Competition and Consumer Act 2010

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This compilation is in 4 volumes

Volume 1:	**Chapter 1, Part I to Chapter 4, Part IVBB sections 1 to 53ZZC**
Volume 2:	Chapter 4, Part IVC to Chapter 6, Part IX sections 55 to 113
Volume 3:	Chapter 6, Part X to Chapter 8, Part XIII sections 10.01 to 193
Volume 4:	Schedules Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

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About this compilation

This compilation

This is a compilation of the *Competition and Consumer Act 2010* that shows the text of the law as amended and in force on 1 July 2026 (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If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.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 competition, fair trading and consumer protection, and for other purposes

Chapter 1—Preliminary

Part I—Preliminary

1 Short title

This Act may be cited as the *Competition and Consumer Act 2010*.

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 sections 44AC, 44E and 95D, 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.

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(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.

(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;

(aaa) Part IVBA;

(aa) Part V;

(b) Part XIB;

(ba) Part XICA;

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

(d) the acquisitions 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.

2BA Application of Parts IV and IVA to local government bodies

(1) Parts IV and IVA apply in relation to a local government body only to the extent that it carries on a business, either directly or by an incorporated company in which it has a controlling interest.

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(2) In this section:

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.

2C Activities that are not business

(1) For the purposes of sections 2A, 2B and 2BA, 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 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

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

(viii) only persons who are all acting for the same local government body (within the meaning of section 2BA) or for the same incorporated company in which such a body has a controlling interest;

(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, 2B and 2BA.

(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.

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

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

3 Repeal

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

4 Interpretation

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

accountable authority has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

Accreditation Registrar means:

(a) if a person holds an appointment under subsection 56CK(1)—that person; or

(b) otherwise—the Commission.

accredited action initiator has the meaning given by section 56AMC.

accredited data recipient has the meaning given by section 56AK.

accredited person means a person who holds an accreditation under subsection 56CA(1).

ACMA means the Australian Communications and Media Authority.

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.

acquisition determination, in respect of a notification of an acquisition, means:

(a) a determination made under subsection 51ABZE(1) in respect of the notification; or

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(b) a determination made under subsection 51ABZW(1) in respect of a public benefit application relating to the notification.

acquisitions provision means any of the following provisions:

(a) a provision of Division 1A of Part IV;

(b) a provision of Part IVA;

(c) a provision of Division 1B of Part IX;

(d) another provision of this Act, to the extent that it relates to a provision covered by paragraph (a), (b) or (c).

acquisitions register means the register kept by the Commission under subsection 51ABZZH(1).

actionable scam intelligence has the meaning given by section 58AI.

action service provider has the meaning given by subsection 56AMB(1).

adjusted turnover, of a body corporate during a period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the period, other than:

(a) supplies made from any of those bodies corporate to any other of those bodies corporate; or

(b) supplies that are input taxed; or

(c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or

(d) supplies that are not made in connection with an enterprise that the body corporate carries on; or

(e) supplies that are not connected with the indirect tax zone.

Expressions used in this definition that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

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AEMC or ***Australian Energy Market Commission*** means the body established by section 5 of the *Australian Energy Market Commission Establishment Act 2004* of South Australia.

AER or ***Australian Energy Regulator*** means the body established by section 44AE.

AER Chair means the Chair of the AER.

AER member means a member of the AER.

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

ASIC means the Australian Securities and Investments Commission.

associate, of an SPF consumer, means an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of the SPF consumer who is:

(a) a natural person who is in Australia or is ordinarily resident in Australia; or

(b) a person who carries on a business having a principal place of business in Australia;

Australian Consumer Law means Schedule 2 as applied under Subdivision A of Division 2 of Part XI.

Australian law has the same meaning as in the *Privacy Act 1988*.

Australian repairer: see section 57BB.

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, and each 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

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

Note: See also the definitions of ***Commonwealth authority*** and ***State or Territory authority*** in subsection 95A(1) (which apply in relation to Part VIIA).

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.

Note: See also the definitions of ***Commonwealth authority*** and ***State or Territory authority*** in subsection 95A(1) (which apply in relation to Part VIIA).

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*.

binding data standard has the meaning given by subsection 56FA(3).

breach turnover period, of a body corporate, for an offence, a contravention, or an act or omission, means the longer of the following periods:

(a) the period of 12 months ending at the end of the month in which:

(i) for an offence—the body corporate ceased committing the offence, or was charged with the offence (whichever is earlier); or

(ii) for a contravention—the contravention ceased, or proceedings in relation to the contravention were instituted (whichever is earlier); or

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(iii) for an act or omission—the act or omission ceased, or proceedings in relation to the act or omission were instituted (whichever is earlier);

(b) the period ending at the same time as the period determined under paragraph (a) and starting:

(i) for an offence—at the beginning of the month in which the body corporate committed, or began committing, the offence (as the case requires); or

(ii) for a contravention—at the beginning of the month in which the contravention occurred or began occurring (as the case requires); or

(iii) for an act or omission—at the beginning of the month in which the act or omission occurred or began occurring (as the case requires).

business includes a business not carried on for profit.

business day: in Part IVA, ***business day*** has the meaning given by section 51ABK.

cartel provision has the meaning given by section 45AD.

CDR Accreditor means:

(a) if a person holds an appointment under subsection 56CG(1)—that person; or

(b) otherwise—the Commission.

CDR action has the meaning given by subsection 56AMA(1).

CDR action participant has the meaning given by section 56AMD.

CDR consumer has the meaning given by subsection 56AI(3) or (3A).

CDR data has the meaning given by subsection 56AI(1).

CDR declaration has the meaning given by subsection 56AMA(2).

CDR participant has the meaning given by subsection 56AL(1).

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CDR provisions has the meaning given by section 56AN.

Chairperson means the Chairperson of the Commission.

Chapter 6 entity has the meaning given by subsection 51ABJ(1).

chargeable CDR data has the meaning given by subsection 56AM(1).

chargeable circumstances:

(a) in relation to the disclosure of chargeable CDR data—has the meaning given by subsection 56AM(2); or

(b) in relation to the use of chargeable CDR data—has the meaning given by subsection 56AM(3).

civil penalty provision of a gas market instrument means a provision of a gas market instrument that is a civil penalty provision (within the meaning of the Regulatory Powers Act).

civil penalty provision of an SPF code means:

(a) a provision of an SPF code (see Division 3 of Part IVF) that is a civil penalty provision (within the meaning of the Regulatory Powers Act); or

(b) subsection 58FZM(3) in relation to compliance with a direction given under subsection 58FZM(2).

civil penalty provision of an SPF principle means:

(a) a provision of Division 2 of Part IVF (about the Scams Prevention Framework) that is a civil penalty provision (within the meaning of the Regulatory Powers Act); or

(b) subsection 58FZM(3) in relation to compliance with a direction given under subsection 58FZM(1).

civil penalty provision of the consumer data rules means a provision of the consumer data rules that is a civil penalty provision (within the meaning of the Regulatory Powers Act).

collective boycott conduct means conduct that has a purpose referred to in subsection 45AD(3) in relation to a contract, arrangement or understanding.

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collects: a person ***collects*** information only if the person collects the information for inclusion in:

(a) a record (within the meaning of the *Privacy Act 1988*); or

(b) a generally available publication (within the meaning of that Act).

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.

Commonwealth AER member means an AER member referred to in section 44AM.

competition includes:

(a) competition from goods that are, or are capable of being, imported into Australia; and

(b) competition from services that are rendered, or are capable of being rendered, in Australia 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.

consumer data rules means rules in force under section 56BA.

contract includes a covenant.

corporation means a body corporate that:

(a) is a foreign corporation;

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(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).

court/tribunal order has the same meaning as in the *Privacy Act 1988*.

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.

data holder has the meaning given by subsection 56AJ(1).

data provider: see section 57BE.

data standard means a data standard made under section 56FA.

Data Standards Body means the body holding an appointment under subsection 56FJ(1).

Data Standards Chair means:
(a) if a person holds an appointment under section 56FG—that person; or
(b) otherwise—the Minister.

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.

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de-identified: information is ***de-identified*** if the information is no longer about an identifiable individual or an individual who is reasonably identifiable.

Deputy Chairperson means a 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.

designated Commonwealth energy law means:

(a) the National Electricity (Commonwealth) Law and Regulations (as defined by the *Australian Energy Market Act 2004*); or

(b) the National Gas (Commonwealth) Law and Regulations (as defined by the *Australian Energy Market Act 2004*); or

(c) the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations (as defined by the *Australian Energy Market Act 2004*); or

(d) the National Energy Retail Law and Regulations (Commonwealth) (as defined by the *Australian Energy Market Act 2004*).

designated complaint: see section 154ZF.

designated gateway has the meaning given by subsection 56AL(2).

designated sector has the meaning given by subsection 56AC(1).

designated Telstra successor company: see section 581G of the *Telecommunications Act 1997*.

determination period:

(a) for a notification of an acquisition—has the meaning given by subsection 51ABZI(3); and

(b) for a public benefit application—has the meaning given by subsection 51ABZZ(2).

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directly or indirectly derived has the meaning given by subsection 56AI(2).

document means any record of information, and includes:

(a) anything on which there is writing; and

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and

(d) a map, plan, drawing or photograph.

dual listed company arrangement has the same meaning as in section 125-60 of the *Income Tax Assessment Act 1997*.

earliest holding day has the meaning given by paragraph 56AC(2)(c).

effective application date, of a public benefit application, has the meaning given by subsection 51ABZP(6), paragraph 51ABZR(1)(a), subsection 51ABZS(5) and paragraph 51ABZT(2)(a).

effective notification date, of a notification of an acquisition, has the meaning given by subsection 51ABW(4), paragraph 51ABZ(1)(a), subsection 51ABZA(5) and subparagraph 51ABZB(2)(a)(i).

electronic communication means a communication of information by means of guided and/or unguided electromagnetic energy:

(a) whether in the form of text; or

(b) whether in the form of data; or

(c) whether in the form of speech, music or other sounds; or

(d) whether in the form of visual images (animated or otherwise); or

(e) whether in any other form; or

(f) whether in any combination of forms.

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external Territory:

(a) means a Territory referred to in section 122 of the Constitution, where an Act makes provision for the government of the Territory as a Territory; but

(b) does not include a Territory covered by the definition of ***Territory*** in this subsection.

Note: The Australian Capital Territory, the Jervis Bay Territory, the Northern Territory, Norfolk Island and the Territories of Christmas Island and of Cocos (Keeling) Islands are covered by the definition of ***Territory*** in this subsection.

fee-free CDR data has the meaning given by subsection 56AM(4).

finally considered, in relation to a notification of an acquisition, has the meaning given by subsection 51ABF(1).

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).

fit and proper person, in relation to accessing and using safety and security information: see section 57DB.

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.

gas market code means regulations made for the purposes of section 53L.

gas market emergency price order means an order in force under section 53M.

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gas market instrument means:

(a) a gas market code; or

(b) a gas market emergency price order.

gas market provision means any of the following provisions:

(a) a provision of Part IVBB;

(b) a provision of the regulations made for the purposes of a provision of Part IVBB (including a gas market code);

(c) a provision of a gas market emergency price order;

(d) another provision of this Act to the extent that it relates to a provision covered by paragraph (a), (b) or (c).

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.

goodwill protection provision: a provision of a contract is a ***goodwill protection provision*** of the contract if:

(a) the contract is for the sale of a business or of shares in the capital of a body corporate carrying on a business; and

(b) the provision is solely for the protection of the purchaser in respect of the goodwill of the business.

holds: a person ***holds*** information if the person has possession or control of a record (within the meaning of the *Privacy Act 1988*) that contains the information.

infringement notice compliance period for an SPF infringement notice: see section 58FT.

initiating party: see section 57EB.

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inspector, of an SPF regulator, has the meaning given by section 58FB.

involved, in a contravention of a civil penalty provision of an SPF principle or of a civil penalty provision of an SPF code, means:

(a) aiding, abetting, counselling or procuring a contravention of the provision; or

(b) inducing, whether by threats or promises or otherwise, such a contravention; or

(c) being in any way, directly or indirectly, knowingly concerned in, or party to, such a contravention; or

(d) conspiring with others to effect such a contravention.

judicial power means the judicial power of the Commonwealth referred to in section 71 of the Constitution.

local energy instrument means a regulation, rule, order, declaration or other instrument if:

(a) the instrument is made or has effect under a law of a State or Territory; and

(b) the law of the State or Territory applies a uniform energy law as a law of its own jurisdiction.

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.

merger authorisation means an authorisation that:

(a) is an authorisation for a person to engage in conduct to which section 50 or 50A would or might apply; but

(b) is not an authorisation for a person to engage in conduct to which any provision of Division 1 or 2 of Part IV other than section 50 or 50A would or might apply.

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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.

no longer subject to review, in relation to an acquisition determination, has the meaning given by subsection 51ABF(2).

notice of competition concerns has the meaning given by subsection 51ABZK(1).

notification, of an acquisition, means a notification of the acquisition that is made to the Commission in accordance with subsection 51ABX(1).

Note: For the acquisitions to which subsection 51ABX(1) applies, see Subdivision B of Division 1 of Part IVA.

notification waiver application has the meaning given by subsection 51ABU(5).

notified acquisition has the meaning given by subsection 51ABW(2).

Note: See also subsection 51ABZD(6).

notifying party, of a notification of an acquisition, has the meaning given by subsection 51ABW(3).

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.

overseas merger authorisation means a merger authorisation that is not an authorisation for a person to engage in conduct to which section 50 would or might apply.

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participant, in proceedings for review under Division 1B of Part IX, does not include the Commission.

party:

(a) to an acquisition—has the meaning given by subsections 51ABI(1) and (2); and

(b) to a contract that is a covenant—includes a person bound by, or entitled to the benefit of, the covenant.

personal information has the same meaning as in the *Privacy Act 1988*.

personal injury includes:

(a) pre-natal injury; or

(b) impairment of a person's physical or mental condition; or

(c) disease;

but does not include an impairment of a person's mental condition unless the impairment consists of a recognised psychiatric illness.

phase 1 determination period, for a notification of an acquisition, has the meaning given by subsection 51ABZI(4).

phase 2 determination period, for a notification of an acquisition, has the meaning given by subsection 51ABZI(5).

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.

prescribed safety and security criteria: see section 57DB.

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.

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price includes a charge of any description.

principal party, to an acquisition, has the meaning given by paragraph 51ABI(1)(a) and subsection 51ABI(2).

privacy safeguard penalty provision has the meaning given by subsection 56EU(1).

privacy safeguards means the provisions in Subdivisions B to F of Division 5 of Part IVD (about the consumer data right).

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

public benefit application has the meaning given by subsection 51ABZP(5).

public benefit assessment has the meaning given by subsection 51ABZZA(1).

purportedly puts into effect, in relation to an acquisition, has the meaning given by subsection 45AV(2).

reasonable steps, for the purposes of Division 2 of Part IVF (about overarching principles of the Scams Prevention Framework), has a meaning affected by section 58BB.

registered charity means an entity that is registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the type of entity mentioned in column 1 of item 1 of the table in subsection 25-5(5) of that Act.

registered training organisation has the same meaning as in the *National Vocational Education and Training Regulator Act 2011*.

Registrar means the Registrar of the Tribunal.

regulated entity has the meaning given by section 58AD.

regulated sector has the meaning given by subsection 58AC(1).

regulated service has the meaning given by section 58AD.

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Regulatory Powers Act means the *Regulatory Powers (Standard Provisions) Act 2014*.

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.

required to be notified, in relation to an acquisition, has the meaning given by sections 51ABO and 51ABS and subsections 51ABT(1) and 51ABV(6).

responding party: see section 57EB.

RTO course: see section 57BC.

Note: ***RTO*** is short for registered training organisation.

safety and security information: see section 57BF.

safety information: see section 57BF.

scam has the meaning given by section 58AG.

scheme adviser means the motor vehicle service and repair information scheme adviser appointed under section 57FA.

scheme information: see section 57BD.

scheme offer: see section 57CA.

scheme price, for scheme information: see section 57CA.

scheme RTO: see section 57BC.

Note: ***RTO*** is short for registered training organisation.

scheme rules means rules made by the Minister under section 57GE.

scheme vehicle: see section 57BA.

security information: see section 57BF.

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

senior officer, of a regulated entity, means:

(a) an officer (within the meaning of the *Corporations Act 2001*) of the entity; or

(b) a senior manager (within the meaning of that Act) of the entity.

sensitive information has the same meaning as in the *Privacy Act 1988*.

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:

(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.

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share includes stock.

South Australian Electricity Legislation means:

(a) the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; and

(b) any regulations, as in force from time to time, made under Part 4 of that Act.

The reference in paragraph (a) to the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

South Australian Energy Retail Legislation means:

(a) the National Energy Retail Law set out in the Schedule to the *National Energy Retail Law (South Australia) Act 2011* of South Australia, as amended from time to time; and

(b) any regulations, as amended from time to time, made under Part 11 of the National Energy Retail Law.

The reference in paragraph (a) to the National Energy Retail Law set out in the Schedule to the *National Energy Retail Law (South Australia) Act 2011* of South Australia, as amended from time to time, includes a reference to any Rules or other instruments, as amended from time to time, made or having effect under that Law.

South Australian Gas Legislation means:

(a) the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time; and

(b) any regulations, as in force from time to time, made under Part 3 of that Act.

The reference in paragraph (a) to the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

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SPF civil penalty order means a civil penalty order under Part 4 of Regulatory Powers Act (as that Part applies because of section 58FJ of this Act).

SPF code has the meaning given by section 58CB.

SPF consumer has the meaning given by section 58AH.

SPF EDR scheme, for a regulated sector, means an external dispute resolution scheme authorised under subsection 58DB(1) for the sector.

SPF general regulator has the meaning given by section 58EB.

SPF governance policies, procedures, metrics and targets, for a regulated entity for a regulated sector, means the entity's:

(a) policies and procedures required under paragraph 58BD(1)(a) for the sector; and

(b) performance metrics and targets required under paragraph 58BD(1)(c) for those policies and procedures.

SPF infringement notice means an infringement notice issued under subsection 58FO(1) or (2).

SPF personal information means:

(a) personal information; or

(b) information relating to a person that may be used (whether alone or in conjunction with other information) to access:

(i) a service or an account; or

(ii) funds, credit or other financial benefits.

SPF principles means the provisions in Subdivisions B to G of Division 2 of Part IVF (about the Scams Prevention Framework).

SPF provisions has the meaning given by section 58AJ.

SPF regulator means:

(a) the SPF general regulator; or

(b) the SPF sector regulator for a regulated sector.

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SPF rules means rules made under section 58GE.

SPF sector regulator has the meaning given by section 58ED.

stale, in relation to a notification of an acquisition, has the meaning given by section 51ABG.

State/Territory AER member means an AER member referred to in section 44AP.

State/Territory energy law means any of the following laws:

(a) a uniform energy law that applies as a law of a State or Territory;

(b) a law of a State or Territory that applies a law mentioned in paragraph (a) as a law of its own jurisdiction;

(c) any other provisions of a law of a State or Territory that:

(i) relate to energy; and

(ii) are prescribed by the regulations for the purposes of this paragraph;

being those provisions as in force from time to time.

stayed, in relation to an acquisition, has the meaning given by section 51ABE and subsections 51ABZZM(2) and (3).

subject to a condition: for when putting a notified acquisition into effect is ***subject*** to a condition, see section 51ABH.

subject to phase 2 review has the meaning given by paragraph 51ABZJ(2)(a).

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.

takeover acquisition, in relation to a takeover bid, means:

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(a) an acquisition that results from the acceptance of an offer under the bid; or

(b) an acquisition, by or on behalf of the bidder (within the meaning of the *Corporations Act 2001*), of securities in the bid class (within the meaning of that Act), that:

(i) results from an on-market transaction (within the meaning of that Act); and

(ii) occurs during the bid period.

takeover bid has the same meaning as in the *Corporations Act 2001*.

target, of an acquisition, has the meaning given by subsection 51ABI(3).

Telstra has the same meaning as in the *Telstra Corporation Act 1991*.

Territory means the following:

(a) the Australian Capital Territory;

(b) the Jervis Bay Territory;

(c) the Northern Territory;

(d) Norfolk Island;

(e) the Territory of Christmas Island;

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

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

this Act includes Schedule 2 to the extent that it is applied under Subdivision A of Division 2 of Part XI.

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

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

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

uniform energy law means:

(a) the South Australian Electricity Legislation; or

(b) the South Australian Gas Legislation; or

(c) the Western Australian Gas Legislation; or

(ca) the South Australian Energy Retail Legislation; or

(d) provisions of a law of a State or Territory that:

(i) relate to energy; and

(ii) are prescribed by the regulations for the purposes of this subparagraph;

being those provisions as in force from time to time.

vehicle identification number, in relation to a scheme vehicle, means the number allocated to the vehicle in accordance with the national road vehicle standards as in force from time to time under the *Road Vehicle Standards Act 2018*.

virtual enquiry technology means any technology that allows a person to appear at all or part of a hearing, examination or other enquiry without being physically present at the hearing, examination or other enquiry.

voluntary action service provider has the meaning given by subsection 56AMB(2).

Western Australian Gas Legislation means:

(a) the National Gas Access (Western Australia) Law (within the meaning of the *National Gas Access (WA) Act 2009* of Western Australia) as in force from time to time; and

(b) any regulations, as in force from time to time, made under Part 3 of that Act.

The reference in paragraph (a) to the National Gas Access (Western Australia) Law (within the meaning of the *National Gas Access (WA) Act 2009* of Western Australia) as in force from time

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to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

(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 engaging in of a concerted practice;

(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 engaging in of a concerted practice;

(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.

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

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

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

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(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

(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

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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

(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

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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.

(5A) For the purposes of Parts IV, VI and VII and the acquisitions provisions:

(a) a body corporate that is a party to a dual listed company arrangement is taken to be related to the other body corporate that is a party to the arrangement; and

(b) a body corporate that is related to one of the parties to the arrangement is taken to be related to the other party to the arrangement; and

(c) a body corporate that is related to one of the parties to the arrangement is taken to be related to each body corporate that is related to the other party to the arrangement.

(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 person is taken to have acquired particular goods or services as a ***consumer*** if the person would be taken to have acquired the goods or services as a consumer under section 3 of the Australian Consumer Law.

(2) If it is alleged in:

(a) any proceeding under this Act; or

(b) 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 is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

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

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

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(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.

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 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 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:

(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

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(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:

(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

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(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.

4KA Definitions etc. that do not apply in Part XI or Schedule 2

Despite any other provision of this Act, sections 4 to 4K do not affect the meaning of any expression used in Part XI or Schedule 2, unless a contrary intention appears.

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 51ADB, 53ZO or 87, 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

(1) 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.

(2) Paragraph (1)(b) does not apply for the purposes of section 57CD.

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 offshore area, within the meaning of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, of a State, a Territory or an external Territory.

(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 offshore areas referred to in that subsection.

(4) For the purposes of this section:

service includes proposed service covered by Division 2A of Part IIIA.

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5 Extended application of this Act to conduct outside Australia

(1) Each of the following provisions:

(a) Part IV;

(aa) Part IVBA;

(ab) Part IVE;

(b) Part XI;

(ba) Part XICA;

(c) the Australian Consumer Law (other than Part 5-3);

(f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (aa), (ab), (b), (ba) or (c));

(fa) the acquisitions provisions;

extends to the engaging in conduct outside Australia by:

(g) bodies corporate incorporated or carrying on business within Australia; or

(h) Australian citizens; or

(i) 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, and Divisions 3 and 4 of Part IVE, have by virtue of subsection (1), those provisions 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.

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6 Extended application of this Act to persons who are not corporations

(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, VIIA 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 33 or 155 of the Australian Consumer Law, to trade or commerce were, by express provision, confined to trade or commerce:

(i) between Australia and places outside Australia; or

(ii) among the States; or

(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; and

(b) the following provisions:

(i) sections 45AF, 45AG, 45AJ, 45AK, 45, 45D to 45EB (other than section 45DB), 46 and 46A;

(ia) Part V (other than Division 5);

(ii) Part VIII;

(iii) sections 31 and 43, Division 3 of Part 3-1, and sections 50, 153, 163, 164 and 168, of the Australian Consumer Law;

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:

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

(v) trade or commerce among the States; or

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

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

(c) any reference in Division 1 of Part 3-2 of the Australian Consumer Law to a contract for the supply of goods or services and any reference in Part 3-5 or 5-4 of the Australian Consumer Law to the supply of goods or services, were, by express provision, confined to a contract made, or the supply of goods or services, as the case may be:

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

(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; and

(ca) any reference in Part 2-3 of the Australian Consumer Law to a contract were, by express provision, confined to a contract made:

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

(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; and

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

(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); and

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

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

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(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, 49, 50, 50A, 77A, 81, 151AE or 151AJ, in an acquisitions provision or in section 229 of the Australian Consumer Law, included a reference to a person not being a corporation.

(2A) So far as subsection (2) relates to Division 1 or 2 of 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)(vi). 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.

Cartel conduct

(2C) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:

(a) the reference in paragraph 45AD(2)(c) to goods or services supplied, or likely to be supplied, were, by express provision, confined to goods or services supplied, or likely to be supplied, to corporations or classes of corporations; and

(b) the reference in paragraph 45AD(2)(d) to goods or services acquired, or likely to be acquired, were, by express provision, confined to goods or services acquired, or likely to be acquired, from corporations or classes of corporations; and

(c) the reference in paragraph 45AD(2)(e) to goods or services re-supplied, or likely to be re-supplied, were, by express provision, confined to goods or services re-supplied, or likely to be re-supplied, to corporations or classes of corporations; and

(d) the reference in paragraph 45AD(2)(f) to goods or services likely to be re-supplied were, by express provision, confined to goods or services likely to be re-supplied to corporations or classes of corporations; and

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(e) the following paragraphs were added at the end of subsection 45AD(2):

"; or (g) goods or services re-supplied, or likely to be re-supplied, by corporations or classes of corporations to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or

(h) goods or services likely to be re-supplied by corporations or classes of corporations to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding."; and

(f) the reference in subparagraph 45AD(3)(a)(i) to the production, or likely production, of goods were, by express provision, confined to the production, or likely production, of goods for supply to corporations or classes of corporations; and

(g) the reference in subparagraph 45AD(3)(a)(ii) to the supply of services were, by express provision, confined to the supply of services to corporations or classes of corporations; and

(h) each reference in subparagraphs 45AD(3)(a)(iii) and (iv) and (b)(i) and (ii) to persons or classes of persons were, by express provision, confined to corporations or classes of corporations; and

(i) the reference in subparagraph 45AD(3)(b)(iii) to the geographical areas in which goods or services are supplied, or likely to be supplied, were, by express provision, confined to the geographical areas in which goods or services are supplied, or likely to be supplied, to corporations or classes of corporations; and

(j) the reference in subparagraph 45AD(3)(b)(iv) to the geographical areas in which goods or services are acquired, or likely to be acquired, were, by express provision, confined to the geographical areas in which goods or services are acquired, or likely to be acquired, from corporations or classes of corporations; and

(k) the reference in paragraph 45AD(3)(c) to the supply or acquisition of goods or services were, by express provision, confined to supply of goods or services to, or the acquisition

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of goods or services from, corporations or classes of corporations; and

(l) the reference in paragraph 45AD(4)(e) to paragraph (2)(e) or (f) included a reference to paragraph (2)(g) or (h); and

(m) section 45AD also provided that it is immaterial whether the identities of the corporations referred to in subsection (2) or (3) of that section can be ascertained; and

(n) each reference in the following provisions of this Act:

(i) Division 1 of Part IV (other than section 45AD);

(ii) any other provision (other than section 4, 45AD, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV;

to a corporation included a reference to a person not being a corporation.

For the purposes of this subsection, ***likely*** and ***production*** have the same meaning as in Division 1 of Part IV.

(2D) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:

(a) sections 45AF, 45AG, 45AJ and 45AK were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of, or relates to, a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; and

(b) each reference in the following provisions of this Act:

(i) Division 1 of Part IV;

(ii) any other provision (other than section 4, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV;

to a corporation included a reference to a person not being a corporation.

(2E) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this

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

(a) sections 45AF, 45AG, 45AJ and 45AK were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in, or relates to:

(i) a Territory; or

(ii) a Commonwealth place (within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*); and

(b) each reference in the following provisions of this Act:

(i) Division 1 of Part IV;

(ii) any other provision (other than section 4, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV;

to a corporation included a reference to a person not being a corporation.

Acquisitions

(2EA) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:

(a) any references in the acquisitions provisions to an acquisition were, by express provision, confined to an acquisition put into effect:

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

(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 2 Territories; and

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(b) each reference in the acquisitions provisions (other than in paragraph 51ABC(2)(b)) to a corporation included a reference to a person not being a corporation.

(2EB) Subsection (2EA) has effect in relation to a participating Territory as if the words "within a Territory," were omitted from subparagraph (2EA)(a)(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.

(2EC) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:

(a) any references in the acquisitions provisions to an acquisition were, by express provision, confined to an acquisition to the extent to which putting the acquisition into effect involves the use of, or relates to, a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; and

(b) each reference in the acquisitions provisions to a corporation (other than in paragraph 51ABC(2)(b)) included a reference to a person not being a corporation.

(2ED) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:

(a) any references in the acquisitions provisions to an acquisition were, by express provision, confined to an acquisition to the extent to which the acquisition is put into effect in, or relates to, a Commonwealth place (within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*); and

(b) each reference in the acquisitions provisions (other than in paragraph 51ABC(2)(b)) to a corporation included a reference to a person not being a corporation.

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Payment surcharges

(2F) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:

(a) each reference in Part IVC to a payment surcharge were a reference to a payment surcharge charged for processing a payment made by means of a postal, telegraphic, telephonic, or other like service (including electronic communication); and

(b) each reference to a corporation included a reference to a person not being a corporation.

Certain provisions of Australian Consumer Law

(3) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by another subsection of this section, the provisions of Parts 2-1, 2-2, 3-1 (other than Division 3), 3-3, 3-4, 4-1 (other than Division 3), 4-3, 4-4 and 5-3 of the Australian Consumer Law have, by force of this subsection, the effect they would have if:

(a) those provisions (other than sections 33 and 155 of the Australian Consumer Law) 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 the provisions of Part XI to a corporation included a reference to a person not being a corporation.

(3A) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by subsection (2), the provisions of Part 2-3 of the Australian Consumer Law have, by force of this subsection, the effect they would have if:

(a) those provisions were, by express provision, confined in their operation to contracts for or relating to:

(i) the use of postal, telegraphic or telephonic services; or

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(ii) radio or television broadcasts; and

(b) a reference in the provisions of Part XI 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, VIIA and X, has as provided by another subsection of this section, the provisions of Parts 2-2, 3-1 (other than sections 30 and 33), Part 4-1 (other than sections 152, 155 and 164) and 5-3 of the Australian Consumer Law 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 sections 279, 282 and 283 of the Australian Consumer Law in relation to a supplier who is a natural person, those sections have effect as if there were substituted for paragraphs 279(3)(a), 282(2)(a) and 283(5)(a) of the Australian Consumer Law the following paragraph:

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

Offences relating to cartel conduct

(5A) Despite anything in section 45AF or 45AG, if a body corporate other than a corporation is convicted of an offence against that section (as that section applies because of this section), the offence is taken to be punishable on conviction as if the body corporate were a corporation.

(5B) Despite anything in section 45AF or 45AG, if a person other than a body corporate is convicted of an offence against that section (as that section applies because of this section), the offence is taken to be punishable on conviction by a term of imprisonment not

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exceeding 10 years or a fine not exceeding 2,000 penalty units, or both.

6AA Application of the *Criminal Code*

(1) Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) Despite subsection (1), Part 2.5 of the *Criminal Code* does not apply to an offence against Part IIIA or XIC, Division 7 of Part XIB, or section 45AF or 45AG.

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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.

(1AA) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) the Commission is a listed entity; and

(b) the Chairperson is the accountable authority of the Commission; and

(c) the following persons are officials of the Commission:

(i) the Chairperson;

(ii) the other members of the Commission;

(iii) the associate members of the Commission;

(iv) persons engaged under section 27; and

(d) the purposes of the Commission include the functions conferred on the Commission by this Act.

(1A) However, the Commission is taken, for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) to be a non-corporate Commonwealth entity, and not to be a corporate Commonwealth entity; and

(b) to be a part of the Commonwealth; and

(c) not to be a body corporate.

(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

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

(3) Any real or personal property held by the Commission is held for and on behalf of the Commonwealth.

(4) Any money received by the Commission is received for and on behalf of the Commonwealth.

(5) To avoid doubt, a right to sue is taken not to be personal property for the purposes of subsection (3).

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.

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

Note: Under section 23 of the *Public Governance, Performance and Accountability Act 2013*, the Chairperson may enter into contracts and other arrangements on behalf of the Commonwealth.

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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, a gas market instrument or the consumer data rules, 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 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.

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(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), (3A) or (3B) or 93AC(1), (2) or (2A), 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, or a class of matters, 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 referred to in 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.

10 Deputy Chairpersons

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

(1A) If there is at least one fully-participating jurisdiction, the Governor-General must not appoint a person as a Deputy

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Chairperson unless the Governor-General is satisfied that a majority of such jurisdictions support the appointment.

(1B) Before the Governor-General appoints a person as a Deputy Chairperson, the Minister must be satisfied that, immediately after the appointment, there will be at least one Deputy Chairperson who has knowledge of, or experience in, small business matters.

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

(5) Not more than 2 persons may hold office as Deputy Chairperson at any one time.

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.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

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

(a) if there are 2 Deputy Chairpersons available to act as Chairperson, the Minister may appoint 1 of them to act as Chairperson during the absence of the Chairperson; or

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(b) if there is only 1 Deputy Chairperson available to act as Chairperson, that Deputy Chairperson is to act as Chairperson during the absence of the Chairperson; or

(c) if there are no Deputy Chairpersons or none of the Deputy Chairpersons are available to act as Chairperson, the Minister may 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 a Deputy Chairperson or a Deputy Chairperson becomes available to act as Chairperson.

Note: For rules that apply to persons acting as the Chairperson, see section 33A of the *Acts Interpretation Act 1901*.

(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; or

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(b) fails to comply with his or her obligations under:
  (i) for any member (including the Chairperson)—section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section; or
  (ii) for the Chairperson—section 17 of this Act; or
(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.

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 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section;

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

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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 Chairperson

(1) The Chairperson must 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.

(2) Subsection (1) applies in addition to section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests).

17A Disclosure of certain interests by members of the Commission when taking part in determinations of matters

(1) If, as a result of rules made for the purposes of section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests), the Chairperson becomes aware that:

(a) a member of the Commission is taking part, or is to take part, in the determination of a matter; and

(b) the member has a pecuniary interest that could conflict with the proper performance of his or her functions in relation to the determination of the matter;

then:

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(c) the Chairperson must cause the interest of the member to be disclosed to each person concerned in the matter (if the matter has not already been disclosed to that person in accordance with the rules); and

(d) unless each person concerned in the matter consents to the member taking part, or continuing to take part, in the determination of the matter—the member must not take part, or continue to take part, in the determination of the matter.

(2) 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.

(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:

(a) if there are 2 Deputy Chairpersons available to preside at the meeting—the Chairperson may nominate 1 of them to preside at the meeting; or

(b) if there is only 1 Deputy Chairperson available to preside at the meeting—that Deputy Chairperson is to preside at the meeting.

(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 connexion with the meeting.

(6) At a meeting of the Commission:

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(a) three members (including the Chairperson or a 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, the *Digital ID Act 2024*, a gas market instrument or the consumer data rules, in relation to a matter shall be exercised by a Division of the Commission constituted by such members (not being less than two in number) as are specified in the direction.

(2) Without limiting subsection 33(3AB) of the *Acts Interpretation Act 1901*, a direction may:
(a) specify a particular matter in relation to which the Division is to exercise the powers of the Commission; or
(b) specify a class of matters in relation to which the Division is to exercise the powers of the Commission from time to time.

(2A) The Chairperson may vary or revoke a direction:

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(a) if the direction specifies a particular matter under paragraph (2)(a)—at any time before the Division makes a determination in relation to the matter; or

(b) otherwise—at any time.

(2B) If a direction is varied to change the membership of the Division, the Division as constituted after the change may continue and complete the determination of any matter that the Division was dealing with before the change.

(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.

(3A) However, a direction under subsection (1) specifying a matter, or a class of matters, in relation to which a Division is to exercise the powers of the Commission does not prevent the Commission dealing with that matter, or a matter in that class of matters, otherwise than in the Division.

(5) At a meeting of a Division of the Commission at which neither the Chairperson nor a Deputy Chairperson is presiding, 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, the *Digital ID Act 2024*, a gas market instrument or the consumer data rules, notwithstanding that another Division of the Commission is exercising powers of the Commission at the same time.

(8) A direction given under subsection (1) is not a legislative instrument.

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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 (other than Part VIIA or section 152ELA), a gas market instrument, the consumer data rules, Procedural Rules under Part XIC, the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the *Water Act 2007*, Rules of Conduct under Part 20 of the *Telecommunications Act 1997*, the *National Broadband Network Companies Act 2011*, regulations under the *National Broadband Network Companies Act 2011*, or the *Australian Postal Corporation Act 1989*, other than this power of delegation and its powers to grant, revoke or vary an authorisation.

Note: Section 95ZD allows the Commission to delegate certain powers under Part VIIA to a member of the Commission.

(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 of certain functions and powers

Delegation to staff members of ASIC

(1) The Commission may, by resolution, delegate:

(a) any of its functions and powers under or in relation to Parts VI and XI and the Australian Consumer Law; and

(b) any of its powers under Part XII that relate to those Parts or the Australian Consumer Law;

to a staff member of ASIC.

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

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Delegations relating to Part IVD or the consumer data rules

(3) The Commission may, by resolution and in accordance with subsection (5), delegate any of its functions and powers under:

(a) Part VI; or

(b) Division 5 of Part XI; or

(c) section 155;

to the extent that the functions or powers relate to Part IVD or the consumer data rules.

Note: Division 5 of Part XI relates to the consumer data rules in the way described in section 56BM.

(4) A member of the Commission may, by writing and in accordance with subsection (5), delegate any of the member's functions and powers under section 155 to the extent that the functions or powers relate to Part IVD or the consumer data rules.

(5) A delegation under subsection (3) or (4) of a function or power may be:

(a) to the Information Commissioner; or

(b) to a member of the staff of the Office of the Australian Information Commissioner referred to in section 23 of the *Australian Information Commissioner Act 2010*;

if:

(c) the Information Commissioner agrees to the delegation in writing; and

(d) in the case of a delegation to a staff member referred to in paragraph (b)—the Information Commissioner is satisfied that the staff member:

(i) is an SES employee or acting SES employee; or

(ii) is holding or performing the duties of a sufficiently senior office or position for the function or power.

27 Staff of Commission

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

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(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.

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;

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(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.

(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 any other manner 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.

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28A Function of Commission in relation to providing resources to the AER

In addition to any other functions conferred on the Commission, the Commission may provide the AER with supports and resources (including corporate and information technology resources) to assist in the administration of the AER.

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, IVA, IVBA, IVBB, IVE, VII, VIIA, X, XIB, XIC or XICA; or

(b) Division 3 of Part XI in relation to individual cases.

(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

(1) The National Competition Council is established by this section.

(2) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
  (a) the Council is a listed entity; and
  (b) the Council President is the accountable authority of the Council; and
  (c) the following persons are officials of the Council:
    (i) the Council President;
    (ii) the other Councillors;
    (iii) the staff referred to in subsection 29M(1);
    (iv) consultants engaged under section 29N; and
  (d) the purposes of the Council include the functions of the Council referred to in section 29B.

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

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(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.

(2B) Subsection (2) does not apply to a State/Territory energy law.

Note: Section 29BA provides that a State/Territory energy law may confer functions or powers, or impose duties, on the Council.

(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.

29BA Commonwealth consent to conferral of functions etc. on Council

(1) A State/Territory energy law may confer functions or powers, or impose duties, on the Council for the purposes of that law.

Note: Section 29BC sets out when such a law imposes a duty on the Council.

(2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a State/Territory energy law to the extent to which:

(a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the Council; or

(b) the authorisation would otherwise exceed the legislative power of the Commonwealth.

(3) The Council cannot perform a duty or function, or exercise a power, under a State/Territory energy law unless the conferral of the function or power, or the imposition of the duty, is in

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accordance with an agreement between the Commonwealth and the State or Territory concerned.

29BB How duty is imposed

Application

(1) This section applies if a State/Territory energy law purports to impose a duty on the Council.

Note: Section 29BC sets out when such a law imposes a duty on the Council.

State or Territory legislative power sufficient to support duty

(2) The duty is taken not to be imposed by this Part (or any other law of the Commonwealth) to the extent to which:

(a) imposing the duty is within the legislative powers of the State or Territory concerned; and

(b) imposing the duty by the law of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the Council.

Note: If this subsection applies, the duty will be taken to be imposed by force of the law of the State or Territory (the Commonwealth having consented under section 29BA to the imposition of the duty by that law).

Commonwealth legislative power sufficient to support duty but State or Territory legislative powers are not

(3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Part to the extent necessary to ensure that validity.

(4) If, because of subsection (3), this Part is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Part.

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(5) The duty is taken to be imposed by this Part in accordance with subsection (3) only to the extent to which imposing the duty:
  (a) is within the legislative powers of the Commonwealth; and
  (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the Council.

(6) Subsections (1) to (5) do not limit section 29BA.

29BC When a State/Territory energy law imposes a duty

For the purposes of sections 29BA and 29BB, a State/Territory energy law ***imposes a duty*** on the Council if:
  (a) the law confers a function or power on the Council; and
  (b) the circumstances in which the function or power is conferred give rise to an obligation on the Council to perform the function or to exercise the power.

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.

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(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

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.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

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.

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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 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section;

(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 or VIIA) except in accordance with a program agreed to by:

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

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

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.

(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.

29LA Resolutions without meetings

(1) If all Councillors (other than those that must not sign a document because of subsection (3)) sign a document containing a statement that they are in favour of a resolution in terms set out in the document, then a resolution in those terms is taken to have been passed at a duly constituted meeting of the Council held on the day the document was signed, or, if the members sign the document on different days, on the last of those days.

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(2) For the purposes of subsection (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more Councillors are together taken to constitute one document containing a statement in those terms signed by those Councillors on the respective days on which they signed the separate documents.

(3) A Councillor must not sign a document containing a statement in favour of a resolution if the resolution concerns a matter in which the Councillor has any pecuniary interest, being an interest that could conflict with the proper performance of the Councillor's functions in relation to any matter.

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

An annual report prepared by the Council President and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* for a period must include details of the following:

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(a) the time taken by the Council to make a recommendation on any application under section 44F, 44M, 44NA or 44NBA (about access regime applications under Part IIIA);

(b) any court or Tribunal decision interpreting:

(i) paragraph (f) of the definition of ***service*** in section 44B (which is an exclusion to do with production processes); or

(ii) section 44CA (about declaration criteria for services under Part IIIA);

(c) any matter the Council considers has impeded the operation of Part IIIA from delivering efficient access outcomes;

(d) any evidence of the benefits arising from determinations of the Commission under section 44V (about arbitration determinations under Part IIIA);

(e) any evidence of the costs of, or the disincentives for, investment in the infrastructure by which declared services (within the meaning of Part IIIA) are provided;

(f) any implications for the operation of Part IIIA in the future.

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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.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

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

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

(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.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

(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.

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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 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.

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37 Constitution of Tribunal for particular matters

For the purpose of hearing and determining proceedings, the Tribunal must be constituted by a Division of the Tribunal consisting of:

(a) in any case—a presidential member of the Tribunal and 2 members of the Tribunal who are not presidential members; or

(b) if the proceedings are proceedings on a review under Division 1A of Part IX—a presidential member of the Tribunal.

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 President may give directions

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

(2) The President may give directions to the Deputy Presidents in relation to the exercise by the Deputy Presidents of powers with respect to matters of procedure in proceedings before the Tribunal.

Note: Subsection 103(2) provides that any presidential member may exercise powers with respect to matters of procedure in proceedings before 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

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(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.

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.

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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.

(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:

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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.

(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

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.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

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Part IIIAA—The Australian Energy Regulator (AER)

Division 1—Preliminary

44AB Definitions

In this Part, unless the contrary intention appears:

AER State/Territory energy law means any of the following laws:

(a) a uniform energy law that applies as a law of a State or Territory;

(b) a law of a State or Territory that applies a law mentioned in paragraph (a) as a law of its own jurisdiction;

(c) any other provisions of a law of a State or Territory that:

(i) relate to energy; and

(ii) are prescribed by the regulations for the purposes of this paragraph;

being those provisions as in force from time to time.

Australian Energy Market Agreement means the agreement, as amended from time to time:

(a) that relates to energy; and

(b) that is between the Commonwealth, all of the States, the Australian Capital Territory and the Northern Territory; and

(c) that is first made in 2004; and

(d) that agrees to the establishment of the AER and the AEMC.

full-time AER member means an AER member appointed on a full-time basis.

part-time AER member means an AER member appointed on a part-time basis.

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44AC This Part binds the Crown

This Part binds the Crown in each of its capacities.

44AD Extra-territorial operation

It is the intention of the Parliament that the operation of this Part should, as far as possible, include operation in relation to the following:

(a) things situated in or outside Australia;

(b) acts, transactions and matters done, entered into or occurring in or outside Australia;

(c) things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would, apart from this Act, be governed or otherwise affected by the law of a State, a Territory or a foreign country.

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Division 2—Establishment of the AER

44AE Establishment of the AER

(1) The Australian Energy Regulator (the ***AER***) is established by this section.

(1A) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) the AER is a listed entity; and

(b) the AER members are the accountable authority of the AER; and

(c) the following persons are officials of the AER:

(i) the AER members;

(ii) the staff of the AER referred to in section 44AAC;

(iii) persons assisting the AER referred to in section 44AACA;

(iv) consultants engaged under section 44AACB; and

(d) the purposes of the AER include the functions of the AER under Division 3 of this Part.

(2) The AER:

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

(b) must have a common seal; and

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

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

(3) However, the AER is taken, for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) to be a non-corporate Commonwealth entity, and not to be a corporate Commonwealth entity; and

(b) to be a part of the Commonwealth; and

(c) not to be a body corporate.

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44AF AER to hold money and property on behalf of the Commonwealth

The AER holds any money or property for and on behalf of the Commonwealth.

44AG Constitution of the AER

The AER consists of:

(a) 2 Commonwealth AER members, appointed in accordance with section 44AM; and

(b) 3 State/Territory AER members, appointed in accordance with section 44AP.

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Division 3—Functions and powers of the AER

44AH Commonwealth functions

(1) The AER has any functions:

(a) conferred under a law of the Commonwealth; or

(b) prescribed by regulations made under this Act.

Note: The AER may have functions under the *Australian Energy Market Act 2004*.

(2) Regulations made for the purposes of paragraph (1)(b) may empower the AER to make legislative instruments.

(3) Section 42 (disallowance) of the *Legislation Act 2003* does not apply to legislative instruments empowered by regulations made for the purposes of paragraph (1)(b).

(4) Subsection (3) has effect subject to any express provision to the contrary in the regulations.

44AI Commonwealth consent to conferral of functions etc. on AER

General rule

(1) Subject to section 44AIA, an AER State/Territory energy law or a local energy instrument may confer functions or powers, or impose duties, on the AER for the purposes of that law or instrument.

Note: Section 44AK sets out when such a law or instrument imposes a duty on the AER.

(2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by an AER State/Territory energy law or local energy instrument to the extent to which:

(a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the AER; or

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(b) the authorisation would otherwise exceed the legislative power of the Commonwealth.

(3) The AER cannot perform a duty or function, or exercise a power, under an AER State/Territory energy law or local energy instrument unless the conferral of the function or power, or the imposition of the duty, is in accordance with the Australian Energy Market Agreement, or any other relevant agreement between the Commonwealth and the State or Territory concerned.

(4) A local energy instrument may confer functions or powers, or impose duties, on the AER only if the instrument is designated for the purposes of this subsection under the Australian Energy Market Agreement, or any other relevant agreement between the Commonwealth and the State or Territory that made the instrument.

(5) To avoid doubt, if an AER State/Territory energy law is also a local energy instrument, subsection (4) applies to the law.

44AIA No merits review of AER decisions

A decision of the AER under an AER State/Territory energy law or local energy instrument is not to be subject to merits review (however described) by a body established under a law of a State or Territory.

44AJ How duty is imposed

Application

(1) This section applies if an AER State/Territory energy law or local energy instrument purports to impose a duty on the AER.

Note 1: Section 44AK sets out when such a law or instrument imposes a duty on the AER.

Note 2: Section 320 of the South Australian Energy Retail Legislation, as it applies as a law of a State or Territory, deals with the case where a duty purportedly imposed on a Commonwealth body under that

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applied law cannot be imposed by the State or Territory or the Commonwealth due to constitutional doctrines restricting such duties.

State or Territory legislative power sufficient to support duty

(2) The duty is taken not to be imposed by this Part (or any other law of the Commonwealth) to the extent to which:

(a) imposing the duty is within the legislative powers of the State or Territory concerned; and

(b) imposing the duty by the law or instrument of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the AER.

Note: If this subsection applies, the duty will be taken to be imposed by force of the law or instrument of the State or Territory (the Commonwealth having consented under section 44AI to the imposition of the duty by that law or instrument).

Commonwealth legislative power sufficient to support duty but State or Territory legislative powers are not

(3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law or instrument of the State or Territory), the duty is taken to be imposed by this Part to the extent necessary to ensure that validity.

(4) If, because of subsection (3), this Part is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Part.

(5) The duty is taken to be imposed by this Part in accordance with subsection (3) only to the extent to which imposing the duty:

(a) is within the legislative powers of the Commonwealth; and

(b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the AER.

(6) Subsections (1) to (5) do not limit section 44AI.

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44AK When an AER State/Territory energy law etc. imposes a duty

For the purposes of sections 44AI and 44AJ, an AER State/Territory energy law or local energy instrument ***imposes a duty*** on the AER if:

(a) the law or instrument confers a function or power on the AER; and

(b) the circumstances in which the function or power is conferred give rise to an obligation on the AER to perform the function or to exercise the power.

44AL Powers of the AER

The AER has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

Note: State and Territory laws or instruments may also confer powers on the AER in respect of its functions under those laws or instruments: see section 44AI.

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Division 4—Administrative provisions relating to the AER

Subdivision A—Appointment etc. of members

44AM Appointment of Commonwealth AER members

(1) A Commonwealth AER member is to be appointed by the Governor-General by written instrument, on either a full-time or part-time basis.

(2) A Commonwealth AER member holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(3) A person is not eligible for appointment as a Commonwealth AER member unless the person has knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration.

44AO Acting appointment of Commonwealth AER member

(1) The Minister may, by written instrument, appoint a person to act as a Commonwealth AER member:

(a) during a vacancy in the office of Commonwealth AER member, whether or not an appointment has previously been made to the office; or

(b) during any period, or during all periods, when the Commonwealth AER member:

(i) is absent from duty or from Australia; or

(ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

(2) A person is not eligible for appointment to act as a Commonwealth AER member unless the person has knowledge of, or experience

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in, industry, commerce, economics, law, consumer protection or public administration.

44AP Appointment of State/Territory AER members

(1) A State/Territory AER member is to be appointed by the Governor-General by written instrument, on either a full-time or part-time basis.

(2) A State/Territory AER member holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(3) A person is not eligible for appointment as a State/Territory AER member unless the person has knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration.

44AQ Acting appointment of State/Territory AER member

(1) The Minister may, by written instrument, appoint a person to act as a State/Territory AER member:

(a) during a vacancy in the office of State/Territory AER member, whether or not an appointment has previously been made to the office; or

(b) during any period, or during all periods, when the State/Territory AER member:

(i) is absent from duty or from Australia; or

(ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

(2) A person is not eligible for appointment to act as a State/Territory AER member unless the person has knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration.

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44AR AER Chair

(1) One of the AER members is to be appointed by the Governor-General as the AER Chair, by written instrument. The appointment as AER Chair may be made at the same time as the appointment as AER member, or at a later time.

(2) A person is not eligible for appointment as the AER Chair unless the person is a full-time AER member.

(3) The AER Chair holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(4) If the AER Chair ceases to be an AER member, then he or she also ceases to be the AER Chair.

Note: A person may cease to be the AER Chair without ceasing to be an AER member.

44ARA AER Deputy Chair

(1) One of the AER members is to be appointed by the Governor-General as the AER Deputy Chair, by written instrument. The appointment as AER Deputy Chair may be made at the same time as the appointment as AER member, or at a later time.

(2) A person is not eligible for appointment as the AER Deputy Chair unless the person is a full-time AER member.

(3) The AER Deputy Chair holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(4) If a person who is the AER Deputy Chair ceases to be an AER member, then the person also ceases to be the AER Deputy Chair.

Note: A person may cease to be the AER Deputy Chair without ceasing to be an AER member.

44ARB AER Deputy Chair to act as the AER Chair

The AER Deputy Chair is to act as the AER Chair:

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(a) during a vacancy in the office of the AER Chair, whether or not an appointment has previously been made to the office; or

(b) during all periods when the AER Chair:

(i) is absent from duty or from Australia; or

(ii) is, for any reason, unable to perform the duties of the office.

Note: See also subsection 33A(2) of the *Acts Interpretation Act 1901*.

44AS Acting AER Deputy Chair

(1) The Minister may, by written instrument, appoint an AER member to act as the AER Deputy Chair:

(a) during a vacancy in the office of the AER Deputy Chair, whether or not an appointment has previously been made to the office; or

(b) during any period, or during all periods, when the AER Deputy Chair:

(i) is absent from duty or from Australia; or

(ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

(2) If a person acting as the AER Deputy Chair ceases to be an AER member, then the appointment to act as the AER Deputy Chair also ceases.

44AT Remuneration of AER members

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

(2) An AER member is to be paid the allowances that are prescribed.

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(3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

44AU Additional remuneration of AER Chair

(1) The AER Chair is to be paid additional remuneration (if any) determined by the Remuneration Tribunal.

(2) The AER Chair is to be paid additional allowances (if any) that are prescribed.

(3) This section has effect subject to the *Remuneration Tribunal Act 1973* other than subsection 7(11) of that Act.

44AV Leave of absence

(1) A full-time AER member has the recreation leave entitlements that are determined by the Remuneration Tribunal.

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

(3) The AER Chair may grant leave of absence to any part-time AER member on the terms and conditions that the AER Chair determines.

44AW Other terms and conditions

An AER member holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Governor-General.

44AX Outside employment

(1) A full-time AER member must not engage in paid employment outside the duties of the member's office without the Minister's consent.

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(2) A part-time AER member must not engage in any paid employment that conflicts or could conflict with the proper performance of the member's duties.

44AY Disclosure of interests

(1) If an AER member has any direct or indirect interest in a matter being considered, or about to be considered, by the AER, being an interest that could conflict with the proper performance of the member's functions in relation to a matter arising at a meeting of the AER, then the member must as soon as practicable disclose that interest at a meeting of the AER.

(2) The disclosure, and any decision made by the AER in relation to the disclosure, must be recorded in the minutes of the meeting.

(3) Section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) does not apply in relation to a person who is an AER member when he or she is acting in his or her capacity as an AER member.

44AZ Resignation

(1) An AER member may resign his or her appointment by giving the Governor-General a written resignation.

(2) The AER Chair may resign his or her appointment as AER Chair by giving the Governor-General a written resignation. The resignation does not affect the person's appointment as an AER member.

(3) A person who is the AER Deputy Chair may resign the person's appointment as AER Deputy Chair by giving the Governor-General a written resignation. The resignation does not affect the person's appointment as an AER member.

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44AAB Termination of appointment

All AER members

(1) The Governor-General may terminate the appointment of an AER member:

(a) for misbehaviour or physical or mental incapacity; or

(b) if the member:

(i) becomes bankrupt; or

(ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or

(iii) compounds with his or her creditors; or

(iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or

(c) if the member fails, without reasonable excuse, to comply with section 44AY.

Additional grounds: full-time AER members

(2) The Governor-General may terminate the appointment of a full-time AER member if:

(a) the member is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or

(b) the member engages, except with the Minister's consent, in paid employment outside the duties of his or her office.

Additional grounds: part-time AER members

(3) The Governor-General may terminate the appointment of a part-time AER member if:

(a) the member is absent, except on leave of absence, from 3 consecutive meetings of the AER; or

(b) the member engages in paid employment that conflicts or could conflict with the proper performance of the duties of his or her office.

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Subdivision B—Staff of the AER etc.

44AAC Staff of the AER

(1) The staff of the AER must be persons engaged under the *Public Service Act 1999*.

(2) For the purposes of the *Public Service Act 1999*:
  (a) the AER Chair and the APS employees assisting the AER Chair together constitute a Statutory Agency; and
  (b) the AER Chair is the Head of that Statutory Agency.

44AACA Persons assisting the AER

(1) The AER may be assisted by:
  (a) officers and employees of Agencies (within the meaning of the *Public Service Act 1999*), and of authorities of the Commonwealth, whose services are made available to the AER in connection with the performance of any of the AER's functions; and
  (b) persons whose services are made available under arrangements made under subsection (2).

(2) The AER may, on behalf of the Commonwealth, make an arrangement with the appropriate authority or officer of:
  (a) a State or Territory government; or
  (b) a State or Territory government authority;
under which the government or authority makes officers or employees available to the AER to perform services in connection with the performance of any of the AER's functions.

(3) An arrangement under subsection (2) may provide for the Commonwealth to reimburse a State or Territory with respect to the services of a person to whom the arrangement relates.

(4) When performing services for the AER under this section, a person is subject to the directions of the AER.

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44AACB Consultants

(1) The AER may, on behalf of the Commonwealth, engage persons to give advice to, and perform services for, the AER.

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

Subdivision C—Meetings of the AER etc.

44AAD Meetings

(1) The AER Chair must convene such meetings of the AER as he or she thinks necessary for the efficient performance of the functions of the AER.

Note: See also section 33B of the *Acts Interpretation Act 1901*, which contains extra rules about meetings by telephone etc.

(2) Meetings of the AER must be held at such places as the AER Chair determines.

(3) At a meeting of the AER, 3 AER members constitute a quorum. The quorum must include the AER Chair.

(4) Questions arising at a meeting must be determined by a majority of the votes of the members present and voting.

(4A) The AER Chair has a deliberative vote and, in the event of an equality of votes, also has a casting vote.

(5) The AER Chair must preside at all meetings of the AER.

(6) The AER Chair may give directions regarding the procedure to be followed at or in connection with a meeting.

44AAE Resolutions without meetings

(1) If all AER members sign a document containing a statement that they are in favour of a resolution in terms set out in the document, then a resolution in those terms is taken to have been passed at a

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duly constituted meeting of the AER held on the day the document was signed, or, if the members sign the document on different days, on the last of those days.

(2) For the purposes of subsection (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more members are together taken to constitute one document containing a statement in those terms signed by those members on the respective days on which they signed the separate documents.

(3) A member must not sign a document containing a statement in favour of a resolution if the resolution concerns a matter in which the member has any direct or indirect interest, being an interest that could conflict with the proper performance of the member's functions in relation to any matter.

44AAEA Arbitration

(1) Sections 44AAD and 44AAE do not apply to the AER as constituted for an arbitration under:
  (a) the National Electricity (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*); or
  (b) the National Gas (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*); or
  (c) a provision of an AER State/Territory energy law.

(2) The reference in subsection (1) to an ***arbitration*** includes a reference to each of the following:
  (a) the making, variation or revocation of an access determination (within the meaning of the law concerned);
  (b) the performance of a function, or the exercise of a power, in connection with the making, variation or revocation of an access determination (within the meaning of the law concerned).

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Subdivision CA—Divisions of the AER

44AAEB Divisions of the AER—functions and powers under a law of the Commonwealth

Directions

(1) The AER Chair may, by writing, direct that all or any of the AER's functions and powers:

(a) under this Part or under regulations made under this Act; or

(b) under another law of the Commonwealth;

in relation to a matter are to be performed and exercised by a Division of the AER constituted by the AER Chair and at least 2 other AER members, as specified in the direction.

(2) If a direction under subsection (1) is in force in relation to a matter, the Division of the AER specified in the direction may make recommendations to the AER in relation to the matter.

(3) If a direction under subsection (1) is in force in relation to a matter, the AER Chair may, by writing, at any time before the Division of the AER specified in the direction has made a determination in relation to the matter:

(a) revoke the direction; or

(b) amend the direction in relation to the membership of the Division or in any other respect.

If the membership of a Division of the AER is changed, the Division as constituted after the change may complete the determination of the matter.

The AER is taken to consist of the Division

(4) For the purposes of the determination of a matter specified in a direction given under subsection (1), the AER is taken to consist of the Division of the AER specified in the direction.

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Meetings

(5) The AER Chair is not required to attend a meeting of a Division of the AER if the AER Chair does not think fit to do so.

(6) The AER Deputy Chair is not required to attend a meeting of a Division of the AER if the AER Deputy Chair does not think fit to do so.

(7) At a meeting of a Division of the AER at which neither the AER Chair nor the AER Deputy Chair is presiding, an AER member nominated for the purpose by the AER Chair is to preside.

(8) Despite section 44AAD, at a meeting of a Division of the AER, 2 AER members form a quorum. The quorum need not include the AER Chair or AER Deputy Chair.

Functions and powers of the AER

(9) A Division of the AER specified under subsection (1) may perform the functions and exercise the powers of the AER mentioned in that subsection despite the fact that another Division of the AER is performing those functions and exercising those powers at the same time.

44AAEC Divisions of the AER—functions and powers under an AER State/Territory energy law or a local energy instrument

Directions

(1) The AER Chair may, by writing, direct that all or any of the AER's functions and powers:

(a) under an AER State/Territory energy law; or

(b) under a local energy instrument;

in relation to a matter are to be performed and exercised by a Division of the AER constituted by the AER Chair and at least 2 other AER members, as specified in the direction.

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(2) If a direction under subsection (1) is in force in relation to a matter, the Division of the AER specified in the direction may make recommendations to the AER in relation to the matter.

(3) If a direction under subsection (1) is in force in relation to a matter, the AER Chair may, by writing, at any time before the Division of the AER specified in the direction has made a determination in relation to the matter:

(a) revoke the direction; or

(b) amend the direction in relation to the membership of the Division or in any other respect.

If the membership of a Division of the AER is changed, the Division as constituted after the change may complete the determination of the matter.

The AER is taken to consist of the Division

(4) For the purposes of the determination of a matter specified in a direction given under subsection (1), the AER is taken to consist of the Division of the AER specified in the direction.

Meetings

(5) The AER Chair is not required to attend a meeting of a Division of the AER if the AER Chair does not think fit to do so.

(6) The AER Deputy Chair is not required to attend a meeting of a Division of the AER if the AER Deputy Chair does not think fit to do so.

(7) At a meeting of a Division of the AER at which neither the AER Chair nor the AER Deputy Chair is presiding, an AER member nominated for the purpose by the AER Chair is to preside.

(8) Despite section 44AAD, at a meeting of a Division of the AER, 2 AER members form a quorum. The quorum need not include the AER Chair or AER Deputy Chair.

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Functions and powers of the AER

(9) A Division of the AER specified under subsection (1) may perform the functions and exercise the powers of the AER mentioned in that subsection despite the fact that another Division of the AER is performing those functions and exercising those powers at the same time.

Application

(10) This section does not apply to an AER State/Territory energy law unless a provision of:
  (a) the AER State/Territory energy law; or
  (b) another law of the State or Territory concerned;
provides that this section extends to, and has effect for the purposes of, the AER State/Territory energy law.

(11) This section does not apply to a local energy instrument unless a provision of:
  (a) the local energy instrument; or
  (b) the AER State/Territory energy law of the State or Territory concerned; or
  (c) another law of the State or Territory concerned;
provides that this section extends to, and has effect for the purposes of, the local energy instrument.

Subdivision D—Miscellaneous

44AAF Confidentiality

(1) The AER must take all reasonable measures to protect from unauthorised use or disclosure information:
  (a) given to it in confidence in, or in connection with, the performance of its functions or the exercise of its powers; or
  (b) that is obtained by compulsion in the exercise of its powers.

Note: The *Privacy Act 1988* also contains provisions relevant to the use and disclosure of information.

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Authorised use and disclosure

(2) For the purposes of subsection (1), the disclosure of information to the extent required or permitted by a law of the Commonwealth, a State or Territory, is authorised use and disclosure of the information.

(3) Disclosing information to one of the following is authorised use and disclosure of the information:

(a) the Commission;

(b) the AEMC;

(c) Australian Energy Market Operator Limited (ACN 072 010 327);

(ca) the Clean Energy Regulator;

(cb) the Climate Change Authority;

(d) any staff or consultant assisting a body mentioned in paragraph (a), (b), (c), (ca) or (cb) in performing its functions or exercising its powers;

(e) any other person or body prescribed by the regulations for the purpose of this paragraph.

(3A) If the AER is satisfied that particular information will enable or assist an entity covered by subsection (3B) to perform or exercise any of the entity's functions or powers, disclosing the information to the entity is authorised use and disclosure of the information.

(3B) The entities are as follows:

(a) a Department;

(b) a body (whether incorporated or not) established or appointed for a public purpose by or under a law of the Commonwealth;

(c) a body established or appointed by the Governor-General, or by a Minister, otherwise than by or under a law of the Commonwealth;

(d) the holder of an office established for public purposes by or under a law of the Commonwealth.

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(4) A person or body to whom information is disclosed under subsection (3) or (3A) may use the information for any purpose connected with the performance of the functions, or the exercise of the powers, of the person or body.

(5) The AER may impose conditions to be complied with in relation to information disclosed under subsection (3) or (3A).

(6) For the purposes of subsection (1), the use or disclosure of information by a person for the purposes of:

(a) performing the person's functions, or exercising the person's powers, as:

(i) an AER member or a delegate of the AER; or

(ii) a member of the staff of the AER; or

(iii) a person assisting the AER referred to in section 44AACA; or

(iv) a consultant engaged under section 44AACB; or

(v) a person who is authorised to perform or exercise a function or power of, or on behalf of, the AER; or

(b) the performance of functions, or the exercise of powers, by the person by way of assisting a delegate of the AER;

is authorised use and disclosure of the information.

(7) Regulations made for the purposes of this section may specify uses of information and disclosures of information that are authorised uses and authorised disclosures for the purposes of this section.

(8) Nothing in any of the above subsections limits:

(a) anything else in any of those subsections; or

(b) what may otherwise constitute, for the purposes of subsection (1), authorised use or disclosure of information.

(9) Despite subsections (3) to (7), if:

(a) any of the following restricts or prohibits the use or disclosure of information:

(i) section 18D of the National Electricity Law set out in the Schedule to the *National Electricity (South*

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Australia) Act 1996 of South Australia as in force from time to time;

(ii) that section applied as a law of another State or Territory; and

(b) the use or disclosure of the information would, apart from this subsection, be authorised under this section;

the use or disclosure of the information is authorised for the purposes of this section only to the extent that the use or disclosure of the information is required or permitted in accordance with the relevant section mentioned in subparagraph (i) or (ii).

44AAFA Power of AER to obtain information and documents

Notice requiring information etc.

(1) This section applies if the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance of the functions referred to in section 44AH (Commonwealth functions).

(2) The AER may, by written notice given to the person, require the person to do one or more of the following:

(a) give such information to the AER;

(b) produce any such documents to the AER;

(c) appear before:

(i) the AER; or

(ii) a specified member of the staff of the AER who is an SES employee or an acting SES employee; or

(iii) a specified person assisting the AER, referred to in section 44AACA, who is an SES employee or an acting SES employee;

to give any such evidence (either orally or in writing) and produce any such documents.

(3) The notice must specify:

(a) if paragraph (2)(a) or (b) applies:

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(i) the period within which the person must comply with the notice; and

(ii) the manner in which the person must comply with the notice; or

(b) if paragraph (2)(c) applies:

(i) the time at which the person must appear before the AER or person; and

(ii) the place at which the person must appear before the AER or person.

Oath or affirmation

(4) The AER may require the evidence given under paragraph (2)(c) to be given on oath or affirmation. For that purpose, an AER member or a person assisting the AER may administer the oath or affirmation.

44AAFB Failure to comply with notice to give information etc. is an offence

Offence

(1) A person commits an offence if:

(a) the person is given a notice under section 44AAFA; and

(b) the person fails to comply with the notice.

Penalty: Imprisonment for 2 years or 100 penalty units, or both.

Exceptions

(2) Subsection (1) does not apply to the extent that the person is not capable of complying with the notice.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

(3) Subsection (1) does not apply to the extent that:

(a) the notice relates to producing documents; and

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(b) the person proves that, after a reasonable search, the person is not aware of the documents; and

(c) the person provides a written response to the notice, including a description of the scope and limitations of the search.

Note: A defendant bears a legal burden in relation to the matter in paragraph (3)(b) (see section 13.4 of the *Criminal Code*).

(4) For the purposes of (but without limiting) paragraph (3)(b), a determination of whether a search is reasonable may take into account the following:

(a) the nature and complexity of the matter to which the notice relates;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document relative to the resources of the person who was given the notice;

(d) any other relevant matter.

44AAFC AER may inspect, copy and retain documents

(1) A member of the AER, or a person authorised by a member of the AER, may inspect a document produced under section 44AAFA and may make and retain copies of such a document.

(2) The AER may take, and retain for as long as is necessary, possession of a document produced under section 44AAFA.

(3) The person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by a member of the AER to be a true copy.

(4) The certified copy must be received in all courts and tribunals as evidence as if it were the original.

(5) Until a certified copy is supplied, the AER must, at such times and places as the AER thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of the document.

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44AAG Federal Court may make certain orders

(1) The Federal Court may make an order, on application by the AER on behalf of the Commonwealth, declaring that a person is in breach of:

(a) a uniform energy law that is applied as a law of the Commonwealth; or

(b) an AER State/Territory energy law.

(2) If the order declares the person to be in breach of such a law, the order may include one or more of the following:

(a) an order that the person pay a civil penalty determined in accordance with the law;

(b) an order that the person cease, within a specified period, the act, activity or practice constituting the breach;

(c) an order that the person take such action, or adopt such practice, as the Court requires for remedying the breach or preventing a recurrence of the breach;

(d) an order that the person implement a specified program for compliance with the law;

(e) an order of a kind prescribed by regulations made under this Act.

(3) If a person has engaged, is engaging or is proposing to engage in any conduct in breach of:

(a) a uniform energy law that is applied as a law of the Commonwealth; or

(b) an AER State/Territory energy law;

the Federal Court may, on application by the AER on behalf of the Commonwealth, grant an injunction:

(c) restraining the person from engaging in the conduct; and

(d) if, in the court's opinion, it is desirable to do so—requiring the person to do something.

(4) The power of the Federal Court under subsection (3) to grant an injunction restraining a person from engaging in conduct of a particular kind may be exercised:

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(a) if the court is satisfied that the person has engaged in conduct of that kind—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; or

(b) if it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the person engages in conduct of that kind.

44AAGA Federal Court may order disconnection if an event specified in the National Electricity Rules occurs

(1) If a relevant disconnection event occurs, the Federal Court may make an order, on application by the AER on behalf of the Commonwealth, directing that a Registered participant's loads be disconnected.

(2) In this section:

National Electricity Law means:

(a) the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; or

(b) that Law as it applies as a law of another State; or

(c) that Law as it applies as a law of a Territory; or

(d) that Law as it applies as a law of the Commonwealth.

National Electricity Rules means:

(a) the National Electricity Rules, as in force from time to time, made under the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia; or

(b) those Rules as they apply as a law of another State; or

(c) those Rules as they apply as a law of a Territory; or

(d) those Rules as they apply as a law of the Commonwealth.

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Registered participant has the same meaning as in the National Electricity Law.

relevant disconnection event means an event specified in the National Electricity Rules as being an event for which a Registered participant's loads may be disconnected, where the event does not constitute a breach of the National Electricity Rules.

44AAH Delegation by the AER

The AER may, by resolution, delegate:

(a) all or any of the AER's functions and powers under this Part or under regulations made under this Act, or under another law of the Commonwealth; or

(b) all or any of the AER's functions and powers under an AER State/Territory energy law;

to an AER member or to a member of the staff of the AER who is an SES employee or acting SES employee.

Note 1: Section 2B of the *Acts Interpretation Act 1901* contains the definitions of ***SES employee*** and ***acting SES employee***.

Note 2: See also sections 34AA to 34A of the *Acts Interpretation Act 1901*, which contain extra rules about delegations.

44AAI Fees

(1) The AER may charge a fee specified in the regulations for services provided by it in performing any of its functions, or exercising any of its powers, under this Part or under regulations made under this Act, or under another law of the Commonwealth or an AER State/Territory energy law.

(2) The fee must not be such as to amount to taxation.

44AAK Regulations may deal with transitional matters

(1) The Governor-General may make regulations dealing with matters of a transitional nature relating to the transfer of functions and powers from a body to the AER.

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(2) Without limiting subsection (1), the regulations may deal with:

(a) the transfer of any relevant investigations being conducted by the body at the time of the transfer of functions and powers to the AER; or

(b) the transfer of any decisions or determinations being made by the body at the time of the transfer of functions and powers to the AER; or

(c) the substitution of the AER as a party to any relevant proceedings that are pending in any court or tribunal at the time of the transfer of functions and powers to the AER; or

(d) the transfer of any relevant information from the body to the AER.

(3) In this section:

matters of a transitional nature also includes matters of an application or saving nature.

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Chapter 2—Access to services

Part IIIA—Access to services

Division 1—Preliminary

44AA Objects of Part

The objects of this Part are to:

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

44B Definitions

In this Part, unless the contrary intention appears:

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

access code application means:

(a) an access code given to the Commission; or

(b) a request made to the Commission for the withdrawal or variation of an access code; or

(c) an application under subsection 44ZZBB(4) for an extension of the period for which an access code is in operation.

access code decision means:

(a) a decision under section 44ZZAA to accept or reject an access code; or

(b) a decision under section 44ZZAA to consent or refuse to consent to the withdrawal or variation of an access code; or

(c) a decision under section 44ZZBB to extend or refuse to extend the period for which an access code is in operation.

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access undertaking means an undertaking under section 44ZZA.

access undertaking application means:

(a) an access undertaking given to the Commission; or

(b) a request made to the Commission for the withdrawal or variation of an access undertaking; or

(ba) a request made to the Commission under subsection 44ZZAAB(7) to consent to the revocation or variation of a fixed principle included as a term of an access undertaking; or

(c) an application under subsection 44ZZBB(1) for an extension of the period for which an access undertaking is in operation.

access undertaking decision means:

(a) a decision under section 44ZZA to accept or reject an access undertaking; or

(b) a decision under section 44ZZA to consent or refuse to consent to the withdrawal or variation of an access undertaking; or

(ba) a decision under subsection 44ZZAAB(7) to consent or refuse to consent to the revocation or variation of a fixed principle included as a term of an access undertaking; or

(c) a decision under section 44ZZBB to extend or refuse to extend the period for which an access undertaking is in operation.

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.

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declaration criteria, for a service, has the meaning given by section 44CA.

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 Act 2001*.

entity means a person, partnership or joint venture.

final determination means a determination other than an interim determination.

fixed principle has the meaning given by section 44ZZAAB.

ineligibility recommendation means a recommendation made by the Council under section 44LB.

interim determination means a determination that is expressed to be an interim determination.

modifications includes additions, omissions and substitutions.

National Gas Law means:

(a) the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time, as that Law applies as a law of South Australia; or

(b) if an Act of another State or of the Australian Capital Territory or the Northern Territory applies the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia, as in force from time

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to time, as a law of that other State or of that Territory—the National Gas Law as so applied; or

(c) the Western Australian Gas Legislation; or

(d) the National Gas (Commonwealth) Law (within the meaning of the *Australian Energy Market Act 2004*); or

(e) the Offshore Western Australian Pipelines (Commonwealth) Law (within the meaning of the *Australian Energy Market Act 2004*).

officer has the same meaning as in the *Corporations Act 2001*.

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.

proposed facility means a facility that is proposed to be constructed (but the construction of which has not started) that will be:

(a) structurally separate from any existing facility; or

(b) a major extension of an existing facility.

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;

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(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 access regime law means:

(a) a law of a State or Territory that establishes or regulates an access regime; or

(b) a law of a State or Territory that regulates an industry that is subject to an access regime; or

(c) a State/Territory energy law.

State or Territory body means:

(a) a State or Territory;

(b) an authority of a State or Territory.

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.

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(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.

44CA Meaning of *declaration criteria*

(1) The ***declaration criteria*** for a service are:

(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; and

Note: ***Market*** is defined in section 4E.

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

(i) over the period for which the service would be declared; and

(ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility); and

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

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(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; and

(d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

(2) For the purposes of paragraph (1)(b):

(a) if the facility is currently at capacity, and it is reasonably possible to expand that capacity, have regard to the facility as if it had that expanded capacity; and

(b) without limiting paragraph (1)(b), the cost referred to in that paragraph includes all costs associated with having multiple users of the facility (including such costs that would be incurred if the service is declared).

(3) Without limiting the matters to which the Council may have regard for the purposes of section 44G, or the designated Minister may have regard for the purposes of section 44H, in considering whether paragraph (1)(d) of this section applies the Council or designated Minister must have regard to:

(a) the effect that declaring the service would have on investment in:

(i) infrastructure services; and

(ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

44D Meaning of *designated Minister*

(1) The Commonwealth Minister is the designated Minister unless subsection (2), (3), (4) or (5) applies.

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

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(a) the provider is a State or Territory body that has some control over the conditions for accessing the facility that is used (or is to be used) to provide the service; 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.

(4) In relation to deciding whether a service is ineligible to be a declared service in a case where:

(a) a person who is, or expects to be, the provider of the service is a State or Territory body that has some control over the conditions for accessing the facility that is used (or is to be used) to provide the service; 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.

(5) In relation to revoking a decision:

(a) that a service is ineligible to be a declared service; and

(b) 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:

(c) the requirement, under subsection 44M(4), that the Council apply the relevant principles set out in the Competition Principles Agreement in deciding whether to recommend to

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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;

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 apply in writing to the Council asking the Council to recommend that a particular service be declared unless:

(a) the service is the subject of a regime for which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(b) the service is the subject of an access undertaking in operation under Division 6; or

(c) if a decision is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process—the service was specified, in the application for that decision, as a service proposed to be provided by means of the facility; or

(d) if the service is provided by means of a pipeline (within the meaning of a National Gas Law)—there is:

(i) a 15-year no-coverage determination in force under the National Gas Law in respect of the pipeline; or

(ii) a price regulation exemption in force under the National Gas Law in respect of the pipeline; or

(e) there is a decision of the designated Minister in force under section 44LG that the service is ineligible to be a declared service.

Note: This means an application can only be made or dealt with under this Subdivision if none of paragraphs (a) to (e) apply.

(1A) If the Council decides that one or more of paragraphs (1)(a) to (e) apply for a service mentioned in a person's purported application under that subsection, the Council must give the person written notice explaining:

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(a) why those paragraphs apply; and
(b) that such an application cannot be made for the service.

(2) After receiving an application under subsection (1), 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, after having regard to the objects of this Part, recommend to the designated Minister:
(i) that the service be declared, with the expiry date specified in the recommendation; or
(ii) that the service not be declared.

Note 1: There are time limits that apply to the Council's recommendation: see section 44GA.

Note 2: The Council may request information and invite public submissions on the application: see sections 44FA and 44GB.

Note 3: The Council must publish its recommendation: see section 44GC.

(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.

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

(6) The applicant may request, in writing, the Council to vary the application at any time before the Council makes a recommendation relating to it.

(7) If a request is made under subsection (6), the Council must decide to:
(a) make the variation; or
(b) reject the variation.

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(9) The Council may reject the variation if it is satisfied that the requested variation is of a kind, or the request for the variation is made at a time or in a manner, that:

(a) would unduly prejudice the provider (if the provider is not the applicant) or anyone else the Council considers has a material interest in the application; or

(b) would unduly delay the process for considering the application.

44FA Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44F.

(2) The Council must:

(a) give a copy of the notice to:

(i) if the person is not the applicant—the applicant; and

(ii) if the person is not the provider of the service—the provider; and

(b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

(b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

(4) Subsections 44GB(4) to (6) apply to information given in response to a notice under this section (whether given in compliance with the notice or not) in a corresponding way to the way those subsections apply to a submission made in response to a notice under subsection 44GB(1).

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Note: This allows the Council to make the information publicly available, subject to any confidentiality concerns.

44G Criteria for the Council recommending declaration of a service

The Council cannot recommend that a service be declared unless it is satisfied of all of the declaration criteria for the service.

44GA Time limit for Council recommendations

Council to make recommendation within the consideration period

(1) The Council must make a recommendation on an application under section 44F within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

Stopping the clock

(3) In working out the expected period in relation to a recommendation on an application under section 44F, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement

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Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
2	A notice is given under subsection 44FA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

(4) Despite subsection (3):

(a) do not disregard any day more than once; and

(b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

(5) The Council, the applicant and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.

(6) The Council must publish, by electronic or other means, the agreement.

Council may extend time for making recommendation

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:

(a) specify when the Council must now make a recommendation on the application; and

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(b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:
(a) the applicant; and
(b) if the applicant is not the provider of the service—the provider.

Publication

(10) If the Council extends the consideration period under subsection (7), it must publish a notice in a manner that results in the notice being accessible to the public and reasonably prominent:
(a) stating that it has done so; and
(b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

(11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

44GB Council may invite public submissions on the application

Invitation

(1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44F if it considers that it is appropriate and practicable to do so.

(2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

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Consideration of submissions

(3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:

(a) must have regard to any submission made on or before the day specified in the notice; and

(b) may disregard any submission made after the day specified in the notice.

Council may make submissions publicly available

(4) The Council may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

(5) A person may, at the time of making a submission, request that the Council:

(a) not make the whole or a part of the submission available under subsection (4); and

(b) not publish or make available the whole or a part of the submission under section 44GC;

because of the confidential commercial information contained in the submission.

(6) If the Council refuses such a request:

(a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and

(c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:

(i) make the whole or the part of the submission available under subsection (4); and

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(ii) publish or make available the whole or the part of the submission under section 44GC; and

(iii) have regard to the whole or the part of the submission in making its recommendation on the application.

44GC Council must publish its recommendation

(1) The Council must publish, by electronic or other means, a recommendation under section 44F and its reasons for the recommendation.

(2) The Council must give a copy of the publication to:

(a) the applicant under section 44F; and

(b) if the applicant is not the provider of the service—the provider.

Timing

(3) The Council must do the things under subsections (1) and (2) on the day the designated Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

Consultation

(4) Before publishing under subsection (1), the Council may give any one or more of the following persons:

(a) the applicant under section 44F;

(b) if the applicant is not the provider of the service—the provider;

(c) any other person the Council considers appropriate;

a notice in writing:

(d) specifying what the Council is proposing to publish; and

(e) inviting the person to make a written submission to the Council within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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(5) The Council must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

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.

Note: The designated Minister must publish his or her decision: see section 44HA.

(1A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the declaration criteria for the service.

(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 section 44HA his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period:

(a) to have made a decision under this section in accordance with the declaration recommendation; and

(b) to have published that decision under section 44HA.

44HA Designated Minister must publish his or her decision

(1) The designated Minister must publish, by electronic or other means, his or her decision on a declaration recommendation and his or her reasons for the decision.

(2) The designated Minister must give a copy of the publication to:

(a) the applicant under section 44F; and

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(b) if the applicant is not the provider of the service—the provider.

Consultation

(3) Before publishing under subsection (1), the designated Minister may give any one or more of the following persons:

(a) the applicant under section 44F;

(b) if the applicant is not the provider of the service—the provider;

(c) any other person the designated Minister considers appropriate;

a notice in writing:

(d) specifying what the designated Minister is proposing to publish; and

(e) inviting the person to make a written submission to the designated Minister within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(4) The designated Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

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:

(a) an application for review of a declaration is made within 21 days after the day the declaration is published; and

(b) the Tribunal makes an order under section 44KA staying the operation of the declaration;

the declaration does not begin to operate until the order is no longer of effect under subsection 44KA(6) or the Tribunal makes a

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decision on the review to affirm the declaration, whichever is the earlier.

(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. The Council must have regard to the objects of this Part in making its decision.

(2) The Council cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation:
  (a) subsection 44F(1) would prevent the making of an application for a recommendation that the service concerned be declared; or
  (b) subsection 44H(4) would prevent the service concerned from being declared.

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

(3A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(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.

(7) If the designated Minister does not publish under subsection (4) his or her decision on the revocation recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:

(a) to have made a decision that the declaration be revoked; and

(b) to have published that decision in accordance with this section.

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 based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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

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(6) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review (including for the purposes of deciding whether to make an order under section 44KA).

(6A) Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(6B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) the person who applied for the declaration recommendation; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

(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).

44KA Tribunal may stay operation of declaration

(1) Subject to this section, an application for review of a declaration under subsection 44K(1) does not:

(a) affect the operation of the declaration; or

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(b) prevent the taking of steps in reliance on the declaration.

(2) On application by a person who has been made a party to the proceedings for review of a declaration, the Tribunal may:

(a) make an order staying, or otherwise affecting the operation or the taking of steps in reliance on, the declaration if the Tribunal considers that:

(i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and

(ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or

(b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).

(3) Subject to subsection (4), the Tribunal must not:

(a) make an order under subsection (2) unless the Council has been given a reasonable opportunity to make a submission to the Tribunal in relation to the matter; or

(b) make an order varying or revoking an order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)) unless:

(i) the Council; and

(ii) the person who requested the making of the order under paragraph (2)(a); and

(iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who requested the making of the last-mentioned order or orders;

have been given a reasonable opportunity to make submissions to the Tribunal in relation to the matter.

(4) Subsection (3) does not prohibit the Tribunal from making an order without giving to a person referred to in that subsection a

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reasonable opportunity to make a submission to the Tribunal in relation to a matter if the Tribunal is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity.

(5) If an order is made under subsection (3) without giving the Council a reasonable opportunity to make a submission to the Tribunal in relation to a matter, the order does not come into operation until a notice setting out the terms of the order is given to the Council.

(6) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):

(a) is subject to such conditions as are specified in the order; and

(b) has effect until:

(i) if a period for the operation of the order is specified in the order—the expiration of that period or, if the application for review is decided by the Tribunal before the expiration of that period, the decision of the Tribunal on the application for review comes into operation; or

(ii) if no period is so specified—the decision of the Tribunal on the application for review comes into operation.

44KB Tribunal may order costs be awarded

(1) If the Tribunal is satisfied that it is appropriate to do so, the Tribunal may order that a person who has been made a party to proceedings for a review of a declaration under section 44K pay all or a specified part of the costs of another person who has been made a party to the proceedings.

(2) However, the Tribunal must not make an order requiring the designated Minister to pay some or all of the costs of another party to proceedings unless the Tribunal considers that the designated Minister's conduct in the proceedings was engaged in without due regard to:

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(a) the costs that would be incurred by the other party to the proceedings as a result of that conduct; or

(b) the time required by the Tribunal to make a decision on the review as a result of that conduct; or

(c) the time required by the other party to prepare their case for the purposes of the review as a result of that conduct; or

(d) the submissions or arguments made during the proceedings to the Tribunal by the other party or parties to the proceedings or by the Council.

(3) If the Tribunal makes an order under subsection (1), it may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.

(4) The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.

(5) If a party (the ***first party***) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.

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 based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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(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 assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

(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.

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Division 2AA—Services that are ineligible to be declared

Subdivision A—Scope of Division

44LA Constitutional limits on operation of this Division

This Division does not apply in relation to a service unless:

(a) the person who is, or expects to be, the provider of the service is a corporation (or a partnership or joint venture consisting wholly of corporations); or

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

Subdivision B—Ineligibility recommendation by Council

44LB Ineligibility recommendation

Person may request recommendation

(1) A person with a material interest in a particular service proposed to be provided by means of a proposed facility may make a written application to the Council asking the Council to recommend that the designated Minister decide that the service is ineligible to be a declared service.

Note: The application must be made before construction of the facility commences: see the definition of ***proposed facility*** in section 44B.

Council must make recommendation

(2) After receiving the application, the Council must, after having regard to the objects of this Part:

(a) recommend to the designated Minister:

(i) that he or she decide that the service is ineligible to be a declared service; and

(ii) the period for which the decision should be in force (which must be at least 20 years); or

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(b) recommend to the designated Minister that he or she decide that the service is not ineligible to be a declared service.

Note 1: There are time limits that apply to the Council's recommendation: see section 44LD.

Note 2: The Council may request information and invite public submissions on the application: see sections 44LC and 44LE.

Note 3: The Council must publish its recommendation: see section 44LF.

Limits on recommendation

(3) The Council cannot recommend that the designated Minister decide that the service is ineligible to be a declared service unless it is satisfied of both of the following matters:

(a) that the service will be provided by means of the proposed facility when constructed;

(b) that it is not satisfied of at least one of the declaration criteria for the service to be provided by means of the proposed facility.

(4) If the applicant is a person other than the designated Minister, the Council may recommend that the designated Minister decide that the service is not ineligible to be a declared service 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 designated Minister decide that the service is not ineligible to be a declared service.

Relationship between ineligibility recommendations, access undertakings and competitive tender processes

(5) The Council may recommend that the designated Minister decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.

(6) The Council may recommend that the designated Minister decide that the service is ineligible to be a declared service even if:

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(a) the service is proposed to be provided by means of a facility specified under paragraph 44PA(2)(a); and

(b) a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of the facility, as a competitive tender process.

Applicant may withdraw application

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

44LC Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of a kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44LB.

(2) The Council must:

(a) give a copy of the notice to:

(i) if the person is not the applicant—the applicant; and

(ii) if the person is not the provider, or the person who expects to be the provider—that person; and

(b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

(b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

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44LD Time limit for Council recommendations

Council to make recommendation within the consideration period

(1) The Council must make a recommendation on an application under section 44LB within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

Stopping the clock

(3) In working out the expected period in relation to a recommendation on an application under section 44LB, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
  (a) starting on the day referred to in column 2 of the item; and
  (b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44LC(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

(4) Despite subsection (3):
  (a) do not disregard any day more than once; and

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(b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

(5) The Council and the applicant may agree in writing that a specified period is to be disregarded in working out the expected period.

(6) The Council must publish, by electronic or other means, the agreement.

Extension of time for making decision

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or it has been previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:
(a) specify when the Council must now make a recommendation on the application; and
(b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:
(a) the applicant; and
(b) if the applicant is not the person who is, or expects to be, the provider—that person.

Publication

(10) If the Council extends the consideration period under subsection (7), it must publish a notice in a manner that results in the notice being accessible to the public and reasonably prominent:
(a) stating that it has done so; and
(b) specifying the day by which it must now make a recommendation on the application.

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Failure to comply with time limit does not affect validity

(11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

44LE Council may invite public submissions on the application

Invitation

(1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44LB if it considers that it is appropriate and practicable to do so.

(2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

(3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:
  (a) must have regard to any submission made on or before the day specified in the notice; and
  (b) may disregard any submission made after the day specified in the notice.

Council may make submissions publicly available

(4) The Council may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

(5) A person may, at the time of making a submission, request that the Council:
  (a) not make the whole or a part of the submission available under subsection (4); and

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(b) not publish or make available the whole or a part of the submission under section 44LF;

because of the confidential commercial information contained in the submission.

(6) If the Council refuses such a request:

(a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and

(c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:

(i) make the whole or the part of the submission available under subsection (4); and

(ii) publish or make available the whole or the part of the submission under section 44LF; and

(iii) have regard to the whole or the part of the submission in making its recommendation on the application.

44LF Council must publish its recommendation

Council must publish its recommendation

(1) The Council must publish, by electronic or other means, a recommendation under section 44LB and its reasons for the recommendation.

(2) The Council must give a copy of the publication to:

(a) the person who made the application under section 44LB; and

(b) if the applicant is not the person who is, or expects to be, the provider—that person.

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Timing

(3) The Council must do the things under subsections (1) and (2) on the day the designated Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

Consultation

(4) Before publishing under subsection (1), the Council may give any one or more of the following persons:

(a) the person who made the application under section 44LB;

(b) any other person the Council considers appropriate;

a notice in writing:

(c) specifying what the Council is proposing to publish; and

(d) inviting the person to make a written submission to the Council within 14 days after the day the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(5) The Council must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Subdivision C—Designated Minister's decision on ineligibility

44LG Designated Minister's decision on ineligibility

(1) On receiving an ineligibility recommendation, the designated Minister must:

(a) decide:

(i) that the service is ineligible to be a declared service; and

(ii) the period for which the decision is in force (which must be at least 20 years); or

(b) decide that the service is not ineligible to be a declared service.

Note: The designated Minister must publish his or her decision: see section 44LH.

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(2) The designated Minister must have regard to the objects of this Part in making his or her decision.

(3) The designated Minister may decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.

(4) The designated Minister may decide that the service is ineligible to be a declared service even if:

(a) the service is proposed to be provided by means of a facility specified under paragraph 44PA(2)(a); and

(b) a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of the facility, as a competitive tender process.

(5) The designated Minister must not decide that the service is ineligible to be a declared service unless he or she is satisfied of both of the following matters:

(a) that the service is to be provided by means of the proposed facility when constructed;

(b) that he or she is not satisfied of at least one of the declaration criteria for the service to be provided by means of the proposed facility.

(6) If the designated Minister does not publish under section 44LH his or her decision on the ineligibility recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:

(a) the designated Minister is taken, immediately after the end of that 60-day period, to have made a decision under subsection (1) in accordance with the ineligibility recommendation and to have published that decision under section 44LH; and

(b) if the Council recommended that the designated Minister decide that the service be ineligible to be a declared service—the period for which the decision is in force is taken to be the period recommended by the Council.

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44LH Designated Minister must publish his or her decision

(1) The designated Minister must publish, by electronic or other means, his or her decision on an ineligibility recommendation and his or her reasons for the decision.

(2) The designated Minister must give a copy of the publication to the person who made the application under section 44LB.

Consultation

(3) Before publishing under subsection (1), the designated Minister may give any one or more of the following persons:
   (a) the person who made the application under section 44LB;
   (b) any other person the designated Minister considers appropriate;

a notice in writing:
   (c) specifying what the designated Minister is proposing to publish; and
   (d) inviting the person to make a written submission to the designated Minister within 14 days after the day the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(4) The designated Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

Subdivision D—Revocation of ineligibility decision

44LI Revocation of ineligibility decision

Council may recommend revocation if facility materially different or upon request

(1) The Council may recommend to the designated Minister that the designated Minister revoke his or her decision (the ***ineligibility***

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decision) that a service is ineligible to be a declared service. The Council must have regard to the objects of this Part in making its recommendation.

(2) The Council cannot recommend that a decision be revoked unless:

(a) it is satisfied that, at the time of the recommendation, the facility that is (or will be) used to provide the service concerned is so materially different from the proposed facility described in the application made under section 44LB that the Council is satisfied of all of the declaration criteria for the service; or

(b) the person who is, or expects to be, the provider of the service that is provided, or that is proposed to be provided, by means of the facility requests that it be revoked.

Minister must decide whether to revoke

(3) On receiving a recommendation that the designated Minister revoke the ineligibility decision, the designated Minister must either revoke the ineligibility decision or decide not to revoke the ineligibility decision.

(4) The designated Minister must have regard to the objects of this Part in making his or her decision.

Minister must publish decision

(5) The designated Minister must publish, by electronic or other means, the decision to revoke or not to revoke the ineligibility decision.

(6) If the designated Minister decides not to revoke the ineligibility decision, the designated Minister must give reasons for the decision to the person who is, or expects to be, the provider of the service concerned when the designated Minister publishes the decision.

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Deemed decision of Minister

(7) If the designated Minister does not publish his or her decision to revoke or not to revoke the ineligibility decision within the period starting at the start of the day the recommendation to revoke the ineligibility decision is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:
   (a) to have made a decision (the ***deemed decision***) under subsection (3) that the ineligibility decision be revoked; and
   (b) to have published the deemed decision under subsection (5).

Limits on when a revocation can be made

(8) The designated Minister cannot revoke the ineligibility decision without receiving a recommendation from the Council that the ineligibility decision be revoked.

When a revocation comes into operation

(9) If the designated Minister revokes the ineligibility decision, the revocation comes into operation at:
   (a) if, within 21 days after the designated Minister publishes his or her decision, no person has applied to the Tribunal for review of the decision—the end of that period; or
   (b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

Subdivision E—Review of decisions

44LJ Review of ineligibility decisions

Application for review

(1) A person whose interests are affected by a decision of the designated Minister under subsection 44LG(1) may apply in writing to the Tribunal for a review of the decision.

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(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 reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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

Council to provide assistance

(5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

(6) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(7) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the person who is, or expects to be, the provider of the service; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

Tribunal's decision

(8) If the designated Minister decided that a service is ineligible to be a declared service, the Tribunal may affirm, vary or set aside the decision.

Note: If the Tribunal sets aside a decision of the designated Minister that a service is ineligible to be a declared service, the designated Minister's

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decision is no longer in force. This means the designated Minister is no longer prevented by subsection 44H(6C) from declaring the service.

(9) If the designated Minister decided that a service is not ineligible to be a declared service, the Tribunal may either:

(a) affirm the designated Minister's decision; or

(b) set aside the designated Minister's decision and decide that the service is ineligible to be a declared service for a specified period (which must be at least 20 years).

Effect of Tribunal's decision

(10) The Tribunal's decision is taken to be a decision by the designated Minister for all purposes of this Part (except this section).

44LK Review of decision to revoke or not revoke an ineligibility decision

Application for review

(1) A person whose interests are affected by a decision of the designated Minister under subsection 44LI(3) may apply in writing to the Tribunal for a 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 reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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

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Council to give assistance

(5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

(6) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(7) The Tribunal must:
  (a) give a copy of the notice to:
    (i) the person who applied for review; and
    (ii) the person who is, or expects to be, the provider of the service; and
    (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
  (b) publish, by electronic or other means, the notice.

Tribunal's decision

(8) If the designated Minister decided to revoke his or her decision (the ***ineligibility decision***) that the service is ineligible to be a declared service, the Tribunal may either:
  (a) affirm the designated Minister's decision; or
  (b) set aside the designated Minister's decision to revoke the ineligibility decision.

(9) If the designated Minister decided not to revoke his or her ineligibility decision, the Tribunal may either:
  (a) affirm the designated Minister's decision; or
  (b) set aside the designated Minister's decision and revoke the ineligibility decision.

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Effect of Tribunal's decision

(10) If the Tribunal sets aside the designated Minister's decision to revoke his or her ineligibility decision, the ineligibility decision is taken never to have been revoked.

(11) If the Tribunal sets aside the designated Minister's decision and revokes the ineligibility decision, the Tribunal's decision is, for the purposes of this Part other than this section, taken to be a decision by the Minister to revoke his or her decision that the service is ineligible to be a declared service.

Subdivision F—Other matters

44LL Ineligibility decisions subject to alteration, cancellation etc.

(1) A decision of the designated Minister under section 44LG that a service is ineligible to be a declared service is made on the basis that:

(a) the decision may be revoked under section 44LI; and

(b) the decision may be cancelled, revoked, terminated or varied by or under later legislation; and

(c) no compensation is payable if the decision is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

(2) Subsection (1) does not, by implication, affect the interpretation of any other provision of this Act.

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Division 2A—Effective access regimes

Subdivision A—Recommendation by Council

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:
  (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.

Note 1: There are time limits that apply to the Council's recommendation: see section 44NC.

Note 2: The Council may request information and invite public submissions on the application: see sections 44MA and 44NE.

Note 3: The Council must publish its recommendation: see section 44NF.

(4) In deciding what recommendation it should make, the Council:
  (a) must, subject to subsection (4A), assess whether the access regime is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement; and
  (aa) must have regard to the objects of this Part; and
  (b) must, subject to section 44DA, not consider any other matters.

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(4A) In deciding what recommendation it should make, the Council must disregard Chapter 5 of a National Gas Law.

(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.

44MA Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44M.

(2) The Council must:
  (a) give a copy of the notice to:
    (i) if the person is not the applicant—the applicant; and
    (ii) if the person is not the provider of the service—the provider; and
  (b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:
  (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
  (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

Subdivision B—Decision by Commonwealth Minister

44N Ministerial decision on effectiveness of access regime

(1) On receiving a recommendation under section 44M, the Commonwealth Minister must:
  (a) decide that the access regime is an effective access regime for the service or proposed service; or

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

Note: The Commonwealth Minister must publish his or her decision: see section 44NG.

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

(a) must, subject to subsection (2A), apply the relevant principles set out in the Competition Principles Agreement; and

(aa) must have regard to the objects of this Part; and

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

(2A) In making a decision, the Commonwealth Minister must disregard Chapter 5 of a National Gas Law.

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

Note: The period for which the decision is in force may be extended: see section 44NB.

(4) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44M within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:

(a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:

(i) to have made a decision under subsection (1) in accordance with the recommendation made by the Council under section 44M; and

(ii) to have published that decision under section 44NG; and

(b) if the Council recommended that the Commonwealth Minister decide that the access regime is an effective access regime for the service, or proposed service—the decision is taken to be in force for the period recommended by the Council under subsection 44M(5).

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Subdivision C—Extensions of Commonwealth Minister's decision

44NA Recommendation by Council

(1) This section applies if a decision of the Commonwealth Minister is in force under section 44N (including as a result of an extension under section 44NB) that a regime established by a State or Territory for access to a service is an effective access regime.

Application to Council

(2) The responsible Minister for the State or Territory may make a written application to the Council asking it to recommend that the Commonwealth Minister decide to extend the period for which the decision is in force.

Note: The Commonwealth Minister may extend the period for which the decision is in force more than once: see section 44NB. This means there may be multiple applications under this subsection.

(3) The responsible Minister for the State or Territory may specify in the application proposed variations to the access regime.

Assessment by Council

(4) The Council must assess whether the access regime (including any proposed variations) is an effective access regime. It must do this in accordance with subsection 44M(4).

(5) If the Council is satisfied that it is an effective access regime, the Council must, in writing, recommend to the Commonwealth Minister that he or she extend the period for which the decision under section 44N is in force. The Council must also recommend an extension period.

(6) If the Council is satisfied that it is not an effective access regime, the Council must, in writing, recommend to the Commonwealth Minister that he or she not extend the period for which the decision under section 44N is in force.

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Note 1: There are time limits that apply to the Council's recommendation: see section 44NC.

Note 2: The Council may request information and invite public submissions on the application: see sections 44NAA and 44NE.

Note 3: The Council must publish its recommendation: see section 44NF.

44NAA Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44NA.

(2) The Council must:
  (a) give a copy of the notice to:
    (i) if the person is not the applicant—the applicant; and
    (ii) if the person is not the provider of the service—the provider; and
  (b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:
  (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
  (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44NB Decision by the Commonwealth Minister

(1) On receiving a recommendation under section 44NA, the Commonwealth Minister must assess whether the access regime (including any proposed variations) is an effective access regime. He or she must do this in accordance with subsection 44N(2).

Note: The Commonwealth Minister must publish his or her decision: see section 44NG.

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(2) If the Commonwealth Minister is satisfied that it is, he or she must, by notice in writing, decide to extend the period for which the decision under section 44N is in force. The notice must specify the extension period.

(3) If the Commonwealth Minister is satisfied that it is not, he or she must, by notice in writing, decide not to extend the period for which the decision under section 44N is in force.

(3A) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44NA within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:

(a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:

(i) to have made a decision under this section in accordance with the recommendation made by the Council under section 44NA; and

(ii) to have published that decision under section 44NG; and

(b) if the Council recommended that the Commonwealth Minister extend the period for which the decision under section 44N is in force—the extension period is taken to be the extension period recommended by the Council under subsection 44NA(5).

Multiple extensions

(4) The Commonwealth Minister may extend the period for which a decision is in force under section 44N more than once.

Subdivision CA—Revocation of Commonwealth Minister's decision

44NBA Recommendation by Council

(1) If a decision of the Commonwealth Minister is in force under section 44N (including as a result of an extension under

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section 44NB) that a regime established by a State or Territory for access to a service is an effective access regime, the Council:

(a) may, on its own initiative; and

(b) must, on an application made under subsection (3);

consider whether to recommend that the Commonwealth Minister revoke the decision.

(2) Before considering on its own initiative whether to recommend that the Commonwealth Minister revoke the decision, the Council must:

(a) publish, by electronic or other means, a notice to that effect; and

(b) give a copy of the notice to:

(i) the responsible Minister for the State or Territory; and

(ii) the provider of the service.

(3) Any of the following may make a written application to the Council asking it to recommend that the Commonwealth Minister revoke the decision:

(a) a person who is seeking access to the service;

(b) the responsible Minister for the State or Territory;

(c) the provider of the service.

The Council must give a copy of the application to each entity mentioned in paragraph (b) or (c), unless that entity is the applicant.

(4) Subject to subsection (5), the Council's consideration of whether to make the recommendation must be in accordance with subsection 44M(4).

(5) In considering whether to make the recommendation, the Council must consider whether it is satisfied that the regime no longer meets the relevant principles, set out in the Competition Principles Agreement, relating to whether access regimes are effective access regimes, because of either or both of the following:

(a) substantial changes to the regime;

(b) substantial amendments of those principles.

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(6) If the Council is so satisfied, the Council must, in writing, recommend to the Commonwealth Minister that he or she revoke the decision.

(7) If the Council is not so satisfied, the Council must, in writing, recommend to the Commonwealth Minister that he or she not revoke the decision.

Note 1: There are time limits that apply to the Council's recommendation: see section 44NC.

Note 2: The Council may request information and invite public submissions: see sections 44NBB and 44NE.

Note 3: The Council must publish its recommendation: see section 44NF.

44NBB Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make under section 44NBA.

(2) The Council must:
  (a) give a copy of the notice to:
    (i) if an application was made under subsection 44NBA(3) and the person is not the applicant—the applicant; and
    (ii) if the person is not the provider of the service—the provider; and
    (iii) in every case—the responsible Minister for the State or Territory; and
  (b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make, the Council:
  (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
  (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

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44NBC Decision by the Commonwealth Minister

(1) On receiving a recommendation under section 44NBA, the Commonwealth Minister must assess whether he or she should revoke the decision. Subject to subsection (2) of this section, he or she must do this in accordance with subsection 44N(2).

Note: The Commonwealth Minister must publish his or her decision: see section 44NG.

(2) In making his or her assessment, the Commonwealth Minister must consider whether he or she is satisfied as to the matter set out in subsection 44NBA(5).

(3) If the Commonwealth Minister is so satisfied, he or she must, by notice in writing, decide to revoke the decision. The notice must specify the day on which the revoked decision is to cease to be in force.

(4) If the Commonwealth Minister is not so satisfied, he or she must, by notice in writing, decide not to revoke the decision.

(5) If the Commonwealth Minister does not publish under section 44NG his or her decision on the recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, he or she is taken, immediately after the end of that 60-day period:
(a) to have made a decision under this section in accordance with the recommendation made by the Council under section 44NBA; and
(b) to have published that decision under section 44NG.

Subdivision D—Procedural provisions

44NC Time limit for Council recommendations

Council to make recommendation within the consideration period

(1) The Council must make a recommendation on an application under section 44M, 44NA or 44NBA, or on a consideration by the

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Council on its own initiative under section 44NBA, within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, or the consideration is notified under paragraph 44NBA(2)(a), unless the consideration period is extended under subsection (7).

Stopping the clock

(3) In working out the expected period in relation to a recommendation on an application under section 44M, 44NA or 44NBA, or on a consideration by the Council on its own initiative under section 44NBA, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
  (a) starting on the day referred to in column 2 of the item; and
  (b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44MA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is given under subsection 44NAA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

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Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
4	A notice is given under subsection 44NBB(1) requesting information in relation to the application or consideration	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

(4) Despite subsection (3):

(a) do not disregard any day more than once; and

(b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

(5) The Council, the applicant (if the Commission is not acting on its own initiative under paragraph 44NBA(1)(a)) and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.

(6) The Council must publish, by electronic or other means, the agreement.

Council may extend time for making recommendation

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the Commonwealth Minister, extend the consideration period by a specified period.

(8) The notice must:

(a) specify when the Council must now make its recommendation; and

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(b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:
(a) if the Commission is not acting on its own initiative under paragraph 44NBA(1)(a)—the applicant; and
(b) if the applicant is not the provider of the service—the provider.

Publication

(10) If the Council extends the consideration period under subsection (7), it must publish a notice in a manner that results in the notice being accessible to the public and reasonably prominent:
(a) stating that it has done so; and
(b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

(11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

44NE Council may invite public submissions

Invitation

(1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44M, 44NA or 44NBA, or on a consideration by the Council on its own initiative under section 44NBA, if it considers that it is appropriate and practicable to do so.

(2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

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Consideration of submissions

(3) Subject to subsection (6), in deciding what recommendation to make, the Council:

(a) must have regard to any submission made on or before the day specified in the notice; and

(b) may disregard any submission made after the day specified in the notice.

Council may make submissions publicly available

(4) The Council may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

(5) A person may, at the time of making a submission, request that the Council:

(a) not make the whole or a part of the submission available under subsection (4); and

(b) not publish or make available the whole or a part of the submission under section 44NF;

because of the confidential commercial information contained in the submission.

(6) If the Council refuses such a request:

(a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and

(c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:

(i) make the whole or the part of the submission available under subsection (4); and

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(ii) publish or make available the whole or the part of the submission under section 44NF; and

(iii) have regard to the whole or the part of the submission in making its recommendation.

44NF Publication—Council

(1) The Council must publish, by electronic or other means, a recommendation under section 44M, 44NA or 44NBA and its reasons for the recommendation.

(2) The Council must give a copy of the publication to:

(a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative); and

(b) the provider of the service.

Timing

(3) The Council must do the things under subsections (1) and (2) on the day the Commonwealth Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

Consultation

(4) Before publishing under subsection (1), the Council may give any one or more of the following persons:

(a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative);

(b) the provider of the service;

(c) any other person the Council considers appropriate;

a notice in writing:

(d) specifying what the Council is proposing to publish; and

(e) inviting the person to make a written submission to the Council within 14 days after the notice is given identifying

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any information the person considers should not be published because of its confidential commercial nature.

(5) The Council must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

44NG Publication—Commonwealth Minister

(1) The Commonwealth Minister must publish, by electronic or other means, his or her decision on a recommendation under section 44M, 44NA or 44NBA and his or her reasons for the decision.

(2) The Commonwealth Minister must give a copy of the publication to:

(a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative); and

(b) the provider of the service.

Consultation

(3) Before publishing under subsection (1), the Commonwealth Minister may give any one or more of the following persons:

(a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative);

(b) the provider of the service;

(c) any other person the Minister considers appropriate;

a notice in writing:

(d) specifying what the Minister is proposing to publish; and

(e) inviting the person to make a written submission to the Minister within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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(4) The Commonwealth Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

Subdivision E—Review of decisions

44O Review of Ministerial decision on effectiveness of access regime

(1) The responsible Minister of the State or Territory:

(a) who applied for a recommendation under section 44M that the Commonwealth Minister decide that the access regime is an effective access regime; or

(b) who applied for a recommendation under section 44NA that the Commonwealth Minister decide to extend the period for which the decision under section 44N is in force;

may apply to the Tribunal for review of the Commonwealth Minister's decision.

(1A) If, on receiving a recommendation under section 44NBA relating to a decision under section 44N, the Commonwealth Minister has made a decision under section 44NBC:

(a) the person who applied under subsection 44NBA(3) for the Council to make a recommendation relating to that decision under section 44N; or

(b) any other person who could have applied under subsection 44NBA(3) for the Council to make such a recommendation;

may apply to the Tribunal for review of the Commonwealth Minister's decision under section 44NBC.

(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 based on the information, reports and things referred to in section 44ZZOAA.

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Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

(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 assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for the review; and

(ii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

(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).

Subdivision F—State or Territory ceasing to be a party to Competition Principles Agreement

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:

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(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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Division 2B—Competitive tender processes for government owned facilities

44PA Approval of competitive tender process

Application to Commission

(1) The Commonwealth Minister, or the responsible Minister of a State or Territory, may make a written application to the Commission asking it to approve a tender process, for the construction and operation of a facility that is to be owned by the Commonwealth, State or Territory, as a competitive tender process.

(2) The application must:
  (a) specify the service or services proposed to be provided by means of the facility; and
  (b) be in accordance with the regulations.

Decision of Commission

(3) The Commission must, by notice in writing, approve or refuse to approve the tender process as a competitive tender process.

Note 1: While a decision is in force approving a tender process as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph (2)(a): see subsection 44H(3A).

Note 2: There are time limits that apply to the Commission's decision: see section 44PD.

Note 3: The Commission may request information and invite public submissions on the application: see sections 44PAA and 44PE.

Note 4: The Commission must publish its decision: see section 44PF.

(4) The Commission must not approve a tender process as a competitive tender process unless:

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(a) it is satisfied that reasonable terms and conditions of access to any service specified under paragraph (2)(a) will be the result of the process; and

(b) it is satisfied that the tender process meets the requirements prescribed by the regulations.

(4A) The Commission may approve the tender process as a competitive tender process even if the service proposed to be provided by means of the facility is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be a declared service.

Period for which decision in force

(5) If the Commission approves the tender process as a competitive tender process, it may specify in the notice the period for which the decision is in force.

Note: Section 44PC provides for revocation of the decision.

(6) The Commission may, by writing, extend that period by a specified period. The Commission may do so more than once.

Legislation Act 2003

(7) A notice under subsection (3) is not a legislative instrument.

44PAA Commission may request information

(1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of the kind specified in the notice that the Commission considers may be relevant to deciding whether to approve or refuse to approve a tender process under section 44PA.

(2) The Commission must:

(a) if the person is not the applicant—give a copy of the notice to the applicant; and

(b) publish, by electronic or other means, the notice.

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(3) In deciding whether to approve or refuse to approve the tender process, the Commission:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

(b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44PB Report on conduct of tender process

Report

(1) If the Commission approves a tender process as a competitive tender process, it must, after a tenderer is chosen, ask the applicant under subsection 44PA(1), by notice in writing, to give the Commission a written report on the conduct of the tender process.

(2) The report must be in accordance with the regulations.

Commission may ask for further information

(3) After the Commission receives the report, it may ask the applicant under subsection 44PA(1), by notice in writing, to give the Commission further information in relation to the conduct of the tender process.

Legislation Act 2003

(4) A report under subsection (1) is not a legislative instrument.

44PC Revocation of approval decision

Discretionary revocation

(1) The Commission may, by writing, revoke a decision to approve a tender process as a competitive tender process if it is satisfied that the assessment of the tenders was not in accordance with that process.

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Note 1: The Commission may invite public submissions on any proposed revocation decision: see section 44PE.

Note 2: The Commission must publish its decision: see section 44PF.

(2) The Commission may, by writing, revoke a decision to approve a tender process as a competitive tender process if it is satisfied that the provider of a service:

(a) specified under paragraph 44PA(2)(a); and

(b) being provided by means of the facility concerned;

is not complying with the terms and conditions of access to the service.

Note 1: The Commission may invite public submissions on any proposed revocation decision: see section 44PE.

Note 2: The Commission must publish its decision: see section 44PF.

(3) Before making a decision under subsection (2), the Commission must give the applicant under subsection 44PA(1), and the provider of the service, a written notice:

(a) stating that the Commission is proposing to make such a decision and the reasons for it; and

(b) inviting the person to make a written submission to the Commission on the proposal; and

(c) stating that any submission must be made within the period of 40 business days after the notice is given.

(4) The Commission must consider any written submission received within that period.

Mandatory revocation

(5) If:

(a) the Commission approves a tender process as a competitive tender process; and

(b) the Commission gives the applicant a notice under subsection 44PB(1) or (3); and

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(c) the applicant does not comply with the notice within the period of 40 business days beginning on the day on which the notice is given;

the Commission must, by writing, revoke the approval decision at the end of that period. The Commission must give notice of the revocation to the applicant.

Definition

(6) In this section:

business day means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

44PD Time limit for Commission decisions

Commission to make decision within 90 days

(1) The Commission must make a decision on an application under subsection 44PA(1) within the period of 90 days (the ***expected period***) starting at the start of the day the application is received.

Stopping the clock

(2) In working out the expected period in relation to a decision on an application under subsection 44PA(1), in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement

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Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
2	A notice is given under subsection 44PAA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is published under subsection 44PE(1) inviting public submissions in relation to the application	The day on which the notice is published	The day specified in the notice as the day by which submissions may be made

(3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

(4) The Commission and the applicant may agree in writing that a specified period is to be disregarded in working out the expected period.

(5) The Commission must publish, by electronic or other means, the agreement.

Deemed approval as a competitive tender process

(6) If the Commission does not publish under subsection 44PF(1) its decision on the application within the expected period, it is taken, immediately after the end of the expected period, to have:

(a) approved the tender process as a competitive tender process; and

(b) published the decision to approve the process and its reasons for that decision; and

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(c) specified that the decision is in force for a period of 20 years, starting 21 days after the start of the day the decision is taken to have been published.

44PE Commission may invite public submissions

Invitation

(1) The Commission may publish, by electronic or other means, a notice inviting public submissions:
   (a) on an application under subsection 44PA(1); or
   (b) on any proposed decision under subsection 44PC(1) or (2) to revoke a decision under subsection 44PA(3) to approve a tender process as a competitive tender process;

   if it considers that it is appropriate and practicable to do so.

(2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

(3) Subject to subsection (6), in making its decision, the Commission:
   (a) must have regard to any submission made on or before the day specified in the notice; and
   (b) may disregard any submission made after the day specified in the notice.

Commission may make submissions publicly available

(4) The Commission may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

(5) A person may, at the time of making a submission, request that the Commission:

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(a) not make the whole or a part of the submission available under subsection (4); and

(b) not publish or make available the whole or a part of the submission under section 44PF;

because of the confidential commercial information contained in the submission.

(6) If the Commission refuses such a request:

(a) for a written submission—the Commission must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Commission that the person withdraws the whole or the part of it; and

(c) if the Commission returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Commission must not:

(i) make the whole or the part of the submission available under subsection (4); and

(ii) publish or make available the whole or the part of the submission under section 44PF; and

(iii) have regard to the whole or the part of the submission in making its decision.

44PF Commission must publish its decisions

(1) The Commission must publish, by electronic or other means, a decision under subsection 44PA(3) or 44PC(1) or (2) and its reasons for the decision.

(2) The Commission must give a copy of the publication to:

(a) for any decision—the applicant under subsection 44PA(1); and

(b) for a decision under subsection 44PC(2)—the provider of the service.

It may also give a copy to any other person the Commission considers appropriate.

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Consultation

(3) Before publishing under subsection (1), the Commission may give the following persons:

(a) for any decision—the applicant under subsection 44PA(1) or any other person the Commission considers appropriate;

(b) for a decision under subsection 44PC(2)—the provider of the service;

a notice in writing:

(c) specifying what the Commission is proposing to publish; and

(d) inviting the person to make a written submission to the Commission within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(4) The Commission must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

44PG Review of Commission's initial decision

Application

(1) A person whose interests are affected by a decision of the Commission under subsection 44PA(3) may apply in writing to the Tribunal for review of the decision.

(2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

(3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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(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 assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

Tribunal's decision

(6) If the Commission refused to approve a tender process as a competitive tender process, the Tribunal must, by writing:

(a) affirm the Commission's decision; or

(b) set aside the Commission's decision and approve the process as a competitive tender process.

(7) A decision of the Tribunal to approve a process as a competitive tender process is taken to be a decision by the Commission for all purposes of this Part (except this section).

(8) If the Commission approved a tender process as a competitive tender process, the Tribunal must, by writing, affirm or set aside the Commission's decision.

Note: If the Tribunal sets aside a decision of the Commission to approve a tender process as a competitive tender process, the Commission's decision is no longer in force. This means the designated Minister is

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no longer prevented by subsection 44H(3A) from declaring a service provided by means of the facility concerned.

44PH Review of decision to revoke an approval

Application

(1) If the Commission makes a decision under subsection 44PC(1) or (2), the following persons may apply in writing to the Tribunal for review of the decision:

(a) for either decision—the applicant under subsection 44PA(1) or any other person whose interests are affected by the decision;

(b) for a decision under subsection 44PC(2)—the provider of the service.

(2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

(3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

(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 assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

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(a) give a copy of the notice to:
  (i) the person who applied for review; and
  (ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and
  (iii) for a review of a decision under subsection 44PC(2)—the provider of the service; and
  (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
(b) publish, by electronic or other means, the notice.

Tribunal's decision

(6) The Tribunal must, by writing, affirm or set aside the Commission's decision.

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Division 2C—Register of decisions and declarations

44Q Register of decisions, declarations and ineligibility decisions

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

(aa) each decision of the Commonwealth Minister to extend the period for which a decision under section 44N is in force; and

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

(ba) each decision of a designated Minister under section 44LG that a service is ineligible to be a declared service; and

(bb) each decision of a designated Minister under section 44LI to revoke his or her decision that a service is ineligible to be a declared service; and

(c) each decision of the Commission under subsection 44PA(3) to approve a tender process as a competitive tender process; and

(d) each decision of the Commission under section 44PC to revoke a decision under subsection 44PA(3).

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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, but only to the extent that those aspects of access are not the subject of an access undertaking that is in operation in relation to the service.

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.

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44T Withdrawal of notifications

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

(a) if the provider notified the dispute:

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

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

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

(2) Despite subparagraph (1)(a)(ii), if the provider notified a dispute over variation of a final 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, 44YA, 44ZZCB or 44ZZCBA, the Commission:

(a) must make a written final determination; and

(b) may make a written interim determination;

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on access by the third party to the service.

Note 1: There are time limits that apply to the Commission's final determination: see section 44XA.

Note 2: The Commission may defer arbitration of the access dispute if it is also considering an access undertaking: see section 44ZZCB.

(2) A 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:

(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;

(da) require the provider to permit interconnection to the facility by the third party;

(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(2A) Without limiting paragraph (2)(d), a requirement referred to in that paragraph may do either or both of the following:

(a) require the provider to expand the capacity of the facility;

(b) require the provider to expand the geographical reach of the facility.

(3) A 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.

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(6) A determination is not a legislative instrument.

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 (including expansions of the capacity of the facility and expansions of the geographical reach 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 (including expanding the capacity of the facility and expanding the geographical reach of the facility);

(ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility);

(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.

(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.

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(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.

(4A) If an application for review of a declaration of a service has been made under subsection 44K(1), the Commission must not make a determination in relation to the service until the Tribunal has made its decision on the review.

(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

Final determinations

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

(aa) the objects of this Part;

(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 (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else;

(ea) the value to the provider of interconnections to the facility 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;

(h) the pricing principles specified in section 44ZZCA.

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

Interim determinations

(3) The Commission may take the following matters into account in making an interim determination:

(a) a matter referred to in subsection (1);

(b) any other matter it considers relevant.

(4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in subsection (1).

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44XA Time limit for Commission's final determination

Commission to make final determination within 180 days

(1) The Commission must make a final determination within the period of 180 days (the ***expected period***) starting at the start of the day the application is received.

Stopping the clock

(2) In working out the expected period in relation to a final determination, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
   (a) starting on the day referred to in column 2 of the item; and
   (b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the arbitration under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A direction is given under subsection 44ZG(1) to give information or make a submission within a specified period	The first day of the period specified for the giving of the information or the making of the submission	The last day of the period specified for the giving of the information or the making of the submission
3	A decision is published under subsection 44ZZCB(4) deferring consideration of the dispute while the Commission considers an access undertaking	The day on which the decision is published	The day on which the Commission makes its decision on the access undertaking under subsection 44ZZA(3)

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Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
4	The Commission, under subsection 44ZZCBA(1) or (2), defers arbitrating the dispute while a declaration is under review by the Tribunal	The day on which the Commission gives the notice to defer arbitrating the dispute	The day the Tribunal makes its decision under section 44K on the review

(3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

(4) The Commission and the parties to the access dispute may agree in writing that a specified period is to be disregarded in working out the expected period.

(5) The Commission must publish, by electronic or other means, the agreement.

Deemed final determination

(6) If the Commission does not publish under section 44ZNB a written report about a final determination within the expected period, it is taken, immediately after the end of the expected period, to have:
  (a) made a final determination that does not impose any obligations on the parties or alter any obligations (if any) that exist at that time between the parties; and
  (b) published a written report about the final determination under section 44ZNB.

44Y Commission may terminate arbitration in certain cases

(1) The Commission may at any time terminate an arbitration (without making a final determination) if it thinks that:
  (a) the notification of the dispute was vexatious; or

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(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.

44YA Commission must terminate arbitration if declaration varied or set aside by Tribunal

If the Commission is arbitrating a dispute in relation to a declared service and the Tribunal sets aside or varies the declaration in relation to the service under section 44K, the Commission must terminate the arbitration.

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.

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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 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.

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(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
   (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.

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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.

(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.

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(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.

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).

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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.

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

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(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.

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.

44ZNA Joint arbitration hearings

Joint arbitration hearing

(1) If:

(a) the Commission is arbitrating 2 or more access disputes at a particular time; and

(b) one or more matters are common to those disputes;

the Chairperson may, by notice in writing, decide that the Commission must hold a joint arbitration hearing in respect of such of those disputes (the ***nominated disputes***) as are specified in the notice.

(2) The Chairperson may do so only if he or she considers this would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.

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Consulting the parties

(3) Before doing so, the Chairperson must give each party to the arbitration of each nominated dispute a notice in writing:
  (a) specifying what the Chairperson is proposing to do; and
  (b) inviting the party to make a written submission on the proposal to the Chairperson within 14 days after the notice is given.

(4) The Chairperson must have regard to any submission so made in deciding whether to do so. He or she may have regard to any other matter he or she considers relevant.

Directions to presiding member

(5) The Chairperson may, for the purposes of the conduct of the joint arbitration hearing, give written directions to the member of the Commission presiding at the hearing.

Constitution and procedure of Commission

(6) Sections 44Z to 44ZN apply to the joint arbitration hearing in a corresponding way to the way in which they apply to a particular arbitration.

Note: For example, the Chairperson would be required to nominate in writing 1 or more members of the Commission to constitute the Commission for the purposes of the joint arbitration hearing.

Record of proceedings etc.

(7) The Commission as constituted for the purposes of the joint arbitration hearing may have regard to any record of the proceedings of the arbitration of any nominated dispute.

(8) The Commission as constituted for the purposes of the arbitration of each nominated dispute may, for the purposes of making a determination in relation to that arbitration:
  (a) have regard to any record of the proceedings of the joint arbitration hearing; and

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(b) adopt any findings of fact made by the Commission as constituted for the purposes of the joint arbitration hearing.

Legislation Act 2003

(9) The following are not legislative instruments:
(a) a notice made under subsection (1);
(b) a direction given under subsection (5).

Subdivision DA—Arbitration reports

44ZNB Arbitration reports

(1) The Commission must prepare a written report about a final determination it makes. It must publish, by electronic or other means, the report.

(2) The report may include the whole or a part of the determination and the reasons for the determination or the part of the determination.

Report must include certain matters

(3) The report must set out the following matters:
(a) the principles the Commission applied in making the determination;
(b) the methodologies the Commission applied in making the determination and the reasons for the choice of the asset valuation methodology;
(c) how the Commission took into account the matters mentioned in subsection 44X(1) in making the determination;
(d) any matter the Commission took into account under subsection 44X(2) in making the determination and the reasons for doing so;
(e) any information provided by the parties to the arbitration that was relevant to those principles or methodologies;

Note: Confidentiality issues are dealt with in subsections (5) to (7).

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(f) any implications the Commission considers the determination has for persons seeking access to the service or to similar services in the future;

(g) if applicable—the reasons for the determination dealing with matters that were already agreed between the parties to the arbitration at the time the access dispute was notified;

(h) if applicable—the reasons for the access dispute being the subject of a joint arbitration hearing under section 44ZNA despite the objection of a party to the arbitration.

Report may include other matters

(4) The report may include any other matter that the Commission considers relevant.

Confidentiality

(5) The Commission must not include in the report any information the Commission decided not to give to a party to the arbitration under section 44ZL.

(6) Before publishing the report, the Commission must give each party to the arbitration a notice in writing:

(a) specifying what the Commission is proposing to publish; and

(b) inviting the party to make a written submission to the Commission within 14 days after the notice is given identifying any information the party considers should not be published because of its confidential commercial nature.

(7) The Commission must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Legislation Act 2003

(8) A report prepared under subsection (1) is not a legislative instrument.

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Subdivision E—Effect of determinations

44ZO Operation of final determinations

(1) If none of the parties to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's final 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 final determination, the determination is of no effect until the Tribunal makes its determination on the review.

Backdating

(3) Any or all of the provisions of a final determination may be expressed to apply from a specified day that is earlier than the day on which it takes effect under subsection (1) or (2).

Example: The Commission makes a final determination on 1 August. It takes effect under subsection (1) on 22 August, but it is expressed to apply from 1 July.

(4) The specified day must not be earlier than the following day:

(a) if the third party and provider commenced negotiations on access to the service after the service became a declared service—the day on which the negotiations commenced;

(b) if the third party and provider commenced negotiations on access to the service before the service became a declared service—the day on which the declaration began to operate.

However, the specified day cannot be a day on which the third party did not have access to the service.

Operation of interim determination

(5) If a provision of a final determination is expressed to apply from a day when an interim determination was in effect, the provision of the final determination prevails over the interim determination to the extent set out in the final determination.

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Interest

(6) If:

(a) a provision of a final determination is covered by subsection (3); and

(b) the provision requires a party to the determination (the ***first party***) to pay money to another party;

the determination may require the first party to pay interest to the other party, at the rate specified in the determination, on the whole or a part of the money, for the whole or a part of the period:

(c) beginning on the day specified under subsection (3); and

(d) ending on the day on which the determination takes effect under subsection (1) or (2).

Guidelines

(7) In exercising the power conferred by subsection (3) or (6), the Commission must have regard to any guidelines in force under subsection (8). It may have regard to any other matter it considers relevant.

(8) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (7).

(9) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (8) is made within 6 months after the commencement of this subsection.

44ZOA Effect and duration of interim determinations

(1) An interim determination takes effect on the day specified in the determination.

(2) Unless sooner revoked, an interim determination continues in effect until the earliest of the following:

(a) the notification of the access dispute is withdrawn under section 44T;

(b) a final determination relating to the access dispute takes effect;

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Note: A backdated final determination may prevail over an interim determination: see subsection 44ZO(5).

(c) an interim determination made by the Tribunal (while reviewing a final determination relating to the access dispute) takes effect.

Subdivision F—Review of final determinations

44ZP Review by Tribunal

(1) A party to a final 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 final determination.

(3) A review by the Tribunal is a re-arbitration of the access dispute based on the information, reports and things referred to in section 44ZZOAA.

Note: There are time limits that apply to the Tribunal's decision on the review: see section 44ZZOA.

(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 assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the other party or parties to the final determination; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

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(b) publish, by electronic or other means, the notice.

(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 final 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 and revocation of determinations

44ZU Variation of final determinations

(1) The Commission may vary a final determination on the application of any party to the determination. However, it cannot vary the final 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 final 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 final determination in the terms of the varied determination.

44ZUA Variation and revocation of interim determinations

(1) The Commission may, by writing, vary or revoke an interim determination.

(2) The Commission must, by writing, revoke an interim determination if requested to do so by the parties to the 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:

(aa) the objects of this Part; and

(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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(2A) The Commission must not register a contract if it deals with a matter or matters relating to access to the service that are dealt with in an access undertaking that is in operation.

(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 based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

(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 assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

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(ii) the other party or parties to the contract; and
(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice; and

(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 and access codes for services

Subdivision A—Giving of access undertakings and access codes

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:

(aa) the objects of this Part;

(ab) the pricing principles specified in section 44ZZCA;

(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;

(da) whether the undertaking is in accordance with an access code that applies to the service;

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(e) any other matters that the Commission thinks are relevant.

Note 1: There are grounds on which the Commission may reject the undertaking if it contains, or should contain, fixed principles: see section 44ZZAAB.

Note 2: The Commission may defer consideration of the undertaking if it is also arbitrating an access dispute: see section 44ZZCB.

(3AA) The Commission must not accept the undertaking if a decision of the Commonwealth Minister is in force under section 44N that a regime established by a State or Territory for access to the service is an effective access regime.

(3AB) The Commission may reject the undertaking if it incorporates one or more amendments (see subsection 44ZZAAA(5)) and the Commission is satisfied that the amendment or amendments are of a kind, are made at a time, or are made in a manner that:

(a) unduly prejudices anyone the Commission considers has a material interest in the undertaking; or

(b) unduly delays the process for considering the undertaking.

(3A) The Commission must not accept the undertaking unless:

(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.

(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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(6B) The Commission may accept the undertaking even if the service is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be a declared service.

(7) The provider may:

(a) withdraw the application given under subsection (1) at any time before the Commission makes a decision on whether to accept the application; and

(b) withdraw or vary the undertaking at any time after it has been accepted by the Commission, but only with the consent of the Commission.

The Commission may consent to a variation of the undertaking if it thinks it appropriate to do so having regard to the matters in subsection (3).

Note 1: There are time limits that apply to a decision of the Commission under this section: see section 44ZZBC.

Note 2: The Commission may request information and invite public submissions in relation to its decision: see sections 44ZZBCA and 44ZZBD.

Note 3: The Commission must publish its decision: see section 44ZZBE.

44ZZAAA Proposed amendments to access undertakings

Commission may give an amendment notice in relation to an undertaking

(1) Before deciding whether to accept an undertaking given to it under subsection 44ZZA(1) by a person who is, or expects to be, the provider of a service, the Commission may give the person an amendment notice in relation to the undertaking.

(2) An ***amendment notice*** is a notice in writing that specifies:

(a) the nature of the amendment or amendments (the ***proposed amendment or amendments***) that the Commission proposes be made to the undertaking; and

(b) the Commission's reasons for the proposed amendment or amendments; and

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(c) the period (the ***response period***) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person.

(3) The Commission may publish, by electronic or other means, the amendment notice.

(4) The Commission may give more than one amendment notice in relation to an undertaking.

Person may give a revised undertaking in response to notice

(5) If a person receives an amendment notice, the person may, within the response period, respond to the notice by giving a revised undertaking to the Commission that incorporates one or more amendments.

(6) If the revised undertaking incorporates one or more amendments that the Commission considers are not of the nature proposed in the amendment notice and do not address the reasons for the proposed amendments given in the amendment notice, the Commission must not accept the revised undertaking and must return it to the person within 21 days of receiving it.

(7) If the person gives a revised undertaking under subsection (5) and the revised undertaking is not returned to the person under subsection (6), the revised undertaking is taken, after the time it is given to the Commission, to be the undertaking given under section 44ZZA for the purposes of this Part.

(8) The person is taken to have not agreed to the proposed amendment or amendments if the person does not respond within the response period.

Commission not required to accept revised undertaking

(9) The Commission is not required to accept the revised undertaking under section 44ZZA.

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No duty to propose amendments

(10) In considering whether to accept an undertaking, the Commission does not have a duty to consider whether to propose one or more amendments to the undertaking.

Notice of proposed amendment is not a legislative instrument

(11) A notice given under subsection (1) is not a legislative instrument.

44ZZAAB Access undertakings containing fixed principles

Access undertakings may contain fixed principles

(1) An access undertaking given to the Commission under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period.

(2) Each of the terms is a ***fixed principle*** and the specified period is a ***fixed period***. Different periods may be specified for different fixed principles.

(3) The fixed period must:
  (a) start:
    (i) when the access undertaking comes into operation; or
    (ii) at a later time ascertained in accordance with the undertaking; and
  (b) extend beyond the expiry date of the undertaking.

Consideration of fixed principles

(4) The Commission may reject the undertaking if it:
  (a) includes a term that is not a fixed principle and that the Commission considers should be a fixed principle; or
  (b) includes a fixed principle that the Commission considers should not be fixed; or
  (c) includes a fixed principle that the Commission considers should be fixed for a period that is different from the period specified in the undertaking.

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However, the Commission must not reject the undertaking solely on the basis that it is consistent with a fixed principle that is included in the undertaking in compliance with subsection (6).

Fixed principles must be carried over to later undertakings

(5) Subsection (6) applies if:

(a) the Commission accepts an undertaking (the ***earlier undertaking***) in connection with the provision of access to a service that includes a fixed principle; and

(b) an undertaking (the ***later undertaking***) is given to the Commission in connection with the provision of access to the service within the fixed period for the fixed principle; and

(c) at the time the later undertaking is given:

(i) the fixed principle has not been revoked under subsection (7); and

(ii) the earlier undertaking has not been varied under subsection 44ZZA(7) so that the fixed principle is no longer a term of the earlier undertaking.

(6) The Commission must not accept the later undertaking under section 44ZZA unless the undertaking includes a term that is the same as the fixed principle.

Variation or revocation of fixed principles when no undertaking is in operation

(7) If there is no access undertaking in operation in connection with the provision of access to a service, the provider may revoke or vary a fixed principle that relates to the service (including the fixed period for the principle), but only with the consent of the Commission. The Commission may consent to the revocation or variation of the fixed principle if it thinks it appropriate to do so having regard to the matters in subsection 44ZZA(3).

Note: Subsection 44ZZA(7) contains provision for fixed principles to be varied or revoked in the situation where there is an access undertaking in operation. This may include a variation of the fixed period for the fixed principle.

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Alteration of fixed principles

(8) If an undertaking that is accepted by the Commission contains one or more fixed principles, the undertaking is accepted on the basis that:

(a) the principle may be varied or revoked under subsection (7) or 44ZZA(7); and

(b) the principle may be cancelled, revoked, terminated or varied by or under later legislation; and

(c) no compensation is payable if the principle is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

(9) Subsection (8) does not, by implication, affect the interpretation of any other provision of this Act.

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:

(aa) the objects of this Part;

(ab) the pricing principles specified in section 44ZZCA;

(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;

(e) any matters specified in regulations made for the purposes of this subsection;

(f) any other matters that the Commission thinks are relevant.

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(3A) The Commission must not accept the code if a decision of the Commonwealth Minister is in force under section 44N that a regime established by a State or Territory for access to the service is an effective access regime.

(6) The industry body may:

(a) withdraw the code given under subsection (1) at any time before the Commission makes a decision whether to accept the code; and

(b) withdraw or vary the code at any time after it has been accepted by the Commission, but only with the consent of the Commission.

The Commission may consent to a variation of the code if it thinks it appropriate to do so having regard to the matters in subsection (3).

Note: The Commission may rely on industry body consultations before giving its consent: see section 44ZZAB.

(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 (including a body or association established by a law of a State or Territory) prescribed by the regulations for the purposes of this section.

Note 1: There are time limits that apply to a decision of the Commission under this section: see section 44ZZBC.

Note 2: The Commission may request information and invite public submissions in relation to its decision: see sections 44ZZBCA and 44ZZBD.

Note 3: The Commission must publish its decision: see section 44ZZBE.

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44ZZAB Commission may rely on industry body consultations

(1) The Commission may accept a code if the industry body has done the following before giving the code to the Commission under subsection 44ZZAA(1):

(a) published the code or a draft of the code and invited people to make submissions to the industry body on the code or draft;

(b) specified the effect of this subsection and subsection (2) when it published the code or draft;

(c) considered any submissions that were received within the time limit specified by the industry body when it published the code or draft.

(2) In deciding whether to accept the code, the Commission may consider any submission referred to in paragraph (1)(c).

(3) Before consenting to a variation or withdrawal of a code under subsection 44ZZAA(6), the Commission may rely on:

(a) publication of the variation or notice of the withdrawal by the industry body, including specification of the effect of this subsection and subsection (4); and

(b) consideration by the industry body of any submissions that were received within the time limit specified by the industry body when it published the variation or notice.

(4) In deciding whether to consent to the variation or withdrawal, the Commission may consider any submission referred to in paragraph (3)(b).

(5) In this section:

code has the same meaning as it has in section 44ZZAA.

industry body has the same meaning as it has in section 44ZZAA.

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Subdivision B—Effect of access undertakings and access codes

44ZZBA When access undertakings and access codes come into operation

Acceptance of access undertakings or access codes

(1) If the Commission accepts an access undertaking or an access code, it comes into operation at:

(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

(2) If the Tribunal decides under paragraph 44ZZBF(7)(e) to accept an access undertaking or access code, it comes into operation at the time of the Tribunal's decision.

(3) An access undertaking or access code continues in operation until its expiry date, unless it is earlier withdrawn.

Note: The period for which an access undertaking or access code is in operation may be extended: see section 44ZZBB.

Withdrawal or variation of access undertakings or access codes

(4) If the Commission consents to the withdrawal or variation of an access undertaking or an access code, the withdrawal or variation comes into operation at:

(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

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(5) If the Tribunal decides under paragraph 44ZZBF(7)(e) to consent to the withdrawal or variation of an access undertaking or access code, the withdrawal or variation comes into operation at the time of the Tribunal's decision.

Revocation or variation of fixed principles in access undertakings

(6) If the Commission consents to the revocation or variation of a fixed principle that is included as a term of an access undertaking under subsection 44ZZAAB(7), the revocation or variation comes into operation at:

(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

(7) If the Tribunal decides under paragraph 44ZZBF(7)(e) to consent to the revocation or variation of a fixed principle that is included as term of an access undertaking, the revocation or variation comes into operation at the time of the Tribunal's decision.

Subdivision C—Extensions of access undertakings and access codes

44ZZBB Extensions of access undertakings and access codes

Access undertakings

(1) If an access undertaking is in operation under section 44ZZBA (including as a result of an extension under this section), the provider of the service may apply in writing to the Commission for an extension of the period for which it is in operation.

Note: The Commission may extend the period for which the undertaking is in operation more than once: see subsection (8). This means there may be multiple applications under this subsection.

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(2) The provider of the service must specify in the application a proposed extension period.

(3) The Commission may, by notice in writing, extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3). The notice must specify the extension period.

Access codes

(4) If an access code is in operation under section 44ZZBA (including as a result of an extension under this section), the industry body may apply in writing to the Commission for an extension of the period for which it is in operation.

Note: The Commission may extend the period for which the code is in operation more than once: see subsection (8). This means there may be multiple applications under this subsection.

(5) The industry body must specify in the application a proposed extension period.

(6) The Commission may, by notice in writing, extend the period for which the code is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZAA(3). The notice must specify the extension period.

(7) If the industry body that gave the code to the Commission has ceased to exist, an application under subsection (4) may be made by a body or association referred to in subsection 44ZZAA(7).

Multiple extensions

(8) The Commission may extend the period for which an access undertaking or an access code is in operation more than once.

Note 1: There are time limits that apply to a decision of the Commission under this section: see section 44ZZBC.

Note 2: The Commission may request information and invite public submissions in relation to its decision: see sections 44ZZBCA and 44ZZBD.

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Note 3: The Commission must publish its decision: see section 44ZZBE.

Subdivision D—Procedural provisions

44ZZBC Time limit for Commission decisions

Commission to make decision on application within 180 days

(1) The Commission must make a decision on an access undertaking application or an access code application within the period of 180 days (the ***expected period***) starting at the start of the day the application is received.

Stopping the clock

(2) In working out the expected period in relation to an access undertaking application or an access code application, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
  (a) starting on the day referred to in column 2 of the item; and
  (b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44ZZBCA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

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Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
3	A notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application	The day on which the notice is published	The day specified in the notice as the day by which submissions may be made
4	A decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the Commission arbitrates an access dispute	The day on which the decision is published	The day on which the final determination in relation to the arbitration of the access dispute is made

(3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

(4) The Commission and:

(a) for an access undertaking application—the provider of the service; and

(b) for an access code application—the industry body or its replacement;

may agree in writing that a specified period is to be disregarded in working out the expected period.

(5) The Commission must publish, by electronic or other means, the agreement.

Deemed final determination

(6) If the Commission does not publish under section 44ZZBE an access undertaking decision or an access code decision within the

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expected period, it is taken, immediately after the end of the expected period, to have:

(a) made a decision to not accept the application; and

(b) published its decision under section 44ZZBE and its reasons for that decision.

44ZZBCA Commission may request information

(1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of a kind specified in the notice that the Commission considers may be relevant to making a decision on an access undertaking application or an access code application.

(2) The Commission must:

(a) give a copy of the notice to:

(i) in the case of an access undertaking application—the provider of the service (unless the provider is the person); and

(ii) in the case of an access code application—the industry body that gave the application to the Commission (unless the body is the person); and

(b) publish, by electronic or other means, the notice.

(3) In making a determination, the Commission:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

(b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44ZZBD Commission may invite public submissions

Invitation

(1) The Commission may publish, by electronic or other means, a notice inviting public submissions on an access undertaking

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application or an access code application if it considers that it is appropriate and practicable to do so.

(2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

(3) Subject to subsection (6), in making its decision on the application, the Commission:

(a) must have regard to any submission made on or before the day specified in the notice; and

(b) may disregard any submission made after the day specified in the notice.

Commission may make submissions publicly available

(4) The Commission may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

(5) A person may, at the time of making a submission, request that the Commission:

(a) not make the whole or a part of the submission available under subsection (4); and

(b) not publish or make available the whole or a part of the submission under section 44ZZBE;

because of the confidential commercial information contained in the submission.

(6) If the Commission refuses such a request:

(a) for a written submission—the Commission must, if the person who made it so requires, return the whole or the part of it to the person; and

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(b) for an oral submission—the person who made it may inform the Commission that the person withdraws the whole or the part of it; and

(c) if the Commission returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Commission must not:

(i) make the whole or the part of the submission available under subsection (4); and

(ii) publish or make available the whole or the part of the submission under section 44ZZBE; and

(iii) have regard to the whole or the part of the submission in making its decision on the application.

44ZZBE Commission must publish its decisions

(1) The Commission must publish, by electronic or other means, an access undertaking decision or an access code decision and its reasons for the decision.

(2) The Commission must give a copy of the publication to:

(a) for an access undertaking decision—the provider of the service; or

(b) for an access code decision—the industry body or its replacement.

Consultation

(3) Before publishing under subsection (1), the Commission may give any one or more of the following persons:

(a) for an access undertaking decision—the provider of the service;

(b) for an access code decision—the industry body or its replacement;

(c) in any case—any other person the Commission considers appropriate;

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a notice in writing:

(d) specifying what the Commission is proposing to publish; and

(e) inviting the person to make a written submission to the Commission within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(4) The Commission must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Subdivision E—Review of decisions

44ZZBF Review of decisions

Application

(1) A person whose interests are affected by an access undertaking decision or an access code decision may apply in writing to the Tribunal for review of the decision.

(2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

(3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

(4) For the purposes of the review, the Tribunal has the same powers as the Commission (other than the power to propose amendments under section 44ZZAAA).

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

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(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

Tribunal's decision

(6) If the Commission:

(a) accepted an access undertaking or access code; or

(b) consented to the withdrawal or variation of an access undertaking or access code; or

(ba) consented to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or

(c) extended the period for which an access undertaking or access code is in operation;

the Tribunal must, by writing, affirm or set aside the Commission's decision.

(7) If the Commission:

(a) rejected an access undertaking or access code; or

(b) refused to consent to the withdrawal or variation of an access undertaking or access code; or

(ba) refused to consent to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or

(c) refused to extend the period for which an access undertaking or access code is in operation;

the Tribunal must, by writing:

(d) affirm the Commission's decision; or

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(e) set aside the Commission's decision and accept the undertaking or code, consent to the withdrawal or variation of the undertaking or code, consent to the revocation or variation of the fixed principle or extend the period for which the undertaking or code is in operation.

Subdivision F—Register of access undertakings and access codes

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.

(1A) For the purposes of subsection (1), if an access undertaking includes one or more fixed principles, the register must also include details of the fixed principles, including their fixed periods.

(2) The register must include all variations of access undertakings and access codes.

(3) The register must also include details of all extensions of the period for which an access undertaking or an access code is in operation.

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Division 6A—Pricing principles for access disputes and access undertakings or codes

44ZZCA Pricing principles for access disputes and access undertakings or codes

The pricing principles relating to the price of access to a service are:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.

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Division 6B—Overlap among determinations, registered contracts, access undertakings and Tribunal review

44ZZCB Deferring access disputes or access undertakings

(1) If, at a particular time, the Commission is:

(a) arbitrating an access dispute under Division 3 relating to one or more matters of access to a declared service; and

(b) considering whether to accept an access undertaking relating to the service and to one or more of those matters;

then the Commission may, by notice in writing, decide to:

(c) defer arbitrating the access dispute, in whole or in part, while it considers the access undertaking; or

(d) defer considering whether to accept the access undertaking, in whole or in part, while it arbitrates the access dispute.

Deferral of arbitration of access dispute

(2) If:

(a) the Commission defers arbitrating the access dispute; and

(b) the Commission then accepts the access undertaking and it comes into operation;

then the Commission must terminate the arbitration when the undertaking comes into operation, but only to the extent of the matters relating to access to the service that are dealt with in the undertaking.

Note: The third party's access to the service is determined under the access undertaking to the extent of the matters it deals with. If the access dispute deals with other matters, the third party's access to the service in relation to those other matters is determined under any determination the Commission makes.

Deferral of consideration of access undertaking

(3) If:

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(a) the Commission defers considering whether to accept the access undertaking; and

(b) the Commission then makes a final determination in relation to the arbitration of the access dispute;

then the Commission must resume considering whether to accept the access undertaking.

Publication

(4) The Commission must publish, by electronic or other means, any decision it makes under subsection (1) and its reasons for the decision. The Commission must give a copy of the decision (including the reasons for the decision) to each party to the arbitration.

Guidelines

(5) In exercising the power conferred by subsection (1), the Commission must have regard to:

(a) the fact that the access undertaking will, if accepted, apply generally to access seekers and a final determination relating to the access dispute will only apply to the parties to the arbitration; and

(b) any guidelines in force under subsection (6).

It may have regard to any other matter it considers relevant.

(6) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (5).

(7) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (6) is made within 6 months after the commencement of this subsection.

Legislation Act 2003

(8) A notice made under subsection (1) is not a legislative instrument.

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44ZZCBA Deferral of arbitration if review is underway

Commission may defer arbitration if declaration not stayed

(1) If:

(a) the Commission is arbitrating an access dispute relating to one or more matters of access to a declared service; and

(b) an application for review of the declaration of the service has been made under subsection 44K(1); and

(c) the Tribunal does not make an order under section 44KA staying the operation of the declaration;

then the Commission may, by notice in writing to each party to the arbitration, decide to defer arbitrating the access dispute until the Tribunal has made its decision on the review if it considers it appropriate to do so.

Commission must defer arbitration if declaration stayed

(2) If:

(a) the Commission is arbitrating an access dispute relating to one or more matters of access to a declared service; and

(b) an application for review of the declaration of the service has been made under subsection 44K(1); and

(c) the Tribunal makes an order under section 44KA staying the operation of the declaration;

then the Commission must, by notice in writing to each party to the arbitration, defer arbitrating the access dispute until the Tribunal has made its decision on the review.

Resumption of arbitration if declaration affirmed

(3) If the Commission defers arbitrating the access dispute and the Tribunal affirms the declaration, the Commission must resume arbitrating the dispute.

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Termination of arbitration if declaration varied or set aside

(4) If the Commission defers arbitrating the access dispute and the Tribunal sets aside or varies the declaration, the Commission must terminate the arbitration.

(5) If:

(a) an arbitration is terminated under subsection (4) or section 44YA; and

(b) an access dispute is notified under section 44S in relation to access to the same declared service; and

(c) the parties to the dispute are the same parties to the terminated arbitration;

then the Commission may have regard to any record made in the course of the terminated arbitration if it considers it appropriate to do so.

Notices are not legislative instruments

(6) A notice given under subsection (1) or (2) is not a legislative instrument.

44ZZCC Overlap between determinations and access undertakings

If, at a particular time:

(a) a final determination is in operation in relation to a declared service; and

(b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with a matter or matters relating to access to the service that are not dealt with in the determination.

44ZZCD Overlap between registered contracts and access undertakings

If, at a particular time:

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(a) a contract is registered under Division 4 in relation to a declared service; and

(b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with a matter or matters relating to access to the service that are not dealt with in the contract.

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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

(b) the person has previously refused or failed to do that thing; or

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(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 Division 6 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.

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 Commonwealth consent to conferral of functions etc. on the Commission or Tribunal by State or Territory laws

(1) Subject to section 44ZZMAA, a State or Territory access regime law may confer functions or powers, or impose duties, on the Commission or Tribunal.

Note: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

(2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a law of a State or Territory to the extent to which:

(a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the Commission or Tribunal; or

(b) the authorisation would otherwise exceed the legislative power of the Commonwealth.

(3) The Commission or Tribunal cannot perform a duty or function, or exercise a power, under a State or Territory access regime law unless the conferral of the function or power, or the imposition of the duty, is in accordance with an agreement between the Commonwealth and the State or Territory concerned.

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44ZZMAA No merits review by Tribunal of decisions under energy laws

(1) This section applies if a State/Territory energy law or the *Australian Energy Market Act 2004* purports to confer a function or power, or to impose a duty, in relation to a decision made under:

(a) a State/Territory energy law; or

(b) a uniform energy law applied as a law of the Commonwealth under the *Australian Energy Market Act 2004*.

However, this section does not apply in relation to a decision relating to the disclosure of confidential or protected information under such a law.

(2) The purported conferral or imposition has no effect to the extent to which it would require or permit merits review (however described) of the decision by the Tribunal.

(3) This section applies despite anything in any law of the Commonwealth, a State or a Territory.

44ZZMA How duty is imposed

Application

(1) This section applies if a State or Territory access regime law purports to impose a duty on the Commission or Tribunal.

Note 1: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

Note 2: Section 320 of the South Australian Energy Retail Legislation, as it applies as a law of a State or Territory, deals with the case where a duty purportedly imposed on a Commonwealth body under that applied law cannot be imposed by the State or Territory or the Commonwealth due to constitutional doctrines restricting such duties.

State or Territory legislative power sufficient to support duty

(2) The duty is taken not to be imposed by this Act (or any other law of the Commonwealth) to the extent to which:

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(a) imposing the duty is within the legislative powers of the State or Territory concerned; and

(b) imposing the duty by the law of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the Commission or Tribunal.

Note: If this subsection applies, the duty will be taken to be imposed by force of the law of the State or Territory (the Commonwealth having consented under section 44ZZM to the imposition of the duty by that law).

Commonwealth legislative power sufficient to support duty but State or Territory legislative powers are not

(3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Act to the extent necessary to ensure that validity.

(4) If, because of subsection (3), this Act is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Act.

(5) The duty is taken to be imposed by this Act in accordance with subsection (3) only to the extent to which imposing the duty:

(a) is within the legislative powers of the Commonwealth; and

(b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the Commission or Tribunal.

(6) Subsections (1) to (5) do not limit section 44ZZM.

44ZZMB When a law of a State or Territory imposes a duty

For the purposes of sections 44ZZM and 44ZZMA, a State or Territory access regime law ***imposes a duty*** on the Commission or Tribunal if:

(a) the law confers a function or power on the Commission or Tribunal; and

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(b) the circumstances in which the function or power is conferred give rise to an obligation on the Commission or Tribunal to perform the function or to exercise the power.

44ZZN Compensation for acquisition of property

(1) If:

(a) a determination would result in an acquisition of property; and

(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, IVA and VII not affected by this Part

This Part does not affect the operation of Parts IV, IVA 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

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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

(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;

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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.

(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.

44ZZOAAA Information to be given to Tribunal

Tribunal to notify decision maker

(1) If an application for review of a decision (however described) is made under this Part, the Tribunal must notify the decision maker of the application.

(2) If the application is made under section 44K, 44L, 44LJ, 44LK or 44O, the Tribunal must also notify the Council of the application.

Decision maker to give material to Tribunal

(3) The decision maker must give the following information to the Tribunal within the period specified by the Tribunal:

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(a) if the decision is taken to have been made because of the operation of subsection 44H(9), 44J(7), 44LG(6), 44LI(7), 44N(4), 44NB(3A) or 44NBC(5)—all of the information that the Council took into account in connection with making the recommendation to which the decision under review relates;

(b) if the decision is taken to have been made because of the operation of subsection 44PD(6), 44XA(6) or 44ZZBC(6)—any information or documents given to the Commission in connection with the decision to which the review relates, other than information or documents in relation to which the Commission could not have regard because of subparagraph 44PE(6)(c)(iii) or 44ZZBD(6)(c)(iii);

(c) otherwise—all of the information that the decision maker took into account in connection with the making of the decision to which the review relates.

Tribunal may request further information

(4) The Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part.

(5) A request under subsection (4) must be made by written notice given to a person specifying the information requested and the period within which the information must be given to the Tribunal.

(6) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and

(iii) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

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(7) Without limiting the information that may be given in accordance with the notice, information may include information that could not have reasonably been made available to the decision maker at the time the decision under review was made.

Certain material before the Tribunal not to be disclosed

(8) The Tribunal may, on the application of a person, prohibit or restrict the disclosure of the contents of a document or other information given to the Tribunal under this section if the Tribunal is satisfied that it is desirable to do so because of the confidential nature of the document or other information, or for any other reason.

(9) In this section:

decision maker, in relation to an application for review under this Part, means:

(a) if the application was made under section 44K, 44L, 44LJ or 44LK—the designated Minister; or

(b) if the application was made under section 44O—the Commonwealth Minister; or

(c) if the application was made under section 44PG, 44PH, 44ZP, 44ZX, or 44ZZBF—the Commission.

44ZZOAA Tribunal only to consider particular material

For the purposes of a review under this Part, the Tribunal:

(a) subject to paragraph (b), must have regard to:

(i) information that was given to the Tribunal under subsection 44ZZOAAA(3); and

(ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and

(iii) any thing done as mentioned in subsection 44K(6), 44L(5), 44LJ(5), 44LK(5), 44O(5), 44PG(5), 44PH(5), 44ZP(5), 44ZX(5) or 44ZZBF(5); and

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(iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) within the specified period; and

(b) may disregard:

(i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and

(ii) any information or report of the kind specified in a notice under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) that is given to the Tribunal after the specified period has ended.

44ZZOA Time limit for Tribunal decisions

(1) The Tribunal must make a decision on a review under this Part within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application for review is received, unless the consideration period is extended under subsection (7).

Stopping the clock

(3) In working out the expected period in relation to an application for review, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

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Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44ZZOAAA(5) requesting information in relation to the decision to which the application relates	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is given under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) requiring information or a report to be given in relation to the review	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information or the report

(4) Despite subsection (3), do not disregard any day more than once.

Stopping the clock by agreement

(5) The following may agree in writing that a specified period is to be disregarded in working out the expected period:

(a) the Tribunal;

(b) the person who applied for review;

(c) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council;

(d) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission;

(e) any other person who has been made a party to the proceedings for review by the Tribunal.

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(6) The Tribunal must publish, by electronic or other means, the agreement.

Extension of time for making decision

(7) If the Tribunal is unable to make a decision on an application for review within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:
  (a) specify when the Tribunal must now make its decision on the application for review; and
  (b) include a statement explaining why the Tribunal has been unable to make a decision on the review within the consideration period.

(9) The Tribunal must give a copy of the notice to:
  (a) the person who applied for review; and
  (b) if the application for review is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and
  (c) if the application for review is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and
  (d) any other person who has been made a party to the proceedings for review by the Tribunal.

Publication

(10) If the Tribunal extends the consideration period under subsection (7), it must publish a notice in a manner that results in the notice being accessible to the public and reasonably prominent:
  (a) stating that it has done so; and
  (b) specifying the day by which it must now make a decision on the application for review.

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Failure to comply with time limit does not affect validity

(11) Failure by the Tribunal to comply with a time limit set in this section does not affect the validity of a decision made by the Tribunal under this Part.

44ZZP Regulations about review by the Tribunal

(1) 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).

(2) Regulations made for the purposes of subsection (1) do not apply in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law.

Note: See section 44ZZR.

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).

44ZZR Procedure of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law

(1) Sections 103, 105, 106, 107, 108 and 110 of this Act apply to the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law.

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(2) The regulations may make provision about the following matters in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law:

(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);

(f) the fees and expenses of witnesses in proceedings before the Tribunal.

(3) Subsection (1), and regulations made for the purposes of subsection (2), have no effect to the extent (if any) to which they are inconsistent with the State/Territory energy law, or the designated Commonwealth energy law, concerned.

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Chapter 3—Restrictive trade practices

Part IV—Restrictive trade practices

Division 1—Cartel conduct

Subdivision A—Introduction

45AA Simplified outline

The following is a simplified outline of this Division:

- This Division sets out parallel offences and civil penalty provisions relating to cartel conduct.
- A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
- A cartel provision is a provision relating to:
  (a) price-fixing; or
  (b) restricting outputs in the production and supply chain; or
  (c) allocating customers, suppliers or territories; or
  (d) bid-rigging;
  by parties that are, or would otherwise be, in competition with each other.

45AB Definitions

In this Division:

benefit includes any advantage and is not limited to property.

bid includes:
(a) tender; and

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(b) the taking, by a potential bidder or tenderer, of a preliminary step in a bidding or tendering process.

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.

likely, in relation to any of the following:

(a) a supply of goods or services;
(b) an acquisition of goods or services;
(c) the production of goods;
(d) the capacity to supply services;

includes a possibility that is not remote.

obtaining includes:

(a) obtaining for another person; and
(b) inducing a third person to do something that results in another person obtaining.

party has a meaning affected by section 45AC.

production includes manufacture, processing, treatment, assembly, disassembly, renovation, restoration, growing, raising, mining, extraction, harvesting, fishing, capturing and gathering.

45AC Extended meaning of *party*

For the purposes of this Division, if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a ***party*** to that contract, arrangement or understanding.

45AD Cartel provisions

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a ***cartel provision*** if:

(a) either of the following conditions is satisfied in relation to the provision:

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(i) the purpose/effect condition set out in subsection (2);
(ii) the purpose condition set out in subsection (3); and

(b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

Purpose/effect condition

(2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:

(a) fixing, controlling or maintaining; or

(b) providing for the fixing, controlling or maintaining of;

the price for, or a discount, allowance, rebate or credit in relation to:

(c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(e) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or

(f) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions—see subsection (8).

Note 2: ***Party*** has an extended meaning—see section 45AC.

Purpose condition

(3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:

(a) preventing, restricting or limiting:

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(i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or

(ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or

(iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or

(iv) the acquisition, or likely acquisition, of goods or services from persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or

(b) allocating between any or all of the parties to the contract, arrangement or understanding:

(i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or

(ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or

(iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

(i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or

(ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the

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basis that one of those bids is more likely to be successful than the others; or

(iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or

(iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

(v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered with related provisions—see subsection (9).

Note 3: ***Party*** has an extended meaning—see section 45AC.

Competition condition

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

(c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services—the supply of those goods or services in trade or commerce; or

(d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or

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(e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or likely re-supply, of goods or services—the supply of those goods or services in trade or commerce to that re-supplier; or

(f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods in trade or commerce; or

(g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services in trade or commerce; or

(h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services in trade or commerce; or

(i) if subparagraph (3)(a)(iv) applies in relation to preventing, restricting or limiting the acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or

(j) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services in trade or commerce; or

(k) if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services in trade or commerce.

Note 1: ***Party*** has an extended meaning—see section 45AC.

Note 2: ***Trade or commerce*** is defined in section 4 to mean trade or commerce within Australia or between Australia and places outside Australia.

Immaterial whether identities of persons can be ascertained

(5) It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (f) or subparagraph (3)(a)(iii) or (iv) or (b)(i) or (ii) can be ascertained.

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Recommending prices etc.

(6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:

(a) to have the purpose mentioned in subsection (2); or

(b) to have, or be likely to have, the effect mentioned in subsection (2);

by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

Immaterial whether particular circumstances or particular conditions

(7) It is immaterial whether:

(a) for the purposes of subsection (2), subparagraphs (3)(a)(iii) and (iv) and paragraphs (3)(b) and (c)—a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and

(b) for the purposes of subparagraph (3)(a)(i)—the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and

(c) for the purposes of subparagraph (3)(a)(ii)—the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

Considering related provisions—purpose/effect condition

(8) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:

(a) the other provisions of the contract, arrangement or understanding;

(b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least

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one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose, or has or is likely to have that effect.

Considering related provisions—purpose condition

(9) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:

(a) the other provisions of the contract, arrangement or understanding;

(b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose.

Purpose/effect of a provision

(10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

(a) the form of the provision; or

(b) the form of the contract, arrangement or understanding; or

(c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

Purpose of a provision

(11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:

(a) the form of the provision; or

(b) the form of the contract, arrangement or understanding; or

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(c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

45AE Meaning of expressions in other provisions of this Act

In determining the meaning of an expression used in a provision of this Act (other than this Division, subsection 6(2C), paragraph 76(1B)(b) or subsection 93AB(1A)), this Division is to be disregarded.

Subdivision B—Offences etc.

45AF Making a contract etc. containing a cartel provision

Offence

(1) A corporation commits an offence if:
(a) the corporation makes a contract or arrangement, or arrives at an understanding; and
(b) the contract, arrangement or understanding contains a cartel provision.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) The fault element for paragraph (1)(b) is knowledge or belief.

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
(a) $100,000,000;
(b) if the court can determine the total value of the benefits that:
(i) have been obtained by one or more persons; and
(ii) are reasonably attributable to the commission of the offence;
3 times that total value;

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(c) if the court cannot determine the total value of those benefits—30% of the corporation's adjusted turnover during the breach turnover period for the offence.

Indictable offence

(4) An offence against subsection (1) is an indictable offence.

45AG Giving effect to a cartel provision

Offence

(1) A corporation commits an offence if:
(a) a contract, arrangement or understanding contains a cartel provision; and
(b) the corporation gives effect to the cartel provision.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) The fault element for paragraph (1)(a) is knowledge or belief.

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
(a) $100,000,000;
(b) if the court can determine the total value of the benefits that:
(i) have been obtained by one or more persons; and
(ii) are reasonably attributable to the commission of the offence;
3 times that total value;
(c) if the court cannot determine the total value of those benefits—30% of the corporation's adjusted turnover during the breach turnover period for the offence.

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Pre-commencement contracts etc.

(4) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section.

Indictable offence

(5) An offence against subsection (1) is an indictable offence.

45AH Determining guilt

(1) A corporation may be found guilty of an offence against section 45AF or 45AG even if:

(a) each other party to the contract, arrangement or understanding is a person who is not criminally responsible; or

(b) subject to subsection (2), all other parties to the contract, arrangement or understanding have been acquitted of the offence.

Note: ***Party*** has an extended meaning—see section 45AC.

(2) A corporation cannot be found guilty of an offence against section 45AF or 45AG if:

(a) all other parties to the contract, arrangement or understanding have been acquitted of such an offence; and

(b) a finding of guilt would be inconsistent with their acquittal.

45AI Court may make related civil orders

If a prosecution against a person for an offence against section 45AF or 45AG is being, or has been, heard by a court, 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 offence; or

(ii) other conduct of that kind; or

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(b) make an order under section 86C, 86D, 86E or 87 in relation to the offence.

45AIA Section 4AB of the Crimes Act does not apply

Section 4AB of the *Crimes Act 1914* does not apply to any provision of this Subdivision.

Subdivision C—Civil penalty provisions

45AJ Making a contract etc. containing a cartel provision

A corporation contravenes this section if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

Note: For enforcement, see Part VI.

45AK Giving effect to a cartel provision

(1) A corporation contravenes this section if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

Note: For enforcement, see Part VI.

(2) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section.

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Subdivision D—Exceptions

45AL Conduct notified

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply to a corporation in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:

(a) the cartel provision:

(i) has the purpose, or has or is likely to have the effect, mentioned in subsection 45AD(2); or

(ii) has the purpose mentioned in a paragraph of subsection 45AD(3) other than paragraph (c); and

(b) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) setting out particulars of the contract, arrangement or understanding; and

(c) the notice is in force under section 93AD.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

45AM Cartel provision subject to grant of authorisation

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract that contains a cartel provision 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

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(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ bears an evidential burden in relation to that matter.

45AMA Acquisition subject to notification

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract that contains a cartel provision, in so far as the cartel provision provides for an acquisition if the contract is subject to a condition that the provision will not come into force unless and until the acquisition becomes a notified acquisition.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ bears an evidential burden in relation to that matter.

45AN Contracts, arrangements or understandings between related bodies corporate

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding if the only parties to the contract, arrangement or understanding are bodies corporate that are related to each other.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

45AO Joint ventures—prosecution

Sections 45AF and 45AG do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the defendant proves that:

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(a) the cartel provision is:
  (i) for the purposes of a joint venture; and
  (ii) reasonably necessary for undertaking the joint venture; and
(b) the joint venture is for any one or more of the following:
  (i) production of goods;
  (ii) supply of goods or services;
  (iii) acquisition of goods or services; and
(c) the joint venture is not carried on for the purpose of substantially lessening competition; and
(d) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and
(e) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
  (i) their joint control; or
  (ii) their ownership of shares in the capital;

of that body corporate.

Note 1: A defendant bears a legal burden in relation to the matter in this section (see section 13.4 of the *Criminal Code*).

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

45AP Joint ventures—civil penalty proceedings

(1) Sections 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the defendant proves that:
(a) the cartel provision is:
  (i) for the purposes of a joint venture; and

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(ii) reasonably necessary for undertaking the joint venture; and

(b) the joint venture is for any one or more of the following:

(i) production of goods;

(ii) supply of goods or services;

(iii) acquisition of goods or services; and

(c) the joint venture is not carried on for the purpose of substantially lessening competition; and

(d) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and

(e) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:

(i) their joint control; or

(ii) their ownership of shares in the capital;

of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

(2) A defendant who wishes to rely on subsection (1) must prove that matter on the balance of probabilities.

45AQ Resale price maintenance

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 but for the operation of section 88; or

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(c) 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 which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

45AR Exclusive dealing

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as giving effect to the cartel provision would, or would but for the operation of subsection 47(10) or section 88 or 93, constitute a contravention of section 47.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

(2) Sections 45AG and 45AK do not apply in relation to the giving effect to a cartel provision by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or section 88 or 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 section 88 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

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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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

(3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

45AS Dual listed company arrangement

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as:

(a) the contract, arrangement or understanding is a dual listed company arrangement; and

(b) the making of the contract, arrangement or understanding would, or would apart from section 88, contravene section 49.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

(2) Sections 45AG and 45AK do not apply in relation to the giving effect to a cartel provision, in so far as:

(a) the cartel provision is a provision of a dual listed company arrangement; and

(b) the giving effect to the cartel provision would, or would apart from section 88, contravene section 49.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

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(3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

45AT Acquisition of shares or assets

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of:

(a) any shares in the capital of a body corporate; or

(b) any assets of a person.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

(3) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides for an acquisition, if the acquisition is a notified acquisition.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code* and subsection (4) of this section).

(4) A person who wishes to rely on subsection (3) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

45AU Collective acquisition of goods or services by the parties to a contract, arrangement or understanding

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:

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(a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in subsection 45AD(2); and

(b) either:

(i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or

(ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

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Division 1A—Acquisitions

Subdivision A—Preliminary

45AV Purportedly putting acquisitions into effect

(1) A reference in this Division to putting an acquisition into effect includes a reference to purportedly putting the acquisition into effect.

(2) A person ***purportedly puts into effect*** an acquisition if the person engages in conduct that, apart from this Division, would constitute putting the acquisition into effect.

Subdivision B—Obligations

45AW Commission must be notified of acquisitions

A person contravenes this section if:

(a) the person is a principal party to an acquisition; and
(b) the acquisition is required to be notified; and
(c) the acquisition is put into effect; and
(d) when the acquisition is put into effect:
  (i) the acquisition is not a notified acquisition; or
  (ii) no notification of the acquisition has an effective notification date (see section 51ABZ); or
  (iii) the latest notification of the acquisition that has an effective notification date is stale.

Note 1: For when an acquisition is ***required to be notified***, see Division 2 of Part IVA.

Note 2: For when an acquisition is ***stale***, see section 51ABG.

Note 3: For enforcement, see Part VI.

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45AX Commission must be notified of material changes of fact in relation to notified acquisitions

(1) This section applies if:

(a) a person is the notifying party of a notification of an acquisition; and

(b) a change of fact occurs; and

(c) the change of fact is material to the Commission making a determination under subsection 51ABZE(1) in respect of the notification; and

(d) the person becomes aware of the change of fact at a time:

(i) occurring on or after the effective notification date of the notification; and

(ii) at which the Commission has not decided to cease considering the notification under section 51ABZD; and

(iii) at which the Commission has not made a determination in respect of the notification under subsection 51ABZE(1); and

(iv) if the notification is subject to phase 2 review—occurring at least 15 business days (within the meaning of section 51ABK) before the end of the phase 2 determination period for the notification.

(2) For the purposes of this section, the person is taken to become aware of the change of fact at the earliest time at which the person is:

(a) aware of the change of fact; and

(b) aware that the change of fact is material in the way described in paragraph (1)(c).

(3) This section also applies if:

(a) a person is the notifying party of a notification of an acquisition; and

(b) the notifying party has made a public benefit application in relation to the notification; and

(c) a change of fact occurs; and

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(d) the change of fact is material to the Commission making a determination under subsection 51ABZW(1) in respect of the application; and

(e) the person becomes aware of the change of fact at a time:

(i) occurring on or after the effective application date of the application; and

(ii) at which the Commission has not decided to cease considering the application under section 51ABZV; and

(iii) at which the Commission has not made a determination under subsection 51ABZW(1) in respect of the application.

(4) For the purposes of this section, the person is taken to become aware of the change of fact at the earliest time at which the person is:

(a) aware of the change of fact; and

(b) aware that the change of fact is material in the way described in paragraph (3)(d).

(5) The person contravenes this subsection if the Commission is not notified of the change of fact, as soon as practicable after the person becomes aware of the change, by:

(a) if the person is the only notifying party of the notification of the acquisition—the person; or

(b) otherwise—all of the notifying parties jointly.

Note: For enforcement, see Part VI.

(6) For the purposes of this section, a person who ought reasonably to be aware of something is taken to be aware of it.

45AY Stayed acquisitions must not be put into effect

A person contravenes this section if:

(a) the person puts an acquisition into effect; and

(b) the acquisition is stayed.

Note 1: For when an acquisition is ***stayed***, see section 51ABE.

Note 2: For enforcement, see Part VI.

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45AZ Conditions must be complied with

(1) This section applies to a person who puts a notified acquisition into effect, if putting the acquisition into effect is subject to conditions.

Note: For when putting an acquisition into effect is ***subject*** to conditions, see section 51ABH.

(2) The person contravenes this subsection if any of those conditions are not complied with.

Note: For enforcement, see Part VI.

Subdivision C—Acquisitions void if put into effect while stayed

45AZA Acquisitions void if put into effect while stayed

(1) This section applies to an acquisition that is put into effect, or purportedly put into effect, in contravention of section 45AY.

(2) The acquisition is, and is taken always to have been, void by force of this subsection.

Subdivision D—Miscellaneous

45AZB Providing false or misleading information

A person contravenes this section if:

(a) the person gives information to the Commission or the Tribunal under an acquisitions provision; and

(b) the information is false or misleading in a material particular; and

(c) the person knows that, or is reckless as to whether, the information is false or misleading in a material particular.

Note: For enforcement, see Part VI.

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Division 2—Other provisions

45 Contracts, arrangements or understandings that restrict dealings or affect competition

(1) A corporation must not:

(a) make a contract or arrangement, or arrive at an understanding, if 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, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(2) Paragraph (1)(b) applies in relation to contracts or arrangements made, or understandings arrived at, before or after the commencement of this section.

(3) For the purposes of this section, ***competition*** means:

(a) in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding—competition in any market in which:

(i) a corporation that is a party to the contract, arrangement or understanding, or would be a party to the proposed contract, arrangement or understanding; or

(ii) 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; or

(b) in relation to a concerted practice—competition in any market in which:

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(i) a corporation that is a party to the practice; or

(ii) 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 practice, 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 provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or to or in relation to a concerted practice, in so far as the provision or practice relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 if subsection 48(2) did not apply; or

(c) conduct that would contravene section 48 if it were not authorised under section 88; or

(d) 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 which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

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(5A) The making of a contract, arrangement or understanding does not constitute a contravention of this section because the contract, arrangement or understanding contains a provision the giving effect to which would, or would apart from subsection 47(10) or section 88 or 93, constitute a contravention of section 47.

(6) This section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding, or to or in relation to engaging in a concerted practice, by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or section 88 or 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 section 88 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.

(6A) The following conduct:

(a) the making of a dual listed company arrangement;

(b) the giving effect to a provision of a dual listed company arrangement;

does not contravene this section if the conduct would, or would apart from section 88, contravene section 49.

(7) This section does not apply to or in relation to:

(a) a contract, arrangement or understanding to the extent that the contract, arrangement or understanding directly or indirectly provides for; or

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(b) a proposed contract, arrangement or understanding to the extent that the proposed contract, arrangement or understanding would directly or indirectly provide for; or

(c) a concerted practice to the extent that the practice directly involves;

the acquisition of any shares in the capital of a body corporate or any assets of a person or a notified acquisition.

(8) This section does not apply to or in relation to:

(a) a contract, arrangement or understanding, or

(b) a proposed contract, arrangement or understanding; or

(c) a concerted practice;

the only parties to which are or would be bodies corporate that are related to each other.

(8AA) This section does not apply to or in relation to a concerted practice if the only persons engaging in it are or would be:

(a) the Crown in right of the Commonwealth and one or more authorities of the Commonwealth; or

(b) the Crown in right of a State or Territory and one or more authorities of that State or Territory.

(8A) Subsection (1) does not apply to a corporation engaging in conduct described in that subsection if:

(a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and

(b) the notice is in force under section 93AD.

(8B) The making by a corporation of a contract is not a contravention of subsection (1) to the extent that the contract provides for an acquisition, if the contract is subject to a condition that the provision of the contract will not come into force unless and until the acquisition becomes a notified acquisition.

(8C) Nothing in subsection (8B) prevents the giving effect by a corporation to such a provision of a contract from constituting a contravention of subsection (1).

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(9) The making by a corporation of a contract that contains a provision in relation to which the corporation intends to apply for an authorisation under section 88 is not a contravention of subsection (1) 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 (1).

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 section 88.

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.

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(3) Subsection (1) applies if the fourth person is a corporation.

(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 section 88.

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 section 88.

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 a workplace 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 a workplace 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*** and ***workplace instrument*** have the same meanings as in the *Fair Work Act 2009*.

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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

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(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.

Note: Section 415 of the *Fair Work Act 2009* 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:

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(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:

(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.

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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.

*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.

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*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

(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 section 88.

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:

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(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).

Note: Conduct that would otherwise contravene this section can be authorised under section 88.

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 must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
(a) that market; or
(b) any other market in which that corporation, or a body corporate that is related to that corporation:
(i) supplies goods or services, or is likely to supply goods or services; or
(ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or
(c) any other market in which that corporation, or a body corporate that is related to that corporation:
(i) acquires goods or services, or is likely to acquire goods or services; or
(ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

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(3) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:

(a) a body corporate that is related to that corporation has, or 2 or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or

(b) that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in that market.

(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:

(a) regard must be had 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:

(i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and

(b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:

(i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or

(ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

(5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control that market; or

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

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(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had 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.

(7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

(8) In this section:

(a) a reference to power is a reference to market power; and

(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.

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.

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(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.

(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:

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(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, 47, 49 and 50, because an authorisation is in force or because of the operation of subsection 45(8A) or 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 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*.

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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

(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

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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:

(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:

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(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.

(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.

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(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 not being a body corporate related to the corporation.

(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 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.

(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

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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:

(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:

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(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 by a corporation unless:

(a) the engaging by the corporation in the conduct that constitutes the practice of exclusive dealing has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(b) the engaging by the corporation in the conduct that constitutes the practice of exclusive dealing, 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.

(11) Subsections (8) and (9) do not apply with respect to:

(a) conduct engaged in:

(i) by a registered charity; and

(ii) for or in accordance with the purposes or objects of that registered charity; or

(b) conduct engaged in in pursuance of a legally enforceable requirement made by a registered charity, being a requirement made for or in accordance with the purposes or objects of that registered charity.

(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:

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(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;

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

(1) A corporation or other person shall not engage in the practice of resale price maintenance.

(2) Subsection (1) does not apply to a corporation or other person engaging in conduct that constitutes the practice of resale price maintenance if:

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(a) the corporation or other person has given the Commission a notice under subsection 93(1) describing the conduct; and
(b) the notice is in force under section 93.

49 Dual listed company arrangements that affect competition

(1) A corporation must not:
(a) make a dual listed company arrangement if a provision of the proposed arrangement 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 dual listed company arrangement if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Note: Conduct that would otherwise contravene this section can be authorised under section 88.

Exception

(2) The making by a corporation of a dual listed company arrangement that contains a provision that has the purpose, or would have or be likely to have the effect, of substantially lessening competition does not contravene this section if:
(a) the arrangement 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 arrangement is made.

However, this subsection does not permit the corporation to give effect to such a provision.

*Meaning of **competition***

(3) For the purposes of this section, ***competition***, in relation to a provision of a dual listed company arrangement or of a proposed dual listed company arrangement, means competition in any market in which:

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(a) a corporation that is a party to the arrangement or would be a party to the proposed arrangement; or

(b) any body corporate related to such a corporation;

supplies or acquires, or is likely to supply or acquire, goods or services or would, apart from 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 dual listed company arrangement or of a proposed dual listed company arrangement is taken 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:

(a) the other provisions of that arrangement or proposed arrangement;

(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.

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 any market.

Note: The corporation will not be prevented from making the acquisition if the corporation is granted an authorisation for the acquisition under section 88.

(2) A person must not directly or indirectly:

(a) acquire shares in the capital of a corporation; or

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(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 any market.

Note: The person will not be prevented from making the acquisition if the person is granted an authorisation for the acquisition under section 88.

(3) For the purposes of this section, an acquisition may have the effect or be likely to have the effect of substantially lessening competition in a market if the acquisition would, in all the circumstances, have the effect, or be likely to have the effect, of creating, strengthening or entrenching a substantial degree of power in the market.

(3A) Subsections 46(3) to (8) have effect for the purposes of this section as if:

(a) a reference in those subsections (other than in paragraph 46(8)(b)) to section 46 included a reference to this section; and

(b) a reference in those subsections to a market were a reference to a market (within the meaning of this section).

Note: Subsections 46(3) to (8) contain matters relevant to working out whether a corporation has a substantial degree of power in a market.

(3B) To avoid doubt, subsection (3) does not affect the meaning of ***substantially lessening competition*** outside this section.

(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

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(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.

(5A) For the purposes of subsection (4), an application for an authorisation is taken to be disposed of 14 days after the day the Tribunal makes a determination on the application.

Notified acquisitions

(5B) This section does not apply to a notified acquisition.

Definitions

(6) In this section:

market means a market for goods or services in:

(a) Australia; or

(b) a State; or

(c) a Territory; or

(d) a region of Australia.

50A Acquisitions that occur outside Australia before 1 January 2026

(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,

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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.

(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

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(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.

(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.

(7A) Subsection (1) does not apply to:

(a) a notified acquisition; or

(b) an acquisition that is put into effect on or after 1 January 2026.

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(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;

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

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(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.

(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;

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(b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened Division 1A or 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:

(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

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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, or concerted practice, to the extent that it relates to the remuneration, conditions of employment, hours of work or working conditions of employees; or

(aa) to:

(i) the making of a contract or arrangement, or the entering into of an understanding; or

(ii) any provision of a contract, arrangement or understanding;

to the extent that the contract, arrangement, understanding or provision relates to the remuneration, conditions of employment, hours of work or working conditions of employees; or

(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; or

(c) to:

(i) any provision of a contract, arrangement or understanding; or

(ii) any concerted practice;

to the extent that the provision or concerted practice obliges a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia or a prescribed association or body; or

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(d) to:

(i) any provision of a contract, arrangement or understanding; or

(ii) any concerted practice;

between partners none of whom is a body corporate, to the extent that the provision or concerted practice relates to:

(iii) the terms of the partnership; or

(iv) the conduct of the partnership business; or

(v) competition between the partnership and a party to the contract, arrangement, understanding or concerted practice, while the party is, or after the party ceases to be, a partner; or

(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 and is not declared under subsection 51ABZG(1); or

(g) to:

(i) any provision of a contract, arrangement or understanding; or

(ii) any concerted practice;

to the extent that the provision or concerted practice relates exclusively to:

(iii) the export of goods from Australia; or

(iv) the supply of services outside Australia;

if full and accurate particulars of the provision or concerted practice were given to the Commission no more than 14 days after the day the contract or arrangement was made or the understanding or concerted practice was entered into, or before 8 September 1976, whichever was the later.

(2AA) For the purposes of paragraph (2)(g), the particulars to be given to the Commission:

(a) need not include particulars of prices for the goods or services; but

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(b) must include particulars of any method of fixing, controlling or maintaining such prices.

(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 commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(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—Notification of acquisitions

Division 1—Preliminary

Subdivision A—Simplified outline

51ABA Simplified outline of this Part

Certain acquisitions, including acquisitions of shares in the capital of a body corporate or of any assets of a person, are required to be notified to the Commission before they are put into effect if they are determined under Division 2.

Division 3 provides for persons to notify proposed acquisitions to the Commission (including acquisitions that are not required to be notified).

The Commission may determine that a notified acquisition may be put into effect if the Commission is satisfied it would not substantially lessen competition (Division 4).

If the Commission does not make such a determination, the notifying parties may ask the Commission to determine that the proposed acquisition would be of public benefit (Division 5).

Note: For the consequences of failing to notify the Commission of an acquisition, or for putting into effect an acquisition that the Commission has neither determined may be put into effect nor determined would be of public benefit, see Division 1A of Part IV.

Subdivision B—Acquisitions to which acquisitions provisions apply

51ABB Acquisitions to which acquisitions provisions apply

(1) Subject to section 51ABD, the acquisitions provisions apply to the following acquisitions:

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(a) an acquisition by a corporation of shares in the capital of a body corporate;
(b) an acquisition by a corporation of any assets of a person;
(c) an acquisition by a corporation of anything determined under paragraph (2)(a) of this section;
(d) an acquisition of shares in the capital of a corporation;
(e) an acquisition of any assets of a corporation;
(f) an acquisition of anything, relating to a corporation, determined under paragraph (2)(a).

(2) The Minister may, by legislative instrument, determine:
(a) a thing for the purposes of paragraphs (1)(c) and (f); or
(b) a person or entity, in relation to an acquisition to which paragraph (1)(c) or (f) of this section applies, for the purposes of paragraph 51ABI(3)(c).

51ABC Acquisition of units in unit trusts and interests in managed investment schemes

(1) The acquisitions provisions apply to the acquisition of units in a unit trust:
(a) as if:
(i) the trust were a body corporate; and
(ii) units in the trust were shares in the capital of the body corporate; and
(b) with such other modifications as are determined under paragraph (3)(a) for the purposes of this paragraph in relation to the trust.

Note: For when a reference to a corporation includes a reference to the unit trust, see paragraph 51ABZZK(2)(c) or (3)(c).

(2) The acquisitions provisions apply to the acquisition of an interest in a managed investment scheme (within the meaning of the *Corporations Act 2001*):
(a) as if:
(i) the scheme were a body corporate; and

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(ii) interests in the scheme were shares in the capital of the body corporate; and

(b) as if the body corporate were a corporation if the following person is a corporation:

(i) if the scheme is a registered scheme (within the meaning of that Act)—the scheme's responsible entity (within the meaning of that Act);

(ii) if the scheme is not a registered scheme—the holder of the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and

(c) with such other modifications as are determined under paragraph (3)(b) for the purposes of this paragraph in relation to the scheme.

(3) The Minister may, by legislative instrument, determine:

(a) modifications of the acquisitions provisions for the purposes of paragraph (1)(b) in relation to a unit trust; or

(b) modifications of the acquisitions provisions for the purposes of paragraph (2)(c) in relation to a managed investment scheme.

51ABD Internal restructures and reorganisations

(1) The acquisitions provisions do not apply to an acquisition that is, or is part of, a restructure or reorganisation of a group of persons who are related:

(a) in the ways referred to in section 4A (related bodies corporate); or

(b) by means of trust or partnership.

(2) Paragraph (1)(a) applies as if:

(a) the Commonwealth, a State or a Territory were a body corporate; and

(b) each authority of the Commonwealth, a State or a Territory were a subsidiary of the Commonwealth, the State or the Territory.

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(3) However, for the purposes of paragraph (1)(a), subsection (2) does not affect when an authority of the Commonwealth, a State or a Territory is related to another authority of the Commonwealth, the State or the Territory.

Subdivision C—Definitions relating to acquisitions and notifications

51ABE When acquisitions are *stayed*

(1) An acquisition to which any of the following subsections applies is ***stayed***.

(2) This subsection applies to an acquisition that:
  (a) is required to be notified; but
  (b) is not a notified acquisition.

Note: For when an acquisition is ***required to be notified***, see Division 2.

(3) This subsection applies to a notified acquisition if the most recent notification of the acquisition has not been finally considered.

Note: For when a notification has been ***finally considered***, see section 51ABF.

(4) This subsection applies to a notified acquisition if:
  (a) the most recent determination under subsection 51ABZE(1) in respect of a notification of the acquisition is a determination that the acquisition must not be put into effect; and
  (b) since making that determination, the Commission has not made a determination under paragraph 51ABZW(1)(a) in respect of the notification.

(5) This subsection applies to a notified acquisition if the most recent notification of the acquisition is stale.

Note: For when a notification is ***stale***, see section 51ABG.

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51ABF When notifications have been *finally considered*

(1) A notification of an acquisition has been ***finally considered*** if:

(a) the Commission has made a determination under subsection 51ABZE(1) in respect of the notification; and

(b) the determination made under subsection 51ABZE(1) is no longer subject to review; and

(c) if the determination made under subsection 51ABZE(1) includes conditions, or is a determination that the acquisition must not be put into effect:

(i) in the case of a determination that includes conditions—a public benefit application in relation to the notification has not been made; or

(ii) in the case of a determination that the acquisition must not be put into effect—a public benefit application in relation to the notification has not been made, and the period during which such an application could be made has ended; or

(iii) in any case—a public benefit application in relation to the notification has been made, and the Commission has decided under section 51ABZV to cease considering the application; or

(iv) in any case—a public benefit application in relation to the notification has been made, the Commission has made a determination under subsection 51ABZW(1) in respect of the application, and the determination made under subsection 51ABZW(1) is no longer subject to review.

Note: A notification has not been ***finally considered*** if:

(a) it does not have an effective notification date; or

(b) the Commission has decided to cease considering the notification under section 51ABZD.

(2) An acquisition determination is ***no longer subject to review*** if:

(a) both:

(i) an application has not been made under subsection 100C(1) for review of the determination; and

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(ii) the period during which such an application could be made has ended; or

(b) an application has been made under subsection 100C(1) for review of the determination, and:

(i) the application has been withdrawn under subsection 100E(1) and the period during which a participant may apply for reinstatement of the application under subsection 100E(2) has ended without an application for reinstatement being made; or

(ii) the Tribunal has dismissed the application; or

(iii) the Tribunal has made a determination on the review under paragraph 100N(1)(a).

51ABG When notifications become *stale*

A notification of an acquisition becomes ***stale*** 12 months after the time (if any) at which the Commission:

(a) unless paragraph (b) of this section applies—makes a determination under paragraph 51ABZE(1)(a) in respect of the notification; or

(b) if the Commission makes a determination under paragraph 51ABZW(1)(a) in respect of a public benefit application that relates to the notification—makes that determination.

51ABH When notified acquisitions are *subject* to conditions

Putting a notified acquisition into effect is ***subject*** to a condition if:

(a) both:

(i) the most recent determination in respect of a notification of the acquisition under subsection 51ABZE(1) includes that condition; and

(ii) since making that determination, the Commission has not made a determination under paragraph 51ABZW(1)(a) in respect of the notification; or

(b) both:

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(i) the most recent determination in respect of a notification of the acquisition under subsection 51ABZW(1) includes that condition; and

(ii) since making that determination, the Commission has not made a determination under subsection 51ABZE(1) in respect of a notification of the acquisition.

51ABI Parties to acquisitions

(1) Each of the following is a ***party*** to an acquisition of shares in the capital of a body corporate, any assets of a person or a thing determined under subsection 51ABB(2):

(a) the person (a ***principal party*** to the acquisition) who acquires the shares, assets or determined thing;

(b) without limiting paragraph (a)—a person that is a party to a contract, arrangement or understanding pursuant to which the acquisition takes place.

(2) To avoid doubt, a reference to a ***party*** or ***principal party*** to an acquisition that has not been put into effect is a reference to a person that would be a party or principal party to the acquisition if the acquisition were put into effect.

(3) The ***target***:

(a) of an acquisition of shares in the capital of a body corporate—is the body corporate; and

(b) of an acquisition of any assets of a person—is the person; and

(c) of an acquisition to which subparagraph 51ABB(1)(c) or (f) applies—is the person or entity determined under paragraph 51ABB(2)(b) for the purposes of this paragraph in relation to the acquisition.

Subdivision D—Other definitions

51ABJ Meaning of *Chapter 6 entity*

(1) A ***Chapter 6 entity*** is:

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(a) a listed company (within the meaning of the *Corporations Act 2001*); or
(b) an unlisted company with more than 50 members (within the meaning of that Act); or
(c) a listed registered scheme (within the meaning of that Act).

(2) In determining whether a company has more than 50 members for the purposes of paragraph (1)(b), count joint holders of a particular parcel of shares as 1 person.

(3) A reference in sections 603, 604 and 605A of the *Corporations Act 2001* to Chapter 6 of that Act is taken to include a reference to:
(a) subsections (1) and (2) of this section; and
(b) Subdivision B of Division 2 of this Part; and
(c) Subdivision D of Division 6 of this Part.

51ABK Meaning of *business day*

For the purposes of this Part, a ***business day*** is a day that is not:
(a) a Saturday; or
(b) a Sunday; or
(c) a public holiday in the Australian Capital Territory; or
(d) a day occurring between:
(i) 23 December in any year; and
(ii) the following 10 January.

Subdivision E—Other provisions

51ABL Conditional contracts, arrangements and understandings

For the purposes of the acquisitions provisions, if:
(a) a person enters into a contract, arrangement or understanding pursuant to which the person will acquire:
(i) shares in the capital of a body corporate; or
(ii) any assets of another person; or
(iii) a thing determined under paragraph 51ABB(2)(a); and

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(b) the provisions of the contract, arrangement or understanding pursuant to which the acquisition is to take place do not become binding on the person until one or more conditions are met;

the person does not acquire shares, assets or a determined thing under the provisions unless and until the provisions become binding.

51ABM Changes in joint ownership

(1) This section applies to joint holders of a particular parcel of shares in the capital of a body corporate.

(2) For the purposes of the acquisitions provisions, one of those persons is taken to acquire those shares if the person begins to hold the shares alone.

51ABN Acquisition of assets

(1) The acquisitions provisions apply in relation to any of the following that is not an asset in the same way as they apply in relation to an asset:

(a) any kind of property;

(b) a legal or equitable right that is not property;

(c) without limiting paragraphs (a) and (b):

(i) part of, or an interest in, an asset referred to in paragraph (a) or (b); or

(ii) goodwill or an interest in it; or

(iii) an interest in an asset of a partnership; or

(iv) an interest in a partnership that is not covered by subparagraph (iii).

(2) For the purposes of the acquisitions provisions, the reference in paragraph 4(4)(b) to an acquisition of an asset in the ordinary course of business is taken not to apply if the asset is:

(a) land, or an interest in land; or

(b) a patent, or an interest in a patent.

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Division 2—Acquisitions that are required to be notified

Subdivision A—Acquisitions that are required to be notified

51ABO When acquisitions are *required to be notified*

Subject to Subdivisions B and C, an acquisition is ***required to be notified*** if:

(a) the acquisition is put into effect on or after 1 January 2026; and

(b) the acquisition:

(i) occurs in circumstances determined under subsection 51ABP(1) for the purposes of this subparagraph in relation to the acquisition; or

(ii) is in a class of acquisitions determined under subsection 51ABQ(1) for the purposes of this subparagraph; and

(c) the acquisition:

(i) does not occur in circumstances determined under subsection 51ABRA(1) for the purposes of this subparagraph in relation to the acquisition; and

(ii) is not in a class of acquisitions determined under subsection 51ABRB(1) for the purposes of this subparagraph.

Note 1: An acquisition is ***required to be notified*** only if it is an acquisition to which this Division applies. For the acquisitions to which this Division applies, see Subdivision B of Division 1.

Note 2: See also subsection 51ABS(5).

51ABP Notification thresholds

(1) The Minister may, by legislative instrument, determine circumstances for the purposes of subparagraph 51ABO(b)(i) in relation to an acquisition.

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(2) The circumstances must be determined wholly or partly by reference to the acquisition meeting a specified threshold.

(3) Without limiting subsection (2) of this section, the specified threshold may be a threshold relating to:
  (a) the value of an acquisition or of a contract, arrangement or understanding; or
  (b) the turnover of a person, a business or part of a business; or
  (c) the level of concentration in a market; or
  (d) any assets of a person.

(4) To avoid doubt, an instrument made under subsection (1) does not affect the meaning of ***substantially lessening competition***.

51ABQ Classes of acquisitions that are required to be notified

(1) The Minister may, by legislative instrument, determine a class of acquisitions for the purposes of subparagraph 51ABO(b)(ii).

(2) Without limiting subsection (1) of this section, the Minister may determine a class of acquisitions under that subsection wholly or partly by reference to:
  (a) a party, or a class of parties, to an acquisition or to a contract, arrangement or understanding; or
  (b) an asset or a class of assets; or
  (c) a business or a class of businesses; or
  (d) a market or a class of markets; or
  (e) an industry or a class of industries; or
  (f) another acquisition, or a class of acquisitions.

(3) In making an instrument under subsection (1), the Minister must consider all of the following:
  (a) the likely effect of making the instrument on:
    (i) the interests of consumers; and
    (ii) promoting competition; and
    (iii) the public interest;

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(b) the likely regulatory impact of requiring the class of acquisitions to which the determination relates to be notified;

(c) any other matters the Minister considers relevant.

(4) In making an instrument under subsection (1) of this section, the Minister may consider any reports or advice of the Commission (including any reports given under subparagraph 51ABR(2)(a)(ii)).

Note: For consultation requirements, see section 17 of the *Legislation Act 2003*.

(5) An instrument made under subsection (1) must not be expressed to commence earlier than the 30th day after the instrument is registered under the *Legislation Act 2003*.

(6) This subsection repeals an instrument made under subsection (1) on the fifth anniversary of the registration of the instrument under the *Legislation Act 2003*, unless the instrument is repealed earlier.

(7) To avoid doubt, an instrument made under subsection (1) does not affect the meaning of ***substantially lessening competition***.

51ABR Classes of acquisitions that are required to be notified—Commission reports

(1) Before making an instrument under subsection 51ABQ(1), the Minister may ask the Commission to analyse the matters in paragraphs 51ABQ(3)(a) to (c) in relation to the instrument.

(2) If the Minister does so:

(a) the Commission must:

(i) analyse the matters; and

(ii) give to the Minister a written report of its analysis; and

(b) the Minister must cause the report to be published on the Department's website; and

(c) the Minister must not make the instrument earlier than 60 days after the report is published.

(3) This section does not limit:

(a) subsection 51ABQ(4) of this Act; or

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(b) section 17 of the *Legislation Act 2003* (consultation requirements).

51ABRA Circumstances in which acquisitions are not required to be notified

(1) The Minister may, by legislative instrument, determine circumstances for the purposes of subparagraph 51ABO(c)(i) in relation to an acquisition.

(2) Without limiting subsection (1) of this section, the Minister may determine circumstances under that subsection that existed to any extent, or that relate to something that occurred, before 1 January 2026.

(3) To avoid doubt, an instrument made under subsection (1) does not affect the meaning of ***substantially lessening competition***.

51ABRB Classes of acquisitions that are not required to be notified

(1) The Minister may, by legislative instrument, determine a class of acquisitions for the purposes of subparagraph 51ABO(c)(ii).

(2) Without limiting subsection (1) of this section, the Minister may determine a class of acquisitions under that subsection wholly or partly by reference to:

(a) a party, or a class of parties, to an acquisition or to a contract, arrangement or understanding; or

(b) an asset or a class of assets; or

(c) a business or a class of businesses; or

(d) a market or a class of markets; or

(e) an industry or a class of industries; or

(f) another acquisition, or a class of acquisitions.

(3) To avoid doubt, an instrument made under subsection (1) does not affect the meaning of ***substantially lessening competition***.

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Subdivision B—Provisions relating to particular kinds of acquisitions

51ABS Acquisitions that do not result in control

(1) Subject to subsection (5), an acquisition by a person of shares in the capital of a body corporate is not ***required to be notified*** if:

(a) immediately after the acquisition is put into effect, the person does not control (within the meaning of section 50AA of the *Corporations Act 2001*) the body corporate; or

(b) the person controlled the body corporate immediately before the acquisition was put into effect.

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

(a) despite subsection 50AA(3) of the *Corporations Act 2001*, the person is taken to control the body corporate if the first person and one or more associates (within the meaning of Chapter 6 of that Act) jointly have the capacity referred to in subsection 50AA(3) of that Act in relation to the body corporate; and

(b) disregard subsection 50AA(4) of that Act if the person is a special purpose vehicle; and

(c) disregard paragraph 50AA(4)(b) of that Act to the extent it applies to a legal obligation the person has as a subsidiary of someone that is a body corporate.

(3) For the purposes of subsection (1) of this section, disregard the effects of a scheme if it would be reasonable to conclude that the purpose of the person, or one of the persons, who enters into or carries out the scheme or any part of the scheme is to enable that subsection to apply to an acquisition.

Note: See section 4F (references to purpose).

(4) For the purposes of subsection (3), a ***scheme*** is:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied; or

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(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise; or

(c) any combination of 2 or more things that are schemes because of paragraph (a) or (b) of this subsection.

Ministerial determinations

(5) Despite subsection (1), an acquisition of shares in the capital of a body corporate is ***required to be notified*** if:

(a) paragraph (1)(a) or (b) applies to the acquisition; and

(b) the acquisition is in a class of acquisitions determined under subsection (6).

(6) For the purposes of paragraph (5)(b), the Minister may, by legislative instrument, determine a class of acquisitions of shares in the capital of bodies corporate.

(7) Without limiting subsection (6), the Minister may determine a class of acquisitions under that subsection wholly or partly by reference to:

(a) the size of an interest in a body corporate; or

(b) the nature of a person's control of a body corporate.

51ABT Acquisitions of shares in the capital of Chapter 6 entities

(1) An acquisition of shares in the capital of a body corporate is not ***required to be notified*** if:

(a) the body corporate is a Chapter 6 entity; and

(b) the acquisition does not result in someone's voting power (within the meaning of the *Corporations Act 2001*) in the body corporate increasing:

(i) from 20% or below to more than 20%; or

(ii) from a starting point that is above 20% and below 100%.

(2) For the purposes of paragraph (1)(b), if:

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(a) a person enters into a contract, arrangement or understanding pursuant to which the person will acquire shares in the capital of a Chapter 6 entity; and

(b) the provisions of the contract, arrangement or understanding pursuant to which the acquisition is to take place do not become binding on the person until one or more conditions are met;

then, in working out someone's voting power, treat the person as not acquiring a relevant interest (within the meaning of the *Corporations Act 2001*) in the shares under the provisions unless and until the provisions become binding.

Subdivision C—Waivers

51ABU Notification waiver applications

(1) A person may apply to the Commission for a determination that an acquisition is not required to be notified.

(2) The application must be made in accordance with any requirements determined under subsection (3).

(3) For the purposes of subsection (2), the Minister may, by legislative instrument, determine requirements for making a notification waiver application.

(4) Without limiting subsection (3), the requirements may include the payment of a fee.

(5) If the application is made in accordance with subsection (2), it is a ***notification waiver application*** in relation to the acquisition.

51ABV Waivers

(1) If a notification waiver application in relation to an acquisition is made, the Commission may, in writing, determine:

(a) that the acquisition is not required to be notified; or

(b) not to make the determination applied for.

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(2) In making a determination under subsection (1), the Commission must:

(a) comply with any requirements determined under subsection (3); and

(b) subject to paragraph (a) of this subsection, have regard to:

(i) the object of this Act; and

(ii) the interests of consumers; and

(iii) if circumstances are determined under subsection 51ABP(1)—the likelihood that, if the acquisition were put into effect, those circumstances would apply; and

(iv) the likelihood that the acquisition would, if put into effect, have the effect mentioned in paragraph 51ABZE(2)(c).

(3) The Minister may, by legislative instrument, determine requirements for the purposes of paragraph (2)(a) of this section.

(4) Without limiting subsection (3), an instrument made under that subsection may:

(a) determine a requirement that, in specified circumstances, the Commission must not make the determination applied for; or

(b) provide for review by the Tribunal of decisions made under subsection (1).

(5) The Commission must give:

(a) written notice of the determination under subsection (1); and

(b) a written explanation of why it made the determination;

to the applicant.

(6) If the Commission makes a determination under paragraph (1)(a) in respect of the application, the acquisition is not ***required to be notified***.

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Division 3—Notification of acquisitions

Subdivision A—Notification of acquisitions

51ABW Notifications of acquisitions

(1) This section applies if the Commission is notified, in accordance with subsection 51ABX(1), of a proposed acquisition (whether or not the acquisition is required to be notified, and whether or not a previous notification of the acquisition has been made).

Note: For the acquisitions to which this section applies, see Subdivision B of Division 1.

(2) The acquisition is a ***notified acquisition***.

(3) The principal party that makes the notification, or each of the principal parties that jointly make the notification, is a ***notifying party*** of the notification.

(4) Subject to paragraph 51ABZ(1)(a), subsection 51ABZA(5) and subparagraph 51ABZB(2)(a)(i), the ***effective notification date*** of the notification is the day the notification is made.

(5) The Commission must give the notifying party, or at least one of the notifying parties, written notice:
(a) that the Commission has received the notification; and
(b) of the effective notification date.

51ABX Requirements for notifications

(1) A notification of a proposed acquisition is made in accordance with this subsection if:
(a) the notification is made in writing; and
(b) the notification is accompanied by the fee (if any) determined under subsection (2) for the purposes of this paragraph in relation to the notification; and
(c) the notification is made by:

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(i) if there is only one principal party to the acquisition—the principal party; or

(ii) otherwise—all of the principal parties jointly; and

(d) any of the following subparagraphs apply when the notification is made:

(i) the acquisition is to take place pursuant to a contract, arrangement or understanding that has been entered into;

(ii) the proposed contract, arrangement or understanding pursuant to which the acquisition is to take place has not been entered into, but all of the proposed parties to the contract, arrangement or understanding pursuant intend to enter into it;

(iii) the acquisition is to be a takeover acquisition in relation to a takeover bid and subsection (4) applies;

(iv) the acquisition is to take place pursuant to a proposed arrangement between a Part 5.1 body and its creditors or any class of them, or between a Part 5.1 body and its members or any class of them, under Part 5.1 of the *Corporations Act 2001*, and the arrangement has been publicly proposed by the Part 5.1 body.

(2) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (1)(b) in relation to the notification.

(3) To avoid doubt, the notification is taken not to be made before the fee (if any) required by paragraph (1)(b) is paid.

(4) For the purposes of subparagraph (1)(d)(iii), this subsection applies if:

(a) the bid has been publicly proposed; or

(b) the bid has been made; or

(c) the proposed principal party, or all of the proposed principal parties, to the acquisition, intend:

(i) that the bid will be a bid to which paragraphs (c) and (d) of item 2 of the table in section 611 of the *Corporations Act 2001* will apply; and

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(ii) to make a request under paragraph 51ABZZL(1)(d) of this Act in relation to the acquisition.

Notifications may cover multiple acquisitions

(5) If a proposal to put an acquisition into effect includes a proposal to put another acquisition into effect:

(a) the proposed acquisitions may be notified in a single notification; and

(b) the acquisitions provisions apply in relation to such a notification as if:

(i) those acquisitions together constituted a single acquisition; and

(ii) each party to those acquisitions were a party to that single acquisition; and

(iii) each principal party to those acquisitions were a principal party to that single acquisition.

Multiple notifying parties

(6) If there is more than one notifying party of a notification of an acquisition:

(a) a reference in this Part (other than this Subdivision) to giving a notice to the notifying party of the notification of the acquisition is taken to be a reference to giving a notice to any of those notifying parties; and

(b) a reference in this Part (other than this Subdivision) to the notifying party of the notification of the acquisition doing a thing (such as giving additional information or documents or making a request or application) is taken to be a reference to all of those notifying parties doing that thing jointly.

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Subdivision B—Powers of the Commission in response to incomplete and misleading notifications and changes of fact

51ABY Notifications that are materially incomplete or misleading

(1) The Commission may decide, in writing, that a notification of an acquisition should be taken not to have an effective notification date, if:
  (a) the notification is not subject to phase 2 review; and
  (b) the Commission has not made a determination in respect of the notification under subsection 51ABZE(1); and
  (c) the Commission is satisfied that subsection (2) of this section applies to the notification.

(2) This subsection applies to the notification if it:
  (a) is materially incomplete; or
  (b) is materially misleading; or
  (c) contains information that is false in a material particular.

(3) The decision must be made within a reasonable period after the Commission begins to be satisfied that subsection (2) applies to the notification.

(4) In considering whether subsection (2) applies to the notification, the Commission may have regard to:
  (a) the extent to which the notification is in the form determined under paragraph (5)(a) for the purposes of this paragraph in relation to the notification; or
  (b) the extent to which the notification includes, or is accompanied by, any information or document determined under paragraph (5)(b) for the purposes of this paragraph in relation to the notification; or
  (c) any additional information or documents given to the Commission as mentioned in section 51ABZA in response to any previous determination under subsection (1) of this section in relation to the notification; or

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(d) any change of fact:
(i) of which the Commission becomes aware after the notification is made; and
(ii) that is material to the Commission making a determination under Division 4 in respect of the notification.

(5) The Minister may, in writing, determine:
(a) a form for the purposes of paragraph (4)(a) in relation to the notification; or
(b) information or documents for the purposes of paragraph (4)(b) in relation to the notification.

(6) A determination under subsection (5) may require the notification to specify any goodwill protection provisions of the contract pursuant to which the acquisition would take place.

(7) A determination made under subsection (5) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the instrument.

(8) To avoid doubt, subsection (2) can apply to the notification after the notification is made (for example, because of a change of fact) even if subsection (2) did not apply to the notification when the notification was made.

51ABZ Notifications that are materially incomplete or misleading—consequences of Commission's decisions

(1) If the Commission makes a decision under subsection 51ABY(1) in relation to a notification of an acquisition:
(a) the notification is taken never to have had an ***effective notification date***; and
(b) the Commission must give to the notifying party of the notification of the acquisition written notice of:
(i) the decision; and
(ii) the grounds on which the Commission is satisfied that subsection 51ABY(2) applies to the notification.

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Note: For review of the decision, see section 51ABZZG.

(2) The Commission must not make a determination under subsection 51ABZE(1) in respect of the notification if, because of a decision made under subsection 51ABY(1), the notification does not have an effective notification date.

51ABZA Notifications that are incomplete or misleading—providing additional information and documents

(1) This section applies in relation to a notification of an acquisition if:
  (a) because of a decision made under subsection 51ABY(1), the notification does not have an effective notification date; and
  (b) the notifying party of the notification gives the Commission additional information or documents in response to the decision.

(2) The additional information or documents are given in accordance with this subsection if:
  (a) in the case of information—the information is given in writing; and
  (b) the information or documents are accompanied by the fee (if any) determined under subsection (3) for the purposes of this paragraph in relation to the information or documents and the notification of the acquisition.

(3) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (2)(b) in relation to the information or documents and the notification.

(4) To avoid doubt, the additional information or documents are taken not to be given before the fee (if any) required by paragraph (2)(b) is paid.

(5) The ***effective notification date*** of the notification of the acquisition is the day the additional information or documents are given.

(6) The Commission must give the notifying party written notice of the effective notification date.

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51ABZB Material changes of fact

(1) This section applies in relation to a notification of an acquisition if:
  (a) the Commission has not made a determination in respect of the notification under subsection 51ABZE(1); and
  (b) the Commission becomes aware of a change of fact.

(2) If the Commission is satisfied that the change of fact is material to the Commission making a determination under subsection 51ABZE(1) in respect of the notification, the Commission may, in writing:
  (a) if the notification is not subject to phase 2 review:
    (i) decide that the ***effective notification date*** of the notification is the date on which the Commission becomes aware of the change of fact; or
    (ii) decide that the phase 1 determination period for the notification is extended by the period mentioned in subsection (3); or
  (b) if the notification is subject to phase 2 review—decide that the phase 2 determination period for the notification is extended by the period mentioned in subsection (3).

(3) For the purposes of subparagraph (2)(a)(ii) or paragraph (2)(b), the extension is for the period:
  (a) starting on the day the Commission makes the decision under that subparagraph or paragraph; and
  (b) including:
    (i) each day on which the notifying party of the notification has not given to the Commission information or documents in response to the decision in accordance with subsection 51ABZC(2); and
    (ii) the day (if any) on which the notifying party gives to the Commission information or documents in response to the decision in accordance with that subsection.

(4) A decision under subsection (2) must be made within a reasonable period after the Commission becomes aware of the change of fact.

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(5) If the Commission makes a decision under subsection (2), the Commission must give written notice of the decision to the notifying party of the notification.

Note: For review of the decision, see section 51ABZZG.

(6) If the Commission extends the phase 1 determination period for the notification under subparagraph (2)(a)(ii) of this section, the period mentioned in paragraph 51ABZZE(3)(a) in relation to making a determination under subsection 51ABZE(1) in respect of the notification is extended by the same number of days.

(7) If the Commission extends the phase 2 determination period for the notification under paragraph (2)(b) of this section, the following paragraphs apply in relation to making a determination under subsection 51ABZE(1) in respect of the notification:

(a) the 25 business days mentioned in section 51ABZK is increased by the number of days of the extension;

(b) the period mentioned in paragraph 51ABZZE(3)(b) is extended by the same number of days.

51ABZC Material changes of fact—providing additional information and documents

(1) This section applies in relation to a notification of an acquisition if:

(a) the Commission has made a decision under subparagraph 51ABZB(2)(a)(ii) or paragraph 51ABZB(2)(b) in relation to the notification because of a material change of fact; and

(b) the notifying party of the notification gives the Commission information or documents in response to the decision.

(2) The information or documents are given in accordance with this subsection if:

(a) in the case of information—the information is given in writing; and

(b) the information or documents are accompanied by the fee (if any) determined under subsection (3) for the purposes of this

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paragraph in relation to the information or documents and the notification of the acquisition.

(3) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (2)(b) in relation to the information or documents and the notification.

(4) To avoid doubt, the information or documents are taken not to be given before the fee (if any) required by paragraph (2)(b) is paid.

Subdivision C—When Commission may cease considering notifications

51ABZD When Commission may cease considering notifications

(1) This section applies to a notification of an acquisition if the Commission has not made a determination in respect of the notification under subsection 51ABZE(1).

(2) The Commission must decide, in writing, to cease considering the notification if requested to do so, in writing, by the notifying party of the notification.

(3) The Commission may also decide to cease considering the notification if the Commission is satisfied that the parties to the acquisition no longer intend to put the acquisition into effect.

(4) Subsections (2) and (3) do not limit each other.

(5) If the Commission decides under subsection (2) or (3) to cease considering the notification:

(a) the Commission must give written notice of the decision to the notifying party of the notification; and

(b) Subdivision B of this Division, and Division 4, do not apply to the notification.

Note: An effect of the decision is that the acquisition must not be put into effect (see section 45AY, subsection 51ABE(3) and section 51ABF).

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(6) To avoid doubt, a decision under subsection (2) or (3) of this section does not have the effect that the acquisition ceases to be a ***notified acquisition***.

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Division 4—Commission consideration of acquisitions: substantial lessening of competition

Subdivision A—Commission consideration of acquisitions

51ABZE Commission consideration of acquisitions

(1) If the Commission is notified of a proposed acquisition in accordance with subsection 51ABX(1), the Commission may, in writing, determine:

(a) that the acquisition may be put into effect; or

(b) that the acquisition must not be put into effect.

Note: The determination may include:

(a) conditions (see section 51ABZF); or

(b) declarations relating to goodwill protection provisions (see section 51ABZG).

(2) The Commission must not determine that the acquisition must not be put into effect unless:

(a) the notification is subject to phase 2 review; and

(b) the Commission has given a notice of competition concerns in relation to the notification in accordance with section 51ABZK; and

(c) the Commission is satisfied that the acquisition, if put into effect, would, in all the circumstances, have the effect, or be likely to have the effect, of substantially lessening competition in any market.

(3) In considering whether to determine that the acquisition may be put into effect or must not be put into effect, the Commission must have regard to:

(a) the object of this Act; and

(b) all relevant matters, including the interests of consumers.

(4) The Commission must give:

(a) written notice of the determination under subsection (1); and

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(b) a written statement of the Commission's reasons for making the determination;

to the notifying party of the notification of the acquisition.

Note 1: If the Commission determines that the acquisition must not be put into effect, the notifying party may apply to the Commission under Division 5 for a determination that the acquisition would be of public benefit.

Note 2: For review of a determination made under subsection (1), see Division 1B of Part IX.

(5) For the purposes of this Act (other than this Division, Subdivision B of Division 6 and paragraph 51ABZZM(2)(a)), the determination is taken to be made when the Commission includes a copy of it on the acquisitions register.

51ABZF Conditions

(1) A determination made under paragraph 51ABZE(1)(a) in respect of a notification of an acquisition may include conditions.

Example: A condition that a specified person must give an undertaking to the Commission for the purposes of section 87B and comply with the undertaking.

Note: If the determination includes conditions, the notifying party of the notification may apply to the Commission under Division 5 for a determination that the acquisition would be of public benefit.

(2) The Commission must not include conditions in the determination unless the Commission is satisfied that, disregarding any conditions the Commission could include, the acquisition, if put into effect, could, in all the circumstances, have the effect of substantially lessening competition in any market.

(3) In considering whether to include conditions in the determination, the Commission:

(a) must have regard to all relevant matters; and

(b) may have regard to:

(i) the effect on the interests of consumers that compliance with the conditions would have, or be likely to have; or

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(ii) without limiting subparagraph (i) of this paragraph—any consumer benefits that would result, or be likely to result from compliance with the conditions.

(4) To avoid doubt, a reference in this Act to a determination made under paragraph 51ABZE(1)(a) includes a reference to any conditions included in it.

51ABZG Goodwill protection provisions

(1) The Commission may declare, in a determination made under subsection 51ABZE(1) in respect of a notification of an acquisition, that paragraph 51(2)(e) does not apply to a goodwill protection provision of the contract pursuant to which the acquisition is to take place.

(2) The Commission must not include a declaration under subsection (1) of this section in relation to a provision of the contract unless the Commission is satisfied that the provision is not necessary for the protection of the purchaser in respect of the goodwill of the business.

(3) To avoid doubt, if the Commission does not include a declaration under subsection (1) in relation to a provision of the contract, the fact that the Commission does not include that declaration does not:

(a) affect the application of any other provision of this Act in relation to the provision; or

(b) limit the powers of the Commission or a court in relation to the provision of the contract, including the ability of the Commission to recognise or claim that paragraph 51(2)(e) does not apply to the provision.

(4) To avoid doubt, a reference in this Act to a determination made under subsection 51ABZE(1) includes a reference to any declarations included in it under subsection (1) of this section.

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Subdivision B—Substantial lessening of competition

51ABZH Substantial lessening of competition

(1) This section applies to the Commission considering, for the purposes of this Part, whether an acquisition, if put into effect, would or could, in all the circumstances, have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Note: For ***lessening of competition***, see section 4G.

(2) The Commission must have regard to all relevant matters.

(3) Without limiting subsection (2), the Commission may have regard to any of the following matters:

(a) the contract, arrangement or understanding, or proposed contract, arrangement or understanding, pursuant to which the acquisition is to take place;

(b) the commercial relationships of the parties to the acquisition (and, if any of the parties is a body corporate, of a body corporate that is related to that party).

(4) For the purposes of this Part, the acquisition may have the effect or be likely to have the effect of substantially lessening competition in a market if the acquisition would, in all the circumstances, have the effect, or be likely to have the effect, of creating, strengthening or entrenching a substantial degree of power in the market.

(5) Subsections 46(3) to (8) have effect for the purposes of this Part as if:

(a) a reference in those subsections (other than in paragraph 46(8)(b)) to section 46 included a reference to this Part; and

(b) a reference in those subsections to a market were a reference to a market (within the meaning of this Part).

Note: Subsections 46(3) to (8) contain matters relevant to working out whether a corporation has a substantial degree of power in a market.

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Cumulative effects

(6) The Commission may treat the effect of the acquisition as being the combined effect of:
  (a) the acquisition (the ***current acquisition***); and
  (b) any one or more acquisitions:
    (i) that are put into effect during the 3 years ending on the effective notification date of the notification of the current acquisition; and
    (ii) the parties to which include any party to the current acquisition or, if a party to the current acquisition is a body corporate, include a body corporate that is related to that party; and
    (iii) the targets of which are involved (directly or indirectly) in the supply or acquisition of the same goods or services or goods or services that are substitutable for, or otherwise competitive with, each other (disregarding any geographical factors or limitations).

(7) Subsection (6) does not limit the circumstances in which an acquisition would or could, if put in effect, have the effect, or be likely to have the effect, of substantially lessening competition for the purposes of this Part.

Effect outside this Part

(8) To avoid doubt, this Subdivision does not affect the meaning of ***substantially lessening competition*** outside this Part.

Subdivision C—Process for considering acquisitions

51ABZI Time for making determinations

Earliest time for making determinations

(1) The Commission must not make a determination under subsection 51ABZE(1) in respect of a notification of an acquisition

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earlier than 15 business days after the effective notification date of the notification.

Commission deemed to make determination at end of determination period

(2) The Commission is taken to determine under paragraph 51ABZE(1)(a), at the end of the determination period for a notification of an acquisition, that the acquisition may be put into effect, unless the Commission makes a determination under subsection 51ABZE(1) in respect of the notification before the end of that period.

Note: A determination the Commission is taken to make under this subsection does not include any conditions under subsection 51ABZF(1) or declarations under subsection 51ABZG(1).

Determination periods

(3) The ***determination period*** for a notification of an acquisition is:
(a) if the notification is not subject to phase 2 review—the phase 1 determination period for the notification; or
(b) if the notification is subject to phase 2 review—the phase 2 determination period for the notification.

(4) The ***phase 1 determination period*** for a notification of an acquisition that has an effective notification date:
(a) starts on the effective notification date; and
(b) subject to subparagraph 51ABZB(2)(a)(ii) and section 51ABZZE (extensions of determination periods), ends 30 business days after it starts.

(5) If a notification of an acquisition is subject to phase 2 review, the ***phase 2 determination period*** for the notification:
(a) starts immediately after the end of the phase 1 determination period for the notification; and
(b) subject to paragraph 51ABZB(2)(b), subsections 51ABZK(5), 51ABZL(4) and 51ABZN(2) and

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section 51ABZZE (extensions of determination periods), ends 90 business days after it starts.

Invalid determinations etc.

(6) Subsection (7) applies if:

(a) the Commission purports to make a determination in respect of a notification of an acquisition under subsection 51ABZE(1) before the end of the determination period; and

(b) the determination is invalid, or a court:

(i) sets the determination aside; or

(ii) remits the decision to make the determination back to the Commission to be remade.

(7) A reference in subsection (2) of this section to making a determination before the end of the determination period includes a reference to purportedly making a determination as mentioned in paragraph (6)(a).

Note: The effect of this subsection is that the invalidity etc. does not result in the Commission being taken to have made a determination under subsection (2) at the end of the determination period.

51ABZJ Phase 2 review—when notifications are *subject to phase 2 review*

(1) During the phase 1 determination period for a notification of an acquisition, the Commission may, in writing, decide that the notification is to be subject to phase 2 review, if:

(a) the Commission is satisfied that the acquisition to which the notification relates, if put into effect, could, in all the circumstances, have the effect, or be likely to have the effect, of substantially lessening competition in any market; and

(b) the Commission has not made a determination in respect of the notification under paragraph 51ABZE(1)(a).

Note: Deciding that the notification is to be subject to phase 2 review extends the time the Commission has to make a determination in

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respect of the notification under subsection 51ABZE(1) (see section 51ABZI).

(2) If the Commission decides that the notification is to be subject to phase 2 review:

(a) the notification is ***subject to phase 2 review***; and

(b) the Commission must give to the notifying party of the notification:

(i) written notice of the decision, including the matters specified under subsection (3); and

(ii) written notice of the day by which, under paragraph (d) of this subsection, the fee (if any) mentioned in paragraph (c) must be paid; and

(c) the Commission must not make a determination in respect of the notification of the acquisition under subsection 51ABZE(1) if the fee (if any) determined under paragraph (4)(a) of this section for the purposes of this paragraph in relation to the notification has not been paid; and

(d) if the fee (if any) mentioned in paragraph (c) of this subsection is not paid on or before the day determined under paragraph (4)(b) for the purposes of this paragraph in relation to the notification—the Commission is taken to decide under subsection 51ABZD(2) on that day to cease considering the notification (if the Commission has not already made a decision under section 51ABZD to cease considering the notification).

Note: See also section 51ABZK (Commission must give notice of competition concerns).

(3) The notice given under subparagraph (2)(b)(i) of this section must:

(a) identify the parties to the acquisition, and describe the economic activities in which they engage;

(b) explain the Commission's satisfaction, including specifying:

(i) the nature of the theory of harm that is the basis for the Commission's satisfaction; and

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(ii) the matters the Commission intends to investigate before making a determination in respect of the notification under subsection 51ABZE(1).

(4) The Minister may, by legislative instrument, determine:

(a) a fee for the purposes of paragraph (2)(c) in relation to the notification; or

(b) a day for the purposes of paragraph (2)(d) in relation to the notification.

51ABZK Phase 2 review—notices of competition concerns

Notices of competition concerns

(1) Subject to subsection (2), the Commission must give the notifying party of a notification of an acquisition a written notice (a ***notice of competition concerns***) in accordance with subsections (3) and (4) if the notification is subject to phase 2 review.

(2) The Commission is not required to give a notice of competition concerns if the Commission makes a determination in respect of the notification of the acquisition under paragraph 51ABZE(1)(a) on or before the 25th business day after the start of the phase 2 determination period for the notification.

Contents of notices of competition concerns

(3) The notice of competition concerns must set out:

(a) the Commission's preliminary assessment of whether the acquisition, if put into effect, would have the effect, or be likely to have the effect, of substantially lessening competition in any market; and

(b) the grounds on which the Commission makes the assessment, referring to the evidence or other material on which those grounds are based.

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Section 51ABZK

When notices of competition concerns must be given

(4) The notice of competition concerns must be given:
  (a) no later than the 25th business day after the start of the phase 2 determination period for the notification of the acquisition; or
  (b) if it is not practicable to give the notice of competition concerns by that day—as soon as practicable after that 25th business day.

(5) If the Commission does not give the notice of competition concerns in relation to the notification of the acquisition before the end of the 25th business day mentioned in paragraph (4)(a), the following paragraphs apply in relation to making a determination under subsection 51ABZE(1) in respect of the notification:
  (a) if the notifying party of the notification agrees in writing to this paragraph applying in relation to the notification—the phase 2 determination period is extended by the number of business days to which subsection (6) of this section applies (not including a day occurring on or after the day, if any, on which the notifying party withdraws its agreement);
  (b) in any case (but subject to subsection (7) of this section)—the 15 business days mentioned in subsections 51ABZZD(3) and (5) are reduced by the number of business days to which subsection (6) of this section applies;
  (c) in any case—the period mentioned in paragraph 51ABZZE(3)(b) is extended by the number of business days to which subsection (6) of this section applies.

(6) This subsection applies to a business day if:
  (a) the day occurs after the 25th business day after the start of the phase 2 determination period for the notification of the acquisition; and
  (b) the Commission does not give the notice of competition concerns on or before the day.

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(7) If the reduction under paragraph (5)(b) would be of more than 15 business days, subsections 51ABZZD(3) and (5) do not apply in relation to making the determination.

51ABZL Phase 2 review—submissions

(1) If the Commission gives the notifying party of a notification of an acquisition a notice of competition concerns in relation to the notification, the Commission:

(a) must give the notifying party a reasonable opportunity to make, during the period:

(i) starting on the day on which the Commission gives the notice of competition concerns; and

(ii) ending on the 25th business day after that day;

oral or written submissions to the Commission in relation to the matters set out in the notice of competition concerns; and

(b) subject to subsection (2) of this section, in making a determination under subsection 51ABZE(1) in respect of the notification of the acquisition, must not take into account submissions received, as mentioned in paragraph (a) of this subsection, after that period.

(2) For the purposes of paragraph (1)(b):

(a) the notifying party may, in writing, before the end of the period during which the notifying party may make submissions to the Commission in relation to the notice of competition concerns, request the Commission to extend the period; and

(b) if the notifying party does so, the Commission may, by written notice given to the notifying party, extend the period.

(3) To avoid doubt, the Commission may extend the period more than once.

(4) If the Commission extends the period, the following periods relating to making a determination under subsection 51ABZE(1) in respect of the notification are also extended by the same number of days:

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(a) the phase 2 determination period for the notification;
(b) the period mentioned in paragraph 51ABZZE(3)(b).

51ABZM Phase 2 review—determinations that acquisition may be put into effect

Sections 51ABZK and 51ABZL do not limit the Commission's ability to make a determination in respect of a notification of an acquisition under paragraph 51ABZE(1)(a) at any time occurring before the end of the determination period for the notification.

51ABZN Phase 2 review—false or misleading information

(1) This section applies in relation to a notification of an acquisition if:
(a) the notification is subject to phase 2 review; and
(b) the Commission has not made a determination in respect of the notification under subsection 51ABZE(1).

(2) If the Commission is satisfied that subsection (3) of this section applies to the notification, the Commission may, in writing, decide that the phase 2 determination period for the notification is extended by the period:
(a) starting on the day the Commission makes the decision under this subsection; and
(b) including:
(i) each day on which the notifying party of the notification has not given to the Commission information or documents in response to the decision in accordance with subsection 51ABZO(2); and
(ii) the day (if any) on which the notifying party gives to the Commission information or documents in response to the decision in accordance with subsection 51ABZO(2).

(3) This subsection applies if:
(a) the notification:
(i) is materially misleading; or

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(ii) contains information that is false in a material particular; or

(b) any information the notifying party gives to the Commission under an acquisitions provision in relation to the notification is false in a material particular.

(4) The decision must be made within a reasonable period after the Commission begins to be satisfied that subsection (3) applies to the notification.

(5) If the Commission makes a decision under subsection (2), the Commission must give written notice of the decision to the notifying party of the notification.

Note: For review of a decision under subsection (2), see section 51ABZZG.

(6) If the Commission extends the phase 2 determination period for the notification under subsection (2) of this section, the following paragraphs apply in relation to making a determination under subsection 51ABZE(1) in respect of the notification:

(a) the 25 business days mentioned in section 51ABZK is increased by the number of days of the extension;

(b) the period mentioned in paragraph 51ABZZE(3)(b) is extended by the same number of days.

51ABZO Phase 2 review—false or misleading information: providing additional information and documents

(1) This section applies in relation to a notification of an acquisition if:

(a) the Commission has made a decision under subsection 51ABZN(2) in relation to the notification; and

(b) the notifying party of the notification gives the Commission information or documents in response to the decision.

(2) The information or documents are given in accordance with this subsection if:

(a) in the case of information—the information is given in writing; and

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(b) the information or documents are accompanied by the fee (if any) determined under subsection (3) for the purposes of this paragraph in relation to the information or documents and the notification of the acquisition.

(3) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (2)(b) in relation to the information or documents and the notification.

(4) To avoid doubt, the information or documents are taken not to be given before the fee (if any) required by paragraph (2)(b) is paid.

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Division 5—Commission consideration of acquisitions: public benefit

Subdivision A—Public benefit applications

51ABZP Public benefit applications

(1) The notifying party of a notification of an acquisition may apply to the Commission for a determination that the acquisition would be of public benefit, if:

(a) both:

(i) the Commission has made a determination under paragraph 51ABZE(1)(a) in respect of the notification that includes conditions; and

(ii) the acquisition has not been put into effect; or

(b) the Commission has made a determination under paragraph 51ABZE(1)(b) in respect of the notification.

(2) The application must be:

(a) made no later than 21 days after the Commission makes the determination; and

(b) made in writing; and

(c) accompanied by the fee (if any) determined under subsection (3) for the purposes of this paragraph in relation to the application.

(3) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (2)(c) in relation to the application.

(4) To avoid doubt, the application is taken not to be made before the fee (if any) required by paragraph (2)(c) of this section is paid.

(5) If the application is made in accordance with subsection (2), it is a ***public benefit application*** in relation to the notification.

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(6) Subject to paragraph 51ABZR(1)(a), subsection 51ABZS(5) and paragraph 51ABZT(2)(a), the ***effective application date*** of the application is the day the application is made.

(7) The Commission must give the notifying party written notice:
  (a) that the Commission has received the application; and
  (b) of the effective application date.

Subdivision B—Powers of the Commission in response to incomplete or misleading public benefit applications and changes of fact

51ABZQ Public benefit applications that are materially incomplete or misleading

(1) The Commission may decide, in writing, that a public benefit application in relation to a notification of an acquisition should be taken not to have an effective application date, if:
  (a) the Commission has not made a determination in respect of the application under subsection 51ABZW(1); and
  (b) the Commission is satisfied that subsection (2) of this section applies to the application.

(2) This subsection applies to the application if it:
  (a) is materially incomplete; or
  (b) is materially misleading; or
  (c) contains information that is false in a material particular.

(3) The decision must be made within a reasonable period after the Commission begins to be satisfied that subsection (2) applies to the application.

(4) In considering whether subsection (2) applies to the public benefit application, the Commission may have regard to:
  (a) the extent to which the application is made in the form determined under paragraph (5)(a) for the purposes of this paragraph in relation to the application; or

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(b) the extent to which the application includes, or is accompanied by, any information or documents determined under paragraph (5)(b) for the purposes of this paragraph in relation to the application; or

(c) any additional information or documents given to the Commission as mentioned in section 51ABZS in response to any previous decision under subsection (1) of this section in relation to the application; or

(d) any change of fact:

(i) of which the Commission becomes aware after the notification is made; and

(ii) that is material to the Commission making a determination under subsection 51ABZW(1) in respect of the application.

(5) The Minister may, in writing, determine:

(a) a form for the purposes of paragraph (4)(a) of this section in relation to the application; or

(b) information or documents for the purposes of paragraph (4)(b) of this section in relation to the application.

(6) A determination made under subsection (5) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the instrument.

(7) To avoid doubt subsection (2) can apply to the application after the application is made (for example, because of a change of fact) even if subsection (2) did not apply to the application when the application was made.

51ABZR Public benefit applications that are materially incomplete or misleading—consequences of Commission's decisions

(1) If the Commission makes a decision under subsection 51ABZQ(1) in relation to a public benefit application in relation to a notification of an acquisition:

(a) the application is taken never to have had an ***effective application date***; and

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(b) the Commission must give to the notifying party of the notification of the acquisition written notice:
(i) of the decision; and
(ii) the grounds on which the Commission is satisfied that subsection 51ABZQ(2) applies to the application.

Note: For review of the decision, see section 51ABZZG.

(2) The Commission must not make a determination under subsection 51ABZW(1) in respect of the application if, because of a decision made under subsection 51ABZQ(1), the application does not have an effective application date.

51ABZS Public benefit applications that are materially incomplete or misleading—providing additional information and documents

(1) This section applies in relation to a public benefit application in relation to a notification of an acquisition if:
(a) because of a decision made under subsection 51ABZQ(1), the application does not have an effective application date; and
(b) the notifying party of the notification gives the Commission additional information or documents in response to the decision.

(2) The additional information or documents are given in accordance with this subsection if:
(a) in the case of information—the information is given in writing; and
(b) the information or documents are accompanied by the fee (if any) determined under subsection (3) for the purposes of this paragraph in relation to the information or documents and the application.

(3) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (2)(b) in relation to the information or documents and the application.

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(4) To avoid doubt, the additional information or documents are taken not to be given before the fee (if any) required by paragraph (2)(b) is paid.

(5) The ***effective application date*** of the public benefit application is the day the additional information or documents are given.

(6) The Commission must give the notifying party written notice of the effective application date.

51ABZT Material changes of fact

(1) This section applies in relation to a public benefit application in relation to a notification of an acquisition if:
  (a) the Commission has not made a determination in respect of the application under subsection 51ABZW(1); and
  (b) the Commission becomes aware of a change of fact.

(2) If the Commission is satisfied that the change is material to the Commission making a determination under subsection 51ABZW(1) in respect of the application, the Commission may, in writing:
  (a) decide that the ***effective application date*** of the application is the date on which the Commission becomes aware of the change of fact; or
  (b) decide that the determination period for the application is extended by the period mentioned in subsection (3) of this section.

(3) For the purposes of paragraph (2)(b), the extension is for the period:
  (a) starting on the day the Commission makes the decision under that paragraph; and
  (b) including:
    (i) each day on which the notifying party of the notification has not given to the Commission information or documents in response to the decision in accordance with subsection 51ABZU(2); and

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(ii) the day (if any) on which the notifying party gives to the Commission information or documents in response to the decision in accordance with that subsection.

(4) The decision must be made within a reasonable period after the Commission becomes aware of the change of fact.

(5) If the Commission makes a decision under subsection (2) of this section, the Commission must give written notice of the decision to the notifying party of the notification.

Note: For review of the decision, see section 51ABZZG.

(6) If the Commission extends the determination period for the public benefit application under paragraph (2)(b) of this section, the following paragraphs apply in relation to making a determination under subsection 51ABZW(1) in respect of the application:

(a) the 20 business days mentioned in section 51ABZZA is increased by the same number of days as the extension;

(b) the period mentioned in paragraph 51ABZZE(3)(c) is extended by the same number of days.

51ABZU Material changes of fact—providing additional information and documents

(1) This section applies in relation to a public benefit application in relation to a notification of an acquisition if:

(a) the Commission has made a decision under paragraph 51ABZT(2)(b) in relation to the application because of a material change of fact; and

(b) the notifying party of the notification gives the Commission information or documents in response to the decision.

(2) The information or documents are given in accordance with this subsection if:

(a) in the case of information—the information is given in writing; and

(b) the information or documents are accompanied by the fee (if any) determined under subsection (3) for the purposes of this

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paragraph in relation to the information or documents and the application.

(3) The Minister may, by legislative instrument, determine a fee for the purposes of paragraph (2)(b) in relation to the information or documents and the application.

(4) To avoid doubt, the information or documents are taken not to be given before the fee (if any) required by paragraph (2)(b) is paid.

Subdivision C—When Commission may cease considering public benefit applications

51ABZV When Commission may cease considering public benefit applications

(1) This section applies to a public benefit application in relation to a notification of an acquisition if the Commission has not made a determination in respect of the application under subsection 51ABZW(1).

(2) The Commission must decide, in writing, to cease considering the application if requested to do so, in writing, by the notifying party of the notification.

(3) The Commission may also decide, in writing, to cease considering the application if the Commission is satisfied that the parties to the acquisition no longer intend to put the acquisition into effect.

(4) Subsections (2) and (3) do not limit each other.

(5) If the Commission decides under subsection (2) or (3) to cease considering the application:

(a) the Commission must give written notice of its decision to the notifying party of the notification; and

(b) Subdivisions B, D and F do not apply to the application.

Note 1: An effect of making the decision is that the acquisition might not be able to be put into effect (see section 45AY, subsection 51ABE(3) and section 51ABF).

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Note 2: For review of a decision under subsection (3) of this section, see section 51ABZZG.

Subdivision D—Commission consideration of public benefit applications

51ABZW Determinations on public benefit applications

(1) If a public benefit application in relation to a notification of an acquisition is made, the Commission may, in writing, determine:
  (a) that the acquisition would be of public benefit; or
  (b) not to make the determination applied for.

Note: The determination may include conditions (see section 51ABZX).

(2) The Commission must not make a determination under paragraph (1)(a) unless the Commission is satisfied that, were the acquisition put into effect (and any conditions included in the determination under subsection 51ABZX(1) complied with):
  (a) the acquisition would, in all the circumstances, result, or be likely to result, in a benefit to the public; and
  (b) the benefit would, in all the circumstances, outweigh the detriment to the public that would result, or be likely to result, from the acquisition.

(3) In considering whether to determine that the acquisition would be of public benefit or not to make the determination applied for, the Commission must have regard to:
  (a) the object of this Act; and
  (b) all relevant matters, including the interests of consumers.

(4) The Commission must give:
  (a) written notice of the determination made under subsection (1); and
  (b) a written statement of the Commission's reasons for making the determination;

to the notifying party of the notification of the acquisition.

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Note: For review of a determination made under subsection (1), see Division 1B of Part IX.

(5) For the purposes of this Act (other than this Division and Subdivision B of Division 6), the determination is taken to be made when the Commission includes a copy of it on the acquisitions register.

51ABZX Conditions

(1) A determination made under paragraph 51ABZW(1)(a) may include conditions.

Example: A condition that a specified person must give an undertaking to the Commission for the purposes of section 87B and comply with the undertaking.

(2) In considering whether to include conditions in a determination, the Commission:

(a) must have regard to all relevant matters; and

(b) may have regard to:

(i) the effect on the interests of consumers that compliance with the conditions would have, or be likely to have; or

(ii) without limiting subparagraph (i) of this paragraph—any consumer benefits that would result, or be likely to result from compliance with the conditions.

Subdivision E—Public benefit

51ABZY Public benefit

(1) This section applies in relation to the Commission considering, for the purposes of this Part, whether, were an acquisition put into effect:

(a) the acquisition would, in all the circumstances, result, or be likely to result, in a benefit to the public; and

(b) the benefit would, in all the circumstances, outweigh the detriment to the public that would result, or be likely to result, from the acquisition.

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(2) The Commission must have regard to all relevant matters.

(3) Without limiting subsection (2), the Commission may have regard to the contract, arrangement or understanding, or proposed contract, arrangement or understanding, pursuant to which the acquisition is to take place.

Subdivision F—Process for considering public benefit applications

51ABZZ Time for making determinations in respect of public benefit applications

Commission deemed to make determination at end of determination period

(1) The Commission is taken to determine under paragraph 51ABZW(1)(b), at the end of the determination period for a public benefit application, not to make the determination applied for, unless the Commission makes a determination in respect of the application under subsection 51ABZW(1) before the end of that period.

*Meaning of **determination period***

(2) If a public benefit application in relation to a notification of an acquisition has an effective application date, the ***determination period*** for the application:

(a) starts on the effective application date; and

(b) subject to paragraph 51ABZT(2)(b), subsections 51ABZZA(4) and 51ABZZB(4) and section 51ABZZE (extensions of determination periods)—ends 50 business days after it starts.

Invalid determinations etc.

(3) Subsection (4) of this section applies if:

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(a) the Commission purports to make a determination in respect of a public benefit application under subsection 51ABZW(1) before the end of the determination period; and

(b) the determination is invalid, or a court:

(i) sets the determination aside; or

(ii) remits the decision to make the determination back to the Commission to be remade.

(4) A reference in subsection (1) of this section to making a determination before the end of the determination period includes a reference to purportedly making the determination as mentioned in paragraph (3)(a).

Note: The effect of this subsection is that the invalidity etc. does not result in the Commission being taken to have made a determination under subsection (1) at the end of the determination period.

51ABZZA Public benefit assessments

Public benefit assessments

(1) The Commission must give the notifying party of a notification of an acquisition a written notice (a ***public benefit assessment***) in accordance with subsections (2) and (3) if a public benefit application in relation to the notification has an effective application date.

Content of public benefit assessments

(2) The public benefit assessment must set out:

(a) the Commission's preliminary assessment of the benefits and detriments to the public that the Commission has identified could result, or be likely to result, from the acquisition, including an assessment of the significance of those benefits and detriments; and

(b) the grounds on which the Commission makes the assessment, referring to the evidence or other material on which those grounds are based.

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When public benefit assessments must be given

(3) The Commission must give the public benefit assessment:
  (a) no later than the 20th business day after the effective application date of the application; or
  (b) if it is not practicable to give the public benefit assessment by that day—as soon as practicable after that 20th business day.

(4) If the Commission does not give the public benefit assessment before the end of the 20th business day mentioned in paragraph (3)(a), the following paragraphs apply in relation to making a determination under subsection 51ABZW(1) in respect of the public benefit application:
  (a) if the notifying party of the notification of the acquisition agrees in writing to this paragraph applying in relation to the application—the determination period for the application is extended by the number of business days to which subsection (5) of this section applies (not including a day occurring on or after the day, if any, on which the notifying party withdraws its agreement);
  (b) in any case (but subject to subsection (6) of this section)—the 15 business days mentioned in subsections 51ABZZD(3) and (5) are reduced by the number of business days to which subsection (5) of this section applies;
  (c) in any case—the period mentioned in paragraph 51ABZZE(3)(c) is extended by the number of business days to which subsection (5) of this section applies.

(5) This subsection applies to a business day if:
  (a) the day occurs after the 20th business day after the effective application date of the application; and
  (b) the Commission does not give the public benefit assessment on or before the day.

(6) If the reduction under paragraph (4)(b) would be of more than 15 business days, subsections 51ABZZD(3) and (5) do not apply in relation to making the determination.

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51ABZZB Public benefit assessments—submissions

(1) If the Commission gives the notifying party of a notification of an acquisition a public benefit assessment in respect of a public benefit application in relation to the notification, the Commission:

(a) must give the notifying party a reasonable opportunity to make, during the period:

(i) starting on the day the Commission gives the public benefit assessment; and

(ii) ending on the 15th business day after that day;

oral or written submissions to the Commission in relation to the matters set out in the public benefit assessment; and

(b) subject to subsection (2) of this section, in making a determination under subsection 51ABZW(1) in respect of the application, must not take into account submissions received, as mentioned in paragraph (a) of this subsection, after that period.

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

(a) the notifying party may, in writing, before the end of the period during which the notifying party may make submissions to the Commission in relation to the public benefit assessment, request the Commission to extend the period; and

(b) if the notifying party does so—the Commission may, by written notice given to the notifying party, extend the period.

(3) To avoid doubt, the Commission may extend the period more than once.

(4) If the Commission extends the period, the following periods relating to making a determination under subsection 51ABZW(1) in respect of the public benefit application are extended by the same number of days:

(a) the determination period for the public benefit application;

(b) the period mentioned in paragraph 51ABZZE(3)(c).

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Division 6—Miscellaneous

Subdivision A—Miscellaneous matters relating to Commission consideration of notifications

51ABZZC Commitments and undertakings

(1) In considering a notification of an acquisition under Division 4, the Commission must not have regard to a commitment or undertaking offered by a party to an acquisition:

(a) if the notification is not subject to phase 2 review—unless:

(i) the commitment or undertaking is offered no later than 20 business days after the effective notification date of the notification; or

(ii) subsection 51ABZZE(3) applies to the commitment or undertaking in relation to the phase 1 determination period; or

(b) if the notification is subject to phase 2 review—unless:

(i) the commitment or undertaking is offered no later than the 60th business day occurring on or after the start of the phase 2 determination period; or

(ii) subsection 51ABZZE(3) applies to the commitment or undertaking in relation to the phase 2 determination period.

(2) In considering a public benefit application in relation to a notification of an acquisition under Division 5, the Commission must not have regard to a commitment or undertaking offered by a party to an acquisition unless subsection 51ABZZE(3) applies to the commitment or undertaking in relation to the determination period for the public benefit application.

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51ABZZD Information gathering

(1) This section applies in relation to the Commission making an acquisition determination in respect of a notification of an acquisition.

(2) Before making the acquisition determination, the Commission may do any of the following:

(a) give any persons who appear to the Commission to be interested a written notice inviting written submissions, to be made to the Commission within a specified period, in relation to the proposed acquisition;

(b) give any party to the acquisition a written notice requesting the party to give the Commission (orally or in writing), within a specified period, additional information relevant to making the determination;

(c) give a person a written notice requesting the person to give the Commission (orally or in writing), within a specified period, particular information relevant to making the determination;

(d) consult with such persons as the Commission believes to be reasonable and appropriate for the purposes of making the determination.

(3) The Commission must not give a request under paragraph (2)(b) or (c) on or after the start of the 15 business days mentioned in subsection (5) unless:

(a) the notifying party of the notification agrees in writing to the Commission making the request; or

(b) the request relates to information the Commission received before those 15 business days; or

(c) the determination is a determination under subsection 51ABZE(1) and the notification is not subject to phase 2 review.

(4) In making the acquisition determination, the Commission:

(a) must take into account any submissions or information received under paragraph (2)(a), (b) or (c) of this section

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within the period specified in the notice mentioned in that paragraph; and

(b) subject to subsection (5) may, but need not, take into account any submissions or information received after the end of those periods; and

(c) subject to subsection (5), must take into account any information obtained from consultations under paragraph (2)(d).

(5) The Commission must not take into account submissions or information received or obtained later than 15 business days before the end of:

(a) if the determination is a determination under subsection 51ABZE(1) and the notification is subject to phase 2 review—the phase 2 determination period for the notification; or

(b) if the determination is a determination under subsection 51ABZW(1) in respect of a public benefit application—the determination period in relation to the application.

Note: This subsection does not apply during the phase 1 determination period.

(6) Subsection (5) does not apply to information given in accordance with a request made as mentioned in subsection (3).

(7) Subsections (4) and (5) of this section do not limit:

(a) section 51ABZL (submissions in response to notice of competition concerns); or

(b) section 51ABZZB (submissions in response to public benefit assessment).

51ABZZE Extensions of determination periods

(1) For the purposes of making an acquisition determination in respect of a notification of an acquisition, this section applies to any of the following periods (the ***determination period***):

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(a) if the determination is a determination under subsection 51ABZE(1):
  (i) the phase 1 determination period for the notification; or
  (ii) the phase 2 determination period for the notification;
(b) if the determination is a determination under subsection 51ABZW(1)—the determination period for a public benefit application in relation to the notification.

(2) The Commission may, during the determination period, give the notifying party of the notification of the acquisition a written notice (the ***extension notice***) extending the determination period for a specified period, if any of the following paragraphs apply:
(a) all of the following subparagraphs apply:
  (i) a party to the acquisition offers, in writing, to make a commitment or undertaking (including giving an undertaking for the purposes of section 87B) in connection with the making of the acquisition determination;
  (ii) subsection (3) of this section applies to the commitment or undertaking;
  (iii) the extension is of no more than 15 business days;
(b) all of the following subparagraphs apply:
  (i) the Commission, before the end of the determination period, requests the notifying party, in writing, to give to the Commission, by a specified day, additional information relevant to making the acquisition determination;
  (ii) the notifying party does not give the additional information to the Commission by the specified day;
  (iii) the extension is of no more than the number of days occurring after the specified day on which the notifying party has not given the additional information to the Commission;
(c) all of the following subparagraphs apply:
  (i) before the end of the determination period, a party to the acquisition is served a notice (the ***section 155 notice***)

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under subsection 155(1) requiring the party to furnish information, produce documents or appear before the Commission relating to the making of the acquisition determination;

(ii) the Commission gives the extension notice 10 business days or more after the section 155 notice is served;

(iii) the extension is of no more than the number of business days in the period commencing 10 business days after the section 155 notice is served and ending on the day on which the party furnishes the information, produces the documents or appears before the Commission;

(d) both:

(i) before the end of the determination period, the notifying party requests the Commission, in writing, to extend the period by a specified number of days; and

(ii) the extension is of no more than that number of days.

Note: An extension under paragraph (c) of this subsection is reviewable under section 51ABZZG.

(3) This subsection applies to a commitment or undertaking that is offered during the following period:

(a) if subparagraph (1)(a)(i) applies—the period:

(i) starting at the start of the determination period; and

(ii) ending 20 business days after it starts;

(b) if subparagraph (1)(a)(ii) applies—the period:

(i) starting on the 50th business day occurring on or after the start of the determination period; and

(ii) ending on the 60th business day occurring on or after the start of the determination period;

(c) if paragraph (1)(b) applies—the period:

(i) starting at the start of the determination period; and

(ii) ending 35 business days after it starts.

(4) However, if the determination period is extended under paragraph (2)(b), (c) or (d) by a number of days, subsection (3) applies, in relation to a commitment or undertaking offered after

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that extension, as if the period mentioned in subsection (3) were extended by the same number of days.

51ABZZF Consequences of setting aside or remitting acquisition determinations

Determinations under subsection 51ABZE(1)

(1) If a court sets aside a determination made under subsection 51ABZE(1) in respect of a notification of an acquisition, Division 4 applies in relation to the notification with the following modifications:

(a) paragraphs 51ABZE(2)(a) and (b) and sections 51ABZJ to 51ABZO (phase 2 review) do not apply;

(b) the phase 1 determination period for the notification is taken to start on the day the court sets aside the determination.

(2) If a court remits a decision to make a determination under subsection 51ABZE(1) in respect of a notification of an acquisition back to the Commission to be made again, Division 4 applies in relation to the notification with the following modifications:

(a) paragraphs 51ABZE(2)(a) and (b) and sections 51ABZJ to 51ABZO (phase 2 review) do not apply;

(b) the phase 1 determination period for the notification is taken to start on the day the court remits the decision.

Determinations under subsection 51ABZW(1)

(3) If a court sets aside a determination made under subsection 51ABZW(1) in respect of a public benefit application, Division 5 applies in relation to the application with the following modification: the determination period for the application is taken to start on the day the court sets aside the determination.

(4) If a court remits a decision to make a determination under subsection 51ABZW(1) in respect of a public benefit application back to the Commission to be made again, Division 5 applies in relation to the application with the following modification: the

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determination period for the application is taken to start on the day the court remits the decision.

51ABZZG Internal review of decisions

(1) This section applies to any of the following decisions (a ***reviewable decision***):

(a) a decision under subsection 51ABY(1), 51ABZB(2), 51ABZD(3) or 51ABZN(2) in respect of a notification of an acquisition;

(b) a decision under subsection 51ABZQ(1), 51ABZT(2) or 51ABZV(3) in respect of a public benefit application in relation to a notification of an acquisition;

(c) a decision under paragraph 51ABZZE(2)(c) to extend a period in relation to making an acquisition determination in respect of a notification of an acquisition.

Applications for internal review

(2) The notifying party of the notification may apply in writing to the Commission for review (an ***internal review***) of the reviewable decision, if the decision was made by a delegate of the Commission who was not a member of the Commission.

(3) An application for an internal review must be made within 7 days after the day on which the decision was made.

Reconsideration by Commission

(4) Within 7 days after receiving an application under subsection (3) for internal review, the Commission must:

(a) review the decision; and

(b) affirm, vary or revoke the decision; and

(c) if the Commission revokes the decision—make such other decision (if any) that the Commission thinks appropriate.

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(5) The Commission must, within 1 business day after the day it makes a decision under subsection (4), give the notifying party a written statement of the Commission's reasons for the decision.

(6) If the Commission's functions under subsections (4) and (5) are performed by a delegate of the Commission, the delegate who makes the decision under subsection (4):

(a) must not have been involved in making the original reviewable decision; and

(b) must hold a position or perform duties of a higher level than the delegate who made the original reviewable decision.

Review by the Tribunal

(7) The notifying party may apply under Division 1A of Part IX to the Tribunal for review of the following decisions relating to the notification of the acquisition:

(a) a reviewable decision made by the Commission itself, or by a delegate of the Commission who was a member of the Commission; or

(b) an internal review decision made under subsection (4).

Subdivision B—Acquisitions register

51ABZZH Acquisitions register

(1) The Commission must keep a register under this subsection.

(2) The acquisitions register must be made available for public inspection on the internet.

(3) The Commission may correct or update information or documents on the acquisitions register.

51ABZZI Contents of acquisitions register

(1) The acquisitions register must include, for each notified acquisition:

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(a) the details, of each notification of the acquisition, determined under paragraph (6)(a) for the purposes of this paragraph; and

(b) a copy of each acquisition determination (if any) made in respect of the notification, and a statement of the Commission's reasons for making the determination; and

(c) if a notification of the acquisition is subject to phase 2 review—a copy of the notice given under subparagraph 51ABZJ(2)(b)(i) in relation to the notification.

(2) The register must also include any other information or documents, relating to the operation of the acquisitions provisions, determined under paragraph (6)(b) of this section.

(3) Details to which paragraph (1)(a) applies must be included on the acquisitions register within 1 business day after the effective notification date of the notification.

(4) Information or documents to which paragraph (1)(b) or (c) applies must be included on the acquisitions register within 1 business day after the day the relevant determination or decision is made.

(5) Information or documents to which subsection (2) applies must be included on the acquisitions register by the time determined under paragraph (6)(c) for the purposes of this subsection in relation to the information or documents.

(6) The Minister may, by legislative instrument, determine:

(a) details of a notification for the purposes of paragraph (1)(a); or

(b) information or documents for the purposes of subsection (2); or

(c) a time for the purposes of subsection (5) in relation to information or documents.

(7) Without limiting paragraph (6)(c), a determination made under that paragraph:

(a) may determine a time by reference to a decision of the Commission in relation to the information or documents; and

(b) may provide for review of such a decision.

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Subdivision C—Partnerships and trusts

51ABZZJ Treatment of partnerships

(1) The acquisitions provisions apply to a partnership as if it were a person, but with the changes set out in this section.

(2) An obligation that would otherwise be imposed on the partnership by the acquisitions provisions is imposed on each partner instead, but may be discharged by any of the partners.

(3) An offence against the acquisitions provisions that would otherwise have been committed by the partnership is taken to have been committed by each partner in the partnership, at the time the offence was committed, who:

(a) did the relevant act or made the relevant omission; or

(b) aided, abetted, counselled or procured the relevant act or omission; or

(c) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

(4) This section applies to a contravention of a civil penalty provision in a corresponding way to the way in which it applies to an offence.

(5) A reference in the acquisitions provisions to a corporation is taken to include a reference to the partnership if all of the partners are corporations.

(6) For the purposes of the acquisitions provisions, a change in the composition of a partnership does not affect the continuity of the partnership.

51ABZZK Treatment of unit trusts

(1) The acquisitions provisions apply to a unit trust as if it were a person, but with the changes set out in this section.

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Trusts with a single trustee

(2) If the unit trust has a single trustee:

(a) an obligation that would otherwise be imposed on the trust by the acquisitions provisions is imposed on the trustee instead; and

(b) an offence against the acquisitions provisions that would otherwise have been committed by the trust is taken to have been committed by the trustee; and

(c) a reference in the acquisitions provisions to a corporation is taken to include a reference to the trust if the trustee is a corporation.

Trusts with multiple trustees

(3) If the unit trust has 2 or more trustees:

(a) an obligation that would otherwise be imposed on the trust by the acquisitions provisions is imposed on each trustee instead, but may be discharged by any of the trustees; and

(b) an offence against the acquisitions provisions that would otherwise have been committed by the trust is taken to have been committed by each trustee of the trust, at the time the contravention was committed, who:

(i) did the relevant act or made the relevant omission; or

(ii) aided, abetted, counselled or procured the relevant act or omission; or

(iii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the trustee); and

(c) a reference in the acquisitions provisions to a corporation is taken to include a reference to the unit trust if all of the trustees are corporations.

Contraventions of civil penalty provisions

(4) This section applies to a contravention of a civil penalty provision in a corresponding way to the way in which it applies to an offence.

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Subdivision D—Surprise hostile takeovers

51ABZZL Surprise hostile takeovers

(1) Subject to subsection (6), this section applies in relation to a notification of an acquisition of shares in the capital of a body corporate if:

(a) the body corporate is a Chapter 6 entity; and

(b) the acquisition is a takeover acquisition in relation to a proposed takeover bid; and

(c) the proposed bid has not been publicly proposed; and

(d) when the notifying party makes the notification of the acquisition, the notifying party requests the Commission, in writing, to apply this section to the notification.

(2) A request made under paragraph (1)(d) must state:

(a) that the bidder (within the meaning of the *Corporations Act 2001*) for the proposed takeover bid intends that the bid will be a bid to which paragraphs (c) and (d) of item 2 of the table in section 611 of the *Corporations Act 2001* will apply; and

(b) that the bidder has not:

(i) entered into an agreement with the board of the target (within the meaning of that Act) in relation to the proposed bid; or

(ii) obtained the board's support for the proposed bid; and

(c) that, if the Commission:

(i) does not decide that the notification is to be subject to phase 2 review; and

(ii) makes a determination under paragraph 51ABZE(1)(a) of this Act in respect of the notification;

the bidder will give a bidder's statement (within the meaning of the *Corporations Act 2001*) to the target within 1 business day after the day the Commission gives the notifying party written notice of the determination under subsection 51ABZE(4) of this Act.

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(3) The Commission must not include information or documents on the acquisitions register in relation to the notification before the 17th business day after the effective notification date of the notification.

(4) Furthermore, the Commission must not include information or documents on the acquisitions register in relation to the notification at all if, before that 17th business day, the Commission decides under section 51ABZD to cease considering the notification.

Commission may determine that this section does not apply

(5) The Commission may, at any time occurring:
(a) after the notifying party makes the request under paragraph (1)(d); and
(b) on or before the 15th business day after the effective notification date of the notification;

determine, in writing, that this section does not apply to the notification, if the Commission is satisfied that:
(c) the bid is not, or is not likely to be, a bid to which paragraphs (c) and (d) of item 2 of the table in section 611 of the *Corporations Act 2001* apply; or
(d) the bidder has done, or intends to do, any of the things mentioned in subparagraph (2)(b)(i) or (ii) of this section; or
(e) it is not likely that the bidder will give a bidder's statement as mentioned in paragraph (2)(c).

(6) If the Commission makes a determination under subsection (5):
(a) this section is taken never to have applied in relation to the notification; and
(b) the Commission must give to the notifying party written notice of the determination.

51ABZZM Acquisitions not stayed during period in which application for review may be made

(1) This section applies to a notification of an acquisition if:

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(a) the Commission makes a determination in respect of the notification under paragraph 51ABZE(1)(a); and
(b) section 51ABZZL applies to the acquisition immediately before the Commission makes the determination.

(2) Despite subsection 51ABE(3), the acquisition is not ***stayed*** during the period:
(a) starting when the determination is made; and
(b) ending:
(i) if no application is made under subsection 100C(1) for review of the determination—at the end of the period during which such an application could be made; or
(ii) if such an application is made—when the bidder (within the meaning of the *Corporations Act 2001*) for the takeover bid becomes aware that the application has been made.

(3) Also, the acquisition is not ***stayed*** at the time it is put into effect, to the extent the acquisition results from an on-market transaction (within the meaning of the *Corporations Act 2001*) that occurs so soon after the bidder becomes aware that the application has been made that it is not reasonably possible for the bidder to prevent the transaction from occurring.

(4) For the purposes of subsections (2) and (3), the bidder is taken to be aware that an application has been made if the bidder ought reasonably to be aware of it.

Voting rights

(5) To the extent the acquisition is put into effect at a time at which, because of subsection (2) or (3), the acquisition is not stayed, the bidder is not entitled to exercise the voting rights attached to any of the shares.

(6) Subsection (5) ceases to apply:
(a) if no application is made under subsection 100C(1) for review of the determination—at the end of the period during which such an application could be made; or

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(b) if such an application is made—at the earliest time (if any) at which:
(i) the notification has been finally considered; and
(ii) subsection 51ABE(4) does not apply to the acquisition.

51ABZZN ASIC's power to exempt and modify

(1) ASIC may, in writing:
(a) exempt a person from subsection 51ABZZM(5); or
(b) declare that subsection 51ABZZM(5) applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of Chapter 6 of the *Corporations Act 2001*, set out in section 602 of that Act.

(3) The exemption or declaration may:
(a) apply to all persons, specified persons, or a specified class of person; and
(b) relate to all bid class securities, specified bid class securities or a specified class of bid class securities; and
(c) relate to any other matter generally or as specified.

(4) An instrument made under subsection (1) of this section is a notifiable instrument if it applies only to:
(a) a specified person (other than a person specified by membership of a class); or
(b) a specified person (other than a person specified by membership of a class) and persons associated with that specified person.

Otherwise, it is a legislative instrument.

(5) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court (within the meaning of the *Corporations Act 2001*) may order the

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person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(6) An exemption or declaration given under subsection (2) applies in relation to shares after the relevant acquisition determination is no longer subject to review.

(7) Subject to subsection (8) of this section, Subdivision A of Division 2 of Part 6.10 of the *Corporations Act 2001* applies in relation to a decision of ASIC under subsection (1) of this section in the same way as that Subdivision applies in relation to a decision of ASIC under section 655A of that Act.

Note: That Subdivision allows the Takeovers Panel to review decisions of ASIC.

(8) For the purposes of subsection (7) of this section, treat a reference, in Subdivision A of Division 2 of Part 6.10 of the *Corporations Act 2001*, to Chapter 6 of that Act as including a reference to this Subdivision.

51ABZZO ASIC's power to exempt and modify—notice of decision and review rights

(1) Subject to subsection (2), ASIC must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by a decision under section 51ABZZN a notice, in writing or otherwise:

(a) of the making of the decision; and

(b) of the person's right to have the decision reviewed by the Takeovers Panel under section 656A of the *Corporations Act 2001* (see subsection 51ABZZN(7) of this Act).

(2) Subsection (1) does not require ASIC to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if ASIC determines that giving notice to the person or persons is not warranted, having regard to:

(a) the cost of giving notice to the person or persons; and

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(b) the way in which the interests of the person or persons are affected by the decision.

(3) A failure to comply with this section does not affect the validity of the decision.

51ABZZP Person must cease to hold shares

(1) If:

(a) the Commission makes a determination under paragraph 51ABZE(1)(a) in respect of a notification of an acquisition; and

(b) the acquisition is put into effect to any extent at a time at which, because of subsection 51ABZZM(2) or (3), the acquisition is not stayed; and

(c) an application for review of the determination is made under subsection 100C(1); and

(d) either:

(i) on the review, the Tribunal determines that the acquisition must not be put into effect; or

(ii) the result of the review is that the acquisition is subject to a condition to which it would not have been subject apart from the review, that condition was not complied with and the non-compliance occurred before the Tribunal makes its determination on the review;

then, within 12 months after the Tribunal makes that determination, the person must cease to hold the shares.

(2) ASIC may extend the period within which the person must cease to hold the shares under subsection (1) if the person applies for the extension before the end of the period.

(3) ASIC must not extend the period more than once.

(4) Any voting rights attached to the shares cannot be exercised while the person continues to hold the shares.

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(5) If, at the end of the 12 months (or extended period), the person still holds the shares, the person commits an offence for each day while that situation continues.

Penalty: 20 penalty units.

(6) An offence based on subsection (5) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the Criminal Code.

(7) A contravention of this section does not affect the validity of any transaction.

(8) Furthermore, if voting rights are exercised in contravention of subsection (4), the meeting or the resolution on which the voting rights were exercised will be invalid on that ground only if:

(a) the Court (within the meaning of the *Corporations Act 2001*) is of the opinion that:

(i) a substantial injustice has been caused or may be caused; and

(ii) the injustice cannot be remedied by any order of the Court; and

(b) the Court declares the meeting or resolution invalid.

Subdivision E—Voluntary transfers under the Financial Sector (Transfer and Restructure) Act 1999

51ABZZQ Certain voluntary transfers under the *Financial Sector (Transfer and Restructure) Act 1999*

(1) This section applies to a notification of an acquisition if:

(a) the acquisition is, or is part of, a voluntary transfer of business (within the meaning of the *Financial Sector (Transfer and Restructure) Act 1999*); and

(b) the certificate of transfer (within the meaning of that Act) states that the voluntary transfer of business is necessary:

(i) to promote financial system stability in Australia; or

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(ii) if the transferring body (within the meaning of that Act) is an ADI (within the meaning of that Act)—to protect the interests of depositors of the transferring body; or

(iii) if the transferring body is a life insurance company (within the meaning of that Act)—to protect the interests of policy owners or prospective policy owners of the transferring body.

(2) If this section applies to the notification:

(a) subsection 51ABZI(1) (earliest time for making determinations) does not apply in relation to the notification; and

(b) the Commission must not include information or documents on the acquisitions register in relation to the notification unless and until the Commission makes a determination under subsection 51ABZE(1) in respect of the notification.

Subdivision F—Miscellaneous

51ABZZR Delegation by Commission

(1) The Commission may, in writing, delegate any or all of the Commission's functions or powers under an acquisitions provision to a member of the staff of the Commission who is an SES employee or an acting SES employee.

(2) The Commission may delegate a function or power to a person under subsection (1) only if the Commission is satisfied that the person has appropriate qualifications, training or experience to perform the function or exercise the power.

(3) In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Commission.

51ABZZS Delegation by Minister

(1) The Minister may, in writing, delegate any or all of the Minister's functions or powers under an acquisitions provision to:

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(a) in any case—an SES employee or acting SES employee in the Department; or

(b) in the case of the Minister's power under subsection 51ABY(5) or 51ABZQ(5):

(i) the Commission; or

(ii) a member of the Commission; or

(iii) a member of the staff of the Commission who is an SES employee or an acting SES employee.

(2) Subsection (1) does not apply to the Minister's power under subsection 51ABB(2), 51ABC(3), 51ABP(1), 51ABQ(1), 51ABRA(1), 51ABRB(1) or 51ABS(6).

(3) The Minister may delegate a function or power to a person under subsection (1) only if the Minister is satisfied that the person has appropriate qualifications, training or experience to perform the function or exercise the power.

(4) In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Minister.

51ABZZT Fees

A fee determined under this Part must not be such as to amount to taxation.

51ABZZU Review of the operation of this Part etc.

(1) The Minister must cause a review to be conducted of the operation of:

(a) Division 1A of Part IV; and

(b) this Part; and

(c) Divisions 1A and 1B of Part IX.

(2) The persons who conduct the review must:

(a) commence it no earlier than 1 December 2028; and

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(b) complete it, and give the Minister a written report of the review, no later than 31 December 2029.

(3) The Minister must cause copies of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister.

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Chapter 4—Provisions relating to particular industries, payment surcharges etc.

Part IVB—Industry codes

Division 1—Preliminary

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 has the meaning given by section 51ACAA.

infringement notice means an infringement notice issued under subsection 51ACD(1).

infringement notice compliance period: see subsection 51ACI(1).

mandatory industry code means an industry code that is declared by regulations under section 51AE to be mandatory.

related contravention: a person engages in conduct that constitutes a ***related contravention*** of an applicable industry code, if the person:

(a) aids, abets, counsels or procures a corporation to contravene the applicable industry code; or

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(b) induces, whether by threats or promises or otherwise, a corporation to contravene the applicable industry code; or

(c) is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a corporation of the applicable industry code; or

(d) conspires with others to effect a contravention by a corporation of the applicable industry code.

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.

51ACAA Meaning of *industry code*

(1) For the purposes of this Part, an ***industry code*** is (subject to subsection (2)) a code that regulates the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

(2) If this Act provides that an industry code prescribed by the regulations for the purposes of this Part may include a provision of a certain kind, then:

(a) the regulations may prescribe, for the purposes of this Part, an industry code that includes a provision of that kind, whether or not the provision regulates conduct of a kind mentioned in subsection (1); and

(b) if the regulations do prescribe, for the purposes of this Part, an industry code that includes a provision of that kind, the

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inclusion of the provision does not prevent the code from being an ***industry code*** for the purposes of this Part.

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Division 2—Contravention of industry codes

51ACB Contravention of industry codes

A corporation must not, in trade or commerce, contravene an applicable industry code.

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Division 2A—Infringement notices

51ACC Purpose and effect of this Division

(1) The purpose of this Division is to provide for the issue of an infringement notice to a person for an alleged contravention of a civil penalty provision of an industry code as an alternative to proceedings for an order under section 76 for the payment of a pecuniary penalty.

(2) This Division does not:

(a) require an infringement notice to be issued to a person for an alleged contravention of a civil penalty provision of an industry code; or

(b) affect the liability of a person to proceedings under section 76 in relation to an alleged contravention of a civil penalty provision of an industry code if:

(i) an infringement notice is not issued to the person for the contravention; or

(ii) an infringement notice issued to the person for the contravention is withdrawn under section 51ACJ; or

(c) prevent a court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

51ACD Issuing an infringement notice

(1) If the Commission has reasonable grounds to believe that a person has contravened a civil penalty provision of an industry code, the Commission may issue an infringement notice to the person.

(2) The Commission must not issue more than one infringement notice to the person for the same alleged contravention of the civil penalty provision of the industry code.

(3) The infringement notice does not have any effect if the notice:

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(a) is issued more than 12 months after the day that the contravention of the civil penalty provision of the industry code is alleged to have occurred; or

(b) relates to more than one alleged contravention of a civil penalty provision of the industry code by the person.

51ACE Matters to be included in an infringement notice

(1) An infringement notice must:

(a) be identified by a unique number; and

(b) state the day on which it is issued; and

(c) state the name and address of the person to whom it is issued; and

(d) identify the Commission and state how it may be contacted; and

(e) give details of the alleged contravention, including:

(i) the day of the alleged contravention; and

(ii) the civil penalty provision of the industry code that was allegedly contravened; and

(f) state the maximum pecuniary penalty that the court could order the person to pay under section 76 for the alleged contravention; and

(g) specify the penalty that is payable in relation to the alleged contravention; and

(h) state that the penalty is payable within the infringement notice compliance period for the notice; and

(i) state that the penalty is payable to the Commission on behalf of the Commonwealth; and

(j) explain how payment of the penalty is to be made; and

(k) explain the effect of sections 51ACG, 51ACH, 51ACI and 51ACJ.

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51ACF Amount of penalty

(1) The penalty to be specified in an infringement notice to be issued to a person, for an alleged contravention of a civil penalty provision of an industry code, must be equal to the following:

(a) if subsection (2) applies to the industry code:

(i) if the person is a body corporate—600 penalty units; or

(ii) otherwise—12 penalty units;

(b) otherwise:

(i) if the person is a body corporate—60 penalty units; or

(ii) otherwise—12 penalty units.

Industry codes relating to food and groceries, or oil

(2) This subsection applies to an industry code that:

(a) relates to:

(i) food and groceries; or

(ii) the conduct of suppliers, distributors and retailers in the petroleum marketing industry; and

(b) provides that this subsection applies to the code.

51ACG Effect of compliance with an infringement notice

(1) This section applies if:

(a) an infringement notice for an alleged contravention of a civil penalty provision of an industry code is issued to a person; and

(b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and

(c) the infringement notice is not withdrawn under section 51ACJ.

(2) The person is not, merely because of the payment, regarded as having contravened the civil penalty provision of the industry code.

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(3) No proceedings (whether criminal or civil) may be started or continued against the person, by or on behalf of the Commonwealth, in relation to the alleged contravention of the civil penalty provision of the industry code.

51ACH Effect of failure to comply with an infringement notice

If:

(a) an infringement notice for an alleged contravention of a civil penalty provision of an industry code is issued to a person; and

(b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and

(c) the infringement notice is not withdrawn under section 51ACJ;

the person is liable to proceedings under section 76 in relation to the alleged contravention of the civil penalty provision of the industry code.

51ACI Infringement notice compliance period for infringement notice

(1) Subject to this section, the ***infringement notice compliance period*** for an infringement notice is the period of 28 days beginning on the day after the day that the infringement notice is issued by the Commission.

(2) The Commission may extend, by notice in writing, the infringement notice compliance period for the infringement notice if the Commission is satisfied that it is appropriate to do so.

(3) Only one extension may be given and the extension must not be for longer than 28 days.

(4) Notice of the extension must be given to the person who was issued the infringement notice.

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(5) A failure to comply with subsection (4) does not affect the validity of the extension.

(6) If the Commission extends the infringement notice compliance period for an infringement notice, a reference in this Division to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

51ACJ Withdrawal of an infringement notice

Representations to the Commission

(1) A person to whom an infringement notice has been issued for an alleged contravention of a civil penalty provision of an industry code may make written representations to the Commission seeking the withdrawal of the infringement notice.

(2) Evidence or information that the person, or a representative of the person, gives to the Commission in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by the Commission

(3) The Commission may, by written notice (the ***withdrawal notice***) given to the person to whom an infringement notice was issued, withdraw the infringement notice if the Commission is satisfied that it is appropriate to do so.

(4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

(5) The withdrawal notice must state:
(a) the name and address of the person; and

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(b) the day on which the infringement notice was issued to the person; and
(c) that the infringement notice is withdrawn; and
(d) that proceedings under section 76 may be started or continued against the person in relation to the alleged contravention of the civil penalty provision of the industry code.

Time limit for giving withdrawal notices

(6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

(7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, the Commission must refund to the person an amount equal to the amount paid.

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Division 3—Public warning notices

51ADA Commission may issue a public warning notice

Commission may issue a public warning notice

(1) The Commission may issue to the public a written notice containing a warning about the conduct of a person if:

(a) the Commission has reasonable grounds to suspect that the conduct may constitute:

(i) if the person is a corporation—a contravention of an applicable industry code by the corporation; or

(ii) in any case—a related contravention of an applicable industry code by the person; and

(b) the Commission is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and

(c) the Commission is satisfied that it is in the public interest to issue the notice.

Notice is not a legislative instrument

(2) A notice issued under subsection (1) is not a legislative instrument.

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Division 4—Orders to redress loss or damage suffered by non-parties etc.

51ADB Orders to redress loss or damage suffered by non-parties etc.

Orders

(1) If:

(a) a person engaged in conduct (the ***contravening conduct***) that:

(i) if the person was a corporation—constituted a contravention of an applicable industry code; or

(ii) in any case—constituted a related contravention of an applicable industry code; and

(b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons (***non-parties***) who are not, or have not been, parties to a proceeding (an ***enforcement proceeding***) instituted under Part VI in relation to the contravening conduct;

any court having jurisdiction in the matter may, on the application of the Commission, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the court may make include all or any of the orders set out in section 51ADC.

(2) An order under subsection (1) may be made against:

(a) the person mentioned in paragraph (1)(a); or

(b) a person involved in the contravening conduct.

(3) A court must not make an order under subsection (1) unless the court considers that the order will:

(a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct; or

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(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct.

Application for orders

(4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.

(5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

(6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), a court may have regard to the conduct of:
(a) the person; and
(b) the non-parties;
in relation to the contravening conduct, since the contravention occurred.

(7) In determining whether to make an order under subsection (1), a court need not make a finding about either of the following matters:
(a) which persons are non-parties in relation to the contravening conduct;
(b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party is bound by an order etc.

(8) If:
(a) an order is made under subsection (1) against a person; and
(b) the loss or damage suffered, or likely to be suffered, by a non-party in relation to the contravening conduct to which

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the order relates has been redressed, prevented or reduced in accordance with the order; and

(c) the non-party has accepted the redress, prevention or reduction;

then:

(d) the non-party is bound by the order; and

(e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party; and

(f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party in relation to that loss or damage.

51ADC Kinds of orders that may be made to redress loss or damage suffered by non-parties etc.

Without limiting subsection 51ADB(1), the orders that a court may make under that subsection against a person (the ***respondent***) include all or any of the following:

(a) an order declaring the whole or any part of a contract made between the respondent and a non-party referred to in that subsection, or a collateral arrangement relating to such a contract:

(i) to be void; and

(ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:

(i) varying such a contract or arrangement in such manner as is specified in the order; and

(ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

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(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;

(d) an order directing the respondent to refund money or return property to a non-party referred to in that subsection;

(e) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party referred to in that subsection;

(f) an order directing the respondent, at his or her own expense, to supply specified services to a non-party referred to in that subsection;

(g) an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 53A), directing the respondent 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.

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Division 5—Investigation power

51ADD Commission may require corporation to provide information

(1) This section applies if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code.

(2) The Commission may give the corporation a written notice that requires the corporation to give the information, or to produce the document, to the Commission within 21 days after the notice is given to the corporation.

(3) The notice must:
  (a) name the corporation to which it is given; and
  (b) specify:
    (i) the information or document to which it relates; and
    (ii) the provisions of the applicable industry code which require the corporation to keep, to generate or to publish the information or document; and
  (c) explain the effect of sections 51ADE, 51ADF and 51ADG.

(4) The notice may relate to more than one piece of information or more than one document.

51ADE Extending periods for complying with notices

(1) A corporation that has been given a notice under section 51ADD may, at any time within the period within which the corporation must comply with the notice (as extended under any previous application of subsection (2)), apply in writing to the Commission for an extension of the period for complying with the notice.

(2) A member of the Commission may, by written notice given to the corporation, extend the period within which the corporation must comply with the notice.

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(3) Subsection (2) does not affect any operation that subsection 33(3) of the *Acts Interpretation Act 1901* has in relation to a notice under section 51ADD of this Act.

Delegation

(4) A member of the Commission may, by writing, delegate the member's powers under subsection (2) to a member of the staff of the Commission who is an SES employee or an acting SES employee.

Note 1: Section 2B of the *Acts Interpretation Act 1901* contains the definitions of ***SES employee*** and ***acting SES employee***.

Note 2: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

(5) In performing a function, or exercising a power, under a delegation, the delegate must comply with any directions of the member.

51ADF Compliance with notices

A corporation that is given a notice under section 51ADD must comply with it within:

(a) the period of 21 days specified in the notice; or

(b) if the period for complying with the notice has been extended under section 51ADE—the period as so extended.

51ADG False or misleading information etc.

(1) A corporation must not, in compliance or purported compliance with a notice given under section 51ADD:

(a) give to the Commission false or misleading information; or

(b) produce to the Commission documents that contain false or misleading information.

(2) This section does not apply to:

(a) information that the corporation could not have known was false or misleading; or

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(b) the production to the Commission of a document containing false or misleading information if the document is accompanied by a statement of the corporation that the information is false or misleading.

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Division 6—Miscellaneous

51AE Regulations relating to industry codes

Regulations may prescribe industry codes etc.

(1) 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).

Conferral of functions and powers

(1A) If regulations prescribe an industry code, the industry code may confer on a person or body functions and powers in relation to the code, including functions and powers in relation to the following matters:

(a) monitoring compliance with the code;

(b) dealing with disputes or complaints arising under, or in relation to, the code;

(c) dealing with matters relating to a prospective agreement (including disputes or complaints relating to such an agreement) that would, if entered into, have the effect that one or more parties to the agreement is a participant in the industry to which the code relates;

(d) conducting investigations under, or in relation to, the code;

(e) providing exemptions from the code or specified provisions of the code;

(f) reviewing, or reporting on, the operation of the code or activities under, or in relation to, the code;

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(g) any other matter relating to the operation, application or administration of the code.

(1B) For the purposes of subsection (1A), the persons or bodies on whom an industry code may confer functions and powers are:

(a) if the function or power is a function of providing, or a power to provide, exemptions from the code or specified provisions of the code—any of the following:

(i) the Commission;

(ii) the Australian Energy Regulator;

(iii) a Minister (whether or not a Minister administering this provision); or

(b) otherwise—any person or body whether or not a participant in the industry to which the code relates, including the following:

(i) a person or body referred to in subparagraph (a)(i), (ii) or (iii);

(ii) any person from time to time holding, occupying or performing the duties of a specified office or position.

How functions and powers are to be exercised

(1C) If an industry code prescribed by the regulations confers on a person or body a function or power in relation to the code, the code may provide that the function or power is to be exercised by legislative instrument or other kind of written instrument.

(1D) However, if an industry code confers on a person or body a function of providing, or a power to provide, exemptions from the code or specified provisions of the code, then (despite anything to the contrary in the code):

(a) the function or power must be exercised by written instrument (an ***exemption instrument***); and

(b) if the code does not provide that an exemption instrument made under the code is a legislative instrument, then:

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(i) if each exemption provided by the instrument relates to a particular entity—the instrument is a notifiable instrument; or

(ii) otherwise—the instrument is a legislative instrument.

Note: If the code provides that an exemption instrument made under the code is a legislative instrument, then the instrument is a legislative instrument: see subsection 8(2) of the *Legislation Act 2003*.

Requirements to provide information

(1E) An industry code prescribed by the regulations:

(a) may require a person or body to provide another person or body with information or documents relevant to the operation, application or administration of the code (whether or not any of those persons or bodies are participants in the industry to which the code relates); and

(b) may confer on a person or body (whether or not a participant in the industry to which the code relates) a function of imposing, or a power to impose, a requirement of the kind mentioned in paragraph (a).

(1F) Paragraph (1E)(b) does not limit subsection (1A).

Pecuniary penalties

(2) If regulations prescribe an industry code (other than a code that relates to an industry covered by subsection (2AA)), the industry code may prescribe a pecuniary penalty not exceeding 600 penalty units for a contravention of a civil penalty provision of the code.

(2AA) This subsection covers the following industries:

(a) franchising;

(b) food and groceries;

(c) suppliers, distributors and retailers in the petroleum marketing industry.

(2A) If regulations prescribe an industry code that relates to an industry covered by subsection (2AA), the industry code may do the following:

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(a) prescribe that the pecuniary penalty for a contravention of a civil penalty provision of the code by a body corporate is the greatest of the following:
  (i) $10,000,000;
  (ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, has obtained directly or indirectly and that is reasonably attributable to the contravention—3 times the value of that benefit;
  (iii) if the Court cannot determine the value of that benefit—10% of the adjusted turnover of the body corporate during the period of 12 months ending at the end of the month in which the contravention occurred;
(b) prescribe that the pecuniary penalty for a contravention of a civil penalty provision of the code by a person who is not a body corporate is $500,000;
(c) if the code does not prescribe a pecuniary penalty mentioned in paragraph (a) or (b) for a contravention of a civil penalty provision of the code by a person—prescribe the following for the contravention:
  (i) in the case of an industry code that relates to the industry covered by paragraph (2AA)(a)—a pecuniary penalty not exceeding 600 penalty units;
  (ii) in the case of an industry code that relates to the industry covered by paragraph (2AA)(b) or (c)—a pecuniary penalty not exceeding 3,200 penalty units if the person is a body corporate and 640 penalty units if the person is not a body corporate.

(2B) An expression used paragraph (2A)(a) has the same meaning as in subsection 76(1C).

Incorporation of matters contained in other instruments

(3) If regulations prescribe an industry code that applies to one or more entities that are authorised by or under a law of the Commonwealth or of a State or Territory to sell electricity, the regulations may make provision in relation to a matter by applying,

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adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

(4) Subsection (3) applies despite subsection 14(2) of the *Legislation Act 2003*.

51AEAA Functions and powers of Commission under industry codes

To avoid doubt, the functions and powers of the Commission under this Act include any function or power conferred on the Commission by an industry code prescribed for the purposes of this Part.

51AEA 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.

51AF Acquisition of property

Scope

(1) This section applies to the following provisions:
  (a) paragraphs 51AE(1A)(b) and (c);
  (b) a provision of an industry code prescribed for the purposes of this Part that is authorised by paragraph 51AE(1A)(b) or (c);
  (c) any other provision of this Act or the regulations, to the extent to which the provision relates to a provision mentioned in paragraph (a) or (b) of this subsection.

Effect of provisions

(2) The provisions have no effect to the extent (if any) to which their operation would result in the acquisition of property (within the

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meaning of paragraph 51(xxxi) of the Constitution) otherwise than on just terms (within the meaning of that paragraph).

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Part IVBA—News media and digital platforms mandatory bargaining code

Division 1—Basic concepts

52A Definitions

In this Part:

bargaining news business representative, for a registered news business, has the meaning given by section 52ZD.

bargaining parties has the meaning given by section 52ZG.

core bargaining issues has the meaning given by section 52ZG.

core news content means content that reports, investigates or explains:

(a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or

(b) current issues or events of public significance for Australians at a local, regional or national level.

covered news content means content that is any of the following:

(a) core news content;

(b) content that reports, investigates or explains current issues or events of interest to Australians.

designated digital platform corporation means a corporation that is specified as a designated digital platform corporation in a determination under section 52E.

designated digital platform service, of a designated digital platform corporation, means a service that is specified as a designated digital platform service of the corporation in a determination under section 52E.

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news business means:

(a) a news source; or

(b) a combination of news sources.

news source means any of the following, if it produces, and publishes online, news content:

(a) a newspaper masthead;

(b) a magazine;

(c) a television program or channel;

(d) a radio program or channel;

(e) a website or part of a website;

(f) a program of audio or video content designed to be distributed over the internet.

registered news business means a news business that is registered under section 52G.

registered news business corporation:

(a) a ***registered news business corporation*** means a corporation that is registered under section 52G; and

(b) a ***registered news business corporation***, for a registered news business, means the corporation that is endorsed under section 52G as the registered news business corporation for the registered news business.

register of bargaining code arbitrators means the register established under section 52ZK.

remuneration issue has the meaning given by subsection 52ZL(1).

represented registered news business has the meaning given by section 52ZG.

responsible digital platform corporation for a designated digital platform service is:

(a) a corporation that:

(i) is a related body corporate of the service's designated digital platform corporation; and

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(ii) if the corporation is not incorporated in Australia—is managed in Australia; and

(iii) either by itself or together with other corporations, operates or controls the designated digital platform service in supplying services that are used by Australians; or

(b) if there is no corporation that satisfies the requirements of paragraph (a)—the service's designated digital platform corporation.

52B Making content available

(1) For the purposes of this Part, a service makes content available if:

(a) the content is reproduced on the service, or is otherwise placed on the service; or

(b) a link to the content is provided on the service; or

(c) an extract of the content is provided on the service.

(2) Subsection (1) does not limit, for the purposes of this Part, the ways in which a service makes content available.

52C Interacting with content

(1) For the purposes of this Part, a user of a service interacts with content made available by the service if:

(a) the content is reproduced on the service, or is otherwise placed on the service, and the user interacts with the content; or

(b) a link to the content is provided on the service and the user interacts with the link; or

(c) an extract of the content is provided on the service and the user interacts with the extract.

(2) Subsection (1) does not limit, for the purposes of this Part, the ways in which a user of a service interacts with content made available by a service.

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52D Distributing content

(1) For the purposes of this Part, the following are examples of ways in which a service distributes content that is made available by the service:

(a) ranking the content;

(b) curating the content;

(c) making the content more or less prominent;

(d) making a user more or less likely to interact with the content.

(2) Subsection (1) does not limit, for the purposes of this Part, the ways in which a service distributes content that is made available by the service.

(3) For the purposes of this Part, treat the following alterations as alterations to the ways in which a service distributes content that is made available by the service:

(a) an alteration to the ways in which the service distributes a particular class of content;

Example 1: An alteration that increases the prevalence or prominence of video content made available by the service by making such video content play automatically.

Example 2: An alteration that increases or decreases the prevalence or prominence of content made available by the service with which users of the service have previously interacted.

Example 3: An alteration that increases the prevalence or prominence of content made available by the service by making extracts from the content available on the service automatically.

Example 4: An alteration that increases the ranking of content made available by the service if a user's friends and family have interacted with content.

(b) an alteration to the ways in which the service distributes content of a particular content creator, or class of content creators;

Example 1: An alteration that increases or decreases the prevalence or prominence of content made available by the service if the content is created by a news business that has facilities to make content load rapidly.

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Example 2: An alteration that decreases the prevalence or prominence of content made available by the service if the content is created by an automated account.

Example 3: An alteration that decreases the prevalence or prominence of content made available by the service if the content is from a particular website, where attempts have been made to manipulate rankings of content from the website.

Example 4: An alteration that decreases the prevalence or prominence of content made available by the service if the content is from an account of a celebrity or other prominent individual.

(c) an alteration to the ways in which the service distributes a particular class of content in relation to a particular class of users of the service.

Example 1: An alteration that prevents inappropriate content being made available by the service to children.

Example 2: An alteration that increases the prevalence or prominence of particular content made available by the service to users of a particular age.

Example 3: An alteration that decreases the prevalence or prominence of particular content made available by the service to users who have indicated they do not wish to see such content.

Example 4: An alteration that increases the prevalence or prominence of content made available by the service to users who are affected by a natural disaster, if the content is reliable information about the disaster.

(4) Subsection (3) does not limit, for the purposes of this Part, the kinds of alterations that are alterations to the ways in which a service distributes content that is made available by the service.

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Division 2—Designated digital platform corporation and designated digital platform services

52E Minister may make designation determination

(1) The Minister may, by legislative instrument, make a determination that:

(a) specifies one or more services covered by subsection (2) in relation to a corporation as ***designated digital platform services*** of the corporation; and

(b) specifies the corporation as a ***designated digital platform corporation***.

(2) This subsection covers a service in relation to a corporation if:

(a) the corporation, either by itself or together with one or more related bodies corporate of the corporation, operates or controls the service; or

(b) a related body corporate of the corporation, either by itself or together with one or more other related bodies corporate of the corporation, operates or controls the service.

(3) In making the determination, the Minister must consider:

(a) whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate; and

(b) whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).

(4) In making the determination, the Minister may consider any reports or advice of the Commission.

(5) Before making the determination, the Minister must give the corporation notice in writing that the Minister intends to make a

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determination under subsection (1) specifying the corporation and a particular service or particular services.

(6) The Minister must not make the determination before the end of the period of 30 days starting on the day on which the notice under subsection (5) is given.

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Division 3—Registered news businesses and registered news business corporations

52F Application for registration of news business and news business corporation

(1) A corporation (the ***applicant corporation***) may apply to the ACMA, in relation to a news business, for:

(a) if the news business is not already a registered news business—the registration of the news business; and

(b) if the applicant corporation is not already a registered news business corporation—the registration of the applicant corporation; and

(c) the endorsement of the applicant corporation as the registered news business corporation for the news business.

(2) The application must:

(a) be in writing; and

(b) set out every news source that comprises the news business; and

(c) set out details of the applicant corporation's point of contact for the purposes of section 52Z; and

(d) if regulations made for the purposes of this paragraph specify requirements—meet those requirements.

(3) The news business set out in the application may be comprised of some or all of the news sources that the applicant corporation, either by itself or together with other corporations, operates or controls.

52G Registration of news business and news business corporation

(1) If the ACMA considers that the requirement in subsection (2) is met, the ACMA must:

(a) if the news business is not already a registered news business—register the news business; and

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(b) if the applicant corporation is not already a registered news business corporation—register the applicant corporation; and

(c) endorse the applicant corporation as the registered news business corporation for the news business.

(2) The requirement in this subsection is met if:

(a) the application is in accordance with subsection 52F(2); and

(b) if the news business is not already a registered news business—none of the news sources set out in the application in accordance with paragraph 52F(2)(b) form part of another news business that is a registered news business; and

(c) if the news business is not already a registered news business—all of the following requirements are met in relation to the news business:

(i) the requirement in subsection 52N(1) (the content test);

(ii) the requirement in subsection 52O(1) (the Australian audience test);

(iii) the requirement in subsection 52P(1) (the professional standards test); and

(d) if the applicant corporation is not already a registered news business corporation—the applicant corporation meets the requirement in subsection 52M(1) (the revenue test); and

(e) the applicant corporation meets the requirement in section 52L (connection between applicant corporation and news business) in relation to the news business.

(3) The ACMA must publish details of each registration and endorsement on the ACMA's website (including details of the applicant corporation's point of contact for the purposes of section 52Z).

52H Revocation of registration or endorsement—general

Revocation of registration of news business

(1) The ACMA may revoke the registration of a registered news business if the ACMA considers that one or more of the news

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sources that form part of the registered news business form part of another registered news business.

(2) The ACMA may revoke the registration of a registered news business if the ACMA considers that any of the following requirements are *not* met in relation to the news business:
  (a) the requirement in subsection 52N(1) (the content test);
  (b) the requirement in subsection 52O(1) (the Australian audience test);
  (c) the requirement in subsection 52P(1) (the professional standards test).

(3) The ACMA may revoke the registration of a registered news business if there is no registered news business corporation that is endorsed as the registered news business corporation for the news business.

Revocation of registration of corporation

(4) The ACMA may revoke the registration of a registered news business corporation if the ACMA considers that the corporation does not meet the requirement in subsection 52M(1) (the revenue test).

(5) The ACMA may revoke the registration of a registered news business corporation if the corporation is not endorsed as the registered news business corporation for at least one registered news business.

Revocation of registration of endorsement of corporation for news business

(6) The ACMA may revoke the endorsement of a registered news business corporation as the registered news business corporation for a registered news business if the ACMA considers that the corporation does not meet the requirement in section 52L (connection between corporation and news business) in relation to the registered news business.

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(7) To avoid doubt, the ACMA may revoke the endorsement of a registered news business corporation as the registered news business corporation for a registered news business at the same time as it endorses another registered news business corporation as the registered news business corporation for the registered news business.

Example: A registered news business corporation (the ***selling corporation***) sells a registered news business to another corporation. The other corporation applies under section 52G for registration as a registered news business corporation and for endorsement as the registered news business corporation for the registered news business. The ACMA grants the application at the same time as revoking the endorsement of the selling corporation as the registered news business corporation for the registered news business.

52I Revocation of registration or endorsement—false or misleading information or documents

(1) This section applies if, as a result of an application by a corporation under section 52F, the ACMA:

(a) registered a news business; or

(b) registered a corporation; or

(c) endorsed a corporation as the registered news business corporation for a news business.

(2) The ACMA may revoke the registration or endorsement if the ACMA considers that the corporation, in making the application, gave the ACMA information that was or documents that were false or misleading in a material particular.

(3) To avoid doubt, for the purposes of this section, information or documents may be false or misleading in a material particular because of the omission of a matter or thing.

52J Obligation on registered news business corporation to notify ACMA of loss of qualification for registration

(1) The registered news business corporation for a registered news business must notify the ACMA, as soon as practicable, if any of

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the following requirements are no longer met in relation to the registered news business corporation or the registered news business:

(a) the requirement in subsection 52N(1) (the content test);
(b) the requirement in subsection 52O(1) (the Australian audience test);
(c) the requirement in subsection 52P(1) (the professional standards test);
(d) the requirement in subsection 52M(1) (the revenue test);
(e) the requirement in section 52L (connection between corporation and news business).

(2) The notification must be in writing.

52K Adding or removing news source from registered news business

(1) A registered news business corporation for a registered news business may apply to the ACMA for:
(a) the addition of a news source to the news business; or
(b) the removal of a news source from the news business.

(2) The application must:
(a) be in writing; and
(b) set out every news source that comprises the news business; and
(c) specify the news source to be added or removed; and
(d) if regulations made for the purposes of this paragraph specify requirements—meet those requirements.

(3) The ACMA may add the news source to the news business if the ACMA considers that:
(a) the application is in accordance with subsection (2); and
(b) the news source does not form part of another news business that is a registered news business; and
(c) the corporation would continue to meet the requirement in 52L (connection between applicant corporation and news

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business) in relation to the news business if the news source were added to the news business; and

(d) the news business would continue to meet all of the following requirements if the news source were added to the news business:

(i) the requirement in subsection 52N(1) (the content test);

(ii) the requirement in subsection 52O(1) (the Australian audience test);

(iii) the requirement in subsection 52P(1) (the professional standards test).

(4) The ACMA may remove the news source from the registered news business if the application is in accordance with subsection (2).

(5) The ACMA must publish details of the addition or removal on the ACMA's website.

52L Requirements for connection between corporation and news business

For the purposes of this Division, the requirement is that the corporation, either by itself or together with other corporations, operates or controls the news business.

52M Revenue test

(1) For the purposes of this Division, the requirement is that the annual revenue of the corporation (or of a related body corporate of the corporation), as set out in the corporation's (or the related body corporate's) annual accounts prepared in accordance with generally accepted accounting principles, exceeds $150,000:

(a) for the most recent year for which there are such accounts; or

(b) for at least 3 of the 5 most recent years for which there are such accounts.

(2) Subsection (3) applies if:

(a) the corporation (or the related body corporate) acquired a business; and

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(b) the business' annual revenue for a year starting before the acquisition is ascertainable from annual accounts prepared in accordance with generally accepted accounting principles.

(3) For the purposes of subsection (1) treat the revenue of the corporation (or of the related body corporate) for the year mentioned in paragraph (2)(b) as including the business' annual revenue for that year.

52N Content test

(1) The requirement in this subsection is met in relation to a news business if the primary purpose of each news source covered by subsection (2) is to create content that is core news content.

(2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the news business.

(3) For the purposes of subsection (1), in determining whether the primary purpose of a news source is to create content that is core news content, take into account the following matters:

(a) the amount of core news content created by the news source;

(b) the frequency with which the news source creates core news content;

(c) the degree of prominence given to core news content created by the news source, compared with the degree of prominence given to other content created by the news source;

(d) any other relevant matter.

52O Australian audience test

(1) The requirement in this subsection is met in relation to a news business if every news source covered by subsection (2) operates predominantly in Australia for the dominant purpose of serving Australian audiences.

(2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the news business.

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52P Professional standards test

(1) The requirement in this subsection is met in relation to a news business if:

(a) every news source covered by subsection (2):

(i) is subject to the rules of the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct; or

(ii) is subject to the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice; or

(iii) is subject to the rules of a code of practice mentioned in paragraph 8(1)(e) of the *Australian Broadcasting Corporation Act 1983* or paragraph 10(1)(j) of the *Special Broadcasting Service Act 1991*; or

(iv) is subject to internal editorial standards that are analogous to the rules mentioned in subparagraph (i), (ii) or (iii) to the extent that they relate to the provision of quality journalism; or

(v) is subject to rules specified in the regulations that replace those mentioned in subparagraph (i), (ii) or (iii); or

(vi) is subject to other rules specified in the regulations; and

(b) every news source covered by subsection (2) has editorial independence from the subjects of its news coverage.

(2) This subsection covers a news source if it comprises, whether by itself or together with other news sources, the relevant news business.

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Division 4—General requirements

Subdivision A—Preliminary

52Q Obligations in respect of digital platform services individually

(1) The provisions of Subdivisions B and C create obligations in respect of every designated digital platform service, in respect of each registered news business.

(2) Those obligations are placed on the responsible digital platform corporation for the designated digital platform service, in respect of the registered news business corporation for the registered news business.

(3) If there is more than one responsible digital platform corporation for the designated digital platform service:

(a) those obligations are placed on each of those responsible digital platform corporations separately; and

(b) treat references in Subdivision B and C to the responsible digital platform corporation for the designated digital platform service as being references to each responsible digital platform corporation for the designated digital platform service.

Subdivision B—The minimum standards

52R Giving list and explanation of data provided to registered news businesses

(1) If the designated digital platform service makes available covered news content of the registered news business, the responsible digital platform corporation for the designated digital platform service must ensure that:

(a) information covered by subsection (2) is given to the registered news business corporation for the registered news business; and

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(b) the information is given in terms that are readily comprehensible; and

(c) if there are other designated digital platform services of the responsible digital platform corporation—the information is given in terms that relate specifically to the designated digital platform service (and not in terms that relate to that service and those other designated digital platform services in aggregate); and

(d) the information is given to the registered news business corporation no later than 28 days after the day on which the registered news business was registered under section 52G; and

(e) if regulations made for the purposes of this paragraph specify other requirements for that information—those requirements are satisfied.

(2) This subsection covers information that comprises lists and explanations of the types of data covered by subsection (3).

(3) This subsection covers data:

(a) that relates to interactions of users of the designated digital platform service with covered news content made available by the designated digital platform service; and

(b) that the designated digital platform service provides to one or more registered news businesses.

(4) The responsible digital platform corporation for the designated digital platform service must ensure that:

(a) updated information covered by subsection (2) is given annually to the registered news business corporation for the registered news business; and

(b) the updated information is given in terms mentioned in paragraphs (1)(b) and (c); and

(c) the updated information is given to the registered news business corporation no later than 12 months after the later of the following days:

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(i) the day on which information was given to the registered news business corporation in accordance with subsection (1);

(ii) the most recent day on which updated information was previously given to the registered news business corporation in accordance with this subsection; and

(d) if regulations made for the purposes of this paragraph specify other requirements for the updated information—those requirements are satisfied.

(5) To avoid doubt, nothing in this section requires the responsible digital platform corporation to give the data covered by subsection (3) to the registered news business corporation.

52S Change to algorithm to bring about identified alteration to distribution of content with significant effect on referral traffic

(1) Subsection (2) applies if:

(a) a change is planned to be made to an algorithm of the designated digital platform service; and

(b) the dominant purpose of the change is to bring about an identified alteration to the ways in which the designated digital platform service distributes content that is made available by the service; and

(c) the change is likely to have a significant effect on the referral traffic from the designated digital platform service to the covered news content of registered news businesses (considered as a whole) that the service makes available.

(2) The responsible digital platform corporation for the designated digital platform service must ensure that:

(a) notice of the change is given to the registered news business corporation for each registered news business; and

(b) the notice is given:

(i) unless subparagraph (ii) applies—at least 14 days before the change is made; or

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(ii) if the change relates to a matter of urgent public interest—no later than 48 hours after the change is made; and

(c) the notice describes the change, and the effect mentioned in paragraph (1)(c), in terms that are readily comprehensible; and

(d) if there are other designated digital platform services of the responsible digital platform corporation—the notice is given in terms that relate specifically to the designated digital platform service (and not in terms that relate to that service and those other designated digital platform services in aggregate).

(3) However, subsection (2) does not apply if the change is made within 14 days after the day on which the registered news business corporation was registered under section 52G.

52V Section 52S—dominant purpose

For the purposes of paragraph 52S(1)(b), treat a change as *not* having the dominant purpose mentioned in that paragraph if the change is any of the following:

(a) a change to an algorithm made as part of routine maintenance with the dominant purpose of ensuring the ongoing effectiveness of the algorithm;

(b) a change to an algorithm with the dominant purpose of ensuring that the algorithm operates more quickly or more efficiently.

52W Section 52S—significant effect

(1) For the purposes of paragraph 52S(1)(c), in determining whether the change is likely to have the significant effect mentioned in the paragraph, take into account the following matters:

(a) whether, as a result of the change, there is likely to be a significant variation to the amount of covered news content made available by the designated digital platform service;

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(b) whether, as a result of the change, there is likely to be a significant variation to the proportion of content made available by the designated digital platform service represented by covered news content;
(c) any other relevant matter (subject to subsection (2)).

(2) For the purposes of paragraph 52S(1)(c), in determining whether the change is likely to have the significant effect mentioned in the paragraph, disregard the following matters:
(a) whether, as a result of the change, there is likely to be a significant variation to the proportion of covered news content of all registered news businesses made available by the designated digital platform service represented by the covered news content of a particular registered news business;
(b) the relative turnover of registered news businesses whose covered news content is made available by the designated digital platform service;
(c) the relative volume of covered news content created by registered news businesses whose covered news content is made available by the designated digital platform service;
(d) the relative financial position of registered news businesses whose covered news content is made available by the designated digital platform service.

Subdivision C—Recognition of original covered news content

52X Recognition of original covered news content

The responsible digital platform corporation for the designated digital platform service must ensure that:
(a) a proposal is developed for the designated digital platform service to recognise original covered news content when it makes available and distributes that content; and
(b) registered news business corporations are consulted in developing that proposal before it is published; and

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(c) the proposal is published no later than 6 months after the first registration of a news business under section 52G.

Subdivision D—Facilitating open communication

52Y Facilitating open communication—responsible digital platform corporation for designated digital platform service

The responsible digital platform corporation for a designated digital platform service must:

(a) set up a point of contact in Australia for the purpose of this section no later than 28 days after the Minister makes a determination under section 52E specifying the designated digital platform corporation; and

(b) if regulations made for the purposes of this paragraph specify requirements for the point of contact—ensure that the point of contact meets those requirements; and

(c) give details of that point of contact to every registered news business corporation:

(i) unless subparagraph (ii) applies—no later than 10 business days after the responsible digital platform corporation sets up the point of contact; or

(ii) if the registered news business corporation is registered under section 52G after the responsible digital platform corporation sets up the point of contact—no later than 10 business days after the registered news business corporation is registered under section 52G; and

(d) acknowledge every communication to that point of contact from a registered news business corporation for a registered news business that relates to the registered news business' covered news content made available by the designated digital platform service; and

(e) if regulations made for the purposes of this paragraph specify requirements for the acknowledgement—ensure that the acknowledgement meets those requirements.

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52Z Facilitating open communication—registered news business corporation for registered news business

A registered news business corporation for a registered news business must:

(a) set up a point of contact for the purpose of this section no later than the day on which the registered news business corporation is registered under section 52G; and

(b) if regulations made for the purposes of this paragraph specify requirements for the point of contact—ensure that the point of contact meets those requirements; and

(c) acknowledge every communication to that point of contact from a responsible digital platform corporation for a designated digital platform service that relates to the registered news business' covered news content made available by that designated digital platform service; and

(d) if regulations made for the purposes of this paragraph specify requirements for the acknowledgement—ensure that the acknowledgement meets those requirements.

Subdivision E—Trade secrets and personal information

52ZA Trade secrets

Nothing in this Division requires the giving of information the disclosure of which would reveal a trade secret.

52ZB Personal information

Nothing in this Division requires or authorises the giving of information that is personal information (within the meaning of the *Privacy Act 1988*).

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Division 5—Non-differentiation

52ZC Digital service to be supplied without differentiating in relation to registered news businesses

(1) This section applies if a responsible digital platform corporation for a designated digital platform service, either by itself or together with other corporations, operates or controls a digital service (whether or not the designated digital platform service).

(2) The responsible digital platform corporation must ensure that the supply of the digital service does not, in relation to crawling, indexing, making available and distributing news businesses' covered news content:

(a) differentiate between registered news businesses, because of any of the following matters:

(ia) a corporation being registered under section 52G, or being endorsed under that section as the registered news business corporation for a news business;

(i) a bargaining news business representative for a registered news business making a notification under 52ZE(1), or not making such a notification;

(ii) a bargaining news business representative for a registered news business giving a notice under 52ZL(2), or not giving such a notice;

(iii) a registered news business being paid, or not being paid, an amount of remuneration for the making available of the registered news business' covered news content by a designated digital platform service (whether or not the remuneration is paid in accordance with a determination of a panel under section 52ZX));

(iv) a registered news business being the subject of, or not being the subject of, an agreement of a kind described in section 52ZZK or 52ZZL;

(v) a registered news business being the subject of, or not being the subject of, an agreement resulting from the

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acceptance of an offer of a kind described in section 52ZZM; or

(b) differentiate between registered news businesses and news businesses that are not registered news businesses, because of any of the following matters:

(i) a matter mentioned in subparagraph (a)(ia), (i), (ii), (iii), (iv) or (v);

(ii) a news business covered by subsection (3) being paid, or not being paid, an amount of remuneration for the making available of the news business' covered news content by a designated digital platform service;

(iii) a news business covered by subsection (3) being the subject of, or not being the subject of, an agreement of a kind described in section 52ZZK or 52ZZL;

(iv) a news business covered by subsection (3) being the subject of, or not being the subject of, an agreement resulting from the acceptance of an offer of a kind described in section 52ZZM; or

(c) differentiate between news businesses that are not registered news businesses, because of any of the following matters:

(i) a corporation being eligible to be registered under section 52G, or being eligible to be endorsed under that section as the registered news business corporation for a news business;

(ii) a corporation applying under section 52F for registration of itself, or of a news business, or for endorsement of itself as the registered news business corporation for a news business.

(3) This subsection covers a news business if:

(a) the news business is not a registered news businesses; and

(b) none of the news sources that comprise the business form part of a registered news business.

(4) Subsection (2) does not apply in relation to differentiation if:

(a) there is an agreement between:

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(i) the responsible digital platform corporation, or a related body corporate of the responsible digital platform corporation; and

(ii) a corporation that is registered (or is eligible to be registered) under section 52G and, either by itself or together with other corporations, operates or controls a news business; and

(b) the agreement provides that a corporation mentioned in subparagraph (a)(i) will ensure that remuneration is to be paid to the news business for the making available of the news business' covered news content by the digital service; and

(c) the differentiation arises solely from the amount of that remuneration.

(5) Subsection (2) does not apply in relation to differentiation if:

(a) there is an agreement between:

(i) the responsible digital platform corporation, or a related body corporate of the responsible digital platform corporation; and

(ii) a corporation that is registered (or is eligible to be registered) under section 52G and, either by itself or together with other corporations, operates or controls a news business; and

(b) the agreement provides that:

(i) a corporation mentioned in subparagraph (a)(ii) will ensure the provision of a specified type of covered news content to be made available by the digital service; and

(ii) a corporation mentioned in subparagraph (a)(i) will ensure that the content is ranked preferentially when the digital service distributes the covered news content; and

(c) the differentiation arises solely from that preferential ranking.

(6) For the purposes of this section:

(a) treat the reference in the definition of ***news source*** in section 52A to "it produces" as instead being a reference to "it regularly produces"; and

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(b) treat the reference in that definition to "news content" as instead being a reference to "covered news content".

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Division 6—Bargaining

Subdivision A—Preliminary

52ZD Bargaining news business representative for a registered news business

(1) The registered news business corporation for a registered news business is the ***bargaining news business representative*** for the registered news business.

(2) Subsection (3) applies if:

(a) a registered news business corporation for a registered news business makes an agreement in writing with a person; and

(b) the agreement provides that the person should be the bargaining news business representative for the registered news business.

(3) Despite subsection (1), the person is the ***bargaining news business representative*** for the registered news business.

(4) To avoid doubt, a person can be the bargaining news business representative for 2 or more registered news businesses.

52ZE Notification of bargaining

(1) The bargaining news business representative for a registered news business may notify a responsible digital platform corporation for a designated digital platform service that it wishes to bargain over one or more specified issues relating to the registered news business' covered news content made available by the designated digital platform service.

(2) If the bargaining news business representative is the bargaining news business representative for 2 or more registered news businesses, a notification made for the purposes of subsection (1) may relate to some or all of those registered news businesses.

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(3) If the responsible digital platform corporation is the responsible digital platform corporation for 2 or more designated digital platform services:

(a) a notification made for the purposes of subsection (1) may relate to some or all of those designated digital platform services; and

(b) where the notification relates to more than one designated digital platform service—treat references in this Division and in Division 7 to the designated digital platform service as including references to each of the designated digital platform services to which the notification relates.

(4) A notification made for the purposes of subsection (1) must set out the following matters:

(a) the bargaining news business representative;

(b) each registered news business to which the notification relates;

(c) the designated digital platform service;

(d) the responsible digital platform corporation for the designated digital platform service;

(e) the specified issues mentioned in subsection (1);

(f) if regulations made for the purposes of this paragraph specify other matters—those matters.

(5) A notification made for the purposes of subsection (1) cannot be later varied to relate to a registered news business that was not set out in the notification.

Subdivision B—Bargaining obligations

52ZF Application of Subdivision

This Subdivision applies if a notification is made for the purposes of subsection 52ZE(1).

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52ZG Bargaining parties, core bargaining issues and represented registered news businesses

(1) The ***bargaining parties*** are as follows:

(a) the bargaining news business representative that made the notification;

(b) the responsible digital platform corporation for the designated digital platform service to which the notification relates.

(2) The bargaining parties may agree, in writing, that they wish to bargain over one or more extra specified issues relating to the registered news business' covered news content made available by any of the following:

(a) the designated digital platform service;

(b) specified services other than the designated digital platform service.

(3) The ***core bargaining issues*** are:

(a) the specified issues in the notification (as mentioned in paragraph 52ZE(4)(e)); and

(a) the specified issues in an agreement (if any) between the bargaining parties as mentioned in subsection (2).

(4) Each registered news business to which the notification relates is a ***represented registered news business***.

52ZH Obligation to negotiate in good faith

Each bargaining party must negotiate in good faith over each core bargaining issue.

52ZI Obligation to notify Commission if agreement reached

If the bargaining parties reach agreement over each core bargaining issue, they must ensure that a written notification of the agreement is given to the Commission as soon as practicable.

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Subdivision BA—Mediation

52ZIA Obligation to participate in mediation

(1) This section applies if:

(a) the bargaining parties have not reached agreement over each core bargaining issue within 3 months after the notification was made for the purposes of subsection 52ZE(1); or

(b) the bargaining parties agree to refer the core bargaining issues to mediation under this Subdivision.

(2) Each bargaining party must participate in a mediation about the core bargaining issues.

(3) To avoid doubt, each bargaining party must comply with section 52ZH (good faith negotiations) in respect of the mediation.

(4) The mediator is to be appointed by the ACMA.

52ZIB Rules about conduct of mediation

(1) The regulations may set out rules relating to the conduct of a mediation under this Subdivision.

(2) A mediation under this Subdivision is to be conducted according to those rules.

(3) Despite subsection 14(2) of the *Legislation Act 2003*, regulations made for the purposes of subsection (1) may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

(4) Without limiting the scope of regulations that may be made for the purposes of subsection (1), those regulations may:

(a) set out rules relating to the payment of the costs of the mediator; and

(b) without limiting the scope of paragraph (a), specify who is to pay those costs.

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52ZIC Termination of mediation

(1) A mediation under this Subdivision terminates if:

(a) unless paragraph (b) applies—2 months have passed since the start of the mediation; or

(b) if the bargaining parties agree to a 2-month extension of the mediation—4 months have passed since the start of the mediation; or

(c) the mediator decides to terminate the mediation in accordance with subsections (3) and (4); or

(d) the bargaining parties agree to terminate the mediation.

(2) To avoid doubt, the bargaining parties can only agree to one extension in accordance with paragraph (1)(b).

(3) The mediator may decide to terminate the mediation if, having regard to the conduct of the bargaining parties in the mediation, the mediator considers that there are no reasonable prospects of the bargaining parties reaching agreement over each core bargaining issue.

(4) The mediator may decide to terminate the mediation whether or not a bargaining party has asked the mediator to do so.

Subdivision C—Miscellaneous

52ZJ Bargaining over other issues

To avoid doubt, nothing in this Division limits the bargaining parties to negotiating only over the core bargaining issues.

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Division 7—Arbitration about remuneration issue

Subdivision A—Preliminary

52ZK Register of bargaining code arbitrators

(1) The ACMA must establish and keep a register of bargaining code arbitrators.

(2) Each such person listed on the register must be:
  (a) a person experienced in legal matters, economic matters or industry matters; or
  (b) a person who the ACMA considers has appropriate experience to be a member of an arbitral panel for the purposes of this Part.

(3) In listing a person on the register, the ACMA must consider requirements (if any) specified in regulations made for the purposes of this subsection.

Subdivision B—Starting arbitration

52ZL Notification of arbitration

(1) This section applies if:
  (a) a notification has been made for the purposes of subsection 52ZE(1) to a responsible digital platform corporation for a designated digital platform service; and
  (b) one of the core bargaining issues (the ***remuneration issue***) concerns the remuneration to be paid to a registered news business for the making available of the registered news business' covered news content by the designated digital platform service.

(2) The bargaining party that is the bargaining news business representative may give a notice to the Commission that arbitration about the remuneration issue should start, if:
  (a) both of the following conditions are satisfied:

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(i) mediation in respect of the core bargaining issues has terminated in accordance with section 52ZIC;

(ii) the bargaining parties had not reached an agreement about terms for resolving the remuneration issue before the mediation terminated; or

(b) the bargaining parties have agreed to arbitration about terms for resolving the remuneration issue no earlier than 10 business days after the notification referred to in paragraph (1)(a) was made.

(3) The notice must:

(a) be in writing; and

(b) if regulations made for the purposes of this paragraph specify requirements—meet those requirements.

(4) However, the bargaining party that is the bargaining news business representative cannot give a notice under subsection (2) at a time if, within the period of 24 months ending at that time, a notice has been given under subsection (2) in respect of:

(a) the designated digital platform service mentioned in paragraph (1)(a); and

(b) the registered news business mentioned in paragraph (1)(b).

(5) As soon as practicable after the Commission has been given a notice under subsection (2), it must give the ACMA and each of the bargaining parties a notice stating that:

(a) an arbitral panel is to be formed; and

(b) the members of the panel are to be appointed in accordance with section 52ZM.

52ZM Formation of arbitral panel

(1) This section applies if a notice has been given under subsection 52ZL(5).

(2) An arbitral panel is to be formed to arbitrate about the remuneration issue.

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(3) The membership of the panel is to be comprised of:
  (a) the Chair; and
  (b) unless the bargaining parties agree that the sole member of the panel is the Chair—2 other members.

(4) The members of the panel are to be appointed by agreement between the bargaining parties.

(5) The bargaining parties may agree to appoint persons who are, or are not, listed on the register of bargaining code arbitrators.

(6) If the bargaining parties agree on the appointment of one or more of the members, each of the bargaining parties must give the Commission and the ACMA a notice that:
  (a) specifies:
    (i) the name (or names) of the person (or persons) appointed; and
    (ii) the date of the agreement; and
  (b) if regulations made for the purposes of this paragraph specify other information—that information.

(7) For the purposes of subsection (6), the notice must be given no later than the end of:
  (a) the period of 10 business days after the notice was given under subsection 52ZL(5); or
  (b) if regulations made for the purposes of this paragraph specify a different period—that period.

(8) If the bargaining parties cannot agree on the appointment of one or more of the members within that period, the ACMA must make that appointment or those appointments.

(9) The ACMA may only make an appointment of a person who is listed on the register of bargaining code arbitrators.

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52ZN Disclosure of conflicts of interest where ACMA appoints member of panel

(1) Before the ACMA appoints a person to be a member of the panel, the ACMA must give the person a reasonable opportunity to declare actual or potential conflicts of interest in accordance with subsection (2).

(2) Before a person accepts appointment as a member of the panel, the person must declare to the ACMA any actual or potential conflict of interest in relation to the arbitration.

(3) If the ACMA has reason to consider that a person who has been appointed as a member of the panel has any actual or potential conflict of interest in relation to the arbitration (regardless whether the person declared the conflict in accordance with subsection (2)):
  (a) the ACMA may give a notice in writing to the person stating that the person should no longer be a member of the panel; and
  (b) the person ceases to be a member of the panel when ACMA gives the person the notice.

(4) If the ACMA gives a notice under paragraph (3)(a), the ACMA must, as soon as practicable:
  (a) give a copy of the notice to the bargaining parties; and
  (b) make an appointment of another person as a member of the panel.

(5) For the purposes of paragraph (4)(b), the ACMA may only make an appointment of a person who is listed on the register of bargaining code arbitrators.

(6) For the purposes of this section, a person has a conflict of interest in relation to the arbitration if the person has any interest, pecuniary or otherwise, that could conflict with the proper performance of the person's functions in relation to the arbitration.

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52ZO Costs of arbitral panel

(1) The bargaining parties must each pay half of the costs of each member of the panel.

(2) Each member of the panel is to determine that member's costs, worked out as daily costs.

(3) If regulations made for the purposes of this subsection specify rules relating to those costs (including the amount of those costs), the bargaining parties must comply with those rules.

52ZP Chair to notify start of arbitration

(1) The Chair must notify the bargaining parties that arbitration about terms for resolving the remuneration issue will start on a specified day that is no later than 5 business days (or, if the regulations specify a different period, the end of that period) after the appointment of the Chair.

(2) The notice must:
  (a) be in writing; and
  (b) if regulations made for the purposes of this paragraph specify requirements—meet those requirements.

52ZQ Bargaining parties' agreement about dealing with extra services in arbitration

(1) The bargaining parties may agree, in writing, that specified services other than the designated digital platform service should be dealt with in the arbitration.

(2) If the bargaining parties notify the Chair of the agreement before the start of the arbitration, Subdivision C applies as if:
  (a) the remuneration issue related to the designated digital platform service and the specified services mentioned in subsection (1); and

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(b) references in that Subdivision to the designated digital platform service included references to those specified services.

(3) The notice must:
(a) be in writing; and
(b) if regulations made for the purposes of this paragraph specify requirements—meet those requirements.

Subdivision C—Final offer arbitration

52ZR Application

This Subdivision applies if the Chair has given notice under section 52ZP.

52ZS Obligation to participate in arbitration in good faith

Each bargaining party must participate in the arbitration in good faith.

52ZT Information request by bargaining party—general

(1) Each bargaining party may give the other bargaining party a request that the other bargaining party give it specified information if:
(a) the information is covered by subsection (2); and
(b) it is reasonable for the bargaining party to make the request for the purposes of this Division; and
(c) the request is made no later than 5 business days after the start of arbitration; and
(d) the bargaining party has not made a previous request under this subsection in respect of the arbitration.

(2) This subsection covers information that is held by any of the following:
(a) if the other bargaining party is the responsible digital platform corporation:

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(i) the responsible digital platform corporation;
(ii) a related body corporate of the responsible digital platform corporation; or

(b) if the other bargaining party is the bargaining news business representative:
(i) the registered news business corporation for the represented registered news business;
(ii) a related body corporate of the registered news business corporation for the represented registered news business.

(3) A request under subsection (1) must:
(a) be made in writing; and
(b) set out reasons why it is reasonable for the bargaining party to make the request for the purposes of this Division; and
(c) if regulations made for the purposes of this paragraph specify other requirements—comply with those requirements.

(4) The bargaining party must give a copy of the request to the panel on the same day that it gives the request to the other bargaining party.

(5) If a bargaining party makes a request under subsection (1), the other bargaining party must ensure that:
(a) the request is complied with no later than 10 business days after:
(i) unless subparagraph (ii) applies—the request was given to the other bargaining party; or
(ii) if an application is made under subsection 52ZU(1)—the panel makes a ruling under subsection 52ZU(3); and
(b) the information requested is given in terms that are readily comprehensible; and
(c) if the other bargaining party is the responsible digital platform corporation and there are other designated digital platform services of the responsible digital platform corporation—the information is given in terms that relate specifically to the designated digital platform service (and

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not in terms that relate to that service and those other designated digital platform services in aggregate); and

(d) if regulations made for the purposes of this paragraph specify other requirements for that information—those requirements are satisfied.

52ZU Information request by bargaining party—challenges by other bargaining party

(1) The other bargaining party may apply to the panel, in writing, for a ruling that it is *not* reasonable for the bargaining party to make the request for the purposes of this Division, in relation to all or a specified part of the information requested.

(2) An application under subsection (1) can be made no later than 10 business days after the bargaining party gives the request to the other bargaining party.

(3) If an application is made under subsection (1), the panel must make a ruling in relation to it no later than 10 business days after it is made.

(4) The ruling may relate to all or a specified part of the information requested.

(5) In making the ruling, the panel must consider the matters mentioned in subsection 52ZZ(1).

(6) Nothing in section 52ZT requires the giving of information to the extent (if any) that the panel makes a ruling under subsection (3) that it was *not* reasonable for the bargaining party to make the request for the purposes of this Division, in relation to all or a specified part of the information requested.

52ZV Information request by bargaining party—miscellaneous rules

(1) Nothing in section 52ZT requires the giving of information the disclosure of which would reveal a trade secret.

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(2) Nothing in section 52ZT requires or authorises the giving of information that is personal information (within the meaning of the *Privacy Act 1988*).

(3) If a bargaining party gives information to the other bargaining party in order to comply with subsection 52ZT(5), the other bargaining party must ensure that the information is not used for a purpose other than a purpose in relation to arbitration under this Division.

(4) Subsection (5) applies if:
  (a) there is a reference to a number of business days in a provision in section 52ZT or 52ZU; and
  (b) regulations made for the purposes of this paragraph specify a different number of business days in respect of that provision.

(5) Treat that reference in the provision as being to the number of business days specified in the regulations as mentioned in paragraph (4)(b).

52ZW Agreed early termination of arbitration

(1) This section applies if:
  (a) the bargaining parties agree that the arbitration should terminate; and
  (b) the panel did not make a determination in accordance with subsection 52ZX(1) before the agreement was made; and
  (c) no information was given by a bargaining party in order to comply with a request made under subsection 52ZT(1) before the agreement was made.

(2) The parties must notify the Chair of the agreement as soon as practicable after the day on which the agreement is made.

(3) The arbitration terminates in accordance with that agreement, but no earlier than the day on which parties notify the Chair of the agreement in accordance with subsection (2).

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(4) However, if the parties fail to comply with subsection (2):
  (a) subsection (3) does not apply; and
  (b) the agreement does not affect the validity of the arbitration or any aspect of the arbitration.

52ZX Final offer arbitration

(1) The panel is to make a determination under this subsection about the terms for resolving the remuneration issue that:
  (a) is in accordance with subsections (7), (8) and (9) (final offer arbitration); and
  (b) sets out a lump sum amount (the ***remuneration amount***) for remunerating the registered news business for the making available of the registered news business' covered news content by the designated digital platform service for 2 years; and
  (c) is consistent with rights under contracts that are in force between:
    (i) the responsible digital platform corporation or a related body corporate of the responsible digital platform corporation; and
    (ii) the registered news business corporation for the represented registered news business or a related body corporate of that registered news business corporation.

(2) Each of the bargaining parties must:
  (a) submit to the panel a final offer for what the remuneration amount should be (expressed as a lump sum); and
  (b) give a copy of the final offer to the Commission on the same day that it submits the final offer to the panel.

(3) If a bargaining party gives a copy of the final offer to the Commission, the Commission must give a copy of the final offer to the other bargaining party as soon as practicable.

(4) A final offer:
  (a) cannot be submitted later than the latest of the following:

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(i) the end of the period of 10 business days after the day on which the arbitration starts;

(ii) if a bargaining party makes a request under subsection 52ZT(1) (information requests)—the end of the period of 10 business days after the latest day on which the other bargaining party may comply with the request in accordance with subsection 52ZT(5);

(iii) if a bargaining party makes an application under subsection 52ZU(1) (challenges to information requests)—the end of the period of 10 business days after the day on which the panel makes a ruling in relation to the application under subsection 52ZU(3);

(iv) if regulations made for the purposes of this subparagraph specify a different period—the end of that period;

(v) if the panel considers that exceptional circumstances justify a different period—the end of that period; and

(b) cannot be more than 30 pages in length.

(5) An offer that does not comply with subsection (4) is not a final offer for the purposes of this Division.

(6) A final offer, once submitted, cannot be withdrawn or amended.

(7) The panel must accept one of the final offers unless the panel considers that each final offer is not in the public interest because it is highly likely to result in serious detriment to:

(a) the provision of covered news content in Australia; or

(b) Australian consumers.

(8) If the panel does not accept one of those final offers, it must ascertain the remuneration amount by adjusting the most reasonable of those offers in a manner that results in that offer being in the public interest.

(9) If one bargaining party fails to submit to the panel a final offer for what the remuneration amount should be, in accordance with subsection (4), the panel must:

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(a) accept the final offer submitted by the other bargaining party, in accordance with subsection (7); or

(b) ascertain the remuneration amount by adjusting the final offer submitted by the other party, in accordance with subsection (8).

52ZXA Final offer to be accompanied by information about contracts

(1) If a bargaining party submits to the panel a final offer in accordance with subsection 52ZX(4), it must, on the same day that it submits the final offer to the panel, give the panel information that:

(a) is relevant to the arbitration; and

(b) relates to all contracts that are in force between:

(i) the responsible digital platform corporation or a related body corporate of the responsible digital platform corporation; and

(ii) the registered news business corporation for the represented registered news business or a related body corporate of that registered news business corporation.

(2) Nothing in subsection (1) requires the giving of information if doing so would disclose information that is protected against disclosure by a duty of confidence.

(3) To avoid doubt, subsection (2) does not prevent a bargaining party from giving information under subsection (1) if the other bargaining party agrees to the bargaining party doing so.

52ZY Final offer arbitration—termination of arbitration if no final offers

If both bargaining parties fail to submit to the panel a final offer for what the remuneration amount should be, the arbitration terminates on the day after the last day on which such a final offer could have been submitted in accordance with subsection 52ZX(4).

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52ZZ Matters to consider in arbitration, etc.

(1) In making a determination under subsection 52ZX(1) (including in complying with subsections 52ZX(7), (8) and (9)), the panel must consider the following matters:

(a) the benefit (whether monetary or otherwise) of the registered news business' covered news content to the designated digital platform service;

(b) the benefit (whether monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content;

(c) the reasonable cost to the registered news business of producing covered news content;

(ca) the reasonable cost to the designated digital platform service of making available covered news content in Australia;

(d) whether a particular remuneration amount would place an undue burden on the commercial interests of the designated digital platform service.

(2) In considering the matters set out in subsection (1), the panel must consider the bargaining power imbalance between Australian news businesses and the designated digital platform corporation.

52ZZA Other requirements for arbitration determination

(1) The panel must make the determination no later than 35 business days (or, if the regulations specify a different period, the end of that period) after the latest of the following days:

(a) the last day on which a final offer may be submitted in accordance with subsection 52ZX(4);

(b) the last day on which a submission may be given by a bargaining party in accordance with subsection 52ZZB(1);

(c) the last day on which a submission may be given by the Commission in accordance with subsection 52ZZC(1);

(d) the last day on which a submission may be given by a bargaining party in accordance with subsection 52ZZC(3).

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(2) If the Chair is not the sole member of the panel:
  (a) the panel must endeavour to make the determination by unanimous decision of the members of the panel; and
  (b) where a unanimous decision is not possible, the panel must make the determination by majority decision of the members of the panel.

(3) The panel must, as soon as practicable, give written reasons for making the determination to the bargaining parties and the Commission.

(4) Those written reasons must contain the information (if any) specified in regulations made for the purposes of this subsection.

52ZZB Submissions of bargaining parties

(1) Each bargaining party may give to the panel a submission about the final offer of the other bargaining party, no later than 5 business days (or, if the regulations specify a different period, the end of that period) after the panel has received both final offers (in accordance with paragraph 52ZX(2)(a)).

(2) The submission can only deal with issues that are dealt with in any material accompanying either of the final offers.

(3) The submission cannot be more than 20 pages in length.

(4) If a bargaining party gives the panel a submission under subsection (1):
  (a) the bargaining party must give a copy of the submission to the Commission on the same day that it gives the submission to the panel; and
  (b) if the Commission is given a copy of the submission under paragraph (a), the Commission must give a copy of the submission to the other bargaining party as soon as practicable.

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52ZZC Role of Commission

(1) The Commission may give to the panel a submission in relation to the arbitration, no later than 10 business days (or, if the regulations specify a different period, the end of that period) after the Commission has received both final offers (in accordance with paragraph 52ZX(2)(b)).

(1A) The information contained in the submission must be:

(a) impartial factual information that relates to the relevant market; and

(b) impartial information that relates to relevant economic principles.

(2) If the Commission gives the panel a submission under subsection (1), it must give the bargaining parties a copy of the submission on the same day that it gives the submission to the panel.

(3) Each bargaining party may give to the panel a submission about the Commission's submission, no later than 5 business days after the bargaining party has received the Commission's submission.

(4) The bargaining party's submission cannot be more than 20 pages in length.

(5) If a bargaining party gives the panel a submission under subsection (3):

(a) the bargaining party must give a copy of the submission to the Commission on the same day that it gives the submission to the panel; and

(b) if the Commission is given a copy of the submission under paragraph (a), the Commission must give a copy of the submission to the other bargaining party as soon as practicable.

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52ZZD Guidelines about conduct of arbitration

(1) The Commission may, in writing, make guidelines relating to the conduct of an arbitration under this Division.

(2) However, the Commission cannot include in the guidelines a provision that relates to any of the following matters unless the Minister has approved the provision, in writing:

(a) how a panel makes a ruling under subsection 52ZU(3) (information requests);

(b) the content of final offers made by bargaining parties in accordance with subsection 52ZX(2);

(c) the content of submissions given by bargaining parties in accordance with subsection 52ZZB(1);

(d) how a panel makes a determination in accordance with subsection 52ZX(1).

(3) A panel may take the guidelines into account in conducting an arbitration under this Division.

(4) However:

(a) the panel need not take the guidelines into account in conducting the arbitration; and

(b) a failure by the panel to take the guidelines into account in conducting the arbitration does not affect the validity of the arbitration or any aspect of the arbitration.

(5) The Commission must publish the guidelines on its website as soon as practicable.

(6) General information made available by the Commission in accordance with subsection 28(1) must not relate to the conduct of an arbitration under this Division.

(7) Guidelines made under subsection (1) are not a legislative instrument.

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Subdivision D—Effect of arbitral determination

52ZZE Bargaining parties must comply with the determination

The bargaining parties must comply with a determination made by the panel in accordance with subsection 52ZX(1).

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Division 8—Enforcement etc.

52ZZF Record generating and keeping

(1) A responsible digital platform corporation for a designated digital platform service must comply with requirements specified in regulations made for the purposes of subsection (2).

(2) The regulations may specify requirements for the generation and keeping of records relating to the operation of this Part.

(3) Division 5 of Part IVB applies in relation to subsection (1) in the same way in which it applies in relation to an applicable industry code (within the meaning of that Part).

(4) This section does not limit section 155 (which is about the general information-gathering powers of the Commission).

52ZZG Infringement notices—Division 4 of this Part

(1) Subject to subsection (2), Division 2A of Part IVB applies in relation to an alleged contravention of a provision of Division 4 of this Part in the same way in which it applies in relation to an alleged contravention of a civil penalty provision of an industry code (within the meaning of that Part).

(2) For the purposes of applying Division 2A of Part IVB in accordance with subsection (1), treat the reference in subparagraph 51ACF(1)(b)(i) to 60 penalty units as being a reference to 600 penalty units.

52ZZH Joint and several liability for pecuniary liabilities

(1) Subsection (2) applies if:

(a) a responsible digital platform corporation for a designated digital platform service is liable to a pecuniary penalty in accordance with section 76 because it contravened a provision of this Part; and

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(b) the responsible digital platform corporation is not the service's designated digital platform corporation.

(2) The responsible digital platform corporation and the service's designated digital platform corporation are jointly and severally liable for the pecuniary penalty.

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Division 9—Agreements between digital platform corporations and registered news business corporations

52ZZI Simplified outline of this Division

Responsible digital platform corporations may make standard offers relating to remuneration for registered news business corporations. If an offer is accepted by a registered news business corporation, rules under this Part relating to bargaining and arbitration do not apply to the parties to the contract.

Responsible digital platform corporations (and related bodies corporate) may also make agreements outside this Part to disapply rules under this Part relating to bargaining, arbitration and other matters.

Responsible digital platform corporations (and related bodies corporate) may also make offers relating to such matters under this Part.

52ZZJ Standard offers—content

(1) An offer by a responsible digital platform corporation for a designated digital platform corporation complies with this subsection if:

(a) the responsible digital platform corporation makes the offer to each registered news business corporation covered by subsection (2) (a ***covered RNBC***); and

(b) the offer provides for the matters in subsection (3) (acceptance procedure); and

(c) the offer provides that a binding agreement resulting from it will have:

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(i) the features mentioned in subsection (4) (formal matters); and

(ii) the features mentioned in subsection (5) (remuneration).

(2) A registered news business corporation is covered by this subsection unless:

(a) regulations made for the purposes of this paragraph specify a kind or kinds of registered news business corporation; and

(b) the registered news business corporation is not of that kind or one of those kinds.

(3) For the purposes of paragraph (1)(b), the matters are as follows:

(a) a covered RNBC may accept the offer before the end of the offer period;

(b) subject to paragraphs (c) and (d), such an acceptance becomes final, and a resulting agreement between the responsible digital platform corporation and the covered RNBC becomes binding, at the end of the offer period;

(c) the covered RNBC may revoke such an acceptance before the end of the offer period;

(d) the responsible digital platform corporation may revoke the offer before the end of the offer period.

(4) For the purposes of subparagraph (1)(c)(i), the features of the agreement are as follows:

(a) the agreement provides that it covers specified corporations (the ***covered corporations***); and

(b) each covered corporation is:

(i) the responsible digital platform corporation; or

(ii) a related body corporate of the responsible digital platform corporation; or

(iii) the registered news business corporation; or

(iv) a related body corporate of the registered news business corporation; and

(c) the agreement specifies a 2 year period (the ***covered period***) during which it is in force; and

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(d) the agreement specifies one or more designated digital platform services or other services (the ***covered services***) of the designated digital platform corporation; and

(e) the agreement expressly provides that some or all provisions mentioned in subsection 52ZZK(4) (the ***specified provisions***) are not to apply to the extent that they would impose an obligation on one covered corporation in respect of another covered corporation in relation to the covered services.

(5) For the purposes of subparagraph (1)(c)(ii), the features of the agreement are as follows:

(a) the agreement specifies that the responsible digital platform corporation will ensure the payment of remuneration to the covered RNBC (or a related body corporate of the covered RNBC) for the making available of the registered news business' covered news content by one or more of the covered services, in respect of the covered period; and

(b) if regulations made for the purposes of this paragraph specify other features—those features.

(6) Regulations made for the purposes of paragraph (5)(b) may specify features relating to the amount of the remuneration mentioned in paragraph (5)(a) (including features that require the determination of that remuneration to be based on specified factors).

(7) Subsection (6) does not limit the scope of regulations that may be made for the purposes of paragraph (5)(b).

(8) The ***offer period*** is the period that:

(a) starts when the responsible digital platform corporation gives a copy of the offer to a covered RNBC; and

(b) ends:

(i) unless subparagraph (ii) applies—60 days after the period starts; or

(ii) if regulations made for the purposes of this subparagraph specify a different day—on that day.

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(9) To avoid doubt, this section does not prevent the making of other kinds of offers or agreements.

52ZZK Standard offers—consequences of agreement

(1) Subsection (2) applies if:

(a) a responsible digital platform corporation for a designated digital platform corporation makes an offer to make a binding agreement; and

(b) the offer complies with subsection 52ZZJ(1); and

(c) the responsible digital platform corporation has given a copy of the offer to all registered news business corporations covered by subsection 52ZZJ(2); and

(d) a registered news business corporation for a registered news business has accepted the offer, and the resulting agreement has become binding on the responsible digital platform corporation and the registered news business corporation; and

(e) the parties to the agreement notify the Commission, in writing, that the agreement has become binding.

(2) The specified provisions do not apply to the extent that (disregarding this subsection) they impose an obligation on one covered corporation in respect of another covered corporation in relation to the covered services that are designated digital platform services.

(3) However, subsection (2) does not apply if, before the agreement became binding, a notification has been made for the purposes of subsection 52ZE(1) to the responsible digital platform corporation, in relation to the registered news business.

(4) The provisions are as follows:

(a) Division 6 (bargaining);

(b) Division 7 (arbitration about remuneration issue).

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52ZZL Contracting out of general requirements, bargaining and arbitration

(1) Subsection (2) applies if:

(a) a responsible digital platform corporation for a designated digital platform corporation (or a related body corporate of such a responsible digital platform corporation) makes a binding agreement with another corporation (the ***news business corporation***); and

(b) the agreement provides that it covers specified corporations (the ***covered corporations***); and

(c) each covered corporation is:

(i) the responsible digital platform corporation; or

(ii) a related body corporate of the responsible digital platform corporation; or

(iii) the news business corporation; or

(iv) a related body corporate of the news business corporation; and

(d) the agreement specifies the period (the ***covered period***) during which it is in force; and

(e) the agreement specifies one or more designated digital platform services or other services (the ***covered services***) of the designated digital platform corporation; and

(f) the agreement expressly provides that some or all provisions mentioned in subsection (4) (the ***specified provisions***) are not to apply to the extent that they would impose an obligation on one covered corporation in respect of another covered corporation in relation to the covered services; and

(g) the parties to the agreement notify the Commission, in writing, that the agreement has been made.

(2) The specified provisions do not apply to the extent that (disregarding this subsection) they impose an obligation on one covered corporation in respect of another covered corporation in relation to the covered services that are designated digital platform services.

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(3) However, subsection (2) does not apply if:

(a) an arbitration under Division 7 started in relation to any of the covered services in respect of the payment of remuneration, for a period starting or ending in the covered period, to the news business corporation (or a related body corporate of the news business corporation); and

(b) before the agreement was made:

(i) the panel made a determination in accordance with subsection 52ZX(1); or

(ii) a bargaining party gave information in order to comply with a request made under subsection 52ZT(1).

(4) The provisions are as follows:

(a) Division 4 (general requirements);

(b) Division 6 (bargaining);

(c) Division 7 (arbitration about remuneration issue).

52ZZM Offers relating to general requirements, bargaining and arbitration not prohibited

(1) To avoid doubt, nothing in this Part prevents a responsible digital platform corporation for a designated digital platform corporation (or a related body corporate of such a responsible digital platform corporation) from making an offer, to corporations covered by subsection (2) in general, to make an agreement of a kind described in paragraphs 52ZZL(1)(a) to (f).

(2) This subsection covers a corporation that, either by itself or together with other corporations, operates or controls a news business.

(3) To avoid doubt:

(a) the offer may provide that it is not subject to further negotiations; and

(b) this section does not prevent the making of other kinds of offer.

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Division 10—Powers and functions of the ACMA in relation to this Part

52ZZN Powers of the ACMA to obtain information etc.

Application of Broadcasting Services Act 1992

(1) Subject to this Division, Parts 13 and 14B of the *Broadcasting Services Act 1992*, and any other provisions of that Act to the extent that they relate to either of those Parts, apply as if:

(a) a reference in Part 13 of the *Broadcasting Services Act 1992* to the ACMA's broadcasting, content and datacasting functions included a reference to the powers and functions of the ACMA under Part IVBA of this Act; and

(b) the references in paragraphs 168(2)(b) and 187(2)(b) of that Act to the "due administration of this Act" included a reference to the due administration of Part IVBA of this Act.

Note: Part 13 of the *Broadcasting Services Act 1992* deals with information-gathering by the ACMA, and Part 14B of that Act deals with civil penalties.

Offences and civil penalty provisions

(2) For the purposes of applying the *Broadcasting Services Act 1992* in relation to this Part in accordance with subsection (1):

(a) omit the penalty in section 201 of that Act and instead treat that section as if it were a civil penalty provision for the purposes of that Act; and

(b) disregard subsections 202(1) and (2) of that Act; and

(c) disregard subsections 205F(4) and (5) of that Act; and

(d) treat the maximum penalty for a contravention of a civil penalty provision of Part 13 or 14B of that Act (including a contravention of a provision that is treated as a civil penalty provision because of this section) as being 600 penalty units.

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52ZZO No Ministerial directions to the ACMA in relation to this Part

(1) Section 14 of the *Australian Communications and Media Authority Act 2005* does not apply in relation to the performance of the ACMA's functions, or the exercise of the ACMA's powers, under:

(a) this Part; or

(b) Part 13 of the *Broadcasting Services Act 1992*, as it applies in relation to this Part because 52ZZN of this Act.

(2) Subsection (3) applies for the purposes of applying Part 13 (the ***applied Part***) of the *Broadcasting Services Act 1992* in relation to this Part in accordance with section 52ZZN of this Act.

(3) Disregard any provision in the applied Part to extent that the provision allows the Minister (within the meaning of the provision) to give a direction to the ACMA that relates to the performance of the ACMA's functions, or the exercise of the ACMA's powers, under this Part.

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Division 11—Miscellaneous

52ZZP Exceptions to Part IV

For the purposes of subsection 51(1), an arrangement between 2 or more registered news business corporations is specified and specifically authorised if it is an arrangement for the purposes of negotiating, under or in relation to this Part, with a responsible digital platform corporation in relation to covered news content.

52ZZQ 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.

52ZZR Giving information and producing documents by electronic means

Paragraphs 9(1)(d) and (2)(d) and 11(1)(e) and (2)(e) of the *Electronic Transactions Act 1999* do not apply to a requirement, or permission, under this Part to give information in writing or produce a document.

Note: Those paragraphs of the *Electronic Transactions Act 1999* deal with the consent of the recipient of information or documents to the information being given, or the documents being produced, by way of electronic communication.

52ZZS Review of operation of this Part

(1) Within the period of 12 months after the commencement of this Part, the Minister must cause a review of the operation of the Part to be commenced.

(2) The review must be completed no later than 12 months after the commencement of the review.

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(3) A written report of the review must be given to the Minister and the Communications Minister (within the meaning of the *National Broadband Network Companies Act 2011*).

(4) The Minister must ensure that copies of the report are available for public inspection as soon as practicable after the period of 28 days beginning on the day the report is given to the Minister.

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Part IVBB—Gas market

Division 1—Preliminary

Subdivision A—Object and simplified outline

53 Object of this Part

The object of this Part is to enhance the welfare of Australians through:

(a) the regulation of the Australian gas market; and

(b) in particular, limitation of increases in gas prices.

53A Simplified outline

The regulations may prescribe rules (known as gas market codes) regulating conduct relating to supplying or acquiring gas.

Without limiting what may be included in a gas market code, a gas market code may include rules that:

(a) regulate dealings between persons who supply or acquire gas, including negotiations and agreements between such persons; or

(b) deal with resolving disputes between persons who supply or acquire gas.

The Minister may make orders (known as gas market emergency price orders) regulating the terms (including prices) on which gas is supplied or acquired.

Note: The terms on which gas is supplied or acquired may also be regulated by a gas market code.

A person must not enter into a scheme for the purpose of avoiding the application of a gas market code or a gas market emergency price order.

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Consequences of contravening the gas market provisions include civil penalties, infringement notices, warning notices and orders under Part VI.

Subdivision B—Definitions

53B Definitions

In this Part:

agreement includes a contract.

Note: For the meaning of ***contract***, see subsection 4(1).

Australia: see subsection 53E(2).

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

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 within a Territory, between a State and a Territory, or between 2 Territories.

expression of interest means a non-binding expression of interest or invitation issued for the purpose of ascertaining whether a person is interested in acquiring or supplying a gas commodity.

gas includes gas in a liquid state.

gas commodity means:

(a) gas; or

(b) goods or services relating to supplying or acquiring gas.

gas exchange means an exchange or other trading system, platform or facility (including an electronic exchange, system, platform or facility) on which:

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(a) expressions of interest relating to supplying or acquiring gas commodities are issued, received or responded to; or
(b) offers relating to supplying or acquiring gas commodities are made, received or responded to; or
(c) agreements relating to supplying or acquiring gas commodities are entered into.

gas market conduct: see section 53C.

gas market matter:
(a) subject to paragraph (b), means any of the following:
(i) gas market conduct;
(ii) the operation, application or administration of a gas market instrument;
(iii) compliance (including non-compliance) with a gas market instrument;
(iv) a failure to supply a gas commodity;
(v) a matter prescribed by the regulations for the purposes of this subparagraph; and
(b) does not include a matter prescribed by the regulations for the purposes of this paragraph.

gas market participant: see section 53D.

offer includes:
(a) a counter-offer; and
(b) a bid on a gas exchange.

price includes price structure.

price dispute means a dispute between gas market participants arising because the gas market participants do not agree to the terms (including terms relating to price) on which they are to supply or acquire gas commodities to or from each other.

prohibited conduct: a person engages in ***prohibited conduct*** if the person engages in conduct that contravenes any of the following provisions:

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(a) section 53ZV;
(b) subsection 53ZW(1);
(c) a civil penalty provision of a gas market instrument.

regulating includes prohibiting.

related contravention: see subsection 53ZO(9).

scheme means:
(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied; or
(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise; or
(c) any combination of 2 or more things that are schemes because of paragraph (a) or (b).

53C Gas market conduct

(1) For the purposes of this Part, ***gas market conduct*** is:
(a) conduct relating to supplying or acquiring a gas commodity, or to the potential supply or acquisition of a gas commodity; or
(b) without limiting paragraph (a)—any of the following:
(i) supplying or acquiring a gas commodity;
(ii) issuing or receiving an expression of interest in relation to supplying or acquiring a gas commodity;
(iii) responding to an expression of interest in relation to supplying or acquiring a gas commodity;
(iv) offering to supply or acquire a gas commodity, or receiving such an offer;
(v) responding to an offer to supply or acquire a gas commodity;
(vi) agreeing to supply or acquire a gas commodity;
(vii) refusing to do anything mentioned in subparagraphs (i) to (vi);
(viii) operating a gas exchange;

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(ix) conduct prescribed by the regulations for the purposes of this subparagraph.

Note: For the meaning of ***conduct***, see subsection 4(2).

(2) For the purposes of this Part, ***gas market conduct*** does not include any of the following:

(a) conduct engaged in by the Minister, the Commission or a member of the Commission;

(b) exercising a power or performing a function conferred by a gas market provision;

(c) conduct engaged in by a mediator or arbiter of a dispute between gas market participants.

(3) Subsection (1) has effect subject to subsection (2).

(4) To avoid doubt, for the purposes of this section, it does not matter whether conduct occurs inside or outside Australia.

Note: See also section 53H (geographical application of the gas market provisions in relation to supplies and acquisitions).

53D Gas market participants

(1) For the purposes of this Part, a gas market ***participant*** is any of the following:

(a) a person who engages, or is capable of engaging, in gas market conduct;

(b) a person who has previously been a gas market participant under paragraph (a), (c) or (d);

(c) a body corporate that is related to a body corporate that is a gas market participant;

(d) any of the persons who carry on a joint venture, if:

(i) subparagraph 4J(a)(i) applies to the joint venture; and

(ii) the joint venture is, or includes, gas market conduct;

(e) a person or body prescribed by the regulations for the purposes of this paragraph.

Note: For the meaning of ***related***, see section 4A.

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(2) For the purposes of this Part, a person or body prescribed by the regulations for the purposes of this subsection is not a gas market ***participant***.

(3) Subsection (1) has effect subject to subsection (2).

Subdivision C—Geographical application

53E Extension to external Territories

(1) The gas market provisions extend to every external Territory.

(2) A reference in the gas market provisions to ***Australia*** is taken to include a reference to the external Territories.

53F Extraterritorial operation

The gas market provisions extend to acts, omissions, matters and things outside Australia.

53G Geographical application of offences

Division 14 (Standard geographical jurisdiction) of the *Criminal Code* does not apply in relation to an offence against the gas market provisions.

Note: The extended geographical application that section 53F gives to the gas market provisions applies to offences against the gas market provisions.

53H Geographical application—supplies and acquisitions

(1) The gas market provisions apply in relation to supplying a gas commodity if the supply:

(a) occurs in Australia; or

(b) is:

(i) to a person in Australia, including by means of importing the gas commodity into Australia; or

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(ii) by means of exporting the gas commodity from Australia.

(2) The gas market provisions apply in relation to acquiring a gas commodity if the acquisition:
(a) occurs in Australia; or
(b) is the direct result of a supply mentioned in subsection (1).

Subdivision D—Application to government entities

53J Gas market provisions bind the Crown

(1) The gas market provisions bind the Crown in each of its capacities.

(2) However, the gas market provisions do not make the Crown:
(a) liable to a pecuniary penalty or to be prosecuted for an offence; or
(b) subject to a remedy under Part VI (about enforcement); or
(c) subject to Part XID (about search and seizure).

53K Application to government entities

(1) The gas market provisions apply in relation to an entity covered by subsection (3) or (4):
(a) if the entity is not a person—as if the entity were a person; and
(b) with the modifications (if any) prescribed by the regulations for the purposes of this paragraph.

Note: See also subsection 53ZZA(1), which provides that the gas market provisions apply in relation to gas market conduct only if it is carried out by certain persons, or in certain circumstances.

(2) To avoid doubt, this section does not limit the ability of a gas market instrument to limit the application of:
(a) the instrument; or
(b) a provision of the instrument; or
(c) a rule included in the instrument;

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in relation to an entity covered by subsection (3) or (4).

Commonwealth government entities

(3) This subsection covers an entity that:
  (a) is part of the Commonwealth; or
  (b) is a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
  (c) is a body (whether or not incorporated) established for a public purpose by or under a law of the Commonwealth; or
  (d) is:
    (i) holding or performing the duties of an office established by or under a law of the Commonwealth; or
    (ii) holding an appointment made under a law of the Commonwealth; or
  (e) is prescribed by the regulations for the purposes of this paragraph.

State or Territory government entities

(4) This subsection covers an entity that:
  (a) is part of a State or Territory; or
  (b) is a body (whether or not incorporated) established for a public purpose by or under a law of a State or Territory; or
  (c) is:
    (i) holding or performing the duties of an office established by or under a law of a State or Territory; or
    (ii) holding an appointment made under a law of a State or Territory; or
  (d) is prescribed by the regulations for the purposes of this paragraph.

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Division 2—Gas market instruments

Subdivision A—Gas market instruments

53L Regulations may prescribe gas market codes

(1) The regulations may prescribe matters required or permitted by this Act to be prescribed by a gas market code.

Note: For the matters that may be included in a gas market code, see Subdivisions B and D and subsection 53ZJ(1).

(2) To avoid doubt, subsection (1) does not limit section 172 (power to make regulations).

53M Minister may make gas market emergency price orders

(1) The Minister may, by legislative instrument, make an order prescribing matters required or permitted by this Act to be prescribed by a gas market emergency price order.

Note: For the matters that may be included in a gas market emergency price order, see Subdivisions C and D and subsection 53ZJ(1).

(2) To avoid doubt, a gas market emergency price order may not do the following:

(a) create an offence;

(b) provide powers of:

(i) arrest or detention; or

(ii) entry, search or seizure;

(c) impose a tax;

(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;

(e) directly amend the text of this Act.

(3) A gas market emergency price order that is inconsistent with the regulations has no effect to the extent of the inconsistency, but a gas market emergency price order is taken to be consistent with the

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regulations to the extent that the gas market emergency price order is capable of operating concurrently with the regulations.

Consultation before making gas market emergency price orders

(4) Before the Minister makes a gas market emergency price order, the Minister must consult with the Commission.

(5) To avoid doubt, subsection (4) does not limit section 17 of the *Legislation Act 2003*.

Sunsetting of gas market emergency price orders

(6) The Minister must not make a gas market emergency price order at or after the time specified by subsection (8).

(7) A gas market emergency price order is repealed by force of this subsection at the time specified by subsection (8), unless the gas market emergency price order is repealed earlier.

(8) For the purposes of subsections (6) and (7), the time is the time occurring:
  (a) if any provision of any gas market emergency price order commences during the 12 months starting on the commencement of this section—12 months after the earliest time any provision of any gas market emergency price order commences; or
  (b) otherwise—12 months after the commencement of this section.

53N Scope of gas market instruments

Gas commodities

(1) A gas market instrument may limit the application of:
  (a) the instrument; or
  (b) a specified provision of the instrument; or
  (c) a specified rule included in the instrument;

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such that the instrument, the specified provision or the specified rule applies only in relation to supplying or acquiring specified gas commodities.

Geography

(2) A gas market instrument may limit the application of:
  (a) the instrument; or
  (b) a specified provision of the instrument; or
  (c) a specified rule included in the instrument;
such that the instrument, the specified provision or the specified rule applies:
  (d) only in relation to parts of Australia in relation to which specified requirements are met; or
  (e) in relation to all parts of Australia other than parts of Australia in relation to which specified requirements are met.

Note: A gas market instrument may specify a requirement for the purposes of this subsection:
  (a) by reference to the Minister, the Commission or another person or body being satisfied that particular requirements are met; or
  (b) by providing for the Minister, the Commission or another person or body to make a legislative, notifiable or other instrument.

See sections 53ZB and 53ZD.

(3) Subsection (2) is subject to section 53ZG.

Note: Section 53ZG provides that a gas market instrument must not give preference to one State or any part thereof.

Time

(4) A gas market instrument may provide that:
  (a) the instrument; or
  (b) a specified provision of the instrument; or
  (c) a specified rule included in the instrument;
applies:
  (d) at a specified time; or
  (e) during a specified period; or

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(f) on an ongoing basis (subject to subsection 53M(7)).

(5) Subsection (4) does not limit Part 4 of Chapter 3 of the *Legislation Act 2003*.

Note: Part 4 of Chapter 3 of the *Legislation Act 2003* is about sunsetting of legislative instruments.

Interaction with Acts Interpretation Act 1901

(6) This section does not limit subsection 33(3A) of the *Acts Interpretation Act 1901*.

Note: Under subsection 33(3A) of the *Acts Interpretation Act 1901*, a gas market instrument may make different provision with respect to different matters or different classes of matters.

Subdivision B—Matters that gas market codes may deal with

53P General

A gas market code may include rules regulating gas market conduct.

Note: The other provisions of this Subdivision and Subdivision D do not limit this section: see section 53ZF.

53Q Dealing with other gas market participants

A gas market code may include any of the following rules in relation to a gas market participant dealing with another gas market participant, if the dealing is or relates to gas market conduct:

(a) rules about how a gas market participant deals with another gas market participant;

(b) rules requiring a gas market participant to deal with another gas market participant in a specified manner, including in good faith;

(c) rules about the matters that, for the purposes of a gas market code, must, may or must not be taken into account in determining whether a gas market participant is dealing with another gas market participant in good faith;

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(d) rules about the period within which a gas market participant does something in dealing with another gas market participant, including the period within which a gas market participant responds to a request made by another gas market participant.

53R Negotiations, expressions of interest and offers

Negotiations

(1) A gas market code may include rules about negotiations relating to supplying or acquiring a gas commodity.

Expressions of interest

(2) A gas market code may include rules about expressions of interest relating to supplying or acquiring a gas commodity, including:

(a) rules requiring a gas market participant to issue, or not to issue, an expression of interest in specified circumstances; or

(b) rules about any of the following matters:

(i) matters to which regard is had before issuing an expression of interest;

(ii) the manner in which an expression of interest is issued (for example, in writing);

(iii) information that is included in an expression of interest or made available in connection with an expression of interest (including the manner in which the information is made available);

(iv) the content of an expression of interest;

(v) the period during which an expression of interest is open;

(vi) responding to an expression of interest;

(vii) dealing with a response to an expression of interest, including by providing information, making an offer or entering into an agreement;

(viii) withdrawing an expression of interest.

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Offers

(3) A gas market code may include rules about offers relating to supplying or acquiring a gas commodity, including:

(a) rules requiring a gas market participant to make, or not to make, an offer in specified circumstances; or

(b) rules about any of the following matters:

(i) matters to which regard is had before making an offer;

(ii) the manner in which an offer is made (for example, in writing);

(iii) information that is included in an offer, or made available in connection with an offer (including the manner in which the information is made available);

(iv) the content of an offer;

(v) the period during which an offer is open;

(vi) responding to an offer;

(vii) dealing with a response to an offer, including by providing information;

(viii) withdrawing an offer.

53S Agreements

(1) A gas market code may include rules about agreements relating to supplying or acquiring a gas commodity, including:

(a) rules requiring a gas market participant to enter, or not to enter, into an agreement in specified circumstances; or

(b) rules about any of the following matters:

(i) the manner in which an agreement is made (for example, in writing);

(ii) matters dealt with in an agreement, including, in the case of an agreement to supply or acquire a gas commodity, the matters mentioned in subsection (2);

(iii) withdrawing from or ending an agreement.

Example: Rules requiring specified matters to be dealt with, or not dealt with, in an agreement.

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(2) For the purposes of subparagraph (1)(b)(ii), the matters are the following:

(a) how much of the gas commodity is to be supplied or acquired;

(b) flexibility of the volume of the gas commodity to be supplied or acquired;

(c) where the gas commodity is to be supplied or acquired;

(d) when the gas commodity is to be supplied or acquired;

(e) payment terms;

(f) a communication protocol for major interruptions to the supply of the gas commodity;

(g) the period of the agreement;

(h) the consequences of a breach of the agreement;

(i) dispute resolution.

53T Terms on which gas commodities are supplied or acquired, including price

(1) A gas market code may include rules about the terms on which a gas market participant offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity, including rules about any of the following matters:

(a) how such a term is expressed;

(b) fees payable in relation to such an offer, agreement, supply or acquisition;

(c) terms (including terms relating to price) specified in an expression of interest relating to supplying or acquiring a gas commodity.

(2) A gas market code may include rules about the price at which a gas market participant offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity, including the following:

(a) rules setting a price;

(b) rules setting a maximum price;

(c) rules setting a minimum price;

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(d) rules setting a maximum and a minimum price;

(e) rules requiring a price to be reasonable;

(f) rules about the matters that, for the purposes of a gas market code, must, may or must not be taken into account in determining whether a price is reasonable;

(g) rules about determining a price, including matters taken into account in determining a price;

(h) rules about how a price is expressed.

Note 1: A gas market code may confer on the Minister, the Commission or any other person or body the function of setting a price: see section 53ZB.

Note 2: Rules of the kind mentioned in this subsection may:

(a) refer to the prices of any gas commodity inside or outside Australia or any published information about any market; or

(b) require a price to be equal to the amount worked out by using a specified formula or method.

See subsection 53ZE(3).

(3) To avoid doubt, a gas market code may include rules requiring a gas market participant not to offer to supply or acquire, not to agree to supply or acquire or not to supply or acquire a gas commodity if rules of the kind mentioned in subsection (1) or (2) are not complied with in relation to the offer, agreement, supply or acquisition.

53U Gas exchanges

A gas market code may include rules regulating the operation of a gas exchange.

53V Dispute and complaint resolution

(1) A gas market code may include rules about disputes between gas market participants relating to gas market conduct, including:

(a) disputes or complaints arising under, or in relation to, a gas market code; or

(b) disputes arising during negotiations between gas market participants, including any of the following:

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(i) disputes relating to a prospective agreement between gas market participants;
(ii) price disputes.

(2) A gas market code may include the following rules about disputes between gas market participants relating to gas market conduct:
(a) rules requiring a gas market participant to have internal or external dispute resolution processes;
(b) rules requiring those processes to meet specified criteria.

(3) A gas market code may do any of the following:
(a) provide for a gas market participant to complain to the Minister or the Commission about:
(i) a contravention of a gas market code; or
(ii) a dispute between gas market participants relating to gas market conduct;
(b) include rules about any of the following matters:
(i) the manner in which such a complaint is made;
(ii) how the Minister or the Commission deals with such a complaint.

53W Mediation and arbitration

(1) A gas market code may provide for the mediation of disputes between gas market participants relating to gas market conduct, including providing for any of the following matters:
(a) a process for appointing a mediator;
(b) the powers or functions of a mediator;
(c) a process for commencing mediation;
(d) the mediation process, including rules about any of the following matters:
(i) a party giving information to another party or to a mediator (including on request);
(ii) a mediator providing a party with an opportunity to be heard;
(iii) terminating a mediation;

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(e) the extent (if any) to which mediation is compulsory;
(f) the consequences of not participating in mediation;
(g) reporting;
(h) generating and keeping records;
(i) confidentiality;
(j) the costs of mediation, including providing for:
(i) determining the costs; or
(ii) who is liable to pay the costs.

(2) A gas market code may provide for the arbitration (including compulsory arbitration) of disputes between gas market participants relating to gas market conduct, including providing for any of the following matters:
(a) establishing or maintaining a register of arbiters;
(b) a process for appointing an arbiter;
(c) the powers or functions of an arbiter;
(d) a process for commencing arbitration, including rules requiring a party to a dispute to take reasonable steps (such as mediation) to resolve a dispute before proceeding to arbitration;
(e) the arbitration process, including rules about any of the following matters:
(i) a party to a dispute giving information to another party or to an arbiter (including on request);
(ii) an arbiter providing a party with an opportunity to be heard;
(iii) terminating an arbitration;
(f) the extent (if any) to which arbitration is compulsory;
(g) the consequences of not participating in arbitration;
(h) decision-making by an arbiter, including processes an arbiter uses in decision-making;
(i) a power of an arbiter to decide that a party to a dispute must supply a gas commodity;

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(j) a power of an arbiter to decide any of the following matters if an arbiter decides that a party to a dispute must supply a gas commodity:
  (i) how much of the gas commodity is to be supplied;
  (ii) where the gas commodity is to be supplied;
  (iii) when the gas commodity is to be supplied;
  (iv) the terms (including terms relating to price) on which the gas commodity is to be supplied;
(k) rules about how a decision of an arbiter binds a party to an arbitration;
(l) the consequences of not complying with a decision of an arbiter;
(m) reporting;
(n) generating and keeping records;
(o) confidentiality;
(p) the costs of arbitration, including providing for:
  (i) determining the costs; or
  (ii) who is liable to pay the costs.

(3) The powers or functions conferred on an arbiter by a gas market code must not involve the exercise of judicial power.

Subdivision C—Matters that gas market emergency price orders may deal with

53X Terms on which gas commodities are supplied or acquired, including price

(1) A gas market emergency price order may include rules about the terms on which a gas market participant offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity, including rules about any of the following matters:
(a) how such a term is expressed;
(b) fees payable in relation to such an offer, agreement, supply or acquisition;

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(c) terms (including terms relating to price) specified in an expression of interest relating to supplying or acquiring a gas commodity.

(2) A gas market emergency price order may include rules about the price at which a gas market participant offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity, including the following:

(a) rules setting a price;

(b) rules setting a maximum price;

(c) rules setting a minimum price;

(d) rules setting a maximum and a minimum price;

(e) rules requiring a price to be reasonable;

(f) rules about the matters that, for the purposes of a gas market emergency price order, must, may or must not be taken into account in determining whether a price is reasonable;

(g) rules about determining a price, including matters taken into account in determining a price;

(h) rules about how a price is expressed.

Note 1: A gas market emergency price order may confer on the Minister, the Commission or any other person or body the function of setting a price: see section 53ZB.

Note 2: Rules of the kind mentioned in this subsection may:

(a) refer to the prices of any gas commodity inside or outside Australia or any published information about any market; or

(b) require a price to be equal to the amount worked out by using a specified formula or method.

See subsection 53ZE(3).

(3) To avoid doubt, a gas market emergency price order may include rules requiring a gas market participant not to offer to supply or acquire, not to agree to supply or acquire or not to supply or acquire a gas commodity if rules of the kind mentioned in subsection (1) or (2) are not complied with in relation to the offer, agreement, supply or acquisition.

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53Y Gas exchanges

A gas market emergency price order may include rules regulating the operation of a gas exchange.

Subdivision D—Incidental and other matters that gas market codes and gas market emergency price orders may deal with

53Z Transparency

(1) A gas market instrument may include rules about a gas market participant, the Minister or the Commission publishing information that relates to a gas market matter, including rules about any of the following:

(a) the type of information that is published;

(b) the circumstances in which information is published;

(c) the manner in which information is published.

Example: A rule requiring information to be published at specified intervals.

(2) A gas market instrument may include rules requiring a gas market participant to give to another gas market participant information or documents relevant to a gas market matter.

53ZA Reporting, records and auditing

(1) A gas market instrument may include rules about:

(a) reporting; or

(b) generating or keeping records (including financial records); or

(c) auditing;

relating to a gas market matter.

(2) A gas market instrument may include rules requiring a gas market participant to give:

(a) financial or other reports, records or documents; or

(b) information;

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relating to a gas market matter to the Minister or the Commission, including requiring such reports, records, documents or information to be given periodically or on request.

(3) A gas market instrument may include rules requiring a gas market participant to do any of the following:

(a) report to the Minister or the Commission the occurrence of a specified event relating to:

(i) a gas market matter; or

(ii) a price dispute;

(b) give to the Minister or the Commission specified information relating to such an event.

53ZB Conferral of powers and functions

(1) A gas market instrument may confer on a person or body a power to do, or a function of doing, any of the following:

(a) monitoring compliance with a gas market instrument;

(b) conducting investigations in relation to a gas market matter;

(c) providing exemptions from:

(i) a gas market instrument; or

(ii) a specified provision of a gas market instrument; or

(iii) a specified rule included in a gas market instrument;

(d) reviewing, or reporting on:

(i) the operation, application or administration of a gas market instrument; or

(ii) activities under, or in relation to, a gas market instrument;

(e) reviewing a decision made under a gas market instrument, or in the exercise or performance of a power or function conferred by a gas market instrument.

(2) A gas market code may confer on a person or body any of the following powers or functions:

(a) a power to determine, or a function of determining, any matter that may be dealt with by a gas market code;

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(b) a power or function relating to the operation, application or administration of a gas market code.

(3) A gas market emergency price order may confer on a person or body any of the following powers or functions:

(a) a power to determine, or a function or determining, any matter that may be dealt with by a gas market emergency price order;

(b) a power or function relating to the operation, application or administration of a gas market emergency price order.

(4) If a gas market code confers on a person or body a power or function, a gas market code:

(a) may provide that the power is to be exercised, or the function performed, by legislative instrument, notifiable instrument or another kind of written instrument; and

(b) may provide for the person or body to delegate the power or function.

Note: For limitations relating to a power to make a legislative instrument, see section 53ZI.

(5) If a gas market emergency price order confers on a person or body a power or function, a gas market instrument:

(a) may provide that the power is to be exercised, or the function performed, by legislative instrument, notifiable instrument or another kind of written instrument; and

(b) may provide for the person or body to delegate the power or function.

Note: For limitations relating to a power to make a legislative instrument, see section 53ZI.

53ZC Fees

(1) A gas market instrument may provide for the charging of a fee for anything done by or in relation to the Commonwealth, the Commission or any other person or body in relation to a gas market instrument, including in the exercise of a power or the performance of a function conferred by a gas market instrument.

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(2) A gas market instrument that provides for the charging of a fee may deal with any of the following matters:
  (a) the amount of the fee, including a method for working out the amount of the fee;
  (b) who is liable to pay the fee;
  (c) the consequences of not paying the fee;
  (d) when the fee becomes due and payable;
  (e) waiving a fee;
  (f) refunding a fee.

53ZD Incidental or related matters

(1) A gas market instrument may include any of the following:
  (a) rules about the circumstances in which persons are, or may be, relieved from complying with requirements in a gas market instrument that that would otherwise apply to them;
  (b) if a gas market instrument requires information or a document to be given or published—exceptions to that requirement, including exceptions that apply in any of the following circumstances:
    (i) circumstances in which publishing the information would prejudice the commercial interests of a person;
    (ii) circumstances in which publishing the information is not in the public interest;
    (iii) circumstances involving personal information;
  (c) rules about the use, disclosure or publication of information or a document by a person to whom the information or document is given under a gas market instrument;
  (d) rules about the manner or form in which persons or bodies:
    (i) may exercise powers or perform functions conferred by a gas market instrument; or
    (ii) must comply with requirements imposed by a gas market instrument;

  which could include requiring the use of a form approved by the Minister, the Commission or another person or body;

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(e) rules providing for any of the following in relation to a decision made under a gas market instrument, or in the exercise or performance of a power or function conferred by a gas market instrument:
  (i) internal review of the decision;
  (ii) review of the decision by the Australian Competition Tribunal;
  (iii) the making of applications to the Administrative Review Tribunal for review of the decision;

(f) rules requiring agents of a gas market participant to do or not to do specified things when:
  (i) engaging in gas market conduct, on behalf of the gas market participant, within the agent's actual or apparent authority; or
  (ii) otherwise acting on behalf of the gas market participant, in relation to gas market conduct, within the agent's actual or apparent authority;

(g) rules providing that, in specified circumstances, a partner in a partnership is taken to contravene a specified provision of a gas market instrument if another partner in the partnership contravenes that provision;

(h) rules providing that, in specified circumstances, a person who carries on a joint venture is taken to contravene a specified provision of a gas market instrument if another person who carries on the joint venture contravenes that provision.

(2) A gas market code may deal with any of the following matters:
  (a) matters incidental or related to any matter that is or may be included in, or dealt with by, a gas market code;
  (b) matters of a transitional nature relating to:
    (i) the making of a gas market code; or
    (ii) a repeal of a gas market emergency price order by subsection 53M(7).

(3) A gas market emergency price order may deal with any of the following matters:

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(a) matters incidental or related to any matter that is or may be included in, or dealt with by, a gas market emergency price order;

(b) matters of a transitional nature relating to the making of a gas market emergency price order.

(4) A gas market instrument may make provision in relation to a matter in a way that depends on a person being satisfied of one or more specified matters.

53ZE What gas market instruments may refer to

Gas market instruments may refer to other instruments

(1) A gas market instrument may make provision in relation to a matter by applying, adopting or incorporating (with or without modification) any matter contained in any other instrument or writing:

(a) as in force or existing at a particular time; or

(b) as in force or existing from time to time.

(2) Subsection (1) has effect despite subsection 14(2) of the *Legislation Act 2003*.

Other matters

(3) A gas market instrument may make provision in relation to a matter (including setting a price):

(a) by reference to:

(i) the price of any gas commodity or other goods or services anywhere inside or outside Australia; or

(ii) any published information about any market (whether inside or outside Australia); or

(b) by reference to, or by providing for, a formula or method.

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Subdivision E—Miscellaneous matters

53ZF Provisions do not limit other provisions

(1) A provision to which this section applies does not limit another provision to which this section applies.

(2) This section applies to:
  (a) subsection 53N(1); and
  (b) subsection 53N(4); and
  (c) each provision of Subdivision B; and
  (d) each provision of Subdivision C; and
  (e) each provision of Subdivision D; and
  (f) subsection 53ZJ(1).

53ZG Constitution—gas market instruments must not give preference to States etc.

(1) A gas market instrument must not give preference to one State or any part thereof within the meaning of section 99 of the Constitution.

(2) A power or function conferred by a gas market instrument must not be exercised or performed in such a way as to give preference to one State or any part thereof within the meaning of section 99 of the Constitution.

53ZH Fees must not amount to taxation

A fee charged under a gas market instrument must not be such as to amount to taxation.

53ZI Powers to make legislative instruments

(1) A gas market instrument must not confer a power to make a legislative instrument on a person or body other than:
  (a) a Minister; or

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(b) the Commission; or
(c) a member of the staff of the Commission; or
(d) an APS employee; or
(e) an entity covered by subsection 53K(3).

(2) A gas market instrument must not confer a power to delegate a power to make a legislative instrument.

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Division 3—Compliance with gas market instruments

Subdivision A—Civil penalty provisions of gas market instruments

53ZJ Civil penalty provisions of gas market instruments

(1) A gas market instrument may:

(a) set out at the foot of a provision of the gas market instrument a pecuniary penalty, or penalties, indicated by the words "Civil penalty"; or

(b) provide that a specified provision of a gas market instrument is a civil penalty provision, or that a person is liable to a civil penalty if the person contravenes the provision;

if the provision is of the kind mentioned in paragraph 79(2)(b) of the Regulatory Powers Act.

Note: Sections 76 to 77 of this Act deal with enforcing the civil penalty provisions.

(2) If an act or thing is required under a civil penalty provision of a gas market instrument to be done:

(a) within a particular period; or

(b) before a particular time;

then the obligation to do that act or thing continues until the act or thing is done (even if the period has expired or the time has passed).

(3) A person who contravenes a civil penalty provision of a gas market instrument that requires an act or thing to be done:

(a) within a particular period; or

(b) before a particular time;

commits a separate contravention of that provision in respect of each day during which the contravention occurs (including the day the relevant order is made under subsection 76(1) or any later day).

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Subdivision B—Infringement notices

53ZK Infringement notices

Object

(1) The object of this section is for Division 5 of Part XI to apply to a provision to which this section applies in a corresponding way to the way that Division applies to a provision of Part 2-2 of the Australian Consumer Law.

Note: That Division is about infringement notices issued for alleged contraventions of provisions of the Australian Consumer Law.

(2) This section applies to the following provisions:

(a) subsection 53ZQ(1);

(b) subsection 53ZQ(2);

(c) subsection 53ZQ(3);

(d) section 53ZV;

(e) subsection 53ZW(1);

(f) a civil penalty provision of a gas market instrument, other than a provision that is a requirement for a gas market participant to deal with another gas market participant in good faith as mentioned in paragraph 53Q(b).

Extended application of Division 5 of Part XI etc.

(3) Division 5 of Part XI, and any other provision of this Act that relates to that Division, also apply in relation to a provision to which this section applies as if:

(a) the substitutions in the following table were made; and

(b) the following substitutions were made:

(i) for a reference in item 1 of the table in section 134C to 60 penalty units, substitute a reference to 600 penalty units;

(ii) for a reference in that item to 12 penalty units, substitute a reference to 60 penalty units.

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Substitutions to be made		
Item	**Column 1** **For a reference in Division 5 of Part XI to …**	**Column 2** **substitute a reference to …**
1	section 224 of the Australian Consumer Law	section 76 of this Act.
2	Chapter 4 or Part 5-2 of the Australian Consumer Law	Part VI of this Act.
3	a provision of Part 2-2 of the Australian Consumer Law	a provision to which section 53ZK of this Act applies.

(4) To avoid doubt, Division 2 of Part XI does not limit the application of section 53ZZA (about constitutional basis) to the extended application of Division 5 of Part XI as described in this section.

Judicial power

(5) Division 5 of Part XI, and any other provision of this Act that relates to that Division, have no effect to the extent to which they would otherwise:
  (a) apply in relation to a provision to which this section applies; and
  (b) purport to confer judicial power on the Commission.

Subdivision C—Public warning notices

53ZL Commission may give draft public warning notice

(1) The Commission may give a person a notice in writing if the Commission reasonably believes that:
  (a) any of the following conditions are satisfied:
    (i) the person has engaged in prohibited conduct;
    (ii) the person is engaging in prohibited conduct; and
  (b) one or more other persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct; and
  (c) it is in the public interest to issue the notice.

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(2) The notice must:
  (a) state the day on which the notice is given; and
  (b) identify:
    (i) the person mentioned in paragraph (1)(a); and
    (ii) the prohibited conduct mentioned in paragraph (1)(a); and
  (c) explain the reasons why the Commission reasonably believes that the requirements in paragraphs (1)(a), (b) and (c) are met; and
  (d) state that:
    (i) the person may, within 21 days after being given the notice, make representations to the Commission regarding the matters mentioned in paragraphs (1)(a), (b) and (c); and
    (ii) the Commission may issue a public warning notice under section 53ZM in relation to the prohibited conduct after those 21 days have passed.

(3) A notice given under subsection (1) is not a legislative instrument.

53ZM Commission may issue public warning notice

(1) This section applies if:
  (a) the Commission gave a person a notice under section 53ZL in relation to prohibited conduct; and
  (b) at least 21 days have passed since the Commission gave the person the notice; and
  (c) no more than 90 days have passed since the Commission gave the person the notice; and
  (d) the Commission reasonably believes that any of the following conditions are satisfied:
    (i) the person has engaged in the prohibited conduct;
    (ii) the person is engaging in the prohibited conduct; and
  (e) the Commission reasonably believes that one or more other persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct.

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(2) This section also applies if the Commission reasonably believes that:

(a) any of the following conditions are satisfied:

(i) a person has engaged in prohibited conduct;

(ii) a person is engaging in prohibited conduct; and

(b) there is a significant risk of imminent, serious harm to the welfare of Australians as a result of the prohibited conduct; and

(c) issuing a notice under this section in relation to the prohibited conduct, without first giving a notice under section 53ZL in relation to the prohibited conduct, is reasonably necessary to:

(i) prevent that harm or reduce that risk; or

(ii) reduce the seriousness of that harm.

(3) The Commission may issue to the public a written notice containing a warning about the prohibited conduct if the Commission reasonably believes that it is in the public interest to issue the notice.

(4) The notice must:

(a) state the day on which the notice is issued; and

(b) identify:

(i) the person mentioned in paragraph (1)(a) or (2)(a); and

(ii) the prohibited conduct mentioned in that paragraph.

(5) A notice issued under subsection (3) is not a legislative instrument.

53ZN Proceedings for defamation not to lie

(1) If the Commission issues a notice under section 53ZM, no action or proceeding for defamation lies against the Commonwealth, the Commission or a member of the staff of the Commission in relation to the issuing of the notice.

(2) This section does not limit subsection 53J(2).

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Subdivision D—Orders to redress loss or damage suffered by non-parties etc.

53ZO Orders to redress loss or damage suffered by non-parties etc.

Orders

(1) If:

(a) a person engaged in conduct (the ***contravening conduct***) that constituted a contravention or a related contravention of a civil penalty provision of a gas market instrument; and

(b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons (***non-parties***) who are not, or have not been, parties to a proceeding (an ***enforcement proceeding***) instituted under Part VI in relation to the contravening conduct;

any court having jurisdiction in the matter may, on the application of the Commission, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2).

Note: The orders that the court may make include all or any of the orders set out in section 53ZP.

(2) An order under subsection (1) may be made against:

(a) the person mentioned in paragraph (1)(a); or

(b) a person involved in the contravening conduct.

(3) A court must not make an order under subsection (1) unless the court considers that the order will:

(a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct.

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Application for orders

(4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.

(5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

(6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), a court may have regard to the conduct of:

(a) the person; and

(b) the non-parties;

in relation to the contravening conduct, since the contravention occurred.

(7) In determining whether to make an order under subsection (1), a court need not make a finding about either of the following matters:

(a) which persons are non-parties in relation to the contravening conduct;

(b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party is bound by an order etc.

(8) If:

(a) an order is made under subsection (1) against a person; and

(b) the loss or damage suffered, or likely to be suffered, by a non-party in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and

(c) the non-party has accepted the redress, prevention or reduction;

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then:

(d) the non-party is bound by the order; and

(e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party; and

(f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party in relation to that loss or damage.

*Meaning of **related contravention***

(9) For the purposes of this Part, a person engages in conduct that constitutes a ***related contravention*** of a civil penalty provision of a gas market instrument if the person:

(a) aids, abets, counsels or procures another person to contravene the provision; or

(b) induces, whether by threats or promises or otherwise, another person to contravene the provision; or

(c) is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of the provision by another person; or

(d) conspires with others to effect a contravention of the provision.

53ZP Kinds of orders that may be made to redress loss or damage suffered by non-parties etc.

Without limiting subsection 53ZO(1), the orders that a court may make under that subsection against a person (the ***respondent***) include all or any of the following:

(a) an order declaring the whole or any part of a contract made between the respondent and a non-party referred to in that subsection, or a collateral arrangement relating to such a contract:

(i) to be void; and

(ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in

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the order (which may be a date that is before the date on which the order is made);

(b) an order:

(i) varying such a contract or arrangement in such manner as is specified in the order; and

(ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;

(d) an order directing the respondent to refund money or return property to a non-party referred to in that subsection;

(e) an order directing the respondent, at the respondent's own expense, to supply specified services to a non-party referred to in that subsection.

Subdivision E—Avoidance schemes

53ZQ Schemes for avoidance purposes

General prohibition

(1) A person contravenes this subsection if:

(a) the person, either alone or with others, engages in any of the following conduct:

(i) enters into a scheme;

(ii) begins to carry out a scheme;

(iii) carries out a scheme; and

(b) having regard to any matters as required under subsection 53ZR(1), it would be reasonable to conclude that the purpose of the person engaging in that conduct was to avoid the application of a civil penalty provision of a gas market instrument.

Note 1: For enforcement, see section 53ZK and Part VI.

Note 2: See section 4F (references to purpose).

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Constitutional corporations

(2) A constitutional corporation contravenes this subsection if:
  (a) the corporation, either alone or with other persons, engages in any of the following conduct:
    (i) enters into a scheme;
    (ii) begins to carry out a scheme;
    (iii) carries out a scheme; and
  (b) having regard to any matters as required under subsection 53ZR(1), it would be reasonable to conclude that the purpose of the corporation engaging in that conduct was to avoid the application of a civil penalty provision of a gas market instrument.

Note: For enforcement, see section 53ZK and Part VI.

Constitutional trade and commerce

(3) A person contravenes this subsection if:
  (a) in the course of constitutional trade or commerce, the person, either alone or with others, engages in any of the following conduct:
    (i) enters into a scheme;
    (ii) begins to carry out a scheme;
    (iii) carries out a scheme; and
  (b) having regard to any matters as required under subsection 53ZR(1), it would be reasonable to conclude that the purpose of the person engaging in that conduct was to avoid the application of a civil penalty provision of a gas market instrument.

Note: For enforcement, see section 53ZK and Part VI.

Prohibitions independent of each other

(4) To avoid doubt, subsections (1), (2) and (3) are independent from and do not limit each other.

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Note: However, a person can be ordered to pay a pecuniary penalty under only one of those subsections in relation to the same conduct: see subsection 76(3).

53ZR Whether it is reasonable to draw conclusion as to purpose

(1) Regard must be had to any matters prescribed by the regulations for the purposes of this subsection in determining, for the purposes of section 53ZQ, whether it would be reasonable to conclude that the purpose of a person entering into or carrying out (to any extent) a scheme was to avoid the application of a civil penalty provision of a gas market instrument.

(2) Subsection (1) does not limit the matters to which regard may be had in making a determination described in that subsection.

53ZS This Subdivision does not limit Division 2

This Subdivision does not limit a provision of Division 2.

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Division 4—Investigation powers

53ZT Commission may require person to provide information

(1) This section applies if a person is required to keep, to generate or to publish information or a document under a gas market instrument.

(2) The Commission may give the person a written notice that requires the person to give the information, or to produce the document, to the Commission within a specified period and in a specified manner.

(3) The notice must:
  (a) name the person to which it is given; and
  (b) specify:
    (i) the information or document to which it relates; and
    (ii) the provisions of the gas market instrument which require the person to keep, to generate or to publish the information or document; and
  (c) explain the effect of sections 53ZU, 53ZV and 53ZW.

(4) The notice may relate to more than one piece of information or more than one document.

53ZU Extending periods for complying with notices

(1) A person who has been given a notice under section 53ZT may, at any time within the period within which the person must comply with the notice (as extended under any previous application of subsection (2) of this section), apply in writing to the Commission for an extension of the period for complying with the notice.

(2) A member of the Commission may, by written notice given to the person, extend the period within which the person must comply with the notice.

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(3) Subsection (2) does not affect any operation that subsection 33(3) of the *Acts Interpretation Act 1901* has in relation to a notice under section 53ZT of this Act.

Delegation

(4) A member of the Commission may, by writing, delegate the member's powers under subsection (2) to a member of the staff of the Commission who is an SES employee or an acting SES employee.

Note: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

(5) In exercising a power under a delegation, the delegate must comply with any directions of the member.

53ZV Compliance with notices

A person that is given a notice under section 53ZT must comply with it within:

(a) the period specified in the notice; or

(b) if the period for complying with the notice has been extended under section 53ZU—the period as so extended.

Note: For enforcement, see section 53ZK and Part VI.

53ZW False or misleading information etc.

(1) A person must not, in compliance or purported compliance with a notice given under section 53ZT:

(a) give to the Commission false or misleading information; or

(b) produce to the Commission documents that contain false or misleading information.

Note: For enforcement, see section 53ZK and Part VI.

(2) This section does not apply to:

(a) information that the person could not have known was false or misleading; or

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(b) the production to the Commission of a document containing false or misleading information if the document is accompanied by a statement of the person that the information is false or misleading.

53ZX This Division does not limit other provisions

This Division does not limit:

(a) a provision of Division 2; or

(b) section 155 (which is about the general information-gathering powers of the Commission).

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Division 5—Other matters

53ZY Certain provisions of this Act do not limit other provisions

(1) A provision to which subsection (3) applies does not limit the gas market provisions.

(2) The gas market provisions do not limit a provision to which subsection (3) applies.

(3) This subsection applies to:
  (a) Part IIIAA; and
  (b) Part IIIA; and
  (c) Part IVB; and
  (d) Part V; and
  (e) Part VIIA; and
  (f) Part XICA.

53ZZ Concurrent operation of State and Territory laws

(1) Subject to subsection (2), the gas market provisions are not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the gas market provisions.

(2) A gas market instrument may provide that a gas market instrument, or a specified provision of a gas market instrument, excludes or limits the operation of a law of a State or Territory.

53ZZA Constitution—application of gas market provisions

(1) The gas market provisions (other than Subdivision E of Division 3 of this Part) apply in relation to gas market conduct if the conduct:
  (a) is engaged in by a constitutional corporation; or
  (b) is engaged in, by a person who is not a constitutional corporation, in a way that affects, is capable of affecting or is

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taken with intent to affect the activities, functions, relationships or business of a constitutional corporation; or

(c) occurs in the course of, or in relation to, constitutional trade or commerce; or

(d) is engaged in by an entity covered by subsection 53K(3).

Note: Subsection 53K(3) covers Commonwealth government entities.

(2) Section 6 (about the application of this Act to persons who are not corporations) does not apply in relation to the gas market provisions.

53ZZB Constitution—acquisition of property

The gas market provisions have no effect to the extent (if any) to which their operation would result in the acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) otherwise than on just terms (within the meaning of that paragraph).

53ZZC Regulations referring to other instruments

(1) Regulations (other than a gas market code) made for the purposes of a provision of this Part may make provision in relation to a matter by applying, adopting or incorporating (with or without modification) any matter contained in any other instrument or writing:

(a) as in force or existing at a particular time; or

(b) as in force or existing from time to time.

Note: For a gas market code, see subsection 53ZE(1).

(2) Subsection (1) has effect despite subsection 14(2) of the *Legislation Act 2003*.

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