any payment to or for the benefit of the

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corporation, being a payment that he or she is induced to make by reason that the prospect is held out to him or her of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by another person) of other persons who become participants in that trading scheme.

(2) A corporation also contravenes this section if:

(a) the corporation is the promoter of, or (if there are more than one) one of the promoters of, is a participant in, or is otherwise acting in accordance with, a trading scheme to which this section applies; and

(b) the corporation, by holding out to any person the prospect of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by another person) of other persons who become participants in that trading scheme, attempts to induce that person:

(i) if he or she is already a participant in that trading scheme, to make any payment to or for the benefit of the promoter or any of the promoters or to or for the benefit of a participant in that trading scheme; or

(ii) if he or she is not already a participant in that trading scheme, to become such a participant and to make a payment of a kind mentioned in subparagraph (i).

(2A) A corporation also contravenes this section if the corporation promotes, or takes part in the promotion of, a scheme under which:

(a) a payment is to be made by a person who participates, or who has applied or been invited to participate, in the scheme to or for the benefit of the corporation or another person who takes part in the promotion of the scheme or to or for the benefit of another person who participates in the scheme; and

(b) the inducement for making the payment is the holding out to the person who makes or is to make the payment the prospect of receiving payments from other persons who may participate in the scheme.

(3) For the purposes of subsection (1), (2) or (2A):

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(a) a prospect of a kind mentioned in that subsection shall be taken to be held out to a person whether it is held out so as to confer on him or her a legally enforceable right or not;

(b) in determining whether an inducement or attempt to induce is made by holding out a prospect of a kind mentioned in that subsection, it is sufficient if a prospect of that kind constitutes or would constitute a substantial part of the inducement; and

(c) any reference to the making of a payment to or for the benefit of a person shall be construed as including the making of a payment partly to or for the benefit of that person and partly to or for the benefit of one or more other persons.

(4) For the purposes of this section, a scheme is a trading scheme to which this section applies if the scheme includes the following elements:

(a) goods or services, or both, are to be provided by the person promoting the scheme (in this section referred to as the ***promoter***) or, in the case of a scheme promoted by two or more persons acting in concert (in this section referred to as the ***promoters***), are to be provided by one or more of those persons; and

(b) the goods or services so provided are to be supplied to or for other persons under transactions arranged or effected by persons who participate in the scheme (each of whom is in this section referred to as a ***participant***), being persons not all of whom are promoters.

(5) For the purposes of subsection (4):

(a) a scheme shall be taken to include the element referred to in paragraph (4)(b) whether a participant who is not a promoter acts in relation to a transaction referred to in that paragraph in the capacity of a servant or agent of the promoter or of one of the promoters or in any other capacity;

(b) a scheme includes any arrangements made in connection with the carrying on of a business, whether those arrangements are made or recorded wholly or partly in writing or not; and

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(c) any reference to the provision of goods or services by a person shall be construed as including a reference to the provision of goods or services under arrangements to which that person is a party.

63A Unsolicited credit and debit cards

(1) A corporation shall not send a prescribed card to a person except:

(a) in pursuance of a request in writing by the person who will be under a liability to the person who issued the card in respect of the use of the card; or

(b) in renewal or replacement of, or in substitution for:

(i) a prescribed card of the same kind previously sent to the first-mentioned person in pursuance of a request in writing by the person who was under a liability to the person who issued the card previously so sent in respect of the use of that card; or

(ii) a prescribed card of the same kind previously sent to the first-mentioned person and used for a purpose for which it was intended to be used.

(2) Subsection (1) applies only in relation to the sending of a prescribed card by or on behalf of the person who issued the card.

(2A) A corporation shall not take any action that enables a person who has a credit card or a debit card to use the card as a debit card or a credit card, as the case may be, except in accordance with a request in writing by the person.

(3) In this section:

article includes a token, card or document;

credit card means any article of a kind commonly known as a credit card or any similar article intended for use in obtaining cash, goods or services on credit, and includes any article of a kind commonly issued by persons carrying on business to customers or prospective customers of those persons for use in obtaining goods or services from those persons on credit;

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debit card means an article intended for use by a person in obtaining access to an account held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services;

prescribed card means a credit card, a debit card or an article that may be used as a credit card and a debit card.

64 Assertion of right to payment for unsolicited goods or services or for making entry in directory

(1) A corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited goods unless the corporation has reasonable cause to believe that there is a right to payment.

(2A) A corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited services unless the corporation has reasonable cause to believe that there is a right to payment.

(3) A corporation shall not assert a right to payment from any person of a charge for the making in a directory of an entry relating to the person or to his or her profession, business, trade or occupation unless the corporation knows or has reasonable cause to believe that the person has authorised the making of the entry.

(4) A person is not liable to make any payment to a corporation, and is entitled to recover by action in a court of competent jurisdiction against a corporation any payment made by the person to the corporation, in full or part satisfaction of a charge for the making of an entry in a directory unless the person has authorised the making of the entry.

(5) For the purposes of this section, a corporation shall be taken to assert a right to a payment from a person for unsolicited goods or services, or of a charge for the making of an entry in a directory, if the corporation:

(a) makes a demand for the payment or asserts a present or prospective right to the payment;

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(b) threatens to bring any legal proceedings with a view to obtaining the payment;

(c) places or causes to be placed the name of the person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment;

(d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or

(e) sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be.

(6) A person shall not be taken for the purposes of this section to have authorised the making of an entry in a directory unless:

(a) a document authorising the making of the entry has been signed by the person or by another person authorised by him or her;

(b) a copy of the document has been given to the person before the right to payment of a charge for the making of the entry is asserted; and

(c) the document specifies:

(i) the name of the directory;

(ii) the name and address of the person publishing the directory;

(iii) particulars of the entry; and

(iv) the amount of the charge for the making of the entry or the basis on which the charge is, or is to be, calculated.

(7) For the purposes of this section, an invoice or other document purporting to have been sent by or on behalf of a corporation shall be deemed to have been sent by that corporation unless the contrary is established.

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(9) In a proceeding against a corporation in respect of a contravention of this section:

(a) in the case of a contravention constituted by asserting a right to payment from a person for unsolicited goods or unsolicited services—the burden lies on the corporation of proving that the corporation had reasonable cause to believe that there was a right to payment; or

(b) in the case of a contravention constituted by asserting a right to payment from a person of a charge for the making of an entry in a directory—the burden lies on the corporation of proving that the corporation knew or had reasonable cause to believe that the person had authorised the making of the entry.

(10) In this section:

directory includes any publication of a similar nature to a directory but does not include a newspaper published in good faith as a newspaper at regular intervals or a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission;

making, in relation to an entry in a directory, means including, or arranging for the inclusion of, the entry.

65 Liability of recipient of unsolicited goods

(1) A person to whom unsolicited goods are supplied by a corporation, in trade or commerce, is not liable to make any payment for the goods and is not liable for the loss of or damage to the goods other than loss or damage resulting from the doing by him or her of a wilful and unlawful act in relation to the goods during the period specified in subsection (4).

(2) Subject to subsection (3), where, on or after the commencing date, a corporation sends, in trade or commerce, unsolicited goods to a person:

(a) neither the corporation nor any person claiming under the corporation is entitled after the expiration of the period

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specified in subsection (4) to take action for the recovery of the goods from the person to whom the goods were sent; and

(b) upon the expiration of that period the goods become, by force of this section, the property of the person to whom the goods were sent freed and discharged from all liens and charges of any description.

(3) Subsection (2) does not apply to or in relation to unsolicited goods sent to a person if:

(a) the person has at any time during the period specified in subsection (4) unreasonably refused to permit the sender or the owner of the goods to take possession of the goods;

(b) the sender or the owner of the goods has within that period taken possession of the goods; or

(c) the goods were received by the person in circumstances in which the person knew, or might reasonably be expected to have known, that the goods were not intended for him or her.

(4) The period referred to in the foregoing subsections is:

(a) if the person who receives the unsolicited goods gives notice with respect to the goods to the sender in accordance with subsection (5):

(i) the period of 1 month next following the day on which the notice is given; or

(ii) the period of 3 months next following the day on which the person received the goods,

whichever first expires; and

(b) in any other case—the period of 3 months next following the day on which the person received the goods.

(5) A notice under subsection (4) shall be in writing and shall:

(a) state the name and address of the person who received the goods;

(b) state the address at which possession may be taken of the goods if it is an address other than that of the person; and

(c) contain a statement to the effect that the goods are unsolicited goods.

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65A Application of provisions of Division to prescribed information providers

(1) Nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:

(a) a publication of matter in connection with:

(i) the supply or possible supply of goods or services;

(ii) the sale or grant, or possible sale or grant, of interests in land;

(iii) the promotion by any means of the supply or use of goods or services; or

(iv) the promotion by any means of the sale or grant of interests in land,

where:

(v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or

(vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:

(A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or

(B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or

(b) a publication of an advertisement.

(2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if:

(a) in any case—the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or

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(b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of ***prescribed information provider*** in subsection (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition)—
the publication was by way of a radio or television broadcast by the prescribed information provider.

(3) In this section:

prescribed information provider means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes:

(a) the holder of a licence granted under the *Broadcasting Services Act 1992*; and

(aa) a person who is the provider of a broadcasting service under a class licence under that Act; and

(ab) the holder of a licence continued in force by subsection 5(1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*; and

(b) the Australian Broadcasting Corporation; and

(c) the Special Broadcasting Service Corporation;

relevant goods or services, in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider;

relevant interests in land, in relation to a prescribed information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

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Division 1AA—Country of origin representations

Subdivision A—General

65AA Overview

This Division provides that certain country of origin representations made about goods do not contravene section 52 (which deals with misleading or deceptive conduct) or paragraph 53(eb) (which deals with false or misleading representations as to place of origin).

65AB General test for country of origin representations

If:

(a) a corporation makes a representation as to the country of origin of goods; and

(b) the goods have been substantially transformed in that country; and

(c) 50% or more of the cost of producing or manufacturing the goods (as the case may be) is attributable to production or manufacturing processes that occurred in that country; and

(d) the representation is not a representation to which section 65AC (product of/produce of representations) or section 65AD (prescribed logo representations) applies,

the corporation does not contravene section 52 or paragraph 53(eb) by reason only of making the representation.

65AC Test for representations that goods are product of/produce of a country

If:

(a) a corporation makes a representation that goods are the produce of a particular country (whether the representation uses the words “product of”, “produce of” or any other grammatical variation of the word “produce”); and

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(b) the country was the country of origin of each significant ingredient or significant component of the goods; and

(c) all, or virtually all, processes involved in the production or manufacture happened in that country,

the corporation does not contravene section 52 or paragraph 53(eb) by reason only of making the representation.

65AD Test for representations made by means of prescribed logo

(1) If:

(a) a corporation makes a representation as to the country of origin of goods by means of a logo specified in regulations made under subsection (2); and

(b) the goods have been substantially transformed in the country represented by the logo as the country of origin of the goods; and

(c) the prescribed percentage of the cost of producing or manufacturing the goods (as the case may be) is attributable to production or manufacturing processes that occurred in that country,

the corporation does not contravene section 52 or paragraph 53(eb) by reason only of making the representation.

(2) The regulations may, in relation to a specified logo, prescribe a percentage in the range of 51% to 100% as the percentage applicable to goods for the purposes of paragraph (1)(c).

65AE Substantial transformation of goods

(1) For the purposes of this Division, goods are ***substantially transformed*** in a country if they undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

(2) Without limiting subsection (1), the regulations may prescribe changes (whether in relation to particular classes of goods or otherwise) that are not fundamental changes for the purposes of

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subsection (1), and may include examples (in relation to particular classes of goods or otherwise) of changes which are fundamental changes for the purposes of subsection (1).

65AF Method of working out costs of production or manufacture

For the purposes of this Division, the cost of producing or manufacturing goods is to be worked out under Subdivision B.

Subdivision B—Cost of production or manufacture of goods

65AG Definitions

In this Subdivision:

inner container includes any container into which goods are packed, other than a shipping or airline container, pallet or other similar article.

materials, in relation to goods, means:

(a) if the goods are unmanufactured raw products—those products; and

(b) if the goods are manufactured goods—all matter or substances used or consumed in the manufacture of the goods (other than matter or substances that are treated as overheads); and

(c) in either case—the inner containers in which the goods are packed.

65AH Cost of producing or manufacturing goods

The cost of producing or manufacturing goods means the sum of:

(a) the expenditure on materials in respect of the goods, worked out under section 65AJ; and

(b) the expenditure on labour in respect of the goods, worked out under section 65AK; and

(c) the expenditure on overheads in respect of the goods, worked out under section 65AL.

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65AJ Expenditure on materials

Calculation of expenditure on materials

(1) Expenditure on materials in respect of goods means the cost of materials:
  (a) incurred by the producer or manufacturer of the goods (as the case may be); and
  (b) that are used in the production or manufacture of the goods; and
  (c) that has not been prescribed under paragraph (2)(a).

Regulations may prescribe materials that are not allowable

(2) The regulations may prescribe, for the purposes of subsection (1):
  (a) the cost of a particular material, or a part of such a cost, that is not allowable in respect of goods, or classes of goods; and
  (b) the manner of working out the cost of a material, or part of the cost.

65AK Expenditure on labour

Calculation of expenditure on labour

(1) Expenditure on labour in respect of goods means the sum of each labour cost:
  (a) that is incurred by the producer or manufacturer of the goods (as the case may be); and
  (b) that relates to the production or manufacture of the goods; and
  (c) that can reasonably be allocated to the production or manufacture of the goods; and
  (d) that has not been prescribed under paragraph (2)(a).

Regulations may prescribe labour costs that are not allowable

(2) The regulations may prescribe, for the purposes of subsection (1):

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(a) a particular labour cost, or a part of a labour cost, that is not allowable in respect of goods, or classes of goods; and
(b) the manner of working out a labour cost, or part of the cost.

65AL Expenditure on overheads

Calculation of expenditure on overheads

(1) Expenditure on overheads in respect of goods means the sum of each overhead cost:
(a) that is incurred by the producer or manufacturer of the goods (as the case may be); and
(b) that relates to the production or manufacture of the goods; and
(c) that can reasonably be allocated to the production or manufacture of the goods; and
(d) that has not been prescribed under paragraph (2)(a).

Regulations may prescribe overhead costs that are not allowable

(2) The regulations may prescribe, for the purposes of subsection (1):
(a) a particular overhead cost, or a part of an overhead cost, that is not allowable in respect of goods, or classes of goods; and
(b) the manner of working out an overhead cost, or part of the cost.

65AM Regulations may prescribe rules for determining the local percentage costs of production or manufacture

(1) Subject to subsection (2), the regulations may prescribe rules for determining the percentage of the total cost of production or manufacture of goods attributable to production or manufacturing processes that occurred in a particular country.

Note: Section 65AH deals with the cost of production or manufacture of goods.

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(2) Rules prescribed under subsection (1) must not discriminate (whether favourably or unfavourably) between countries or classes of countries.

Subdivision C—Evidentiary matters

65AN Proceedings arising under section 52 and paragraph 53(eb)

(1) If:

(a) proceedings are brought against a person in respect of section 52 or paragraph 53(eb); and

(b) the person seeks to rely on a provision of this Division, or of a regulation made under this Division, in the proceedings,

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

(2) In this section:

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

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Division 1A—Product Safety and Product Information

65B Warning notice to public

(1) The Minister may publish a notice in writing in the *Gazette* containing one or both of the following:

(a) a statement that goods of a kind specified in the notice are under investigation to determine whether the goods will or may cause injury to any person;

(b) a warning of possible risks involved in the use of goods of a kind specified in the notice.

(2) Where:

(a) an investigation referred to in subsection (1) has been completed; and

(b) neither a notice under section 65J inviting a supplier to notify the Commission whether the supplier wishes the Commission to hold a conference nor a notice under section 65L has been published in relation to the goods since the commencement of the investigation,

the Minister shall, as soon as practicable after the investigation has been completed, by notice in writing published in the *Gazette*, announce the results of the investigation, and may announce in the notice whether, and if so, what action is proposed to be taken in relation to the goods under this Division.

65C Product safety standards and unsafe goods

(1) A corporation shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind:

(a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;

(b) in respect of which there is in force a notice under this section declaring the goods to be unsafe goods; or

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(c) in respect of which there is in force a notice under this section imposing a permanent ban on the goods.

(2) The regulations may, in respect of goods of a particular kind, prescribe a consumer product safety standard consisting of such requirements as to:

(a) performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods;

(b) testing of the goods during, or after the completion of, manufacture or processing; and

(c) the form and content of markings, warnings or instructions to accompany the goods,

as are reasonably necessary to prevent or reduce risk of injury to any person.

(3) A corporation shall not export goods the supply in Australia of which is prohibited by subsection (1) unless the Minister has, by notice in writing given to the corporation, approved the export of those goods.

(4) Where the Minister approves the export of goods under subsection (3), the Minister shall cause a statement setting out particulars of the approval to be laid before each House of the Parliament within 7 sitting days of that House after the approval is given.

(5) Subject to section 65J, where it appears to the Minister that goods of a particular kind will or may cause injury to any person, the Minister may, by notice in writing published in the *Gazette*, declare the goods to be unsafe goods.

(6) A notice under subsection (5) remains in force until the end of 18 months after the date of publication of the notice in the *Gazette* unless it is revoked before the end of that period.

(7) Subject to section 65J, where:

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(a) a period of 18 months has elapsed after the date of publication of a notice in the *Gazette* declaring goods to be unsafe goods; and

(b) there is not a prescribed consumer product safety standard in respect of the goods,

the Minister may, by notice in writing published in the *Gazette*, impose a permanent ban on the goods.

(8) Where:

(a) the supplying of goods by a corporation constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods; and

(c) the person would not have suffered the loss or damage if the goods had complied with that standard,

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

(9) Where:

(a) the supplying of goods by a corporation constitutes a contravention of this section by reason that there is in force a notice under this section declaring the goods to be unsafe goods or imposing a permanent ban on the goods; and

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods,

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

65D Product information standards

(1) A corporation shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer

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product information standard has been prescribed, unless the corporation has complied with that standard in relation to those goods.

(2) The regulations may, in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to:

(a) the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and

(b) the form and manner in which that information is to be disclosed on or with the goods,

as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods.

(3) Subsection (1) does not apply to goods that are intended to be used outside Australia.

(4) If there is applied to goods:

(a) a statement that the goods are for export only; or

(b) a statement indicating by the use of words authorised by the regulations to be used for the purposes of this subsection that the goods are intended to be used outside Australia,

it shall be presumed for the purposes of this section, unless the contrary is established, that the goods are intended to be so used.

(5) For the purposes of subsection (4), a statement shall be deemed to be applied to goods if:

(a) the statement is woven in, impressed on, worked into or annexed or affixed to the goods; or

(b) the statement is applied to a covering, label, reel or thing in or with which the goods are supplied.

(6) A reference in subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and a reference in that subsection to a label includes a reference to a band or ticket.

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(7) Where:

(a) the supplying of goods by a corporation constitutes a contravention of this section by reason that the corporation has not complied with a prescribed consumer product information standard in relation to the goods;

(b) a person suffers loss or damage by reason of not having particular information in relation to the goods; and

(c) the person would not have suffered the loss or damage if the corporation had complied with that standard in relation to the goods,

the person shall be deemed, for the purposes of this Act, to have suffered the loss or damage by the supplying of the goods.

65E Power of Minister to declare product safety or information standards

(1) The Minister may, by notice in writing published in the *Gazette*, declare that, in respect of goods of a kind specified in the notice, a particular standard, or a particular part of a standard, prepared or approved by the Standards Association of Australia or by a prescribed association or body, or such a standard or part of a standard with additions or variations specified in the notice, is a consumer product safety standard for the purposes of section 65C or a consumer product information standard for the purposes of section 65D.

(2) Where a notice is so published, the standard, or the part of the standard, referred to in the notice, or the standard or part of a standard so referred to with additions or variations specified in the notice, as the case may be, shall be deemed to be a prescribed consumer product safety standard for the purposes of section 65C or a prescribed consumer product information standard for the purposes of section 65D, as the case may be.

(3) Subsection (1) does not authorise the publication of a notice in relation to goods of a particular kind if the standard or the part of the standard referred to in the notice, or the standard or the part of the standard so referred to with additions and variations specified

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in the notice, is inconsistent with a standard prescribed in relation to goods of that kind by regulations made for the purposes of section 65C or 65D.

65F Compulsory product recall

(1) Subject to section 65J, where:

(a) a corporation (in this section referred to as the ***supplier***), in trade or commerce, supplies on or after 1 July 1986 goods that are intended to be used, or are of a kind likely to be used, by a consumer;

(b) one of the following subparagraphs applies:

(i) it appears to the Minister that the goods are goods of a kind which will or may cause injury to any person;

(ii) the goods are goods of a kind in respect of which there is a prescribed consumer product safety standard and the goods do not comply with that standard;

(iii) the goods are goods of a kind in relation to which there is in force a notice under subsection 65C(5) or (7); and

(c) it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods causing injury to any person,

the Minister may, by notice in writing published in the *Gazette*, require the supplier to do one or more of the following:

(d) take action within the period specified in the notice to recall the goods;

(e) disclose to the public, or to a class of persons specified in the notice, in the manner and within the period specified in the notice, one or more of the following:

(i) the nature of a defect in, or a dangerous characteristic of, the goods identified in the notice;

(ii) the circumstances, being circumstances identified in the notice, in which the use of the goods is dangerous; or

(iii) procedures for disposing of the goods specified in the notice;

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(f) inform the public, or a class of persons specified in the notice, in the manner and within the period specified in the notice, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:

(i) except where the notice identifies a dangerous characteristic of the goods—repair the goods;

(ii) replace the goods;

(iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods,

within the period specified in the notice.

(2) Notwithstanding subparagraph (1)(f)(iii), where the Minister, in a notice under subsection (1), requires the supplier to take action under paragraph (1)(f), the Minister may specify in the notice that, where:

(a) the supplier chooses to refund the price of the goods; and

(b) a period of more than 12 months has elapsed since a person (whether or not the person to whom the refund is to be made) acquired the goods from the supplier,

the amount of a refund may be reduced by the supplier by an amount attributable to the use which a person has had of the goods, being an amount calculated in a manner specified in the notice.

(3) The Minister may, by notice in writing published in the *Gazette*, give directions as to the manner in which the supplier is to carry out a recall of goods required under subsection (1).

(4) Where the supplier, under subsection (1), undertakes to repair goods, the supplier shall cause the goods to be repaired so that:

(a) any defect in the goods identified in the notice under subsection (1) is remedied; and

(b) if there is a prescribed consumer product safety standard in respect of the goods—the goods comply with that standard.

(5) Where the supplier, under subsection (1), undertakes to replace goods, the supplier shall replace the goods with like goods which:

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(a) if a defect in, or a dangerous characteristic of, the first-mentioned goods was identified in the notice under subsection (1)—do not contain that defect or have that characteristic; and

(b) if there is a prescribed consumer product safety standard in respect of goods of that kind—comply with that standard.

(6) Where the supplier, under subsection (1), undertakes to repair goods or replace goods, the cost of the repair or replacement, including any necessary transportation costs, shall be borne by the supplier.

(7) Where goods are recalled, whether voluntarily or in accordance with a requirement made by the Minister under paragraph (1)(d), a person who has supplied or supplies any of the recalled goods to another person outside Australia shall, as soon as practicable after the supply of those goods, give a notice in writing to that other person:

(a) stating that the goods are subject to recall;

(b) if the goods contain a defect or have a dangerous characteristic—setting out the nature of that defect or characteristic; and

(c) if the goods do not comply with a prescribed consumer product safety standard in respect of the goods—setting out the nature of the non-compliance.

(8) Where a person is required under subsection (7) to give a notice in writing to another person, the first-mentioned person shall, within 10 days after giving that notice, provide the Minister with a copy of that notice.

(9) A person who contravenes subsection (8) is guilty of an offence punishable on conviction by a fine not exceeding 30 penalty units.

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914.* If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence.

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65G Compliance with product recall order

Where a notice under subsection 65F(1) is in force in relation to a corporation, the corporation:

(a) shall comply with the requirements and directions in the notice; and

(b) shall not, in trade or commerce:

(i) where the notice identifies a defect in, or a dangerous characteristic of, the goods—supply goods of the kind to which the notice relates which contain that defect or have that characteristic; or

(ii) in any other case—supply goods of the kind to which the notice relates.

65H Loss or damage caused by contravention of product recall order

Where:

(a) a corporation contravenes section 65G by:

(i) supplying goods of a kind in relation to which a notice under subsection 65F(1) is in force; or

(ii) failing to comply with the requirements of such a notice; and

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods,

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods, or by the failure of the corporation to comply with the notice, as the case may be.

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65J Opportunity for conference to be afforded before certain powers exercised

(1) Subject to section 65L, where the Minister proposes to publish a notice under subsection 65C(5) or (7) or 65F(1) in relation to goods of a particular kind, the Minister shall prepare:

(a) a draft of the notice proposed to be published; and

(b) a summary of the reasons for the proposed publication of the notice,

and shall, by notice in writing published in the *Gazette*, invite any person (in this section referred to as a ***supplier***) who supplied or proposes to supply goods of that kind to notify the Commission, within the period (in this section referred to as the ***relevant period***) of 10 days commencing on the day specified in the last-mentioned notice, being not earlier than the day on which that notice is published in the *Gazette*, whether the supplier wishes the Commission to hold a conference in relation to the proposed publication of the first-mentioned notice.

(2) A notice published under subsection (1) shall set out a copy of the draft notice under subsection 65C(5) or (7) or 65F(1) and a copy of the summary of the reasons for the proposed publication of the notice.

(3) If no supplier notifies the Commission in writing within the relevant period or within such longer period as the Commission allows that the supplier wishes the Commission to hold a conference in relation to the proposed publication of the notice under subsection 65C(5) or (7) or 65F(1), the Commission shall notify the Minister accordingly.

(4) If a supplier notifies the Commission in writing within the relevant period or within such longer period as the Commission allows that the supplier wishes the Commission to hold a conference in relation to the proposed publication of a notice under subsection 65C(5) or (7) or 65F(1), the Commission shall appoint a day (being not later than 14 days after the end of that period), time and place for the holding of the conference, and give notice of the

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day, time and place so appointed to the Minister and to each supplier who so notified the Commission.

(5) At a conference under this section:

(a) the Commission shall be represented by a member or members nominated by the Chairperson;

(b) each supplier who notified the Commission in accordance with subsection (4) is entitled to be present or to be represented;

(c) any other person whose presence at the conference is considered by the Commission to be appropriate is entitled to be present or to be represented;

(d) the Minister or a person or persons nominated in writing by the Minister is or are entitled to be present; and

(e) the procedure to be followed shall be as determined by the Commission.

(6) The Commission shall cause a record of proceedings at a conference under this section to be kept.

(7) The Commission shall, as far as is practicable, ensure that each person who, in accordance with subsection (5), is entitled to be present or who is representing such a person at a conference is given a reasonable opportunity at the conference to present his or her case and, in particular, to inspect any documents which the Commission proposes to consider for the purpose of making a recommendation after the conclusion of the conference, other than any document that contains particulars of a secret formula or process, and to make submissions in relation to those documents.

65K Recommendation after conclusion of conference

As soon as is practicable after the conclusion of a conference in relation to the proposed publication of a notice under subsection 65C(5) or (7) or 65F(1), the Commission shall:

(a) by notice in writing given to the Minister, recommend that:

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(i) the Minister publish the first-mentioned notice in the same terms as the draft notice referred to in subsection 65J(1);

(ii) the Minister publish the first-mentioned notice with such modifications as are specified by the Commission; or

(iii) the Minister not publish the first-mentioned notice; and

(b) cause a copy of the notice in writing given to the Minister to be given to each supplier who was present or represented at the conference.

65L Exception in case of danger to public

(1) Where it appears to the Minister that goods of a particular kind create an imminent risk of death, serious illness or serious injury, the Minister may, by notice in writing published in the *Gazette*, certify that a notice in relation to the goods under subsection 65C(5) or 65F(1) should be published without delay.

(2) Where the Minister publishes a notice in the *Gazette* under subsection (1):

(a) in a case where the notice is published before the Minister takes any action under subsection 65J(1) in relation to goods of a particular kind—section 65J does not apply in relation to the action that the Minister may take under subsection 65C(5) or 65F(1) in relation to goods of that kind; or

(b) in any other case—any action taken by the Minister under subsection 65J(1) in relation to goods of a particular kind ceases to have effect and, if a conference had, under section 65J, been arranged or such a conference had commenced or been completed without the Commission making a recommendation under section 65K, the Minister may publish the notice under subsection 65C(5) or 65F(1) without regard to the action taken under subsection 65J(1).

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65M Conference after goods banned

(1) Where:

(a) a notice has been published under subsection 65C(5) in relation to goods of a particular kind; and

(b) the Minister publishes a notice under section 65L in relation to goods of that kind,

the Minister shall, by notice in writing published in the *Gazette*, invite any person (in this section referred to as a ***supplier***) who supplied or proposes to supply goods of that kind to notify the Commission within the period (in this section referred to as the ***relevant period***) of 10 days commencing on the day specified in the last-mentioned notice, being not earlier than the day on which that notice is published in the *Gazette*, to notify the Commission whether the supplier wishes the Commission to hold a conference in relation to the notice referred to in paragraph (a).

(2) If a supplier notifies the Commission in writing within the relevant period, or within such longer period as the Commission allows, that the supplier wishes the Commission to hold a conference in relation to the notice published under subsection 65C(5), the Commission shall appoint a day (being not later than 14 days after the end of that period), time and place for the holding of the conference and give notice of the day, time and place so appointed to the Minister and to each supplier who so notified the Commission.

(3) Subsections 65J(5), (6) and (7) apply in relation to a conference held under this section.

65N Recommendation after conclusion of conference

As soon as is practicable after the conclusion of a conference in relation to a notice that has been published under subsection 65C(5), the Commission shall:

(a) by notice in writing given to the Minister, recommend that the notice under subsection 65C(5):

(i) remain in force;

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(ii) be varied; or

(iii) be revoked; and

(b) cause a copy of the notice in writing given to the Minister to be given to each supplier who was present or represented at the conference.

65P Minister to have regard to recommendation of Commission

Where the Commission, under section 65K or 65N, makes a recommendation to the Minister in relation to the proposed publication of a notice under subsection 65C(5) or (7) or 65F(1) or in relation to a notice that has been published under subsection 65C(5):

(a) the Minister shall have regard to the recommendation; and

(b) where the Minister decides to act otherwise than in accordance with the recommendation, the Minister shall, by notice in writing published in the *Gazette*, set out the reasons for the Minister's decision.

65Q Power to obtain information, documents and evidence

(1) Where the Minister or an officer authorised by the Minister for the purposes of this section (in this section referred to as an ***authorised officer***) has reason to believe that a corporation which, in trade or commerce, supplies goods of a particular kind which are intended to be used or are of a kind likely to be used by a consumer and which will or may cause injury to any person is capable of furnishing information, producing documents or giving evidence relating to goods of that kind, the Minister or the authorised officer may, by notice in writing served on the corporation, require the corporation:

(a) to furnish to the Minister, by writing signed by a competent officer of the corporation, in the manner, and within such reasonable time, as are specified in the notice, any such information;

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(b) to produce to the Minister, or to the authorised officer, in accordance with such reasonable requirements as are specified in the notice, any such documents; or

(c) to cause a competent officer of the corporation to appear before the Minister or the authorised officer at such reasonable time and place as are specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) Where an authorised officer has reason to believe that goods of a particular kind which are intended to be used or are of a kind likely to be used by a consumer will or may cause injury to a person, an authorised officer may, for the purposes of ascertaining whether goods of that kind will or may cause injury to any person, enter any premises in or from which the authorised officer has reason to believe a corporation supplies goods of that kind in trade or commerce and:

(a) inspect goods of that kind;

(b) take samples of goods of that kind;

(c) inspect any documents relating to goods of that kind and make copies of, or take extracts from, those documents; or

(d) inspect equipment used in the manufacturing, processing or storage of goods of that kind.

(3) The powers of an authorised officer under subsection (2) shall not be exercised except:

(a) pursuant to a warrant issued under subsection (5); or

(b) in circumstances where the exercise of those powers is required without delay in order to protect life or public safety.

(4) An authorised officer may apply to a person who is a judge of the Court or of the Supreme Court of a State or Territory for the issue under subsection (5) of a warrant to exercise the powers of an authorised officer under subsection (2) in relation to premises.

(5) Where an application under subsection (4) is made to a person who is a judge of such a court, the person may issue a warrant

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authorising an authorised officer named in the warrant, with such assistance as the officer thinks necessary and if necessary by force, to enter the premises specified in the warrant and to exercise the powers of an authorised officer under subsection (2) in relation to those premises.

(6) A person who is a judge of such a court shall not issue a warrant under subsection (5) unless:

(a) an affidavit has been furnished to the person setting out the grounds on which the issue of the warrant is being sought;

(b) the applicant or some other person has given to the first-mentioned person such further information (if any) as the first-mentioned person requires concerning the grounds on which the issue of the warrant is being sought; and

(c) the first-mentioned person is satisfied that there are reasonable grounds for issuing the warrant.

(7) A warrant issued under subsection (5) shall:

(a) specify the purpose for which the warrant is issued;

(b) state whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night;

(c) include a description of the kind of goods authorised to be inspected or sampled; and

(d) specify a day, not being later than 7 days after the day on which the warrant is issued, at the end of which the warrant ceases to have effect.

(7A) An authorised officer or a person assisting the authorised officer must, before any person enters the premises under a warrant issued under subsection (5):

(a) announce that he or she is authorised to enter the premises; and

(b) give any person at the premises an opportunity to allow entry to the premises.

(7B) An authorised officer or a person assisting the authorised officer is not required to comply with subsection (7A) if he or she believes

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on reasonable grounds that immediate entry to the premises is required to ensure:

(a) the safety of a person (including the authorised officer and the person assisting the authorised officer); or

(b) that the effective execution of the warrant is not frustrated.

(8) Where an authorised officer takes samples under paragraph (2)(b), the officer shall pay a reasonable price for the goods sampled.

(9) A person who refuses or fails to comply with a notice under this section to the extent that the person is capable of complying with it is guilty of an offence.

Penalty: 40 penalty units.

(9A) A person who, in purported compliance with such a notice, furnishes information or gives evidence that, to the person's knowledge, is false or misleading in a material particular is guilty of an offence.

Penalty: Imprisonment for 12 months.

(10) A person who refuses or fails to provide an authorised officer acting in accordance with subsection (2) with all reasonable facilities and assistance for the effective exercise of the authorised officer's powers under that subsection is guilty of an offence.

Penalty: Imprisonment for 2 years.

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*. Under subsection 4D(1) of that Act, these penalties are only maximum penalties for the offences. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of one of the offences, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence.

(11) Any information furnished or evidence given by a person under this section, any document produced by a person under this section, and any information, evidence or document obtained under this section, is not admissible in evidence against the person:

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(a) in any proceedings instituted by the person; or
(b) in any other proceedings, other than proceedings against the person for a contravention of a provision of this section.

65R Notification of voluntary recall

(1) Where a corporation voluntarily takes action to recall goods because the goods will or may cause injury to any person, the corporation shall, within 2 days after taking that action, give a notice in writing to the Minister:
(a) stating that the goods are subject to recall; and
(b) setting out the nature of the defect in, or dangerous characteristic of, the goods.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 30 penalty units.

Note: `Penalty units are defined in section 4AA of the *Crimes Act 1914.* If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence.

65S Copies of certain notices to be given to suppliers or published in certain newspapers

(1) Where the Minister publishes a notice in writing in the *Gazette* under subsection 65B(1), 65J(1), 65L(1) or 65M(1), the Minister shall, within 2 days after the publication of that notice in the *Gazette*, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period, either:
(a) cause a copy of the notice to be given to each person who, to the knowledge of the Minister, supplies goods of the kind to which the notice relates; or
(b) cause a copy of the notice to be published in a newspaper circulating in each part of Australia where goods of the kind to which the notice relates are, to the knowledge of the Minister, supplied.

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(2) Any failure to comply with subsection (1) in relation to a notice does not invalidate the notice.

65T Certain action not to affect insurance contracts

The liability of an insurer under a contract of insurance with a corporation, being a contract relating to the recall of goods supplied or proposed to be supplied by the corporation or to the liability of the corporation with respect to possible defects in goods supplied or proposed to be supplied by the corporation, shall not be affected by reason only that the corporation gives to the Minister, to the Commission, to a person appointed or engaged under the *Public Service Act 1999*, or to an officer of an authority of the Commonwealth information relating to any goods supplied or proposed to be supplied by the corporation.

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Division 2—Conditions and Warranties in Consumer Transactions

66 Interpretation

(1) In this Division:

(a) a reference to the quality of goods includes a reference to the state or condition of the goods;

(b) a reference to a contract does not include a reference to a contract made before the commencing date;

(c) a reference to antecedent negotiations in relation to a contract for the supply by a corporation of goods to a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person whereby the consumer was induced to make the contract or which otherwise promoted the transaction to which the contract relates; and

(d) a reference to the person by whom any antecedent negotiations were conducted is a reference to the person by whom the negotiations or arrangements concerned were conducted or made.

(2) Goods of any kind are of merchantable quality within the meaning of this Division if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

66A Convention on Contracts for the International Sale of Goods

The provisions of the United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna, Austria, on 10 April 1980, prevail over the provisions of this Division to the extent of any inconsistency.

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67 Conflict of laws

Where:

(a) the proper law of a contract for the supply by a corporation of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia; or

(b) a contract for the supply by a corporation of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of a State or Territory for all or any of the provisions of this Division,

this Division applies to the contract notwithstanding that term.

68 Application of provisions not to be excluded or modified

(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of this Division;

(b) the exercise of a right conferred by such a provision;

(c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or

(d) the application of section 75A,

is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

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68A Limitation of liability for breach of certain conditions or warranties

(1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by section 69) to:

(a) in the case of goods, any one or more of the following:

(i) the replacement of the goods or the supply of equivalent goods;

(ii) the repair of the goods;

(iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;

(iv) the payment of the cost of having the goods repaired; or

(b) in the case of services:

(i) the supplying of the services again; or

(ii) the payment of the cost of having the services supplied again.

(2) Subsection (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.

(3) In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:

(a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this subsection referred to as ***the buyer***) relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

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(b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and

(d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

69 Implied undertakings as to title, encumbrances and quiet possession

(1) In every contract for the supply of goods by a corporation to a consumer, other than a contract to which subsection (3) applies, there is:

(a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and

(c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer—an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

(2) A corporation is not, in relation to a contract for the supply of goods, in breach of the implied warranty referred to in

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paragraph (1)(c) by reason only of the existence of a floating charge over assets of the corporation unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.

(3) In a contract for the supply of goods by a corporation to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as he or she or a third person may have, there is:

(a) an implied warranty that all charges or encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and

(b) an implied warranty that:

(i) the supplier;

(ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have—that person; and

(iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made,

will not disturb the consumer's quiet possession of the goods.

70 Supply by description

(1) Where there is a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

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71 Implied undertakings as to quality or fitness

(1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:

(a) as regards defects specifically drawn to the consumer's attention before the contract is made; or

(b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the corporation or of that person.

(3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a corporation as they apply to a contract for the supply of goods made by a corporation in the course of a business, except where that corporation is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

72 Supply by sample

Where in a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to

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a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample:

(a) there is an implied condition that the bulk will correspond with the sample in quality;

(b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and

(c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

73 Liability for loss or damage from breach of certain contracts

(1) Where:

(a) a corporation (in this section referred to as the ***supplier***) supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a consumer enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer; or

(b) a consumer enters into a contract with a linked credit provider of a corporation (in this section also referred to as the ***supplier***) for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the consumer,

and the consumer suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, or as a result of a breach of a condition that is implied in the contract by virtue of section 70, 71 or 72 or of a warranty that is implied in the contract by virtue of section 74 of this Act or section 12ED of the *Australian Securities and Investments Commission Act 1989*, the supplier and the linked credit provider are, subject to this section, jointly and severally liable to the consumer for the amount of the loss or damage, and the consumer may recover that amount by action in accordance with this section in a court of competent jurisdiction.

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(2) Where:

(a) a corporation (in this section also referred to as the ***supplier***) supplies goods, or causes goods to be supplied, to a credit provider who is not a linked credit provider of the supplier;

(b) a consumer enters into a contract with the credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer;

(c) antecedent negotiations in relation to the contract were conducted with the consumer by or on behalf of the supplier; and

(d) the credit provider did not take physical possession of the goods before they were delivered to the consumer,

or where a consumer enters into a contract with a credit provider for the provision of credit in respect of the supply of services to the consumer by a corporation (in this section also referred to as the ***supplier***) of which the credit provider is not a linked credit provider, and the consumer suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of section 70, 71 or 72 or of a warranty that is implied in the contract by virtue of section 74 of this Act or section 12ED of the *Australian Securities and Investments Commission Act 1989*, the credit provider is not under any liability to the consumer for the amount of the loss or damage, but the consumer may recover that amount by action in a court of competent jurisdiction against the supplier.

(3) A linked credit provider of a particular supplier is not liable to a consumer by virtue of subsection (1) in proceedings arising under that subsection if the credit provider establishes:

(a) that the credit provided by the credit provider to the consumer was the result of an approach made to the credit provider by the consumer that was not induced by the supplier;

(b) where the proceedings relate to the supply by way of lease, hire or hire-purchase of goods by the linked credit provider to the consumer, that:

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(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier, the credit provider had not had cause to suspect that:

(A) the consumer might be entitled to recover an amount of loss or damage suffered as a result of misrepresentation or breach of a condition or warranty referred to in subsection (1); and

(B) the supplier might be unable to meet the supplier's liabilities as and when they fall due;

(c) where the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that:

(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that:

(A) the consumer might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract or as a result of a breach of a condition or warranty referred to in subsection (1); and

(B) the supplier might be unable to meet the supplier's liabilities as and when they fall due; or

(d) where the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to:

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(i) the nature and volume of business carried on by the linked credit provider; and

(ii) such other matters as appear to be relevant in the circumstances of the case,

the linked credit provider, before becoming aware of the contract of sale or of proposals for the making of the contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract, failure of consideration, breach of a condition or breach of a warranty as referred to in subsection (1).

(4) Subject to subsection (5), in any proceedings in relation to a contract referred to in paragraph (1)(a) or (b) in which a credit provider claims damages or an amount of money from a consumer, the consumer may set up the liability of the credit provider under subsection (1) in diminution or extinction of the consumer's liability.

(5) Subject to subsection (6), a consumer may not, in respect of a liability for which, by reason of this section, a supplier and a linked credit provider are jointly and severally liable:

(a) bring proceedings to recover an amount of loss or damage from the credit provider; or

(b) where proceedings are brought against the consumer by the credit provider, make a counter-claim or exercise the right conferred by subsection (4) against the credit provider,

unless the consumer brings the action against the supplier and the credit provider jointly or, in the case of a counter-claim or right conferred by subsection (4), claims in the proceedings against the supplier in respect of the liability by third-party proceedings or otherwise.

(6) Subsection (5) and paragraphs (8)(a) and (9)(a) do not apply in relation to proceedings where:

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(a) the supplier has been dissolved or is commenced to be wound up; or

(b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the consumer, declared that subsection (5) and paragraphs (8)(a) and (9)(a) do not apply in relation to the proceedings.

(7) The liability of a linked credit provider to a consumer for damages or a sum of money in respect of a contract referred to in subsection (1) does not exceed the sum of:

(a) the amount financed under the tied loan contract, tied continuing credit contract, lease contract, contract of hire or contract of hire-purchase;

(b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and

(c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.

(8) Where in proceedings arising under subsection (1), judgment is given against a supplier and a linked credit provider, the judgment:

(a) shall not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and

(b) may be enforced against the linked credit provider only to the extent of:

(i) the amount calculated in accordance with subsection (7); or

(ii) so much of the judgment debt as has not been satisfied by the supplier,

whichever is the lesser.

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(9) Where in proceedings arising under subsection (1), a right conferred by subsection (4) is established against a linked credit provider, the consumer:

(a) shall not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and

(b) may receive the benefit only to the extent of:

(i) the amount calculated in accordance with subsection (7); or

(ii) so much of the judgment debt as has not been satisfied by the supplier;

whichever is the lesser.

(10) Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under subsection (7) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

(11) Notwithstanding any other law, where, in proceedings arising under subsection (1), judgment is given against a supplier and a linked credit provider or against a linked credit provider for an amount of loss or damage, the court in which the proceedings are taken shall, on the application of the consumer, unless good cause is shown to the contrary, award interest to the consumer against the supplier and credit provider or against the credit provider, as the case may be, upon the whole or a part of the amount, from the time when the consumer became entitled to recover the amount until the date on which the judgment is given, at whichever of the following rates is the greater:

(a) where the amount payable by the consumer to the credit provider for the obtaining of credit in connection with the goods or services to which the proceedings relate may be

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calculated at a percentage rate per annum—that rate or, if more than one such rate may be calculated, the lower or lowest of those rates;

(b) 8% or such other rate as is prescribed.

(12) In determining whether good cause is shown against awarding interest under subsection (11) on the whole or part of an amount of loss or damage, the court shall take into account any payment made into court by the supplier or credit provider.

(13) Where a judgment given in proceedings arising under subsection (1) is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgment so enforced to any rights that the consumer would have had but for the judgment against the supplier or any other person.

(14) In this section:

credit provider means a corporation providing, or proposing to provide, in the course of a business carried on by the corporation, credit to consumers in relation to the acquisition of goods or services;

linked credit provider, in relation to a supplier, means a credit provider:

(a) with whom the supplier has a contract, arrangement or understanding relating to:

(i) the supply to the supplier of goods in which the supplier deals;

(ii) the business carried on by the supplier of supplying goods or services; or

(iii) the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services;

(b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit;

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(c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or

(d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at premises of the supplier;

tied continuing credit contract means a continuing credit contract under which a credit provider provides credit in respect of the payment by a consumer for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider;

tied loan contract means a loan contract entered into between a credit provider and a consumer where:

(a) the credit provider knows or ought reasonably to know that the consumer enters into the loan contract wholly or partly for the purposes of payment for goods or services supplied by a supplier; and

(b) at the time the loan contract is entered into the credit provider is a linked credit provider of the supplier.

73A Continuing credit contract

(1) For the purposes of this section:

(a) a reference to an agreement includes a reference to an arrangement, understanding or course of dealing; and

(b) a person shall be deemed to agree with another person with respect to a matter if the first-mentioned person has an agreement, arrangement or understanding with the other person, or is engaged in a course of dealing with the other person, with respect to the matter.

(2) Where:

(a) a person (in this section referred to as ***the creditor***), in the course of a business carried on by the creditor, agrees with a consumer to provide credit to the consumer in respect of:

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(i) payment for goods or services or cash supplied by the creditor to the consumer from time to time; or

(ii) payment by the creditor to a third person in respect of goods or services or cash supplied by that third person to the consumer from time to time; and

(b) the amounts owing to the creditor from time to time under the agreement are or are to be calculated on the basis that all amounts owing, and all payments made, by the consumer under or in respect of the agreement are entered in one or more accounts kept for the purpose of the agreement,

the agreement is, for the purposes of section 73, a continuing credit contract.

(3) Where the creditor agrees to make payments to a third person in respect of goods or services or cash supplied by that third person to the consumer, as mentioned in subparagraph (2)(a)(ii), then, for the purposes of this section, the creditor shall, in respect of any goods or services or cash so supplied, be deemed to have provided credit to the consumer to the extent of any payments made or to be made by the creditor to that third person.

73B Loan contract

For the purposes of section 73, ***loan contract*** means a contract under which a person in the course of a business carried on by that person provides or agrees to provide, whether on one or more occasions, credit to a consumer in one or more of the following ways:

(a) by paying an amount to or in accordance with the instructions of the consumer;

(b) by applying an amount in satisfaction or reduction of an amount owed to the person by the consumer;

(c) by varying the terms of a contract under which money owed to the person by the consumer is payable;

(d) by deferring an obligation of the consumer to pay an amount to the person;

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(e) by taking from the consumer a bill of exchange or other negotiable instrument on which the consumer (whether alone or with another person or other persons) is liable as drawer, acceptor or endorser.

74 Warranties in relation to the supply of services

(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.

(3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:

(a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or

(b) a contract of insurance.

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Division 2A—Actions against manufacturers and importers of goods

74A Interpretation

(1) In this Division:

express warranty, in relation to goods, means an undertaking, assertion or representation in relation to:

(a) the quality, performance or characteristics of the goods;

(b) the provision of services that are or may at any time be required in respect of the goods;

(c) the supply of parts that are or may at any time be required for the goods; or

(d) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods in relation to which the undertaking, assertion or representation is given or made form part,

given or made in connection with the supply of the goods or in connection with the promotion by any means of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods;

manufactured includes grown, extracted, produced, processed and assembled.

(2) In this Division:

(a) a reference to goods shall, unless the contrary intention appears, be read as a reference to goods of a kind ordinarily acquired for personal, domestic or household use or consumption;

(aa) a reference to a person who acquires goods from a consumer does not include a reference to a person who acquires goods for the purpose of re-supply;

(b) a reference to the quality of goods includes a reference to the state or condition of the goods;

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(c) a reference to antecedent negotiations in relation to the acquisition of goods by a consumer shall be read as a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person whereby the consumer was induced to acquire the goods or which otherwise promoted the acquisition of the goods by the consumer; and

(d) a reference to the person by whom any antecedent negotiations were conducted shall be read as a reference to the person by whom the negotiations or arrangements concerned were conducted or made.

(3) If:

(a) a corporation holds itself out to the public as the manufacturer of goods;

(b) a corporation causes or permits the name of the corporation, a name by which the corporation carries on business or a brand or mark of the corporation to be applied to goods supplied by the corporation; or

(c) a corporation causes or permits another person, in connection with the supply or possible supply of goods by that other person, or in connection with the promotion by that other person by any means of the supply or use of goods, to hold out the corporation to the public as the manufacturer of the goods,

the corporation shall be deemed, for the purpose of this Division, to have manufactured the goods.

(4) If:

(a) goods are imported into Australia by a corporation that was not the manufacturer of the goods; and

(b) at the time of the importation the manufacturer of the goods does not have a place of business in Australia,

the corporation shall be deemed, for the purposes of this Division, to have manufactured the goods.

(5) For the purposes of paragraph (3)(b):

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(a) a name, brand or mark shall be deemed to be applied to goods if it:

(i) is woven in, impressed on, worked into or annexed or affixed to the goods; or

(ii) is applied to a covering, label, reel or thing in or with which the goods are supplied; and

(b) if the name of a corporation, a name in which a corporation carries on business or a brand or mark of a corporation is applied to goods, it shall be presumed, unless the contrary is established, that the corporation caused or permitted the name, brand or mark to be applied to the goods.

(6) The reference in subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and the reference in that subsection to a label includes a reference to a band or ticket.

(7) If goods are imported into Australia on behalf of a corporation, the corporation shall be deemed, for the purposes of this Division, to have imported the goods into Australia.

(8) For the purposes of this Division, goods shall be taken to be supplied to a consumer notwithstanding that, at the time of the supply, they are affixed to land or premises.

74B Actions in respect of unsuitable goods

(1) Where:

(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the corporation, either directly, or through the person from whom the consumer acquired the goods or a person by whom

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any antecedent negotiations in connection with the acquisition of the goods were conducted;

(d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied; and

(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose,

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

(a) if the goods are not reasonably fit for the purpose referred to in that subsection by reason of:

(i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or

(ii) a cause independent of human control,

occurring after the goods have left the control of the corporations; or

(b) where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the corporation.

74C Actions in respect of false descriptions

(1) Where:

(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer by description;

(c) the goods do not correspond with the description; and

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(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods do not correspond with the description,

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply if the goods do not correspond with the description referred to in that subsection by reason of:

(a) an act or default of any person (not being the corporation or a servant or agent of the corporation); or

(b) a cause independent of human control,

occurring after the goods have left the control of the corporation.

(3) A corporation is not liable to compensate a person for loss or damage suffered by the person by reason that goods do not correspond with a description unless the description was applied to the goods:

(a) by or on behalf of the corporation; or

(b) with the consent of the corporation, whether express or implied.

(4) If the goods referred to in subsection (1) are supplied to the consumer by reference to a sample as well as by description, it is not a defence to an action under this section that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(5) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

74D Actions in respect of goods of unmerchantable quality

(1) Where:

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(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c) the goods are not of merchantable quality; and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality,

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

(a) if the goods are not of merchantable quality by reason of:

(i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or

(ii) a cause independent of human control,

occurring after the goods have left the control of the corporation;

(b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer; or

(c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.

(3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:

(a) any description applied to the goods by the corporation;

(b) the price received by the corporation for the goods (if relevant); and

(c) all the other relevant circumstances.

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74E Actions in respect of non-correspondence with samples etc.

(1) Where:

(a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;

(b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c) the goods are supplied to the consumer by reference to a sample;

(d) the bulk of the goods does not correspond with the sample in quality or the goods have a defect, rendering them unmerchantable, that is not, or would not be, apparent on reasonable examination of the sample; and

(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the bulk does not correspond with the sample in quality or by reason that the goods have that defect,

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the loss or damage by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply where:

(a) the sample is not supplied by the corporation;

(b) the supply by sample is made without the express or implied concurrence of the corporation; or

(c) the failure of the bulk of the goods to correspond with the sample in quality or the existence of the defect is due to:

(i) an act or default of any person (not being the corporation or a servant or agent of the corporation), or a cause independent of human control, occurring after the goods have left the control of the corporation; or

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(ii) other circumstances that were beyond the control of the corporation and that it could not reasonably be expected to have foreseen.

74F Actions in respect of failure to provide facilities for repairs or parts

(1) Where:

(a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or

(b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer,

and:

(c) at a time (in this section referred to as the ***relevant time***) after the acquisition of the goods by the consumer:

(i) the goods require to be repaired but facilities for their repair are not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer; or

(ii) a part is required for the goods but the part is not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer;

(d) the corporation acted unreasonably in failing to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time; and

(e) the consumer or that other person suffers loss or damage by reason of the failure of the corporation to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time,

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the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply where the corporation took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he or she acquired the goods that:

(a) the corporation did not promise that facilities for the repair of the goods, or that parts for the goods, would be available; or

(b) the corporation did not promise that facilities for the repair of the goods, or that parts for the goods, would be available after a specified period, being a period that expired before the relevant time.

(3) Where the corporation took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he or she acquired the goods that the corporation did not promise that:

(a) facilities for the repair of the goods, being facilities of a kind specified in the notice, would be available;

(b) parts for the goods, being parts of a kind specified in the notice, would be available; or

(c) facilities for the repair of the goods would be available at, or parts for the goods would be available from, a place or places specified in the notice,

the corporation is not liable to compensate the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer for loss or damage suffered by the consumer or that other person by reason of the failure of the corporation to ensure that facilities of the kind specified in the notice, or parts of the kind specified in the notice, were available, or that facilities for the repair of the goods were available at, or parts for the goods were available from, a place or places specified in the notice, as the case may be.

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(4) In determining whether a corporation acted unreasonably in failing to ensure that facilities for the repair of goods were, or that a part was, reasonably available to a person at the relevant time, a court shall have regard to all the circumstances of the case, and in particular to the existence, at the relevant time, of circumstances that prevented those facilities or that part being so available, being circumstances beyond the control of the corporation.

74G Actions in respect of non-compliance with express warranty

(1) Where:

(a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or

(b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer,

and:

(c) the corporation fails to comply with an express warranty given or made by the corporation in relation to the goods; and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason of the failure,

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) For the purposes of any action instituted by a person against a corporation under this section, where:

(a) an undertaking, assertion or representation was given or made in connection with the supply of goods or in connection

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with the promotion by any means of the supply or use of goods; and

(b) the undertaking, assertion or representation would, if it had been given or made by the corporation or a person acting on its behalf, have constituted an express warranty in relation to the goods,

it shall be presumed that the undertaking, assertion or representation was given or made by the corporation or a person acting on its behalf unless the corporation proves that it did not give or make, and did not cause or permit the giving or making of, the undertaking, assertion or representation.

74H Right of seller to recover against manufacturer or importer

Where:

(a) a person (in this section referred to as the ***seller***) is under a liability to another person (in this section referred to as the ***consumer***) in respect of loss or damage suffered by the consumer as a result of a breach of a condition or warranty implied by a provision of Division 2 in a contract for the supply of goods (whether or not the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption) by the seller to the consumer; and

(b) a third person (in this section referred to as the ***manufacturer***):

(i) is liable to compensate the consumer in respect of the same loss or damage by reason of a provision of this Division; or

(ii) in a case where the goods referred to in paragraph (a) are not of a kind ordinarily acquired for personal, domestic or household use or consumption—would, if the provisions of sections 74B, 74C, 74D and 74E applied in relation to those goods, be liable to compensate the consumer in respect of the same loss or damage by reason of any of those provisions,

the manufacturer is liable to indemnify the seller in respect of the liability of the seller to the consumer and the seller may, in respect

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of the manufacturer's liability to indemnify the seller, institute an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the seller could have obtained if the liability of the manufacturer to indemnify the seller had arisen under a contract of indemnity made between the manufacturer and the seller.

74J Time for commencing actions

(1) Subject to this section, an action under a provision of this Division may be commenced at any time within 3 years after the day on which the cause of action accrued.

(2) For the purposes of this section, a cause of action shall be deemed to have accrued:

(a) in the case of an action other than an action under section 74H, on the day on which the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer first became aware, or ought reasonably to have become aware:

(i) in the case of an action under section 74B—that the goods were not reasonably fit for the purpose referred to in that section;

(ii) in the case of an action under section 74C—that the goods did not correspond with the description referred to in that section;

(iii) in the case of an action under section 74D—that the goods were not of merchantable quality;

(iv) in the case of an action under section 74E—that the bulk of the goods did not correspond with the sample in quality or the goods had the defect referred to in that section;

(v) in the case of an action under section 74F—that the goods required to be repaired or that the part was required for the goods, as the case may be; or

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(vi) in the case of an action under section 74G—of the failure of the corporation to comply with the express warranty referred to in that section; or

(b) in the case of an action under section 74H, on:

(i) the day, or the first day, as the case may be, on which the seller referred to in that section made a payment in respect of, or otherwise discharged in whole or in part, the liability of that seller to the consumer referred to in that section; or

(ii) the day on which a proceeding was instituted by that consumer against that seller in respect of that liability or, if more than one such proceeding was instituted, the day on which the first such proceeding was instituted,

whichever was the earlier.

(3) In an action under a provision of this Division, it is a defence if the defendant proves that the action was not commenced within 10 years after the time of the first supply to a consumer of the goods to which the action relates.

74K Application of Division not to be excluded or modified

(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying, any liability of a person to compensate or indemnify another person that may arise under this Division, is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with that provision.

(3) Nothing in this section applies to a term of a contract referred to in subsection 74L(4).

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74L Limitation in certain circumstances of liability of manufacturer to seller

(1) Notwithstanding section 74H but subject to this section, in the case of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the liability under that section of a manufacturer to a seller is limited to a liability to pay to the seller an amount equal to:

(a) the cost of replacing the goods;

(b) the cost of obtaining equivalent goods; or

(c) the cost of having the goods repaired,

whichever is the lowest amount.

(2) Subsection (1) does not apply in relation to particular goods if the seller establishes that it is not fair or reasonable for the liability of the manufacturer in respect of those goods to be limited as mentioned in subsection (1).

(3) In determining for the purposes of subsection (2) whether or not it is fair or reasonable for the liability of a manufacturer to a seller in respect of goods to be limited as mentioned in subsection (1), a court shall have regard to all the circumstances of the case and, in particular, to:

(a) the availability of suitable alternative sources of supply of the goods;

(b) the availability of equivalent goods; and

(c) whether the goods were manufactured, processed or adapted to the special order of the seller.

(4) This section is subject to any term of a contract between the manufacturer and the seller imposing on the manufacturer a greater liability than the liability mentioned in subsection (1).

(5) In this section, the expressions ***manufacturer*** and ***seller*** have the same respective meanings as in section 74H.

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Division 3—Miscellaneous

75 Saving of other laws and remedies

(1) Except as provided by subsection (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

(2) Where an act or omission of a person is both an offence against section 79 and an offence under the law of a State or Territory and that person is convicted of either of those offences, he or she is not liable to be convicted of the other of those offences.

(3) Except as expressly provided by this Part, nothing in this Part shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.

75A Rescission of contracts

(1) Where:

(a) a corporation supplies goods to a consumer in the course of a business; and

(b) there is a breach of a condition that is, by virtue of a provision of Division 2, implied in the contract for the supply of the goods,

the consumer is, subject to this section, entitled to rescind the contract by:

(c) causing to be served on the corporation a notice in writing signed by him or her giving particulars of the breach; or

(d) causing the goods to be returned to the corporation and giving to the corporation, either orally or in writing, particulars of the breach.

(2) Where a consumer purports to rescind under this section a contract for the supply of goods by a corporation, the purported rescission does not have any effect if:

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(a) the notice is not served or the goods are not returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods;

(b) in the case of a rescission effected by service of a notice, after the delivery of the goods to the consumer but before the notice is served:

(i) the goods were disposed of by the consumer, were lost, or were destroyed otherwise than by reason of a defect in the goods;

(ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or

(iii) the goods were damaged by abnormal use; or

(c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the consumer:

(i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or

(ii) the goods were damaged by abnormal use.

(3) Where a contract for the supply of goods by a corporation to a consumer has been rescinded in accordance with this section:

(a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the corporation—the property in the goods re-vests in the corporation upon the service of the notice or the return of the goods; and

(b) the consumer may recover from the corporation, as a debt, the amount or value of any consideration paid or provided by him or her for the goods.

(4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other Act, any State Act, any law of a Territory or any rule of law.

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Part VA—Liability of manufacturers and importers for defective goods

75AA Interpretation

In this Part:

action goods, in relation to a liability action, means the goods whose supply and defect is alleged in the action;

Commonwealth mandatory standard, in relation to goods, means a mandatory standard in respect of the goods imposed by a law of the Commonwealth;

defendant, in relation to a liability action, means a person against whom the action is brought (however described);

liability action means an action under section 75AD, 75AE, 75AF or 75AG and includes such an action because of paragraph 75AD(f) or section 75AH;

loss includes damage;

mandatory standard, in relation to goods, means a standard:

(a) for the goods or anything relating to the goods; and

(b) that, under a law of the Commonwealth, a State or a Territory, must be complied with when the goods are supplied by their manufacturer, being a law creating an offence or liability where there is such non-compliance,

but does not include a standard which may be complied with by meeting a higher standard;

manufactured includes grown, extracted, produced, processed and assembled;

plaintiff, in relation to a liability action, means the person by whom the action is brought (however described);

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use includes consume.

75AB Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this Part

Subsections 74A(3) to (8) (inclusive) operate as if references in them to Division 2A of Part V included references to this Part.

75AC Meaning of goods having defect

(1) For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect.

(2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances including:

(a) the manner in which, and the purposes for which, they have been marketed; and

(b) their packaging; and

(c) the use of any mark in relation to them; and

(d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and

(e) what might reasonably be expected to be done with or in relation to them; and

(f) the time when they were supplied by their manufacturer.

(3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.

(4) An inference that goods have a defect is not to be made only because:

(a) there was compliance with a Commonwealth mandatory standard for them; and

(b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer.

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75AD Liability for defective goods causing injuries—loss by injured individual

If:

(a) a corporation, in trade or commerce, supplies goods manufactured by it; and

(b) they have a defect; and

(c) because of the defect, an individual suffers injuries,

then:

(d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and

(e) the individual may recover that amount by action against the corporation; and

(f) if the individual dies because of the injuries—a law of a State or Territory about liability in respect of the death of individuals applies as if:

(i) the action were an action under the law of the State or Territory for damages in respect of the injuries; and

(ii) the defect were the corporation's wrongful act, neglect or default.

75AE Liability for defective goods causing injuries—loss by person other than injured individual

(1) If:

(a) a corporation, in trade or commerce, supplies goods manufactured by it; and

(b) they have a defect; and

(c) because of the defect, an individual suffers injuries; and

(d) a person, other than the individual, suffers loss because of:

(i) the injuries; or

(ii) if the individual dies because of the injuries—the individual's death; and

(e) the loss does not come about because of a business relationship between the person and the individual,

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then:

(f) the corporation is liable to compensate the person for the amount of the person's loss; and

(g) the person may recover that amount by action against the corporation.

(2) For the purposes of this section:

(a) a profession is taken to be a business; and

(b) a relationship between employer and employee or a similar relationship is a business relationship.

75AF Liability for defective goods—loss relating to other goods

If:

(a) a corporation, in trade or commerce, supplies goods manufactured by it; and

(b) they have a defect; and

(c) because of the defect, goods of a kind ordinarily acquired for personal, domestic or household use (not being the defective goods) are destroyed or damaged; and

(d) a person who:

(i) so used; or

(ii) intended to so use;

the destroyed or damaged goods, suffers loss as a result of the destruction or damage,

then:

(e) the corporation is liable to compensate the person for the amount of the loss; and

(f) the person may recover that amount by action against the corporation.

75AG Liability for defective goods—loss relating to buildings etc.

If:

(a) a corporation, in trade or commerce, supplies goods manufactured by it; and

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(b) they have a defect; and

(c) because of the defect, land, buildings, or fixtures, ordinarily acquired for private use are destroyed or damaged; and

(d) a person who:

(i) so used; or

(ii) intended to so use;

the land, buildings or fixtures, suffers loss as a result of the destruction or damage,

then:

(e) the corporation is liable to compensate the person for the amount of the loss; and

(f) the person may recover that amount by action against the corporation.

75AH Survival of liability actions

A law of a State or Territory about the survival of causes of action vested in persons who die applies to actions under section 75AD, 75AE, 75AF or 75AG.

75AI No liability action where workers' compensation or law giving effect to an international agreement applies

Section 75AD, 75AE, 75AF or 75AG does not apply to a loss in respect of which an amount has been, or could be, recovered under a law of the Commonwealth, a State or a Territory that:

(a) relates to workers' compensation; or

(b) gives effect to an international agreement.

75AJ Unidentified manufacturer

(1) If a person who wishes to institute a liability action does not know who manufactured the action goods, the person may serve on a supplier, or each supplier, of the action goods who is known to the person a written request to give the person particulars identifying:

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(a) the corporation which manufactured the goods (having regard to section 75AB); or

(b) the supplier of the goods to the supplier requested.

(2) If, 30 days after the person has made the request or requests, the person still does not know who manufactured the action goods, then the corporation, or each corporation, that is a supplier:

(a) to whom a request was made; and

(b) who did not comply with the request,

is taken, for the purposes of the action, to have manufactured the action goods.

75AK Defences

(1) In a liability action, it is a defence if it is established that:

(a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time; or

(b) they had that defect only because there was compliance with a mandatory standard for them; or

(c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered; or

(d) if they were comprised in other goods (***finished goods***)—that defect is attributable only to:

(i) the design of the finished goods; or

(ii) the markings on or accompanying the finished goods; or

(iii) the instructions or warnings given by the manufacturer of the finished goods.

(2) In this section:

supply time means:

(a) in relation to electricity—the time at which it was generated, being a time before it was transmitted or distributed; or

(b) in relation to other goods—the time when they were supplied by their actual manufacturer.

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75AL Commonwealth liability for goods that are defective only because of compliance with Commonwealth mandatory standard

(1) If a defendant in a liability action raises the defence that the action goods had the alleged defect only because there was compliance with a Commonwealth mandatory standard for them, that defendant must, as soon as practicable after raising that defence, serve on the Commonwealth a prescribed notice of the action and of that defence together with a copy of that defendant's defence in the action.

(2) Service of the notice and defence makes the Commonwealth a defendant in the action.

(3) If, in the action, the Court finds that the plaintiff would have succeeded against the defendant who served the notice but for the action goods having the alleged defect only because there was compliance with a Commonwealth mandatory standard for them, then:

(a) the Commonwealth, and not the defendant who served the notice, is liable to pay the plaintiff for the amount of the loss caused by the defect; and

(b) the Court is to enter judgment against the Commonwealth for that amount; and

(c) the Court may make such orders for costs as the Court considers just.

75AM Liability joint and several

If 2 or more corporations are liable under section 75AD, 75AE, 75AF or 75AG for the same loss they are jointly and severally liable.

75AN Contributory acts or omissions to reduce compensation

(1) If the loss in a liability action under section 75AD or 75AE was caused by both:

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(a) an act or omission of the individual who suffers the injuries concerned; and

(b) a defect of the action goods,

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in causing the loss.

(2) If the loss in a liability action under section 75AF or 75AG was caused by both:

(a) an act or omission of the person who suffered the loss; and

(b) a defect of the action goods,

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to the person's share in causing the loss.

(3) For the purposes of this section, the acts and omissions of a person who is responsible for another person include the acts and omissions of that other person.

75AO Time for commencing actions

(1) Subject to subsection (2), a person may commence a liability action at any time within 3 years after the time the person became aware, or ought reasonably to have become aware, of the alleged loss, the defect and the identity of the person who manufactured the action goods.

(2) A liability action must be commenced within 10 years of the supply by the manufacturer of the action goods.

75AP Application of provisions not to be excluded or modified

(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of this Part; or

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(b) the exercise of a right conferred by any of those provisions; or

(c) any liability under any of those provisions,

is void.

(2) A term of a contract is not taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

75AQ Representative actions by the Commission

(1) The Commission may, by application, commence a liability action on behalf of one or more persons identified in the application who has suffered the loss for whose amount the action is commenced.

(2) The Commission may only make an application under this section if it has obtained the written consent of the person, or each of the persons, on whose behalf the application is being made.

75AR Saving of other laws and remedies

(1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, in force in a State or Territory.

(2) This Part is not to be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.

75AS Jurisdiction of courts

Subsection 75B(2) and sections 86, 86A and 86B operate in relation to an action under this Part as if:

(a) references in them to Part VI included references to this Part; and

(b) references in them to Division 1, 1A or 1AA of Part V included references to this Part; and

(c) references in them to the Minister were omitted.

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Part VB—Price exploitation in relation to A New Tax System

75AT Definitions

In this Part, unless the contrary intention appears:

GST has the same meaning as in the GST Act.

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999*.

Note: The operation of the GST Act is affected by the GST Transition Act.

GST implementation date means the day on which the GST Act commences.

GST Transition Act means the *A New Tax System (Goods and Services Tax Transition) Act 1999*.

New Tax System changes means the following:

(a) the amendment of the *Sales Tax (Exemptions and Classifications) Act 1992* made by the GST Transition Act;

(b) the ending of sales tax, as provided for in the *A New Tax System (End of Sales Tax) Act 1999*;

(c) the imposition of GST;

(d) any other changes (including changes to Commonwealth, State or Territory laws) prescribed by the regulations for the purposes of this definition.

New Tax System transition period means the period:

(a) starting on the later of 1 July 1999 and the commencement of the *A New Tax System (Trade Practices Amendment) Act 1999*; and

(b) ending on the day that is 2 years after the GST implementation date.

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price, in relation to a supply, includes:

(a) a charge of any description for the supply; and

(b) any pecuniary or other benefit, whether direct or indirect, received or to be received by a person for or in connection with the supply.

regulated supply means:

(a) a supply that:

(i) occurs during the New Tax System transition period and before the GST implementation date; and

(ii) is by a person who would be required to be registered under the GST Act had the supply occurred on or after 1 July 2000; and

(iii) had the supply occurred on or after 1 July 2000, it would have been a taxable supply for the purposes of the GST Act or would have been a taxable supply had it not been GST-free or input taxed for the purposes of that Act; or

(b) a supply that:

(i) occurs during the New Tax System transition period and on or after the GST implementation date; and

(ii) is by a person who is registered or required to be registered under the GST Act; and

(iii) is a taxable supply for the purposes of the GST Act, or would have been a taxable supply for the purposes of the GST Act had it not been GST-free or input taxed for the purposes of that Act.

supply means:

(a) a supply of goods, including by way of sale, exchange, lease, hire or hire-purchase; or

(b) any other transaction or dealing that is a supply for the purposes of the GST Act.

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75AU Price exploitation in relation to New Tax System changes

(1) A corporation contravenes this section if it engages in price exploitation in relation to the New Tax System changes.

(2) For the purposes of this section, a corporation engages in price exploitation in relation to the New Tax System changes if:

(a) it makes a regulated supply; and

(b) the price for the supply is unreasonably high, having regard alone to the New Tax System changes (whether the supply took place before or after those changes); and

(c) the price for the supply is unreasonably high even if the following other matters are also taken into account:

(i) the supplier's costs;

(ii) supply and demand conditions;

(iii) any other relevant matter.

75AV Price exploitation—guidelines about when prices contravene section 75AU

(1) The Commission must, by written instrument, formulate guidelines about when prices for regulated supplies may be regarded as being in contravention of section 75AU.

(2) The Commission may, by written instrument, vary the guidelines.

(3) The Commission must have regard to the guidelines in making decisions under section 75AW or 75AX in relation to the issue, variation and revocation of notices under that section.

(4) The Court may have regard to the guidelines in any proceedings:

(a) under section 76 relating to section 75AU; or

(b) under section 80 for an injunction relating to section 75AU.

(5) As soon as practicable after making or varying the guidelines, the Commission must cause a copy of the guidelines, or of the variation, to be published in the *Gazette*. However, failure to do so does not affect the validity of the guidelines or of the variation.

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75AW Commission may issue notice to corporation it considers has contravened section 75AU

(1) If the Commission considers that a corporation has made a supply in contravention of section 75AU, the Commission may give the corporation a notice in writing under this section.

(2) The notice must:
  (a) be expressed to be given under this section; and
  (b) identify:
    (i) the corporation that made the supply; and
    (ii) the kind of supply made; and
    (iii) the circumstances in which the supply was made; and
  (c) state that, in the Commission's opinion:
    (i) the price for the supply was unreasonably high as mentioned in paragraph 75AU(2)(b); and
    (ii) that unreasonably high price was not attributable to matters referred to in paragraph 75AU(2)(c).

(3) In any proceedings:
  (a) under section 76 relating to section 75AU; or
  (b) under section 80 for an injunction relating to section 75AU;

the notice is taken to be prima facie evidence that:
  (c) the price for the supply was unreasonably high as mentioned in paragraph 75AU(2)(b); and
  (d) that unreasonably high price was not attributable to matters referred to in paragraph 75AU(2)(c).

(4) The Commission may vary or revoke the notice on its own initiative or on application made by the corporation. The Commission must give the corporation notice in writing of the variation or revocation.

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75AX Commission may issue notice to aid prevention of price exploitation

(1) The Commission may give a corporation a notice in writing under this section if the Commission considers that doing so will aid the prevention of price exploitation (within the meaning of section 75AU).

(2) The notice must:

(a) be expressed to be given under this section; and

(b) be expressed to relate to any supply that the corporation makes that is:

(i) of a kind specified in the notice; and

(ii) made in circumstances specified in the notice; and

(iii) made during the period specified in the notice (which must not be a period ending after the end of the New Tax System Transition period); and

(c) specify the maximum price that, in the Commission's opinion, may be charged for a supply to which the notice is expressed to relate.

(3) The Commission may, on its own initiative or on application made by the corporation:

(a) vary the notice to:

(i) change the period specified as required by subparagraph (2)(b)(iii); or

(ii) change the price specified in the notice as required by paragraph (2)(c); or

(b) revoke the notice.

The Commission must give the corporation notice in writing of the variation or revocation.

(4) The Commission may publish the notice, or particulars of any variation or revocation of the notice, in such manner as the Commission considers appropriate, including, for example, in a national newspaper.

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75AY Commission may monitor prices

(1) The Commission may monitor prices for either or both of the following purposes:

(a) to assess the general effect of the New Tax System changes on prices charged by corporations for supplies during the New Tax System transition period;

(b) to assist its consideration of whether section 75AU has been, is being, or may in the future be, contravened.

(2) A member of the Commission may, by notice in writing served on a person, require the person:

(a) to give the Commission specified information in writing signed by:

(i) the person; or

(ii) if the person is a body corporate—a competent officer of the body corporate; or

(b) to produce to the Commission specified documents;

being information, or documents containing information, relating to prices or the setting of prices that the member considers will or may be useful to the Commission in monitoring prices as mentioned in subsection (1).

Note: The powers under this section are in addition to the powers under section 155. Under section 155, the Commission may obtain information about particular matters that constitute or may constitute a contravention of section 75AU.

(3) Without limiting subsection (2), information or documents that may be required under that subsection may relate to prices, or the setting of prices:

(a) before or after all or any of the New Tax System changes have taken effect; and

(b) before or after the start of the New Tax System transition period; and

(c) in a situation, or during a period, specified in the notice.

(4) A person must not:

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(a) refuse or fail to comply with a notice under subsection (2) to the extent that the person is capable of complying with it; or

(b) in purported compliance with such a notice, intentionally or recklessly provide information or a document that is false or misleading.

Penalty: 20 penalty units.

75AZ Reporting

(1) The Commission must, within 28 days after the end of each quarter, give the Minister a written report about the operations of the Commission under this Part during the quarter.

(2) Without otherwise limiting subsection (1), a report under that subsection must include particulars of:

(a) all notices given under section 75AX during the quarter; and

(b) all variations or revocations during the quarter of notices given under section 75AX.

(3) For this purpose, a ***quarter*** is a period of 3 months:

(a) that occurs wholly or partly during the New Tax System transition period; and

(b) that starts on any of the following days in a year:

(i) 1 January;

(ii) 1 April;

(iii) 1 July;

(iv) 1 October.

(4) As soon as practicable after the Minister receives a report under subsection (1), the Minister must make the report public by such means as the Minister considers appropriate.

(5) If this section commences during a quarter (but not on the first day of a quarter):

(a) no report is to be made at the end of the quarter; but

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(b) the report made at the end of the next quarter is also to include the information required by subsection (1) in relation to the previous quarter.

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Part VI—Enforcement and remedies

75B Interpretation

(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB or V, or of section 75AU, shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

(2) In this Part, unless the contrary intention appears:

(a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;

(b) a reference to the Federal Court is a reference to the Federal Court of Australia; and

(c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

76 Pecuniary penalties

(1) If the Court is satisfied that a person:

(a) has contravened any of the following provisions:

(i) a provision of Part IV;

(ii) section 75AU;

(b) has attempted to contravene such a provision;

(c) has aided, abetted, counselled or procured a person to contravene such a provision;

(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;

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(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision,

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (***Boycott conduct*** is defined in subsection 87AA(2).)

(1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

(a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—$750,000; and

(b) for each other act or omission to which this section applies—$10,000,000.

(1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed $500,000 for each act or omission to which this section applies.

(2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of, section 45D, 45DA, 45DB, 45E or 45EA.

(3) If conduct constitutes a contravention of two or more provisions of Part IV, a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

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(4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which the 2 limits in subsection (1A) apply is an amount up to the higher of those limits.

77 Civil action for recovery of pecuniary penalties

(1) The Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

78 Criminal proceedings not to be brought for contraventions of Part IV or section 75AU

Criminal proceedings do not lie against a person by reason only that the person:

(a) has contravened any of the following provisions:
  (i) a provision of Part IV;
  (ii) section 75AU;
(b) has attempted to contravene such a provision;
(c) has aided, abetted, counselled or procured a person to contravene such a provision;
(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
(f) has conspired with others to contravene such a provision.

79 Offences against Part V

(1) A person who:
  (a) contravenes;

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(b) aids, abets, counsels or procures a person to contravene;

(c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene;

(d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or

(e) conspires with others to contravene,

a provision of Part V other than section 52, 65Q or 65R or subsection 65F(9) is guilty of an offence punishable on conviction:

(f) in the case of a person not being a body corporate—by a fine not exceeding $40,000; or

(g) in the case of a person being a body corporate—by a fine not exceeding $200,000.

(2) Where a person is convicted of two or more offences constituted by, or relating to, contraventions of the same provision of Part V, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature and to have occurred at or about the same time (whether or not the person is also convicted of an offence or offences constituted by, or relating to, another contravention or other contraventions of that provision that were of a different nature or occurred at a different time), the Court shall not, in respect of the first-mentioned offences, impose on the person fines that, in the aggregate, exceed the maximum fine that would be applicable in respect of one offence by that person against that provision.

(3) Where:

(a) a person is convicted of an offence constituted by, or relating to, a contravention of a provision of Part V; and

(b) a fine has, or fines have, previously been imposed on the person by the Court for an offence or offences constituted by, or relating to, another contravention or other contraventions of the same provision, being a contravention that, or contraventions each of which, appears to the Court to have been of the same nature as, or of a substantially similar nature to, and to have occurred at or about the same time as, the first-mentioned contravention (whether or not a fine has,

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or fines have, also previously been imposed on the person for an offence or offences constituted by, or relating to, a contravention or contraventions of that provision that were of a different nature or occurred at a different time),

the Court shall not, in respect of the offence mentioned in paragraph (a), impose on the person a fine that exceeds the amount (if any) by which the maximum fine applicable in respect of that offence under subsection (1) is greater than the amount of the fine, or the sum of the amounts of the fines, first referred to in paragraph (b).

(4) In proceedings under this section against a person for contravening a provision of Part V, the Court may:

(a) grant an injunction under section 80 against the person in relation to:

(i) the conduct that constitutes, or is alleged to constitute, the contravention; or

(ii) other conduct of that kind; or

(b) make an order under section 80A in relation to the contravention.

(5) Sections 5, 7 and 7A of the *Crimes Act 1914* do not apply in relation to an offence against subsection (1).

(6) A prosecution for an offence against subsection (1) may be commenced within 3 years after the commission of the offence.

79A Enforcement and recovery of certain fines

(1) Where a person on whom a fine has been imposed for an offence against section 65Q, 65R, 79 or 155 or subsection 65F(9) or 87A(5) defaults in payment of the fine, a Court may:

(a) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or

(b) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and

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may be enforced, as if it were a judgment debt under a judgment of the Court.

(2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

(3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

(a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and

(b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.

(4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:

(a) on payment of the fine; or

(b) if the fine is not paid—on full compliance with the order.

(5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 18A of the *Crimes Act 1914* in respect of a fine shall be calculated at the rate of one day's imprisonment for each $25 of the amount of the fine that is from time to time unpaid.

(6) Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.

(7) Subject to subsection (8), where:

(a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or

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more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and

(b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature,

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

(8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.

(9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).

(10) Paragraphs 18A(1)(b), (c) and (d) of the *Crimes Act 1914* do not apply with respect to fines referred to in subsection (1).

(11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

80 Injunctions

(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV, IVA, IVB or V;

(ii) section 75AU;

(b) attempting to contravene such a provision;

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(c) aiding, abetting, counselling or procuring a person to contravene such a provision;

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision,

the Court may grant an injunction in such terms as the Court determines to be appropriate.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (***Boycott conduct*** is defined in subsection 87AA(2).)

(1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

(1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50 or section 75AU.

(1AAA) Subject to subsection (1B), a person other than the Minister or the Commission may not apply for an injunction on the ground of:

(a) a person's actual, attempted or proposed contravention of section 50A; or

(b) a person's actual or proposed involvement in a contravention of section 50A.

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(1B) Where the Tribunal has, on the application of a person (in this subsection referred to as the ***applicant***) other than the Minister or the Commission, made a declaration under subsection 50A(1) in relation to the acquisition by a person of a controlling interest in a corporation, the applicant is entitled to make an application under subsection (1) for an injunction by reason that the corporation has contravened or attempted to contravene or is proposing to contravene subsection 50A(6) in relation to that declaration.

(2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

(3) The Court may rescind or vary an injunction granted under subsection (1) or (2).

(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

(a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;

(b) whether or not the person has previously refused or failed to do that act or thing; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

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(6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

(6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.

(7) Where:

(a) in a case to which subsection (6) does not apply the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and

(b) the Minister gives the undertaking,

the Court shall accept the undertaking by the Minister and shall not require a further undertaking from any other person.

(8) Subsection (7) does not apply in relation to an application for an injunction relating to Part IV.

80AA Division 7 of Part VI of the Workplace Relations Act does not prevent granting of injunction

Nothing in Division 7 of Part VI of the *Workplace Relations Act 1996* prevents the Court granting an injunction under section 80.

80AB Stay of injunctions

(1) The Court may stay the operation of an injunction granted under section 80 if:

(a) the injunction is in respect of conduct that constitutes or would constitute a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA or an associated contravention; and

(b) there is a proceeding in respect of a dispute relating to the conduct pending before:

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(i) the Australian Industrial Relations Commission under Division 7 of Part VI of the *Workplace Relations Act 1996*; or

(ii) a court, tribunal or authority of a State or Territory under a prescribed provision of a law of the State or Territory; and

(c) the conduct relates to the supply of goods or services to, or the acquisition of goods or services from, a person who is or becomes a party to the proceeding referred to in paragraph (b); and

(d) any of the following has applied for the stay:

(i) a Minister of the Commonwealth;

(ii) if subparagraph (b)(ii) applies—a Minister of the State or Territory concerned;

(iii) a party to the proceeding for the injunction; and

(e) the Court considers that granting the stay:

(i) would be likely to facilitate the settlement of the dispute by conciliation; and

(ii) would, in all the circumstances, be just.

(2) An order staying the operation of the injunction may be expressed to have effect for a specified period and may be varied or rescinded by the Court at any time.

(3) If the proceeding referred to in paragraph (1)(b) is terminated because the Australian Industrial Relations Commission, or the State or Territory court, tribunal or authority, has settled the dispute to which the conduct relates by conciliation, the Court must not make any order in relation to the costs of the proceedings in respect of the granting of the injunction or in relation to the costs of any proceedings for the rescission of the injunction.

(4) Nothing in this section affects other powers of the Court.

(5) In this section:

associated contravention means:

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(a) attempting to contravene subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or

(b) aiding, abetting, counselling or procuring a person to contravene any of those provisions; or

(c) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene any of those provisions; or

(d) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of any of those provisions; or

(e) conspiring with others to contravene any of those provisions.

injunction includes an interim injunction.

80A Order to disclose information or publish advertisement

(1) Without limiting the generality of section 80, where on the application of the Minister or the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Part IVB or V, the Court may make either or both of the following orders:

(a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access;

(b) an order requiring that person or a person involved in the contravention to publish, at his or her own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

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80B Section 75AU contraventions—orders limiting prices or requiring refunds of money

Without limiting the generality of section 80, where, on the application of the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of section 75AU, the Court may make either or both of the following orders:

(a) an order requiring that person, or a person involved in the contravention, not to make a regulated supply of a kind specified in the order for a price in excess of the price specified in the order while the order remains in force;

(b) an order requiring that person, or a person involved in the contravention, to refund money to a person specified in the order.

81 Divestiture

(1) The Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of the shares or assets acquired in contravention of that section.

(1A) Where:

(a) the Court finds, in a proceeding instituted under this Part, that a person (in this subsection referred to as the ***acquirer***) has acquired shares in the capital of a body corporate or any assets of a person in contravention of section 50;

(b) the Court finds, whether in that proceeding or any other proceeding instituted under this Part, that the person (in this section referred to as the ***vendor***) from whom the acquirer acquired those shares or those assets, as the case may be, was involved in the contravention; and

(c) at the time when the finding referred to in paragraph (b) is made, any of those shares or those assets, as the case may be, are vested in the acquirer or, if the acquirer is a body

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corporate, in any body corporate that is related to the acquirer,

the Court may, on the application of the Commission, declare that the acquisition, in so far as it relates to the shares or assets referred to in paragraph (c), is void as from the day on which it took place and, where the Court makes such a declaration:

(d) the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and

(e) the vendor shall refund to the acquirer any amount paid to the vendor in respect of the acquisition of the shares or assets to which the declaration relates.

(1B) Where a declaration has been made under subsection 50A(1) in relation to the obtaining of a controlling interest in a corporation, or in each of 2 or more corporations, the Court may, on the application of the Minister or the Commission, if it finds, or has in a proceeding instituted under section 80 found, that that corporation, or any of those corporations, as the case may be (in this subsection referred to as the ***relevant corporation***), has contravened subsection 50A(6), by order, for the purpose of ensuring that the obtaining of that controlling interest ceases to have the result referred to in paragraph 50A(1)(a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.

(1C) Where an application is made to the Court for an order under subsection (1) or a declaration under subsection (1A), the Court may, instead of making an order under subsection (1) for the purpose of securing the disposal by a person of shares or assets or an order under subsection (1A) that the acquisition by a person of shares or assets is void, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

(2) An application under subsection (1), (1A) or (1B) may be made at any time within 3 years after the date on which the contravention occurred.

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(3) Where an application for directions under subsection (1) or for a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsections (1) and (1A).

82 Actions for damages

(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

83 Finding in proceedings to be evidence

In a proceeding against a person under section 82 or in an application under subsection 87(1A) for an order against a person, a finding of any fact by a court made in proceedings under section 77, 80, 80A or 81, or for an offence against section 79, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part IV, IVA, IVB or V is *prima facie* evidence of that fact and the finding may be proved by production of a document under the seal of the court from which the finding appears.

84 Conduct by directors, servants or agents

(1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA, IVB, V or VB applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct

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was engaged in within the scope of the person's actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent,

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

(3) Where, in a proceeding under this Part in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of Part IVA, IVB, V or VB applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of the servant's or agent's actual or apparent authority, had that state of mind.

(4) Conduct engaged in on behalf of a person other than a body corporate:

(a) by a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent,

shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose

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of the person and the person's reasons for the person's intention, opinion, belief or purpose.

85 Defences

(1) Subject to subsection (2), in a prosecution under this Part in relation to a contravention of a provision of Part V, it is a defence if the defendant establishes:

(a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake;

(b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person; or

(c) that:

(i) the contravention in respect of which the proceeding was instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and

(ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

(1A) In paragraphs (1)(b) and (c), ***another person*** does not include a person who was:

(a) a servant or agent of the defendant; or

(b) in the case of a defendant being a body corporate, a director, servant or agent of the defendant,

at the time when the contravention occurred.

(2) If a defence provided by subsection (1) involves an allegation that a contravention was due to reliance on information supplied by another person or to the act or default of another person, the defendant is not, without leave of the Court, entitled to rely on that defence unless he or she has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing giving such information that would identify or assist in the

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identification of the other person as was then in his or her possession.

(3) In a proceeding under this Part in relation to a contravention of a provision of Part V committed by the publication of an advertisement, it is a defence if the defendant establishes that he or she is a person whose business it is to publish or arrange for the publication of advertisements and that he or she received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of that Part.

(4) In a proceeding under this Part in relation to a contravention of Part V committed by the supplying of goods that did not comply with a consumer product safety standard or in relation to which the supplier did not comply with a consumer product information standard, it is a defence if the defendant establishes:

(a) that the goods were acquired by him or her for the purpose of re-supply and were so acquired from a person who carried on in Australia a business of supplying such goods otherwise than as the agent of a person outside Australia; and

(b) that he or she did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with that standard or that he or she had not complied with that standard in relation to the goods, as the case may be, or he or she relied in good faith on a representation by the person from whom he or she acquired the goods that a consumer product safety standard or a consumer product information standard, as the case may be, had not been prescribed in respect of the goods.

(5) A person is not, without leave of the Court, entitled to rely on the defence provided by subsection (4) unless he or she has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing identifying the person from whom he or she acquired the goods.

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(6) Where, in any proceedings under this Part against a person other than a body corporate, it appears to the Court that the person has or may have engaged in conduct in contravention of a provision of Part IV or in conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit.

86 Jurisdiction of courts

(1) Jurisdiction is conferred on the Federal Court in any matter arising under this Act in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part.

(2) The several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise, and, subject to the Constitution, jurisdiction is conferred on the several courts of the Territories, with respect to any matter arising under Part IVA or IVB or Division 1, 1A or 1AA of Part V in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.

(3) Nothing in subsection (2) shall be taken to enable an inferior court of a State or Territory to grant a remedy other than a remedy of a kind that the court is able to grant under the law of that State or Territory.

(4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than the jurisdiction of the several courts of the States and Territories under subsection (2) and the jurisdiction of the High Court under section 75 of the Constitution.

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86A Transfer of matters

(1) Where:

(a) a civil proceeding instituted (whether before or after the commencement of this section) by a person other than the Minister or the Commission is pending in the Federal Court; and

(b) a matter for determination in the proceeding arose under Part IVA or IVB or Division 1, 1A or 1AA of Part V,

the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Court's own motion, transfer to a court of a State or Territory the matter referred to in paragraph (b) and may also transfer to that court any other matter for determination in the proceeding.

(2) The Federal Court shall not transfer a matter to another court under subsection (1) unless the other court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:

(a) the matter arises out of or is related to a proceeding that is pending in the other court; or

(b) it is otherwise in the interests of justice that the matter be determined by the other court.

(3) Where the Federal Court transfers a matter to another court under subsection (1):

(a) further proceedings in the matter shall be as directed by the other court; and

(b) the judgment of the other court in the matter is enforceable throughout Australia and the external Territories as if it were a judgment of the Federal Court.

(4) Where:

(a) a proceeding is pending in a court (other than the Supreme Court) of a State or Territory; and

(b) a matter for determination in the proceeding arose under Part IVA or Division 1, 1A or 1AA of Part V,

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the court shall, if directed to do so by the Federal Court, transfer to the Federal Court the matter referred to in paragraph (b) and such other matters for determination in the proceeding the determination of which would, apart from any law of a State or of the Northern Territory relating to cross-vesting of jurisdiction, be within the jurisdiction of the Federal Court as the Federal Court determines.

(5) Where:

(a) a proceeding is pending in a court (other than the Supreme Court) of a State or Territory; and

(b) a matter for determination in the proceeding arose under Part IVA or Division 1, 1A or 1AA of Part V,

the court may, subject to subsection (6), upon the application of a party or of the court's own motion, transfer to a court (other than the Supreme Court) of a State or Territory other than the State or Territory referred to in paragraph (a) the matter referred to in paragraph (b).

(6) A court shall not transfer a matter to another court under subsection (5) unless the other court has power to grant the remedies sought before the first-mentioned court in the matter and it appears to the first-mentioned court that:

(a) the matter arises out of or is related to a proceeding that is pending in the other court; or

(b) it is otherwise in the interests of justice that the matter be determined by the other court.

(7) Where a court transfers a matter to another court under subsection (5), further proceedings in the matter shall be as directed by the other court.

86B Transfer of certain proceedings to Family Court

(1) Subject to subsection (2), where:

(a) a civil proceeding is pending in the Federal Court; and

(b) a matter for determination in the proceeding arises under Part IVA or Division 1, 1A or 1AA of Part V,

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the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the proceeding to the Family Court.

(2) A proceeding that is pending in the Federal Court at the commencement of this section shall not be transferred to the Family Court unless the parties to the proceeding consent to the transfer.

(3) Subject to subsection (4), where a proceeding is transferred to the Family Court:

(a) the Family Court has jurisdiction to hear and determine the proceeding;

(b) the Family Court also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether by virtue of paragraph (a) or otherwise):

(i) that are associated with matters arising in the proceeding; or

(ii) that, apart from subsection 32(1) of the *Federal Court of Australia Act 1976*, the Federal Court would have had jurisdiction to hear and determine in the proceeding;

(c) the Family Court may, in and in relation to the proceeding:

(i) grant such remedies;

(ii) make orders of such kinds; and

(iii) issue, and direct the issue of, writs of such kinds,

as the Federal Court could have granted, made, issued or directed the issue of, as the case may be, in and in relation to the proceeding;

(d) remedies, orders and writs granted, made or issued by the Family Court in and in relation to the proceeding have effect, and may be enforced by the Family Court, as if they had been granted, made or issued by the Federal Court;

(e) appeals lie from judgments of the Family Court given in and in relation to the proceeding as if the judgments were judgments of the Federal Court constituted by a single Judge of that Court, and do not otherwise lie; and

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(f) subject to paragraphs (a) to (e) (inclusive), this Act, the regulations, the *Federal Court of Australia Act 1976*, the Rules of Court made under that Act, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:

(i) a reference to the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to the Family Court;

(ii) a reference to a Judge of the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to a Family Court Judge;

(iii) a reference to the expression ***the Court or a Judge*** when used in relation to the Federal Court included a reference to a Family Court Judge sitting in Chambers;

(iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Family Court; and

(v) any other necessary changes were made.

(4) Where any difficulty arises in the application of paragraphs (3)(c), (d) and (f) in or in relation to a particular proceeding, the Family Court may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.

(5) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Act to the Family Court.

87 Other orders

(1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA, IVB or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under

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section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of section 80, the Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IVA, IVB or V or on the application of the Commission in accordance with subsection (1B) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(1B) Where, in a proceeding instituted for an offence against section 79 or instituted by the Commission or the Minister under section 80, a person is found to have engaged (whether before or after the commencement of this subsection) in conduct in contravention of a provision of Part IVA, IVB or V, the Commission may make an application under subsection (1A) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but the Commission shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IVA, IVB or V notwithstanding that a

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proceeding has not been instituted under another provision of this Part in relation to that contravention.

(1CA) An application under subsection (1A) may be commenced:

(a) in the case of conduct in contravention of Part IVA—at any time within 2 years after the day on which the cause of action accrued; or

(b) in any other case—at any time within 3 years after the day on which the cause of action accrued.

(1D) For the purpose of determining whether to make an order under this section in relation to a contravention of Part IVA, the Court may have regard to the conduct of parties to the proceeding since the contravention occurred.

(2) The orders referred to in subsections (1) and (1A) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions of such a contract;

(c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted

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by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

(3) Where:

(a) a provision of a contract made, or a covenant given, whether before or after the commencement of the *Trade Practices Amendment Act 1977*:

(i) in the case of a provision of a contract, is unenforceable by reason of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or

(ii) in the case of a covenant, is unenforceable by reason of section 45B in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation; or

(b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the

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commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47,

the Court may, on the application of a party to the contract or of a person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, as the case may be, make an order:

(c) varying the contract or covenant, or a collateral arrangement relating to the contract or covenant, in such manner as the Court considers just and equitable; or

(d) directing another party to the contract, or another person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, to do any act in relation to the first-mentioned party or person that the Court considers just and equitable.

(4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.

(5) The powers conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or covenant in proceedings instituted in that other court in respect of the contract or covenant.

(6) In subsection (2), ***interest***, in relation to land, has the same meaning as in section 53A.

87A Power of Court to prohibit payment or transfer of moneys or other property

(1) Where:

(a) proceedings have been commenced against a person for an offence against section 79;

(b) an application has been made under section 80 for an injunction against a person in relation to a contravention of a provision of Part IVA or V;

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(c) an action has been commenced under subsection 82(1) against a person in relation to a contravention of a provision of Part V; or

(d) an application for an order under subsection 87(1A) or (1B) has been or may be made against a person in relation to a contravention of a provision of Part IVA or V,

the Court may, on the application of the Minister or the Commission, make an order or orders mentioned in subsection (2) if the Court is satisfied that:

(e) it is necessary or desirable to do so for the purpose of preserving money or other property held by or on behalf of a person referred to in paragraph (a), (b), (c) or (d), as the case may be (in this section referred to as the ***relevant person***), where the relevant person is liable or may become liable under this Act to pay moneys by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or refund other property; and

(f) it will not unduly prejudice the rights and interests of any other person.

(2) The orders referred to in subsection (1) are:

(a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;

(b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the relevant person or on behalf of an associate of the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of, the other property, to, or to another person at the direction or request of, the person on whose behalf the money or other property is held;

(c) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of money of

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the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the money is held;

(d) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the other property is located; and

(e) an order appointing, where the relevant person is a natural person, a receiver or trustee of the property or of part of the property of the relevant person with such powers as are specified in the order.

(3) Subject to subsection (4), an order under this section may be expressed to operate:

(a) for a period specified in the order; or

(b) until proceedings under any other provision of this Part in relation to which the order was made have been concluded.

(4) An order under this section made on an application *ex parte* shall not be expressed to operate for a period exceeding 30 days.

(5) A person who contravenes or fails to comply with an order by the Court under this section that is applicable to the person is guilty of an offence punishable on conviction:

(a) in the case of a person not being a body corporate—by a fine not exceeding $20,000; or

(b) in the case of a person being a body corporate—by a fine not exceeding $100,000.

(6) Nothing in this section affects the powers that the Court has apart from this section.

(7) This section has effect subject to the *Bankruptcy Act 1966*.

(8) A reference in this section to a person who is an associate of a relevant person is a reference to:

(a) a person holding money or other property on behalf of the relevant person; or

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(b) if the relevant person is a body corporate—a wholly owned subsidiary of the relevant person.

87AA Special provision relating to Court's exercise of powers under this Part in relation to boycott conduct

(1) In exercising its powers in proceedings under this Part in relation to boycott conduct, the Court is to have regard to any action the applicant in the proceedings has taken, or could take, before an industrial authority in relation to the boycott conduct. In particular, the Court is to have regard to any application for conciliation that the applicant has made or could make.

(2) In this section:

boycott conduct means conduct that constitutes or would constitute:

(a) a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or

(b) attempting to contravene one of those provisions; or

(c) aiding, abetting, counselling or procuring a person to contravene one of those provisions; or

(d) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene one of those provisions; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of one of those provisions; or

(f) conspiring with others to contravene one of those provisions.

industrial authority means:

(a) the Australian Industrial Relations Commission; or

(b) a State industrial authority as defined in subsection 4(1) of the *Workplace Relations Act 1996*.

87B Enforcement of undertakings

(1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter

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in relation to which the Commission has a power or function under this Act (other than Part X).

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.

(3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

87C Enforcement of undertakings—Secretary to the Department

(1) The Secretary to the Department may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Secretary has a power or function under this Act.

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Secretary to the Department.

(3) If the Secretary to the Department considers that the person who gave the undertaking has breached any of its terms, the Secretary may apply to the Court for an order under subsection (4).

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(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

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Part VII—Authorisations and notifications in respect of restrictive trade practices

Division 1—Authorisations

87D Definitions

(1) In this Division:

industry code of practice means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

minor variation, in relation to an authorisation, is a single variation that does not involve a material change in the effect of the authorisation.

(2) A reference in this Division to a proposal of the Commission is a reference to a notice of the Commission:

(a) so far as the revocation of an authorisation is concerned—under subsection 91B(3); and

(b) so far as the revocation of an authorisation and the substitution of another—under subsection 91C(3).

88 Power of Commission to grant authorisations

(1) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorisation to the corporation:

(a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45; or

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(b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45,

and, while such an authorisation remains in force:

(c) in the case of an authorisation to make a contract or arrangement or to arrive at an understanding—subsection 45(2) does not prevent the corporation from making the contract or arrangement or arriving at the understanding in accordance with the authorisation and giving effect in accordance with the authorisation to any provision of the contract or arrangement so made or of the understanding so arrived at;

(d) in the case of an authorisation to give effect to a provision of a contract:

(i) the provision is not unenforceable by reason of subsection 45(1); and

(ii) subsection 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorisation; or

(e) in the case of an authorisation to give effect to a provision of an arrangement or understanding—subsection 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorisation.

(5) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person:

(a) to require the giving of, or to give, a covenant where the proposed covenant would have the purpose, or would have or might have the effect, of substantially lessening competition in a market referred to in paragraph 45B(2)(a); or

(b) to enforce the terms of a covenant,

and, while such an authorisation remains in force:

(c) in the case of an authorisation to require the giving of, or to give, a covenant:

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(i) the covenant is not unenforceable by reason of subsection 45B(1); and

(ii) subsection 45B(2) does not apply in relation to the covenant; or

(d) in the case of an authorisation to enforce the terms of a covenant:

(i) the covenant is not unenforceable by reason of subsection 45B(1); and

(ii) paragraphs 45B(2)(b) and (c) do not apply in relation to the covenant.

(6) An authorisation granted by the Commission to a person under any of the preceding provisions of this section to:

(a) make a contract or arrangement or arrive at an understanding;

(b) give effect to a provision of a contract, arrangement or understanding;

(c) require the giving of, or give, a covenant; or

(d) enforce the terms of a covenant,

has effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as a party to the contract, arrangement or understanding or as a proposed party to the proposed contract, arrangement or understanding, or as a person who is or would be bound by, or entitled to the benefit of, the covenant or the proposed covenant, as the case may be.

(7) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person, and to any other person acting in concert with the first-mentioned person, to engage in conduct to which section 45D, 45DA or 45DB would or might apply and, while such an authorisation remains in force, that section does not apply in relation to the engaging in that conduct by the applicant and by any person acting in concert with the applicant.

(7A) Subject to this Part, the Commission may, on application by or on behalf of a person, grant an authorisation to the person to engage in

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conduct to which section 45E or 45EA would or might apply. While the authorisation remains in force, that section does not apply in relation to the person engaging in that conduct.

(8) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorisation to the corporation to engage in conduct that constitutes or may constitute the practice of exclusive dealing and, while such an authorisation remains in force, section 47 does not prevent the corporation from engaging in that conduct in accordance with the authorisation.

(8AA) If:

(a) the Commission grants an authorisation to a corporation to engage in particular conduct under subsection (8); and

(b) the particular conduct referred to in the authorisation is conduct expressly required or permitted under a contract, an arrangement, an understanding or an industry code of practice,

then:

(c) the authorisation has effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as a party or proposed party to the contract, arrangement, understanding or code; and

(d) the authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the contract, arrangement, understanding or code at a time after the authorisation is granted.

(8AB) For the purposes of subsection (8AA), a reference in that subsection to a contract, an arrangement, an understanding or an industry code of practice includes a reference to a proposed contract, a proposed arrangement, a proposed understanding or a proposed industry code of practice (as the case requires).

(8A) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person to engage in conduct that constitutes (or may constitute) the practice

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of resale price maintenance. While the authorisation remains in force, section 48 does not prevent the person from engaging in that conduct in accordance with the authorisation.

(9) Subject to this Part, the Commission may, upon application by or on behalf of a person:

(a) grant an authorisation to the person to acquire shares in the capital of a body corporate or to acquire assets of a person; or

(b) grant an authorisation to the person to acquire a controlling interest in a body corporate within the meaning of section 50A,

and, while such an authorisation remains in force:

(c) in the case of an authorisation under paragraph (a)—section 50 does not prevent the person from acquiring shares or assets in accordance with the authorisation; or

(d) in the case of an authorisation under paragraph (b)—section 50A does not, to the extent specified in the authorisation, apply in relation to the acquisition of that controlling interest.

(10) An authorisation to a corporation under subsection (1) may be expressed so as to apply to or in relation to another person who:

(a) in the case of an authorisation to make a contract or arrangement or arrive at an understanding—becomes a party to the proposed contract or arrangement at a time after it is made or becomes a party to the proposed understanding at a time after it is arrived at; or

(b) in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding—becomes a party to the contract, arrangement or understanding at a time after the authorisation is granted.

(11) An authorisation under subsection (5) may be expressed so as to apply to or in relation to another person who:

(a) in the case of an authorisation to require the giving of, or to give, a covenant—becomes bound by, or entitled to the benefit of, the proposed covenant at a time after the covenant is given; or

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(b) in the case of an authorisation to enforce the terms of a covenant—becomes bound by, or entitled to the benefit of, the covenant at a time after the authorisation is granted.

(12) The Commission does not have power to grant an authorisation to a corporation to make a contract or arrangement, to arrive at an understanding or to require the giving of, or to give, a covenant if the contract or arrangement has been made, the understanding has been arrived at or the covenant has been given before the Commission makes a determination in respect of the application.

(13) An application made to the Commission under this section for an authorisation in relation to a particular contract or proposed contract (including an application mentioned in subsection (8AA)) may be expressed to be made also in relation to another contract or proposed contract that is or will be, or in relation to two or more other contracts or proposed contracts that are or will be, in similar terms to the first-mentioned contract or proposed contract and, where an application is so expressed, the Commission may grant a single authorisation in respect of all the contracts or proposed contracts or may grant separate authorisations in respect of any one or more of the contracts or proposed contracts.

(14) Where an application made to the Commission under this section for an authorisation in relation to a particular contract or proposed contract is expressed in accordance with subsection (13) to be made also in relation to another contract or contracts or proposed contract or proposed contracts:

(a) the application shall set out:

(i) the names of the parties to each other contract; and

(ii) the names of the parties to each other proposed contract where those names are known to the applicant at the time when the application is made; and

(b) if an authorisation is granted in respect of a proposed contract the names of the parties to which were not so known to the applicant, the authorisation shall, by force of this subsection, be deemed to be expressed to be subject to a condition that any party to the contract will, when so required by the

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Commission, furnish to the Commission the names of all the parties to the contract.

(15) In subsections (13) and (14):

(a) ***contract*** includes an arrangement, understanding, industry code of practice or covenant and ***proposed contract*** has a corresponding meaning; and

(b) the reference to the parties to a contract or proposed contract shall, for the purposes of the application of those subsections in relation to a covenant or proposed covenant by reason of paragraph (a) of this subsection, be read as a reference to the persons who are or will be, or but for subsection 45B(1) would be, respectively bound by, or entitled to the benefit of, the covenant or proposed covenant.

(16) A corporation that has made an application to the Commission for an authorisation, or a person other than a corporation who has made an application to the Commission for an authorisation under subsection (9), may at any time, by notice in writing to the Commission, withdraw the application.

89 Procedure for applications and the keeping of a register

(1) An application for an authorisation, a minor variation of an authorisation, a revocation of an authorisation or a revocation of an authorisation and the substitution of another authorisation, shall be made in writing as prescribed.

(2) If the Commission receives such an application, the Commission must cause notice of the receipt of that application to be made public in such manner as it thinks fit.

(3) The Commission must keep a register of:

(a) applications for authorisations; and

(b) applications for minor variations of authorisations; and

(c) applications for, or the Commission's proposals for, the revocation of authorisations; and

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(d) applications for, or the Commission's proposals for, the revocation of authorisations and the substitution of other authorisations,

including applications that have been withdrawn or proposals that have been abandoned.

(4) Subject to this section, the register kept under subsection (3) shall include:

(a) any document furnished to the Commission in relation to an application or proposal referred to in subsection (3);

(aa) any draft determination, and any summary of reasons, by the Commission that is furnished to a person under section 90A, or under that section as applied by section 91C;

(ab) any record of a conference made in accordance with subsection 90A(8), or with that subsection as applied by section 91C, and any certificate in relation to a conference given under subsection 90A(9), or under that subsection as so applied;

(b) particulars of any oral submission made to the Commission in relation to such an application or proposal; and

(c) the determination of the Commission on such an application or proposal and the statement of the reasons given by the Commission for that determination.

(5) Where a person furnishes a document to the Commission in relation to an application or proposal referred to in subsection (3) or makes an oral submission to the Commission in relation to such an application or proposal, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (3) by reason of the confidential nature of any of the matters contained in the document or submission.

(5A) Where such a request is made:

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(a) if the document or the part of the document, or the submission or the part of the submission, to which the request relates contains particulars of:

(i) a secret formula or process;

(ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or

(iii) the current costs of manufacturing, producing or marketing goods or services,

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (3); and

(b) in any other case—the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(5B) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (3), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (4)(a) does not apply in relation to the document or part of the document.

(5C) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (3), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (4)(b) does not apply in relation to the submission or that part of the submission, as the case may be.

(5D) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained

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in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (4)(a) or particulars referred to in paragraph (4)(b) from the register kept under subsection (3).

(5E) If a person requests, in accordance with subsection (5) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (3), the document or part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

(6) A document shall not be included in the register kept under subsection (3) if a direction in relation to that document was in force under paragraph 22(1)(b) of the *Trade Practices Act 1974* immediately before the commencement of the *Trade Practices Amendment Act 1977*.

90 Determination of applications for authorisations

(1) The Commission shall, in respect of an application for an authorisation:

(a) make a determination in writing granting such authorisation as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorisation the Commission shall comply with the requirements of section 90A.

(6) The Commission shall not make a determination granting an authorisation under subsection 88(1), (5) or (8) in respect of a

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provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorisation under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or

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(ii) an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or

(iii) an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies,

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorisation under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

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(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(10) Subject to subsections (10A), (12), (13), (14) and (15), if:

(a) the Minister, by notice published in the *Gazette*, fixes a date for the purposes of the application of this subsection in relation to applications for authorisations under subsection 88(1), (5), (7), (7A), (8) or (8A); and

(b) the Commission does not determine an application for an authorisation under a subsection in relation to which a date is so fixed within 4 months from that date or the date on which the application was or is received by the Commission, whichever is the later,

the Commission shall be deemed to have granted, at the expiration of that period, the authorisation applied for.

(10A) If, within the latest occurring 4 month period referred to in paragraph (10)(b) in relation to an application for an authorisation, the Commission gives to the applicant a written notice requesting the applicant to give to the Commission additional information relevant to the determination of the application, the reference in that paragraph to 4 months shall be taken to be a reference to a period consisting of 4 months increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide.

(11) Subject to subsections (12), (13) and (15), if the Commission does not determine an application for an authorisation under subsection 88(9) within:

(a) 30 days from the day on which the application is received by the Commission; or

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(b) if the Commission, before the end of that period of 30 days, gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application—the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide,

the Commission shall be deemed to have granted, at the end of that period, the authorisation applied for.

(11A) The Commission may, within the 30 day period mentioned in subsection (11), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (11) to 30 days are to be treated as references to 45 days.

(12) If the applicant for an authorisation informs the Commission in writing before the expiration of the period referred to in subsection (10) or (11) (in this subsection and in subsection (13) referred to as the ***base period***) that the applicant agrees to the Commission taking a specified longer period for the determination of the application, a reference to that longer period shall be deemed for the purposes of that application to be substituted in subsection (10) or (11), as the case may be, for the reference in that subsection to the base period.

(13) For the purposes of any application of subsection (12), a reference in that subsection to the base period shall, if a reference to another period is deemed by any other application or applications of that subsection to have been substituted in subsection (10) or (11) for the reference in subsection (10) or (11) to the base period, be construed as a reference to that other period.

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(14) If a person to whom a notice has been sent under subsection 90A(2) in relation to a draft determination in respect of an application for an authorisation notifies the Commission in accordance with subsection 90A(6) that he or she wishes the Commission to hold a conference in relation to the draft determination, the period referred to in subsection (10) of this section shall be deemed to be increased by a period equal to the period commencing on the day on which the first notification in relation to the draft determination was received by the Commission and ending on the seventh day after the day specified in the certificate given by a member of the Commission in pursuance of subsection 90A(9) as the day on which the conference terminated.

(15) Where a party to a joint venture makes at the one time two or more applications for authorisations, being applications each of which deals with a matter relating to the joint venture:

(a) the Commission shall not make a determination in respect of any one of those applications unless it also makes a determination or determinations at the same time in respect of the other application or other applications; and

(b) if the Commission does not make a determination in respect of any one of the applications within the period referred to in whichever of subsections (10) and (11) is applicable in relation to that application, the Commission shall be deemed to have granted, at the expiration of that period, all the authorisations applied for.

90A Commission to afford opportunity for conference before determining application for authorisation

(1) Before determining an application for an authorisation (other than an application for an authorisation under subsection 88(9)), the Commission shall prepare a draft determination in relation to the application.

(2) The Commission shall, by notice in writing sent to the applicant and to each other interested person, invite the applicant or other person to notify the Commission, within 14 days after a date fixed

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by the Commission being not earlier than the day on which the notice is sent, whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.

(3) If:

(a) the draft determination provides for the granting of the application unconditionally; and

(b) no person has made a written submission to the Commission opposing the application,

each notice by the Commission under subsection (2) shall inform the person to whom the notice is sent that the draft determination so provides.

(4) If:

(a) the draft determination does not provide for the granting of the application or provides for the granting of the application subject to conditions; or

(b) the draft determination provides for the granting of the application unconditionally but a written submission has, or written submissions have, been made to the Commission opposing the application,

the Commission shall send with each notice under subsection (2) a copy of the draft determination and:

(c) in a case to which paragraph (a) applies—a summary of the reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or

(d) in a case to which paragraph (b) applies—a summary of the reasons why it is satisfied that the application should be granted unconditionally.

(5) If each of the persons to whom a notice was sent under subsection (2):

(a) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the

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Commission to hold a conference in relation to the draft determination; or

(b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference,

the Commission may make the determination at any time after the expiration of that period.

(6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(7) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft determination) nominated by the Chairperson; and

(b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion;

(e) no other person is entitled to be present.

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(8) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(9) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

(a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;

(b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

(c) shall give a certificate certifying the day on which the first notification under subsection (6) in relation to the draft determination was received by the Commission and the day on which the conference terminated,

and any such certificate shall be received in all courts as evidence of the matters certified.

(10) A document purporting to be a certificate referred to in subsection (9) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(11) The Commission shall take account of all matters raised at the conference and may at any time after the termination of the conference make a determination in respect of the application.

(12) For the purposes of this section, ***interested person*** means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that, in the opinion of the Commission, is real and substantial.

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(13) Where the Commission is of the opinion that two or more applications for authorisations that are made by the same person, or by persons being bodies corporate that are related to each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application and may prepare one draft determination in relation to the applications and hold one conference in relation to that draft determination.

91 Grant and variation of authorisations

(1) An authorisation may be expressed to be in force for a period specified in the authorisation and, if so expressed, remains in force for that period only.

(1A) An authorisation, other than an authorisation deemed to have been granted under subsection 90(10) or (11), comes into force on the day specified for the purpose in the authorisation, not being a day earlier than, and an authorisation deemed to have been granted under subsection 90(10) or (11) comes into force on:

(a) where paragraph (b) or (c) does not apply—the end of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation;

(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review;

(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(1B) A minor variation of an authorisation comes into force on a day specified by the Commission in the determination making the variation, not being a day earlier than:

(a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of the determination of the Commission in respect of the application for the minor variation; or

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(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or

(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(1C) If an authorisation (the ***prior authorisation***) is revoked and another authorisation is made in substitution for it, that other authorisation comes into force on the day specified for the purpose in that other authorisation, not being a day earlier than:

(a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of an application, or the Commission's proposal, for the revocation of the prior authorisation and the substitution of that other authorisation; or

(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or

(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(2) If the Commission considers that it is appropriate to do so:

(a) for the purpose of enabling due consideration to be given to:

(i) an application for an authorisation; or

(ii) an application for a minor variation of an authorisation; or

(iii) an application for the revocation of an authorisation and the substitution of a new one; or

(b) pending the expiration of the time allowed for the making of an application to the Tribunal for review of a determination by the Commission of an application referred to in paragraph (a) and, if such an application for a review is made, pending the making of a determination by the Tribunal on the review; or

(c) for any other reason,

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the Commission may at any time:

(d) in the case of an application for an authorisation—grant an authorisation that is expressed to be an interim authorisation; and

(e) in the case of an application for a minor variation of an authorisation—grant an authorisation that is expressed to be an interim authorisation dealing only with the matter the subject of the application for a variation; and

(f) in the case of an application for the revocation of an authorisation and the substitution of another—suspend the operation of the authorisation sought to be revoked and grant an authorisation that is expressed to be an interim authorisation in substitution for the authorisation suspended.

(2AA) An authorisation granted under paragraph 91(2)(d), (e) or (f) and expressed to be an interim authorisation comes into force on such a date, not being a date before the grant of the interim authorisation, as is specified by the Commission in the interim authorisation.

(2AB) The Commission may, at any time, revoke an authorisation that is expressed to be an interim authorisation and, where that interim authorisation is in substitution for an authorisation the operation of which has been suspended, the revocation of the interim authorisation has the effect of reviving the operation of the suspended authorisation.

(2A) Subsections 90(4) to (9), inclusive, do not apply in relation to an authorisation that is expressed to be an interim authorisation.

(3) An authorisation may be expressed to be subject to such conditions as are specified in the authorisation.

91A Minor variations of authorisations

(1) A person to whom an authorisation was granted, or another person on behalf of such a person, may apply to the Commission for a minor variation of the authorisation.

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(2) On receipt of an application, the Commission must, if it is satisfied that the variation sought in the application is a minor variation, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate the nature of the variation applied for; and

(b) invite submissions in respect of the variation within a period specified by the Commission.

(3) After considering the application and any submissions received within the period specified, the Commission may make a determination in writing varying the authorisation or dismissing the application.

(4) The Commission must not make a determination varying an authorisation to which, if it were a new authorisation, subsection 90(6) or (7) would apply, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

(5) The Commission must not make a determination varying an authorisation to which, if it were a new authorisation, subsection 90(8) or (9) would apply, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.

(6) Nothing in this section prevents a person from applying for 2 or more variations in the same application.

(7) If:

(a) a person applies for 2 or more variations:

(i) at the same time; or

(ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and

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(b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation,

the Commission may deal with all of those variations together as if they were a single minor variation.

(8) An application for a minor variation may be withdrawn by notice in writing to the Commission at any time.

91B Revocation of an authorisation

(1) A person to whom an authorisation was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorisation.

(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorisation has been applied for; and

(b) indicate the basis on which the revocation has been applied for; and

(c) invite submissions in respect of the revocation within a period specified by the Commission.

(3) If, at any time after granting an authorisation, it appears to the Commission that:

(a) the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular; or

(b) a condition to which the authorisation was expressed to be subject has not been complied with; or

(c) there has been a material change of circumstances since the authorisation was granted,

the Commission may, by notice in writing given to any persons who appear to the Commission to be interested:

(d) inform those persons that it is considering the revocation of the authorisation; and

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(e) indicate the basis on which the revocation is being proposed; and

(f) invite submissions in respect of the revocation within a period specified by the Commission.

(4) After considering any submissions invited under subsection (2) or (3) that are received within the period specified by the Commission under that subsection, the Commission may make a determination in writing:

(a) revoking the authorisation; or

(b) deciding not to revoke the authorisation.

(5) If an objection to the revocation is included in any submission

(a) that was invited under subsection (2) or (3); and

(b) that is received within the period specified by the Commission under that subsection,

the Commission must not make a determination revoking the authorisation unless the Commission is satisfied that it would, if the authorisation had not already been granted, be prevented under subsection 90(6), (7), (8) or (9) from making a determination granting the authorisation in respect of which the revocation is sought.

(6) An application for revocation may be withdrawn by notice in writing to the Commission at any time.

(7) The Commission may disregard any objection that, in its opinion, is either vexatious or frivolous.

91C Revocation of an authorisation and substitution of a replacement

(1) A person to whom an authorisation was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorisation and the substitution of a new authorisation for the one revoked.

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(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorisation, and the substitution of another authorisation for it, has been applied for; and

(b) indicate the basis upon which the revocation and substitution has been applied for and the nature of the substituted authorisation so applied for; and

(c) invite submissions in respect of the revocation and substitution within a period specified by the Commission.

(3) If, at any time after granting an authorisation, it appears to the Commission that:

(a) the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular; or

(b) a condition to which the authorisation was expressed to be subject has not been complied with; or

(c) there has been a material change of circumstances since the authorisation was granted,

the Commission may, by notice in writing given to any persons who appear to be interested:

(d) inform those persons that it is considering the revocation of the authorisation and the substitution of a new authorisation; and

(e) indicate the basis on which the revocation and substitution is being proposed and the nature of the substituted authorisation proposed; and

(f) invite submissions in respect of the proposed action within a period specified by the Commission.

(4) After considering any submissions invited under subsection (2) or (3) in relation to an authorisation that are received within the period specified by the Commission under that subsection and after compliance with the requirements of section 90A in accordance

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with subsection (5), the Commission may make a determination in writing:

(a) revoking the authorisation and granting another such authorisation that it considers appropriate, in substitution for it; or

(b) deciding not to revoke the authorisation.

(5) Before making a determination under subsection (4) in relation to an application, or a proposal, for the revocation of an authorisation and the substitution of another, the Commission must comply with the requirements of section 90A.

(6) For the purposes of complying with section 90A in accordance with subsection (5), section 90A has effect:

(a) as if the reference in subsection (1) to an application for an authorisation (other than an application for an authorisation under subsection 88(9)) were a reference to an application, or to a proposal, for the revocation of an authorisation (other than an authorisation granted on an application granted under subsection 88(9)) and the substitution of another authorisation; and

(b) as if references in other provisions of that section to an application, or to an application for an authorisation, were references either to an application, or to a proposal, for the revocation of an authorisation and the substitution of another; and

(c) as if subsection 90A(2) had provided, in its operation in relation to a proposal for the revocation of an authorisation and the substitution of another, that:

(i) the reference to the applicant and to each other interested person were a reference only to each interested person; and

(ii) each reference to the applicant or other person were a reference only to the other person.

(7) The Commission must not make a determination revoking an authorisation and substituting another authorisation unless the Commission is satisfied that it would not be prevented under

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subsection 90(6), (7), (8) or (9) from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 88.

(8) An application for the revocation of an authorisation and the substitution of another authorisation may be withdrawn by notice in writing to the Commission at any time.

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Division 2—Notifications

93 Notification of exclusive dealing

(1) Subject to subsection (2), a corporation that engages, or proposes to engage, in conduct of a kind referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9) may give to the Commission notice, as prescribed, setting out particulars of the conduct or proposed conduct.

(2) A corporation may not give a notice for conduct or proposed conduct if:

(a) the corporation applied for an authorisation for the conduct or proposed conduct; and

(b) the Commission or the Trade Practices Commission made a determination dismissing the application or granting an authorisation (whether or not the authorisation is still in force); and

(c) either:

(i) the Tribunal or the Trade Practices Tribunal made a determination on an application for a review of a determination described in paragraph (b); or

(ii) the time for making such an application for review has ended without the making of an application.

(2A) In subsection (2):

Trade Practices Commission means the Trade Practices Commission established by section 6A of this Act as in force immediately before this subsection commenced;

Trade Practices Tribunal means the Trade Practices Tribunal continued in existence by section 30 of this Act as in force immediately before this subsection commenced.

(3) If the Commission is satisfied that the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2), (3), (4) or (5) or paragraph 47(8)(a) or (b) or (9)(a), (b) or

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(c) and referred to in a notice given by the corporation to the Commission under subsection (1) has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:

(a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or

(b) any benefit to the public that has resulted or is likely to result from the conduct, or would result or be likely to result from the proposed conduct, would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct,

the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(3A) If:

(a) a corporation has notified the Commission under subsection (1) of conduct or proposed conduct described in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d); and

(b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct,

the Commission may give the corporation a written notice stating that the Commission is so satisfied.

(3B) The Commission must also give the corporation a written statement of its reasons for giving notice when the Commission gives the notice.

(4) Before giving a notice under subsection (3) or (3A) the Commission shall comply with the requirements of section 93A.

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(5) In satisfying itself for the purposes of subsection (3) or (3A) in relation to any conduct or proposed conduct referred to in a notice given to the Commission by a corporation under subsection (1), the Commission shall seek such relevant information as it considers reasonable and appropriate and may make a decision on the basis of any information so obtained and any other information furnished to it by the corporation or any other person or otherwise in its possession.

(6) A corporation that has given a notice to the Commission under this section in relation to any conduct or proposed conduct may, at any time before the Commission has given to the corporation a notice under subsection (3) or (3A) in relation to the conduct or proposed conduct, by notice in writing to the Commission, withdraw the first-mentioned notice.

(7) Where a corporation has given notice to the Commission under subsection (1):

(a) in the case of a notice given before the expiration of the period of 3 months commencing on the date of commencement of the *Trade Practices Amendment Act 1977*, the engaging by the corporation in the conduct referred to in the notice on or after that date and before the giving of the notice shall not be taken, for the purposes of section 47, to have had the effect of substantially lessening competition within the meaning of that section; and

(b) in any case, the engaging by the corporation in the conduct referred to in the notice after the giving of the notice shall not be taken, for the purposes of section 47, to have the purpose, or to have or be likely to have the effect, of substantially lessening competition within the meaning of that section unless:

(i) the Commission has given notice to the corporation under subsection (3) of this section in relation to the conduct and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or

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(ii) the notice has been, or is deemed to have been, withdrawn and the conduct takes place after the day on which the notice was, or is deemed to have been, withdrawn.

(7A) A notice under subsection (1) describing conduct or proposed conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) comes into force:

(a) at the end of a prescribed period that started on the day when the corporation gave the Commission the notice; or

(b) if the Commission gives notice to the corporation under subsection 93A(2) during that period—when the Commission decides not to give the corporation a notice under subsection (3A) of this section.

(7B) A notice under subsection (1) describing conduct or proposed conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) does not come into force:

(a) if the notice is withdrawn, or deemed to be withdrawn, before it would come into force under subsection (7A); or

(b) if the Commission:

(i) gives notice to the corporation under subsection 93A(2) during the period described in paragraph (7A)(a); and

(ii) gives notice to the corporation under subsection (3A).

(7C) A notice under subsection (1) describing conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) ceases to be in force:

(a) when the notice is withdrawn or deemed to be withdrawn; or

(b) if the Commission gives the corporation a notice under subsection (3A)—on the 31st day after the Commission gave the notice under subsection (3A) or on a later day specified in writing by the Commission.

(8) Where:

(a) a corporation gives a notice to the Commission under subsection (1) in relation to any conduct or proposed conduct;

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(b) before or after the notice is given the corporation makes an application to the Commission for an authorisation to engage in that conduct;

(c) the Commission:

(i) makes a determination dismissing the application; or

(ii) makes a determination granting an authorisation in respect of the application; and

(d) the Tribunal makes a determination on an application for a review of the determination of the Commission or the time for making such an application for review expires without an application for review having been made,

the notice shall thereupon be deemed to be withdrawn.

(9) If an application is made to the Tribunal for a review of the giving of a notice by the Commission under subsection (3) or (3A), a reference in subsection (7) or paragraph (7C)(b) to the day on which the Commission gave the notice shall be read as a reference to:

(a) if the application is withdrawn—the day on which the application is withdrawn;

(b) if the Tribunal, on the application of the Commission or of any other person who the Tribunal is satisfied has an interest in the subject matter of the review, declares that the application for the review is not being proceeded with by the applicant with due diligence—the day on which the Tribunal makes the declaration; or

(c) in any other case—the day on which the Tribunal makes a determination on the review.

(10) Where:

(a) a corporation has given a notice to the Commission under subsection (1) in relation to conduct or proposed conduct and the Commission has given notice to the corporation in writing under subsection (3) or (3A) in relation to the conduct or the proposed conduct; or

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(b) a notice given by a corporation to the Commission under subsection (1) in relation to conduct or proposed conduct is withdrawn or deemed to be withdrawn,

the corporation is not entitled to give a further notice under subsection (1) to the Commission in relation to the same conduct or proposed conduct or in relation to conduct or proposed conduct to the like effect.

93A Commission to afford opportunity for conference before giving notice in relation to exclusive dealing

(1) Before giving a notice under subsection 93(3) or (3A) in relation to any conduct or proposed conduct, the Commission shall prepare a draft notice in relation to that conduct or proposed conduct.

(2) The Commission shall, by notice in writing sent to the corporation to the conduct or proposed conduct of which the draft notice relates and to each other interested person, invite the corporation or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the corporation or other person wishes the Commission to hold a conference in relation to the draft notice.

(3) The Commission shall send with each notice under subsection (2) a copy of the draft notice and a summary of the reasons why it proposes to give the notice under subsection 93(3) or (3A).

(4) If each of the persons to whom a notice was sent under subsection (2):

(a) notifies the Commission in writing within the period of 14 days mentioned in that subsection that the person does not wish the Commission to hold a conference in relation to the draft notice; or

(b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference,

the Commission must decide after the end of that period whether or not to give the notice under subsection 93(3) or (3A).

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(5) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft notice, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(6) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft notice) nominated by the Chairperson; and

(b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and

(e) no other person is entitled to be present.

(7) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(8) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

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(a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;

(b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

(c) shall give a certificate certifying the day on which the first notification under subsection (5) in relation to the draft notice was received by the Commission and the day on which the conference terminated,

and any such certificate shall be received in all courts as evidence of the matters certified.

(9) A document purporting to be a certificate referred to in subsection (8) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(10) The Commission must take account of all matters raised at the conference.

(10A) After the conference, the Commission must decide whether or not to give a notice under subsection 93(3) or (3A).

(11) For the purposes of this section, ***interested person*** means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the matter, being an interest that, in the opinion of the Commission, is real and substantial.

(12) Where the Commission is of the opinion that two or more notices given to the Commission under subsection 93(1) by the same person, or by persons being bodies corporate that are related to each other, deal with substantially similar conduct or proposed conduct, the Commission may treat the notices as if they constituted a single notice and may prepare one draft notice in

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relation to the notices so given to the Commission and hold one conference in relation to that draft notice.

95 Register of notifications

(1) The Commission shall keep a register containing:

(aa) notices relating to voluntary industry codes given to the Commission pursuant to regulations made under section 51AE (including notices that have been withdrawn pursuant to those regulations); and

(a) draft notices, and summaries of reasons, by the Commission furnished to any person under section 93A; and

(b) records of conferences made in accordance with subsection 93A(7) and certificates in relation to conferences given under subsection 93A(8); and

(c) notices (including notices that have been withdrawn) given to the Commission under section 93; and

(d) documents furnished to the Commission in relation to such notices; and

(e) particulars of any oral submissions made to the Commission in relation to such notices; and

(f) particulars of notices given by the Commission to corporations by which notices under section 93 were given; and

(g) particulars of any permits given by the Commission under subparagraph 93(7)(b)(i); and

(ga) details of the specification of any day by the Commission under paragraph 93(7C)(b); and

(h) records of proceedings at conferences held under section 65J or 65M; and

(j) particulars of recommendations made to the Minister by the Commission under section 65K or 65N.

(2) Where a person furnishes a document to the Commission:

(a) in relation to a notice given to the Commission under section 93; or

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(b) in relation to a conference held under section 65J or 65M,

or makes an oral submission to the Commission in relation to the notice or the conference, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (1) by reason of the confidential nature of any of the matters contained in the document or submission.

(3) Where such a request is made:

(a) if the document or part of the document, or the submission or part of the submission, to which the request relates contains particulars of:

(i) a secret formula or process;

(ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or of assets of a person; or

(iii) the current costs of manufacturing, producing or marketing goods or services,

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (1); and

(b) in any other case—the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(4) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (1), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the

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document to him or her and, in that case, paragraph (1)(d) does not apply in relation to the document or part of the document.

(5) Subsection (4) does not apply in relation to a document that was produced to the Minister or the Commission in pursuance of a notice under section 65Q or 155.

(6) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (1), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (1)(e) does not apply in relation to the submission or that part of the submission, as the case may be.

(7) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (1)(d) or particulars referred to in paragraph (1)(e) from the register kept under subsection (1).

(8) If a person requests in accordance with subsection (2) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (1), the document or the part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

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Part VIII—Resale price maintenance

96 Acts constituting engaging in resale price maintenance

(1) Subject to this Part, a corporation (in this section called ***the supplier***) engages in the practice of resale price maintenance if that corporation does an act referred to in any of the paragraphs of subsection (3).

(2) Subject to this Part, a person (not being a corporation and also in this section called ***the supplier***) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.

(3) The acts referred to in subsections (1) and (2) are the following:

(a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;

(b) the supplier inducing, or attempting to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier;

(c) the supplier entering into an agreement, or offering to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;

(d) the supplier withholding the supply of goods to a second person for the reason that the second person:

(i) has not agreed as mentioned in paragraph (a); or

(ii) has sold, or is likely to sell, goods supplied to him or her by the supplier, or goods supplied to him or her by a

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third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold;

(e) the supplier withholding the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the second person:

(i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or

(ii) has sold, or is likely to sell, goods supplied to him or her, or to be supplied to him or her, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; and

(f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold.

(4) For the purposes of subsection (3):

(a) where a price is specified by another person on behalf of the supplier, it shall be deemed to have been specified by the supplier;

(b) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier;

(c) where a formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that formula, that price shall be deemed to have been specified by the supplier; and

(d) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price ascertained by calculation from, or by reference to, a

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formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier.

(5) In subsection (4), ***formula*** includes a set form or method.

(6) For the purposes of subsection (3), anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.

(7) A reference in any of paragraphs (3)(a) to (e), inclusive, including a reference in negative form, to the selling of goods at a price less than a price specified by the supplier shall be construed as including references to:

(a) the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale;

(b) the displaying of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be displayed for sale; and

(c) the offering of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be offered for sale,

and a reference in paragraph (3)(d), (e) or (f) to a price below which the goods are not to be sold shall be construed as including a reference to the price below which the goods are not to be advertised for sale, to the price below which the goods are not to be displayed for sale and to the price below which the goods are not to be offered for sale.

96A Resale price maintenance in relation to services

(1) This Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods.

(2) For the purposes of subsection (1), this Part is to be read with appropriate modifications, including the following modifications:

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(a) references in this Part to goods are to be read as references to services;

(b) references to the sale of goods are to be read as references to the re-supply of services.

97 Recommended prices

For the purposes of paragraph 96(3)(b), the supplier is not to be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods:

(a) by reason only of a statement of a price being applied to the goods as mentioned in paragraph 99(1)(a) or being applied to a covering, label, reel or thing as mentioned in paragraph 99(1)(b), provided that the statement is preceded by the words "recommended price"; or

(b) by reason only of his or her having given notification in writing to the second person (not being a notification by way of a statement being applied as mentioned in paragraph (a)) of the price that he or she recommends as appropriate for the sale of those goods, provided that there is included in the notification, and in each writing that refers, whether expressly or by implication, to the notification, a statement to the following effect:

"The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation.".

98 Withholding the supply of goods

(1) For the purposes of paragraph 96(3)(d) or (e), the supplier shall be deemed to withhold the supply of goods to another person if:

(a) the supplier refuses or fails to supply those goods to, or as requested by, the other person;

(b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;

(c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, method or

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place of delivery or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or

(d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this subsection.

(2) Paragraph 96(3)(d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person:

(a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods; or

(b) otherwise for the purpose of promoting the business of that other person.

(3) For the purposes of subsection (2), there shall be disregarded:

(a) a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale; or

(b) a sale of goods that took place with the consent of the supplier.

99 Statements as to the minimum price of goods

(1) For the purposes of paragraph 96(3)(f), if:

(a) a statement is applied to goods, whether by being woven in, impressed on, worked into or annexed or affixed to the goods or otherwise;

(b) a statement is applied to a covering, label, reel or thing in or with which goods are supplied; or

(c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to lead to the belief that it refers to goods,

the statement shall be deemed to have been used in relation to those goods.

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(2) For the purposes of subsection (1), ***covering*** includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and ***label*** includes a band or ticket.

100 Evidentiary provisions

(1) Where, in proceedings under this Act by a person (in this section referred to as ***the plaintiff***) against another person (in this section referred to as ***the defendant***), it is claimed that the defendant has engaged in the practice of resale price maintenance and it is established that:

(a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 98(1)(a), (b), (c) or (d);

(b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and

(c) during the period of 6 months immediately before the time when the defendant so acted, the defendant became aware of a matter or circumstance capable of constituting a reason referred to in paragraph 96(3)(d) or (e) for the defendant's so acting,

then, subject to subsection (2), it shall be presumed, unless the contrary is established, that that matter or circumstance was the reason for the defendant's so acting.

(2) Subsection (1) does not apply where the plaintiff establishes the matter mentioned in paragraph 98(1)(b) or (c) but the terms disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

(3) In the application of this section in proceedings by the Commission for an injunction, references to the plaintiff shall be construed as references to a person specified in the application for the injunction as the person in relation to whom the defendant is claimed to have acted as mentioned in paragraph (1)(a).

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Part IX—Review by Tribunal of determinations of Commission

Division 1—Applications for Review

101 Applications for review

(1) A person dissatisfied with a determination by the Commission:

(a) in relation to an application for an authorisation or a minor variation of an authorisation; or

(b) in relation to the revocation of an authorisation, or the revocation of an authorisation and the substitution of another authorisation,

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

(1AA) If:

(a) the person applying under subsection (1) for review of a determination was the applicant for an authorisation, or for the minor variation of an authorisation, for the revocation of an authorisation or for the revocation of an authorisation and the substitution of another authorisation; or

(b) the Tribunal is satisfied that the person has a sufficient interest,

the Tribunal must review the determination.

(1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(6), (7), (8) or (9).

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(1B) A presidential member may, on the application of a person concerned:

(a) in an application for an authorisation under subsection 88(9); or

(b) in an application for a minor variation or a revocation of such an authorisation; or

(c) in an application for the revocation of such an authorisation and the substitution of another authorisation,

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

(2) A review by the Tribunal is a re-hearing of the matter and subsections 90(6), (7), (8) and (9), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

101A Application for review of notice under subsection 93(3) or (3A)

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3) or (3A) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

102 Functions and powers of Tribunal

(1) On a review of a determination of the Commission in relation to:

(a) an application for an authorisation; or

(b) an application for a minor variation of an authorisation; or

(c) an application for, or the Commission's proposal for, the revocation of an authorisation; or

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(d) an application for, or the Commission's proposal for, the revocation of an authorisation and the substitution of another authorisation,

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

(1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:

(a) the grant of an authorisation under subsection 88(9); or

(b) the minor variation, or the revocation, of an authorisation granted under that subsection; or

(c) the revocation of an authorisation granted under that subsection and the substitution of another authorisation,

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

(1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.

(1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.

(2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission in relation to:

(a) an application for an authorisation; or

(b) an application for a minor variation of an authorisation; or

(c) an application for, or the Commission's proposal for, the revocation of an authorisation; or

(d) an application for, or the Commission's proposal for, the revocation of an authorisation and the substitution of another authorisation,

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

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(4) Upon a review of the giving of a notice by the Commission under subsection 93(3):

(a) if the person who applied for the review satisfies the Tribunal that in all the circumstances:

(i) the conduct or proposed conduct to which the notice relates has resulted or is likely to result, or would result or be likely to result, as the case may be, in a benefit to the public; and

(ii) that benefit would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct,

the Tribunal shall make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal shall make a determination affirming the notice.

(5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.

(5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.

(5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).

(5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:

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(a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and

(b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.

(6) For the purposes of a review by the Tribunal, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

(7) For the purposes of a review, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connection with the making of the determination, or the giving of the notice, to which the review relates.

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Division 2—Procedure and Evidence

103 Procedure generally

(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.

104 Regulations as to certain matters

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 persons participating in any proceedings before the Tribunal; and

(aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and

(b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

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105 Power to take evidence on oath

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

(2) A member of the Tribunal 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.

106 Hearings to be in public except in special circumstances

(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 or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of 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.

107 Evidence in form of written statement

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

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108 Taking of evidence by single member

The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorise 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:

(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.

109 Participants in proceedings before Tribunal

(1) A person to whom an authorisation was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorisation.

(1A) A person to whom a notice was given by the Commission under subsection 93(3) or (3A) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.

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

110 Representation

In proceedings before the Tribunal:

(a) a natural person may appear in person;

(aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;

(b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;

(c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by

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a member or officer of the association approved by the Tribunal; and

(d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.

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