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

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If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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Chapter 6—Other provisions

Part X—International liner cargo shipping

Division 1—Preliminary

10.01 Objects of Part

(1) The principal objects of this Part are:

(a) to ensure that Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive; and

(b) to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories; and

(c) to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade; and

(d) as far as practicable, to extend to Australian importers in each State and Territory the protection given by this Part to Australian exporters.

(2) It is the intention of the Parliament that the principal objects of this Part should be achieved:

(a) by permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power, particularly by:

(i) enacting additional restrictive trade practice provisions applying to ocean carriers;

(ii) requiring conference agreements to meet certain minimum standards;

(iii) making conference agreements generally publicly available;

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(iv) permitting only partial and conditional exemption from restrictive trade practice prohibitions; and

(v) requiring conferences to take part in negotiations with representative shipper bodies;

(b) through increased reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters; and

(c) by the exercise of jurisdiction, consistent with international law:

(i) over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services; and

(ii) to enable remedies for contravention of the provisions of this Part to be enforced within Australia.

10.01A Simplified outline

The following is a simplified outline of this Part:

- This Part sets up a system for regulating international liner cargo shipping services.

- The main components of that system are as follows:
  (a) registration of conference agreements;
  (b) regulation of non-conference ocean carriers with substantial market power;
  (c) regulation of unfair pricing practices;
  (d) registration of agents of ocean carriers.

- The parties to a conference agreement relating to international liner cargo shipping services may apply for the registration of the agreement.

- If the conference agreement is registered, the parties will be given partial and conditional exemptions from:

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(a) sections 45AF, 45AG, 45AJ and 45AK (cartel conduct); and
(b) section 45 (contracts etc. that restrict dealings or affect competition); and
(c) section 47 (exclusive dealing).

- The parties to a registered conference agreement are required to negotiate with, and provide information to, representative shipper bodies.

- The Commission may investigate whether grounds exist for the Minister to deregister a conference agreement.

- The main ground for deregistration is a breach by the parties to the agreement of requirements imposed on them by this Part.

10.02 Interpretation

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

agreement means any contract, agreement, arrangement or understanding, whether made in or outside Australia.

ancillary service, in relation to a scheduled cargo shipping service, means:

(a) an inter-terminal transport service; or
(b) a stevedoring service; or
(c) a service provided outside Australia;

that:

(d) relates to the cargo transported, or to be transported, on the scheduled cargo shipping service; and
(e) is provided by, or on behalf of, the provider of the scheduled cargo shipping service.

association includes a body corporate.

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Australian exporter means a person who exports goods from Australia.

Australian flag shipping operator means a person who:

(a) is an Australian citizen or a body corporate incorporated by or under the law of the Commonwealth or of a State or Territory;

(b) provides, or proposes to provide, shipping services; and

(c) normally uses, or proposes normally to use, in providing the services only:

(i) a ship that is registered in Australia; or

(ii) 2 or more ships, all or most of which are registered in Australia.

Australian importer means a person who imports goods into Australia.

authorised officer means an officer of the Department who is authorised, in writing, by the Minister for the purposes of this Part.

conference means an unincorporated association of 2 or more ocean carriers carrying on 2 or more businesses each of which includes, or is proposed to include, the provision of outwards liner cargo shipping services or inwards liner cargo shipping services.

conference agreement means:

(a) an outwards conference agreement; or

(b) an inwards conference agreement.

designated inwards peak shipper body means an association specified in a notice under subsection 10.03(2A).

designated inwards secondary shipper body means an association specified in a notice under subsection 10.03(2B).

designated inwards shipper body means:

(a) a designated inwards peak shipper body; or

(b) a designated inwards secondary shipper body.

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designated outwards peak shipper body means an association specified in a notice under subsection 10.03(1).

designated outwards secondary shipper body means an association specified in a notice under subsection 10.03(2).

designated outwards shipper body means:

(a) a designated outwards peak shipper body; or

(b) a designated outwards secondary shipper body.

designated port area means the area within the limits of a port appointed under section 15 of the *Customs Act 1901*, being the limits fixed under that section.

designated secondary shipper body means:

(a) a designated outwards secondary shipper body; or

(b) a designated inwards secondary shipper body.

designated shipper body means:

(a) a designated outwards shipper body; or

(b) a designated inwards shipper body.

exemption order means an order under section 10.72A.

freight rate agreement means a conference agreement that consists of or includes freight rate charges.

freight rate charges:

(a) in relation to an outwards conference agreement—means those parts of the conference agreement that specify freight rates (including base freight rates, surcharges, rebates and allowances) for outwards liner cargo shipping services; and

(b) in relation to an inwards conference agreement—means those parts of the conference agreement that specify freight rates (including base freight rates, surcharges, rebates and allowances) for inwards liner cargo shipping services.

handling cargo includes a service that is related to handling of cargo.

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inland terminal has the meaning given by section 10.02A.

international liner cargo shipping service means:

(a) an outwards liner cargo shipping service; or

(b) an inwards liner cargo shipping service.

inter-terminal transport service means a service for the transport of various types of general cargo:

(a) from an inland terminal to a port terminal; or

(b) from a port terminal to an inland terminal; or

(c) from a port terminal to another port terminal;

and includes the handling of the cargo within any of those terminals.

inwards conference agreement means an agreement between members of a conference in relation to inwards liner cargo shipping services provided, or proposed to be provided, by them, and includes an inwards varying conference agreement.

inwards liner cargo shipping service means an inwards scheduled cargo shipping service and, if the inwards scheduled cargo shipping service is part of a terminal-to-terminal service, includes an ancillary service that relates to the inwards scheduled cargo shipping service.

inwards loyalty agreement means an agreement:

(a) between an ocean carrier or conference and a shipper or designated inwards shipper body; and

(b) that makes provision, in relation to inwards liner cargo shipping services, having the purpose or effect of giving certain benefits to the shipper, or a shipper represented by the designated inwards shipper body, if the shipper ships with the ocean carrier, or members of the conference:

(i) all or particular cargo, or a particular portion of all or particular cargo, shipped by the shipper; or

(ii) a particular quantity of cargo or of particular cargo.

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inwards scheduled cargo shipping service means a scheduled cargo shipping service where the transport of the cargo by sea commences from a place outside Australia and ends at a place in Australia.

inwards varying conference agreement means an agreement:

(a) that varies an inwards conference agreement; or

(b) that otherwise affects an inwards conference agreement (including an agreement referred to in subsection (4)).

loyalty agreement means:

(a) an outwards loyalty agreement; or

(b) an inwards loyalty agreement.

ocean carrier means a person who provides, or proposes to provide, international liner cargo shipping services.

outwards conference agreement means an agreement between members of a conference in relation to outwards liner cargo shipping services provided, or proposed to be provided, by them, and includes an outwards varying conference agreement.

outwards liner cargo shipping service means an outwards scheduled cargo shipping service and, if the outwards scheduled cargo shipping service is part of a terminal-to-terminal service, includes an ancillary service that relates to the outwards scheduled cargo shipping service.

outwards loyalty agreement means an agreement:

(a) between an ocean carrier or conference and a shipper or designated outwards shipper body; and

(b) that makes provision, in relation to outwards liner cargo shipping services, having the purpose or effect of giving certain benefits to the shipper, or a shipper represented by the designated outwards shipper body, if the shipper ships with the ocean carrier, or members of the conference:

(i) all or particular cargo, or a particular portion of all or particular cargo, shipped by the shipper; or

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(ii) a particular quantity of cargo or of particular cargo.

outwards scheduled cargo shipping service means a scheduled cargo shipping service where the transport of the cargo by sea commences from a place in Australia and ends at a place outside Australia.

outwards varying conference agreement means an agreement:

(a) that varies an outwards conference agreement; or

(b) that otherwise affects an outwards conference agreement (including an agreement referred to in subsection (3)).

port terminal means:

(a) the area within the limits of a wharf appointed under section 15 of the *Customs Act 1901*, being the limits fixed under that section; or

(b) a terminal facility within the limits of a designated port area.

pricing practice means the fixing, controlling or maintaining by an ocean carrier of prices charged for, or the giving or allowing by an ocean carrier of discounts, allowances, rebates or credits in relation to, outwards liner cargo shipping services or inwards liner cargo shipping services provided by the ocean carrier.

provisionally registered conference agreement means a conference agreement that is provisionally registered under this Part.

registered agent, in relation to an ocean carrier, means the person specified in the register of ocean carrier agents as the agent of the ocean carrier.

registered conference agreement means a conference agreement that is finally registered under this Part.

registered non-conference ocean carrier with substantial market power means an ocean carrier specified in the register of non-conference ocean carriers with substantial market power.

Registrar means the Registrar of Liner Shipping.

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scheduled cargo shipping service means a scheduled service for the transport of various types of general cargo by sea on particular routes, generally by container and generally at predetermined freight rates.

stevedoring service means:

(a) the loading or unloading of cargo into or from a ship; or

(b) the handling of cargo within a port terminal.

terminal-to-terminal service means:

(a) an outwards scheduled cargo shipping service, together with any ancillary service that relates to the outwards scheduled cargo shipping service; or

(b) an inwards scheduled cargo shipping service, together with any ancillary service that relates to the inwards scheduled cargo shipping service.

vary, in relation to a conference agreement, includes vary by way of:

(a) omitting or altering any of the provisions of, or parties to, the agreement;

(b) adding new provisions or parties to the agreement; or

(c) substituting new provisions or parties for any of the provisions of, or parties to, the agreement.

varying conference agreement means:

(a) an outwards varying conference agreement; or

(b) an inwards varying conference agreement.

(2) A reference in this Part to the minimum level of outwards liner cargo shipping services provided, or proposed to be provided, under an outwards conference agreement includes a reference to the frequency of sailings, cargo carrying capacity, and ports of call, of outwards liner cargo shipping services provided, or proposed to be provided, under the agreement.

(2A) A reference in this Part to the minimum level of inwards liner cargo shipping services provided, or proposed to be provided,

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under an inwards conference agreement includes a reference to the frequency of sailings, cargo carrying capacity, and ports of call, of inwards liner cargo shipping services provided, or proposed to be provided, under the agreement.

(3) A reference in this Part to an agreement that affects an outwards conference agreement includes a reference to an agreement between parties to the conference agreement or between parties to the conference agreement and other ocean carriers:

(a) that affects the conduct of parties to the conference agreement in relation to outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement;

(b) that affects the minimum level of outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement; or

(c) that otherwise affects:

(i) the operation, or proposed operation, of the conference agreement; or

(ii) outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement.

(4) A reference in this Part to an agreement that affects an inwards conference agreement includes a reference to an agreement between parties to the conference agreement or between parties to the conference agreement and other ocean carriers:

(a) that affects the conduct of parties to the conference agreement in relation to inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement; or

(b) that affects the minimum level of inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement; or

(c) that otherwise affects:

(i) the operation, or proposed operation, of the conference agreement; or

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(ii) inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement.

(5) For the purposes of this Part (except where the contrary intention appears), if:

(a) an ancillary service relates to a scheduled cargo shipping service; and

(b) the ancillary service is provided on behalf of the provider of the scheduled cargo shipping service by a third person;

the ancillary service is taken to be provided by the provider of the scheduled cargo shipping service instead of by the third person.

10.02A Inland terminals

(1) The Minister may, by legislative instrument, declare that a specified facility is an ***inland terminal*** for the purposes of this Part.

(2) The facility must be in Australia, but outside a designated port area.

(3) In making a declaration under subsection (1), the Minister must have regard to the following matters:

(a) whether the facility is under the control of a person who is, or of persons each of whom is:

(i) an ocean carrier; or

(ii) a person who provides services at the facility at the request of an ocean carrier;

(b) whether the facility is used for either or both of the following purposes:

(i) assembling export cargoes for transport to a port terminal located at the port where the cargoes are to be loaded onto ships for export;

(ii) delivering imported cargoes to importers or their representatives;

(c) any other matters that the Minister thinks are relevant.

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(4) In making a declaration under subsection (1), the Minister must not give preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State.

(5) A declaration under subsection (1) has effect accordingly.

10.03 Designated shipper bodies

(1) If the Minister is of the opinion that an association represents the interests, in relation to outwards liner cargo shipping services, of Australian shippers generally, the Minister may, by legislative instrument, declare that the association is a designated outwards peak shipper body for the purposes of this Part.

(2) If the Minister is of the opinion:

(a) that an association represents the interests, in relation to outwards liner cargo shipping services, of all or any of the following kinds of persons:

(i) Australian shippers in a particular trade;

(ii) Australian shippers of particular kinds of goods;

(iii) shippers in a particular part of Australia;

(iv) producers of goods of a kind exported, or proposed to be exported, from Australia; and

(b) that it is desirable that the association be a designated outwards secondary shipper body for the purposes of this Part;

the Minister may, by legislative instrument, declare that the association is a designated outwards secondary shipper body for the purposes of this Part.

(2A) If the Minister is of the opinion that an association represents the interests, in relation to inwards liner cargo shipping services, of Australian shippers generally, the Minister may, by legislative instrument, declare that the association is a designated inwards peak shipper body for the purposes of this Part.

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(2B) If the Minister is of the opinion:

(a) that an association represents the interests, in relation to inwards liner cargo shipping services, of all or any of the following kinds of persons:

(i) Australian shippers in a particular trade;

(ii) Australian shippers of particular kinds of goods;

(iii) shippers in a particular part of Australia; and

(b) that it is desirable that the association be a designated inwards secondary shipper body for the purposes of this Part;

the Minister may, by legislative instrument, declare that the association is a designated inwards secondary shipper body for the purposes of this Part.

(3) Where the Minister declares that an association is a designated outwards peak shipper body, a designated inwards peak shipper body, a designated outwards secondary shipper body or a designated inwards secondary shipper body for the purposes of this Part, the Registrar shall enter particulars of the association in the register of designated shipper bodies.

(4) The particulars entered in the register shall include whether the association is a designated outwards peak shipper body, a designated inwards peak shipper body, a designated outwards secondary shipper body or a designated inwards secondary shipper body.

(5) The Minister may, by legislative instrument, make guidelines to be applied by the Registrar in the exercise of the Registrar's powers to nominate designated secondary shipper bodies for the purposes of sections 10.29, 10.41 and 10.52.

(6) The Registrar shall enter particulars of any nomination of a designated secondary shipper body for the purposes of section 10.29, 10.41 or 10.52 in the register of designated shipper bodies.

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Division 2—Additional restrictive trade practice provisions applying to ocean carriers

10.04 Application of section 46 in relation to conference agreements

(1) For the purposes of section 46, if the parties to a conference agreement together have a substantial degree of power in a market in which any party to the agreement provides international liner cargo shipping services under the agreement, each party to the conference agreement shall be taken to have a substantial degree of power in the market.

(2) In subsection (1):

conference agreement means an agreement between members of a conference in relation to international liner cargo shipping services provided, or proposed to be provided, by them, and includes an agreement that varies such an agreement.

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Division 3—Minimum standards for conference agreements

10.06 Application of Australian law to outwards conference agreements and withdrawal from agreements

(1) An outwards conference agreement must expressly provide for a question arising under the agreement in relation to an outwards liner cargo shipping service provided, or proposed to be provided, under the agreement to be determined in Australia in accordance with Australian law unless the parties and the Minister agree, in writing, to the particular question being otherwise determined.

(2) An outwards conference agreement must expressly permit any party to the agreement to withdraw from the agreement on reasonable notice without penalty.

10.07 Minimum levels of shipping services to be specified in conference agreements

(1) An outwards conference agreement must contain provisions specifying the minimum level of outwards liner cargo shipping services to be provided under the agreement.

(2) An inwards conference agreement must contain provisions specifying the minimum level of inwards liner cargo shipping services to be provided under the agreement.

Note: See also paragraph 10.33(1)(b) and section 10.72A.

10.08 Conference agreements may include only certain restrictive trade practice provisions

(1) If a conference agreement includes a provision:

(aa) that is a provision where the following conditions are satisfied in relation to the provision:

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(i) the purpose/effect condition set out in subsection 45AD(2);

(ii) the competition condition set out in subsection 45AD(4); or

(ab) that is a provision where the following conditions are satisfied in relation to the provision:

(i) the purpose condition set out in subsection 45AD(3);

(ii) the competition condition set out in subsection 45AD(4); or

(b) that has the purpose, or has or is likely to have the effect, of substantially lessening competition (within the meaning of section 45);

the provision, so far as it is covered by paragraph (aa), (ab) or (b), must either:

(c) deal only with the following matters:

(i) the fixing or other regulation of freight rates;

(ii) the pooling or apportionment of earnings, losses or traffic;

(iii) the restriction or other regulation of the quantity or kind of cargo to be carried by parties to the agreement;

(iv) the restriction or other regulation of the entry of new parties to the agreement; or

(d) be necessary for the effective operation of the agreement and of overall benefit to:

(i) in the case of an outwards conference agreement—Australian exporters; or

(ii) in the case of an inwards conference agreement—Australian importers.

(2) If a conference agreement includes a provision that permits or requires the practice of exclusive dealing (within the meaning of section 47), the provision, so far as it permits or requires that practice, must be necessary for the effective operation of the agreement and of overall benefit to:

(a) in the case of an outwards conference agreement—Australian exporters; or

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(b) in the case of an inwards conference agreement—Australian importers.

Note: See also paragraph 10.33(1)(ba) and section 10.72A.

(3) This section does not apply in relation to a provision of a conference agreement so far as the provision requires or permits a party to the agreement to enter into a loyalty agreement.

10.09 Where may consequences of conference agreements not complying with minimum standards be found?

The consequences of a conference agreement not complying with this Division are to be found in the following provisions:

(a) section 10.28 (decision on application for provisional registration);

(b) section 10.33 (decision on application for final registration);

(c) section 10.45 (circumstances in which Minister may exercise powers in relation to registered conference agreements).

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Division 4—Registers and files and public inspection of them

10.10 Registers and conference agreement files open to public inspection

(1) The registers and conference agreement files kept by the Registrar and the Commission under this Part are open to public inspection.

(2) A person is entitled, on application to the Registrar or the Commission, as the case requires, and payment of the prescribed fee, to obtain a copy of the whole or any part of:
  (a) an entry in a register kept under this Part; or
  (b) a conference agreement file kept under this Part.

10.11 What registers are to be kept by the Registrar?

(1) The Registrar shall keep:
  (a) a register of conference agreements; and
  (b) a register of designated shipper bodies; and
  (c) a register of non-conference ocean carriers with substantial market power; and
  (d) a register of obligations concerning unfair pricing practices; and
  (e) a register of ocean carrier agents; and
  (f) a register of exemption orders.

(2) An entry in a register must contain such particulars as are prescribed in relation to the register.

10.12 What conference agreement files are to be kept by the Registrar?

(1) The Registrar shall keep a file, to be known as the conference agreement file, for each conference agreement (other than a varying conference agreement).

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(2) The conference agreement file for a conference agreement must include:

(a) documents filed with the Registrar under Division 6 in relation to the agreement or any relevant varying conference agreement (other than any part of a document that is not open to public inspection);

(b) abstracts accepted by the Registrar under section 10.36 in relation to such documents (being abstracts of those parts of the documents that are not open to public inspection); and

(c) notifications given to the Registrar under subsection 10.40(1) or 10.43(1) in relation to the agreement or any relevant varying conference agreement.

10.13 What register is to be kept by the Commission?

(1) The Commission shall keep a register of Commission investigations.

(2) Subject to section 10.88, the register of Commission investigations shall contain:

(a) references given to the Commission by the Minister under subsections 10.47(1), 10.50(1), 10.57(1) and 10.63(1);

(b) particulars of decisions made by the Commission under subsections 10.48(2), 10.48(2A) and 10.58(2) to hold investigations;

(c) requests made to the Commission by the Minister under subsections 10.48(3) and 10.58(3);

(d) documents given to the Commission in relation to investigations by it under this Part;

(e) particulars of oral submissions made to the Commission in relation to such investigations; and

(f) reports given to the Minister by the Commission in relation to such investigations.

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Division 5—Exemptions from certain restrictive trade practice prohibitions

Subdivision A—Exemptions relating to conference agreements

10.14 Exemptions apply only to certain activities

(1) Subject to this section, the exemptions provided by this Subdivision apply only in relation to the following parts of an outwards liner cargo shipping service or an inwards liner cargo shipping service:

(a) the parts of the service that consist of the transport of the cargo by sea;

(b) stevedoring services;

(c) activities that take place outside Australia.

(2) The exemptions provided by this Subdivision extend to the fixing of charges for an inter-terminal transport service where the service is part of an outwards liner cargo shipping service or an inwards liner cargo shipping service.

(3) The exemptions provided by this Subdivision extend to the determination of common terms and conditions for bills of lading for use in relation to an outwards liner cargo shipping service or an inwards liner cargo shipping service.

(4) To avoid doubt, the exemptions provided by this Subdivision do not extend to any dealings between the parties to a conference agreement and a person who provides ancillary services on behalf of the provider of a scheduled cargo shipping service.

10.15 When do exemptions commence to apply in relation to registered conference agreements?

(1) The exemptions provided by this Subdivision (other than sections 10.17A and 10.18A) apply in relation to the operation of a

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registered outwards conference agreement only after the end of 30 days after the conference agreement is finally registered.

(2) The exemptions provided by this Subdivision (other than sections 10.17A and 10.18A) apply in relation to the operation of a registered inwards conference agreement only after whichever is the later of the following times:

(a) the end of 30 days after the conference agreement is finally registered;

(b) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*.

10.16 Exemptions do not apply to variations of conference agreement unless varying agreement registered

Where a registered conference agreement is varied or otherwise affected by a varying conference agreement (other than an agreement that consists solely of freight rate charges), the exemptions provided by this Subdivision (other than sections 10.17A and 10.18A) apply only in relation to the operation of the registered conference agreement itself, and not that agreement as varied or otherwise affected, unless the varying conference agreement has been finally registered.

10.17 Exemptions from sections 45AF, 45AG, 45AJ, 45AK and 45

(1) Sections 45AF, 45AJ and 45 do not apply in relation to the making of a contract or arrangement, or the arriving at an understanding, if:

(a) the contract, arrangement or understanding is a conference agreement; and

(b) the parties apply for its provisional registration under this Part within 30 days after the making of the contract or arrangement or arriving at the understanding.

(2) Sections 45AG, 45AK and 45 do not apply in relation to conduct engaged in by a party to a registered conference agreement so far as the conduct gives effect to a provision of the agreement in

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relation to an outwards liner cargo shipping service or an inwards liner cargo shipping service.

10.17A Exemptions from sections 45AF, 45AG, 45AJ, 45AK and 45 for freight rate agreements

(1) Sections 45AF, 45AJ and 45 do not apply to the making of freight rate charges in a freight rate agreement if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for outwards liner cargo shipping services provided under a single registered outwards conference agreement after the end of 30 days after the last-mentioned agreement is finally registered; and

(b) the parties to the freight rate agreement are the same as the parties to the registered outwards conference agreement.

(2) Sections 45AF, 45AJ and 45 do not apply to the making of freight rate charges in a freight rate agreement if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for inwards liner cargo shipping services provided under a single registered inwards conference agreement after whichever is the later of the following times:

(i) the end of 30 days after the last-mentioned agreement is finally registered;

(ii) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*; and

(b) the parties to the freight rate agreement are the same as the parties to the registered inwards conference agreement.

(3) Sections 45AG, 45AK and 45 do not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for outwards liner cargo shipping services

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provided under a single registered outwards conference agreement after the end of 30 days after the last-mentioned agreement is finally registered; and

(b) the parties to the freight rate agreement are the same as the parties to the registered outwards conference agreement.

(4) Sections 45AG, 45AK and 45 do not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for inwards liner cargo shipping services provided under a single registered inwards conference agreement after whichever is the later of the following times:

(i) the end of 30 days after the last-mentioned agreement is finally registered;

(ii) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*; and

(b) the parties to the freight rate agreement are the same as the parties to the registered inwards conference agreement.

10.18 Exemption from section 47

(1) Section 47 does not apply in relation to conduct engaged in by a party to a registered conference agreement so far as the conduct gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service or an inwards liner cargo shipping service.

(2) The exemption provided by subsection (1) does not apply in relation to subsections 47(6) and (7).

10.18A Exemptions from section 47 for freight rate agreements

(1) Section 47 does not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

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(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for outwards liner cargo shipping services provided under a single registered outwards conference agreement after the end of 30 days after the last-mentioned agreement is finally registered; and

(b) the parties to the freight rate agreement are the same as the parties to the registered outwards conference agreement.

(2) Section 47 does not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for inwards liner cargo shipping services provided under a single registered inwards conference agreement after whichever is the later of the following times:

(i) the end of 30 days after the last-mentioned agreement is finally registered;

(ii) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*; and

(b) the parties to the freight rate agreement are the same as the parties to the registered inwards conference agreement.

(3) The exemptions provided by subsections (1) and (2) do not apply in relation to subsections 47(6) and (7).

Subdivision B—Exemptions relating to loyalty agreements

10.19 Exemptions from sections 45AF, 45AG, 45AJ, 45AK and 45

(1) Sections 45AF, 45AJ and 45 do not apply in relation to the making of a contract or arrangement, or the arriving at an understanding, if the contract, arrangement or understanding is a loyalty agreement.

(2) Sections 45AG, 45AK and 45 do not apply in relation to conduct engaged in by a party to a loyalty agreement so far as the conduct

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gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service or an inwards liner cargo shipping service.

10.20 Exemption from section 47

(1) Section 47 does not apply in relation to conduct engaged in by a party to a loyalty agreement in relation to another party to the agreement so far as the conduct gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service or an inwards liner cargo shipping service.

(2) The exemption provided by subsection (1) does not apply in relation to subsections 47(6) and (7).

10.21 Exemptions cease to apply in relation to a shipper at the shipper's option

The exemptions provided by this Subdivision in relation to the operation of a loyalty agreement cease to apply in relation to conduct engaged in by an ocean carrier in relation to a shipper if the shipper notifies, as prescribed, the Commission and each ocean carrier who is a party to the agreement that the shipper no longer wishes the exemptions to apply.

Subdivision D—Other exemptions

10.24 Exemptions from sections 45AF, 45AG, 45AJ, 45AK, 45 and 47 in relation to certain negotiations

(1) Sections 45AF, 45AJ, 45 and 47 do not apply in relation to conduct engaged in by an ocean carrier, conference, shipper or designated shipper body so far as the conduct relates to the determination of terms and conditions of loyalty agreements.

(2) Sections 45AF, 45AG, 45AJ, 45AK, 45 and 47 do not apply in relation to conduct engaged in by an ocean carrier, conference, shipper or designated shipper body so far as the conduct relates to

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the obligations of an ocean carrier under any of the following provisions:

(a) section 10.29 (parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement);

(b) section 10.41 (parties to registered conference agreement to negotiate with certain designated shipper bodies etc.);

(c) section 10.52 (non-conference ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc.).

(3) The exemptions provided by this section do not apply in relation to subsections 47(6) and (7).

10.24A Exemptions from sections 45AF, 45AG, 45AJ, 45AK, 45 and 47 in relation to stevedoring contracts

(1) Sections 45AF, 45AJ and 45 do not apply in relation to the making of a stevedoring contract.

Note: For ***stevedoring contract***, see subsection (5).

(2) Sections 45AG, 45AK, 45 and 47 do not apply in relation to conduct engaged in by a party to a stevedoring contract so far as the conduct gives effect to a provision of the contract.

(3) Sections 45AF, 45AJ, 45 and 47 do not apply in relation to conduct engaged in by an ocean carrier or a stevedoring operator so far as the conduct relates to the determination of terms and conditions of a stevedoring contract.

Note: For ***stevedoring operator***, see subsection (5).

(3A) The exemptions provided by this section do not extend to any dealings between stevedoring operators.

(4) The exemptions provided by this section do not apply in relation to subsections 47(6) and (7).

(5) In this section:

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stevedoring contract means a contract between:

(a) an ocean carrier; and

(b) a stevedoring operator;

under which the stevedoring operator provides, or arranges for the provision of, stevedoring services to the ocean carrier in connection with cargo transported on international liner cargo shipping services provided by the ocean carrier.

stevedoring operator means a person who:

(a) provides, or proposes to provide; or

(b) arranges for the provision of, or proposes to arrange for the provision of;

stevedoring services in connection with cargo transported on international liner cargo shipping services.

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Division 6—Registration of conference agreements

Subdivision A—Provisional registration

10.25 Application for provisional registration of conference agreement

(1) The parties to a conference agreement may apply for its provisional registration under this Part.

(2) The application must comply with the following provisions:
  (a) subsections 10.26(1) and (2) (how application is to be made and verified);
  (b) section 10.27 (copy of agreement to be filed with application etc.).

10.26 How application is to be made and verified

(1) An application for the provisional registration of a conference agreement must be:
  (a) in the appropriate prescribed form;
  (b) made to the Registrar in accordance with the regulations; and
  (c) accompanied by the appropriate prescribed fee.

(2) The application must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

(3) The application may be made by a party to the agreement on behalf of the party and other parties to the agreement.

10.27 Copy of agreement to be filed with application etc.

(1) Subject to subsections (1A) and (1B), an application for the provisional registration of a conference agreement must be accompanied by:

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(a) a complete copy of the agreement so far as it is in writing (including all provisions of the agreement so far as they are in writing); and

(b) a written memorandum that fully sets out the agreement so far as it is not in writing (including all provisions of the agreement so far as they are not in writing);

other than any parts of the agreement that relate to the minimum level of:

(c) in the case of an outwards conference agreement—outwards liner cargo shipping services to be provided under the agreement or an outwards conference agreement that is varied or otherwise affected by the agreement; or

(d) in the case of an inwards conference agreement—inwards liner cargo shipping services to be provided under the agreement or an inwards conference agreement that is varied or otherwise affected by the agreement.

(1A) The copy of the agreement referred to in paragraph (1)(a) need not include the freight rate charges in the agreement.

(1B) The written memorandum referred to in paragraph (1)(b) need not include the freight rate charges in the agreement.

(2) A document that accompanies an application for the provisional registration of a conference agreement must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

10.27A Copy of conference agreement to be given to designated peak shipper body

(1) If:

(a) the parties to an outwards conference agreement apply for its provisional registration; and

(b) at the time of the application, there is a designated outwards peak shipper body;

the parties must give the designated outwards peak shipper body a copy of:

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(c) the complete copy of the agreement referred to in paragraph 10.27(1)(a); and

(d) the written memorandum referred to in paragraph 10.27(1)(b);

as soon as practicable after the application is made.

(2) If:

(a) the parties to an inwards conference agreement apply for its provisional registration; and

(b) at the time of the application, there is a designated inwards peak shipper body;

the parties must give the designated inwards peak shipper body a copy of:

(c) the complete copy of the agreement referred to in paragraph 10.27(1)(a); and

(d) the written memorandum referred to in paragraph 10.27(1)(b);

as soon as practicable after the application is made.

10.28 Decision on application for provisional registration

(1) If the Registrar is satisfied:

(a) that an application has properly been made for the provisional registration of a conference agreement; and

(aa) in the case of an outwards conference agreement—that subsection 10.27A(1) has been complied with, or does not apply to the agreement; and

(ab) in the case of an inwards conference agreement—that subsection 10.27A(2) has been complied with, or does not apply to the agreement; and

(b) in the case of an outwards conference agreement—that the agreement complies with section 10.06 (application of Australian law to outwards conference agreements and withdrawal from agreements) or, if the agreement varies or otherwise affects another conference agreement, that the other conference agreement as varied or affected complies with that section; and

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(ba) in the case of an inwards conference agreement that was in force at the commencement of this paragraph—that there are no circumstances that, under the regulations, are taken to be special circumstances for the purposes of this paragraph; and

(c) that provisional registration of the agreement is not prevented by one or more of the following provisions:

(i) section 10.38 (application for registration to be returned where request for confidentiality refused etc.);

(ii) section 10.39 (application also to be made for registration of varying agreements);

(iii) subsection 10.40(1) (notification of happening of affecting events prior to final registration etc.);

the Registrar shall, within 14 days after the making of the application, provisionally register the agreement by entering in the register of conference agreements:

(d) particulars of the agreement; and

(e) a notation to the effect that the agreement has been provisionally registered.

(2) If the Registrar is not so satisfied, the Registrar shall, within that 14 day period, refuse to provisionally register the agreement.

(3) When the Registrar provisionally registers the agreement or refuses to provisionally register the agreement, the Registrar shall immediately notify the applicants.

(4) If the Registrar provisionally registers the agreement, the Registrar must give the Commission a copy of:

(a) the complete copy of the agreement referred to in paragraph 10.27(1)(a); and

(b) the written memorandum referred to in paragraph 10.27(1)(b).

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10.29 Parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement

(1) The parties to a provisionally registered outwards conference agreement shall:

(a) take part in negotiations with the designated outwards peak shipper bodies or, if there is not at that time a designated outwards peak shipper body, the designated outwards secondary shipper bodies nominated by the Registrar for the purposes of the agreement for the purposes of this section, in relation to the minimum level of outwards liner cargo shipping services to be provided under the agreement (including any provisions of the agreement that affect the level of those services) and consider the matters raised, and representations made, by the shipper bodies;

(b) if a shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties—make the information available to the shipper body; and

(c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(1A) The parties to a provisionally registered inwards conference agreement must:

(a) take part in negotiations with:

(i) the designated inwards peak shipper bodies; or

(ii) if there is not at that time a designated inwards peak shipper body—the designated inwards secondary shipper bodies nominated by the Registrar for the

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purposes of the agreement for the purposes of this section;

in relation to the minimum level of inwards liner cargo shipping services to be provided under the agreement (including any provisions of the agreement that affect the level of those services) and consider the matters raised, and representations made, by the shipper bodies; and

(b) if a shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties—make the information available to the shipper body; and

(c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(1B) Subsections (1) and (1A) do not apply in relation to a conference agreement unless, within 14 days after the provisional registration of the agreement, the shipper bodies notify, as prescribed, the Registrar and the parties to the agreement that they wish to have negotiations in relation to the agreement.

(2) Subsections (1) and (1A) do not apply in relation to a conference agreement if the shipper bodies notify, as prescribed, the Registrar and the parties to the agreement that they do not wish to have negotiations in relation to the agreement.

(3) The nomination of a designated secondary shipper body for the purposes of a provisionally registered conference agreement must be made by written notice given to the parties to the agreement.

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Subdivision B—Final registration

10.30 Application for final registration of conference agreement

(1) The parties to a provisionally registered conference agreement may apply for its final registration under this Part.

(2) The application must comply with the following provisions:
  (a) subsections 10.31(1) and (2) (how application is to be made and verified);
  (b) section 10.32 (copy of agreement to be filed with application etc.).

10.31 How application is to be made and verified

(1) An application for the final registration of a conference agreement must be:
  (a) in the appropriate prescribed form;
  (b) made to the Registrar in accordance with the regulations; and
  (c) accompanied by the appropriate prescribed fee.

(2) The application must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

(3) The application may be made by a party to the agreement on behalf of the party and other parties to the agreement.

10.32 Copy of agreement to be filed with application etc.

(1) Subject to subsections (1A) and (1B), an application for the final registration of a conference agreement must be accompanied by:
  (a) a complete copy of the agreement so far as it is in writing (including all provisions of the agreement so far as they are in writing); and
  (b) a written memorandum that fully sets out the agreement so far as it is not in writing (including all provisions of the agreement so far as they are not in writing).

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(1A) The copy of the agreement referred to in paragraph (1)(a) need not include the freight rate charges in the agreement.

(1B) The written memorandum referred to in paragraph (1)(b) need not include the freight rate charges in the agreement.

(2) A document that accompanies an application for the final registration of a conference agreement must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

10.33 Decision on application for final registration

(1) If the Registrar is satisfied:

(a) that an application has properly been made for the final registration of a conference agreement; and

(b) any of the following subparagraphs applies:

(i) that the agreement complies with section 10.07 (minimum levels of shipping services to be specified in conference agreements) or, if the agreement varies or otherwise affects another conference agreement, that the other conference agreement as varied or affected complies with section 10.07;

(ii) that section 10.07 does not apply in relation to the agreement because of an exemption order;

(iii) that the agreement is an inwards conference agreement that was in force at the commencement of this subparagraph; and

(ba) any of the following subparagraphs applies:

(i) that the agreement complies with section 10.08 (conference agreements may include only certain restrictive trade practice provisions) or, if the agreement varies or otherwise affects another conference agreement, that the other conference agreement as varied or affected complies with section 10.08;

(ii) that section 10.08 does not apply in relation to the agreement because of an exemption order;

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(iii) that the agreement is an inwards conference agreement that was in force at the commencement of this subparagraph; and

(c) in the case of an outwards conference agreement—that subsection 10.29(1) (parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement) has been complied with, or does not apply, in relation to the agreement; and

(ca) in the case of an inwards conference agreement—that subsection 10.29(1A) (parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement) has been complied with, or does not apply, in relation to the agreement; and

(d) that final registration of the agreement is not prevented by one or more of the following provisions:

(i) section 10.38 (application for registration to be returned where request for confidentiality refused etc.);

(ii) section 10.39 (application also to be made for registration of varying conference agreements);

(iii) subsection 10.40(1) (notification of happening of affecting events prior to final registration etc.);

the Registrar shall, within 14 days after the making of the application, finally register the agreement by entering in the register of conference agreements a notation to the effect that the agreement has been finally registered.

(2) If the Registrar is not so satisfied, the Registrar shall, within that 14 day period, refuse to finally register the agreement.

(3) When the Registrar finally registers the agreement or refuses to finally register the agreement, the Registrar shall immediately notify the applicants.

(4) If the Registrar finally registers the agreement, the Registrar must give the Commission a copy of:

(a) the complete copy of the agreement referred to in paragraph 10.32(1)(a); and

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(b) the written memorandum referred to in paragraph 10.32(1)(b).

Subdivision C—Confidentiality requests

10.34 Request for confidentiality

(1) An application for the provisional or final registration of a conference agreement may include a request that a specified part of the application, or of a document accompanying the application, not be open to public inspection under this Part.

(2) If such a request is included in the application, the application must include a statement of reasons in support of the request.

10.35 Abstract to accompany request for confidentiality

(1) Where a request is made under section 10.34 that a part of the application in which the request is included, or of a document accompanying the application, not be open to public inspection under this Part, the application must be accompanied by an abstract of the part of the application or other document in relation to which the request is made.

(2) The abstract must:
(a) be in the appropriate prescribed form; and
(b) comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

10.36 Examination of abstract

(1) Where:
(a) a request is properly made under section 10.34 that a part of a document not be open to public inspection under this Part; and
(b) the request is accompanied by an abstract of the part of the document;

the Registrar shall first determine whether to accept the abstract.

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(2) If the Registrar is satisfied:
  (a) that the abstract adequately describes the scope of the part of the document; and
  (b) that the abstract complies with subsection 10.35(2);
the Registrar shall accept the abstract.

(3) If the Registrar is not so satisfied, the Registrar shall:
  (a) refuse to accept the abstract; and
  (b) refuse the request and immediately notify the applicants of the decision.

10.37 Decision on request for confidentiality

(1) If:
  (a) the Registrar is satisfied that a request has properly been made under section 10.34 that a part of a document not be open to public inspection under this Part;
  (b) the Registrar has, under section 10.36, accepted an abstract for the part of the document; and
  (c) the Registrar is also satisfied, on the basis of the statement of reasons in support of the request that is included in the application for provisional or final registration of the conference agreement concerned:
    (i) in the case of an outwards conference agreement—that granting the request would not disadvantage Australian exporters; and
    (ia) in the case of an inwards conference agreement—that granting the request would not disadvantage Australian importers; and
    (ii) that the request is justified because disclosure of the part of the document would disclose:
      (A) trade secrets;
      (B) information (other than trade secrets) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

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(C) any other information concerning a person in relation to the person's business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking, the disclosure of which would, or could reasonably be expected to, unreasonably affect the person adversely in relation to the person's lawful business or professional affairs or the organisation or undertaking in relation to its lawful business, commercial or financial affairs;

the Registrar shall, within 14 days after the making of the request, direct that the part of the document not be open to public inspection under this Part.

(2) If the Registrar is not so satisfied, the Registrar shall, within that 14 day period, refuse the request and immediately notify the applicants of the decision.

10.38 Application for registration to be returned where request for confidentiality refused etc.

Where:

(a) an application for the provisional or final registration of a conference agreement includes a request under section 10.34 that a part of a document not be open to public inspection under this Part; and

(b) the request is refused by the Registrar;

the Registrar shall also refuse the application, and shall return the application, and any documents that accompanied the application, to the applicants.

Subdivision D—Miscellaneous

10.39 Application also to be made for registration of varying conference agreements

(1) Subject to subsection (2), if:

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(a) application has been made for the provisional or final registration of a conference agreement (in this section called the ***original agreement***), but the original agreement has not been finally registered; and

(b) another conference agreement that varies or otherwise affects the original agreement is or has been made or arrived at;

the Registrar shall not provisionally or finally register the original agreement unless application has been made for the provisional registration of the other conference agreement.

(2) Subsection (1) does not apply if the conference agreement referred to in paragraph (1)(b) consists solely of freight rate charges.

10.40 Notification of happening of affecting events prior to final registration etc.

(1) If:

(a) application has been made for the provisional or final registration of a conference agreement, but the agreement has not been finally registered; and

(b) either of the following subparagraphs applies:

(i) the proposed operation of the conference agreement is affected, or outwards liner cargo shipping services or inwards liner cargo shipping services proposed to be provided under the agreement are affected, by the happening of an event or otherwise than by a varying conference agreement;

(ii) parties to the conference agreement have made or arrived at an agreement with other ocean carriers that affects outwards liner cargo shipping services or inwards liner cargo shipping services provided, or that would, but for the agreement, have been provided, by the other ocean carriers;

the Registrar shall not provisionally or finally register the original agreement unless the parties to the agreement have notified the Registrar of the matter.

(2) The notice must be:

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(a) in the appropriate prescribed form; and
(b) given to the Registrar in accordance with the regulations.

(3) The notice must comply with any regulations requiring its verification (in whole or part).

(4) Where the parties to a conference agreement give a notice under subsection (1), the Registrar may make such variations (if any) to the particulars entered in the register of conference agreements in relation to the agreement as the Registrar considers necessary or desirable to take account of the notice.

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Division 7—Obligations of ocean carriers in relation to registered conference agreements

10.41 Parties to registered conference agreement to negotiate with certain designated shipper bodies etc.

(1) The parties to a registered conference agreement shall:

(a) take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements (including any provisions of the agreement that affect those arrangements) whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body;

(b) if the shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties—make the information available to the shipper body; and

(c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2) The parties to the agreement shall give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

(3) In this section:

eligible Australian contract means:

(a) a contract entered into in Australia; or

(b) a contract where questions arising under the contract are to be determined in accordance with Australian law.

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freight rates includes base freight rates, surcharges, rebates and allowances.

negotiable shipping arrangements:

(a) in relation to an outwards conference agreement—means the arrangements for, or the terms and conditions applicable to, outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call); or

(b) in relation to an inwards conference agreement—means:

(i) the arrangements for, or the terms and conditions applicable to, inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call), where those arrangements or those terms and conditions, as the case may be, are embodied in an eligible Australian contract; or

(ii) the arrangements for, or the terms and conditions applicable to, the parts of the inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement that consist of activities that take place on land in Australia (including, for example, terminal handling charges and charges for inter-terminal transport services).

relevant designated shipper body:

(a) in relation to an outwards conference agreement—means:

(i) a designated outwards peak shipper body; or

(ii) a designated outwards secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section; or

(b) in relation to an inwards conference agreement—means:

(i) a designated inwards peak shipper body; or

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(ii) a designated inwards secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section.

10.42 Application to be made for registration of varying conference agreements

(1) Subject to subsection (3), where a conference agreement that varies or otherwise affects a registered conference agreement is made or arrived at, application shall be made for its provisional registration.

(2) The application must be made within 30 days after the making of or arriving at the agreement.

(3) Subsection (1) does not apply to a conference agreement that consists solely of freight rate charges.

10.43 Parties to registered conference agreement to notify happening of affecting events etc.

(1) Where:

(a) the operation, or proposed operation, of a registered conference agreement is affected, or outwards liner cargo shipping services or inwards liner cargo shipping services provided, or proposed to be provided, under the agreement are affected, by the happening of an event or otherwise than by a varying conference agreement; or

(b) parties to a registered conference agreement make or arrive at an agreement with other ocean carriers that affects outwards liner cargo shipping services or inwards liner cargo shipping services provided, or that would, but for the agreement, have been provided, by the other ocean carriers;

the parties to the registered conference agreement shall notify the Registrar of the matter.

(2) The notice must be:

(a) in the appropriate prescribed form; and

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(b) given to the Registrar in accordance with the regulations within 30 days after the operation, or proposed operation, of the agreement is affected, the services are affected or the agreement is made or arrived at, as the case may be.

(3) The notice must comply with any regulations requiring its verification (in whole or part).

(4) Where the parties to a registered conference agreement give a notice under subsection (1), the Registrar may make such variations (if any) to the particulars entered in the register of conference agreements in relation to the agreement as the Registrar considers necessary or desirable to take account of the notice.

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Division 8—Powers of Minister in relation to registered conference agreements

10.44 Powers exercisable by Minister in relation to registered conference agreements etc.

(1) Subject to sections 10.45 and 10.46, the Minister may direct the Registrar:

(a) to cancel the registration of a registered conference agreement; or

(b) to cancel the registration of a registered conference agreement so far as it relates to:

(i) a particular provision of the agreement;

(ii) a particular party to the agreement; or

(iii) particular conduct.

(2) Where the Minister gives a direction under subsection (1), the Registrar shall immediately enter particulars of the direction in the register of conference agreements.

(3) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement, the exemptions provided by Subdivision A of Division 5 cease to apply in relation to the agreement.

(4) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement so far as it relates to a particular provision of the agreement, the exemptions provided by Subdivision A of Division 5 cease to apply in relation to the provision.

(5) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement so far as it relates to a particular party to the agreement, the exemptions provided by Subdivision A of Division 5 cease to apply in relation to the party.

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(6) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement so far as it relates to particular conduct, the exemptions provided by Subdivision A of Division 5 cease to apply in relation to conduct of that kind in relation to the agreement.

(7) A direction under subsection (1) must be given in writing, and the Registrar shall serve a copy of the direction on the parties to the conference agreement concerned.

(8) If:

(a) the Commission reports to the Minister under section 10.47 or 10.48 in relation to either or both of the matters referred to in subparagraphs 10.45(1)(a)(viii) and (ix); and

(b) after taking the report into account, the Minister is satisfied of either or both of those matters and decides to give a direction under subsection (1);

the Minister must:

(c) prepare a statement about the decision; and

(d) cause:

(i) a copy of the statement; and

(ii) a copy of the Commission's report;

to be laid before each House of the Parliament within 15 sittings days of that House after the decision was made.

10.45 Circumstances in which Minister may exercise powers in relation to registered conference agreements

(1) The Minister shall not give a direction under subsection 10.44(1) in relation to a registered conference agreement unless:

(a) the Minister is satisfied of one or more of the following matters:

(i) in the case of an outwards conference agreement—that the agreement does not comply with section 10.06 (application of Australian law to outwards conference agreements and withdrawal from agreements);

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(ia) that section 10.07 (minimum levels of shipping services to be specified in conference agreements) applies to the agreement, and that the agreement does not comply with that section;

(ib) that section 10.08 (conference agreements may include only certain restrictive trade practice provisions) applies to the agreement, and that the agreement does not comply with that section;

(ii) that section 10.41 (parties to registered conference agreement to negotiate with certain designated shipper bodies etc.) applies to the parties to the agreement, and that the parties have contravened, or propose to contravene, that section;

(iia) that parties to the agreement have contravened, or propose to contravene, subsection 10.43(1) (parties to registered conference agreement to notify happening of affecting events etc.);

(iii) that section 10.42 (application to be made for registration of varying conference agreements) has not been complied with in relation to a conference agreement that varies or otherwise affects the agreement;

(iv) that parties to the agreement have given effect to or applied, or propose to give effect to or apply, the agreement without due regard to the need for outwards liner cargo shipping services or inwards liner cargo shipping services provided under the agreement to be:

(A) efficient and economical; and

(B) provided at the capacity and frequency reasonably required to meet the needs of shippers who use, and shippers who may reasonably be expected to need to use, the services;

(v) in the case of an outwards conference agreement—that parties to the agreement have given effect to or applied, or propose to give effect to or apply, the agreement in a manner that prevents or hinders an Australian flag

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shipping operator from engaging efficiently in the provision of outwards liner cargo shipping services to an extent that is reasonable;

(vi) that provisional or final registration of the agreement was granted on the basis of a statement or information that was false or misleading in a material particular;

(vii) that parties to the agreement have breached an undertaking given by the parties to the agreement under section 10.49;

(viii) that subsection (3) applies to parties to the agreement;

(ix) that subsection (4) applies to parties to the agreement; and

(aa) if the Minister is satisfied of either or both of the matters referred to in subparagraphs (1)(a)(viii) and (ix)—at least 21 days before giving the direction, the Minister served on each party to the agreement a written notice of his or her intention to give the direction; and

(b) the Minister has carried on or attempted to carry on, either personally or through authorised officers, consultations with the parties to the agreement directed at obtaining an undertaking or action by the parties that would have made a direction under subsection 10.44(1) unnecessary; and

(c) either of the following subparagraphs applies:

(i) the Commission has reported to the Minister under section 10.47 or 10.48 in relation to matters referred to in paragraph (a) of which the Minister is satisfied and the Minister has taken the report into account;

(ii) the Minister is satisfied that the special circumstances of the case make it desirable to give the direction before he or she receives such a report from the Commission.

(2) For the purposes of subparagraph (1)(a)(v), in determining what is reasonable, have regard to:

(a) the national interest; and

(b) the interests of the following:

(i) Australian shippers generally;

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(ii) Australian shippers in a particular trade;
(iii) Australian shippers of particular kinds of goods;
(iv) shippers in a particular part of Australia; and

(c) any other relevant matters.

(3) This subsection applies to the parties to a registered conference agreement if:

(a) the agreement includes a provision that is covered by paragraph 10.08(1)(aa) or (b); and

(b) the parties to the agreement have engaged in conduct, or propose to engage in conduct, to give effect to or apply the provision; and

(c) that conduct or proposed conduct has not resulted in, or is unlikely to result in, a benefit to the public that outweighs the detriment to the public constituted by any lessening of competition that:

(i) has resulted, or is likely to result, from the conduct; or
(ii) would result, or be likely to result, if the proposed conduct were engaged in; and

(d) there are exceptional circumstances that warrant the giving of a direction under subsection 10.44(1).

(4) This subsection applies to the parties to a registered conference agreement if:

(a) the parties to the agreement have prevented, or are proposing to prevent, the entry of a prospective party to the agreement; and

(b) the prevention or proposed prevention is unreasonable; and

(c) the prevention or proposed prevention is contrary to the interests of any or all of the following:

(i) Australian shippers generally;
(ii) Australian shippers in a particular trade;
(iii) Australian shippers of particular kinds of goods;
(iv) shippers in a particular part of Australia;

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(v) in the case of an outwards conference agreement—producers of goods of a kind exported, or proposed to be exported, from Australia.

10.46 Action to be taken where powers exercised by Minister without first obtaining Commission report

(1) Where the Minister gives a direction under subsection 10.44(1) before receiving a report under section 10.47 or 10.48 in relation to matters referred to in paragraph 10.45(1)(a) of which the Minister was satisfied before giving the direction, the Minister shall immediately refer the matters to the Commission under section 10.47.

(2) The Commission shall report to the Minister within a period of not more than 60 days in relation to those matters and any other matters that the Commission is then investigating under this Division in relation to the conference agreement concerned.

(3) If, after taking the Commission's report into account, the Minister is satisfied of one or more of the matters referred to in paragraph 10.45(1)(a), the Minister may, within 21 days after receiving the Commission's report, direct the Registrar not to take action under subsection (4) in relation to the agreement, and may also give such further directions under subsection 10.44(1) in relation to the agreement as the Minister considers appropriate.

(4) The Registrar shall delete the particulars of the direction under subsection 10.44(1) from the register of conference agreements at the end of 21 days after the Minister receives the Commission's report unless the Minister has given a direction under subsection (3) in relation to the agreement.

(5) On the deletion of the particulars of the direction, Subdivision A of Division 5 applies in relation to the agreement to the extent to which it would have applied but for the entry of the particulars.

(6) Subsection (1) shall not be taken by implication to limit the matters that may be referred to the Commission under section 10.47.

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(7) A direction under subsection (3) must be given in writing, and the Registrar must serve a copy of the direction on the parties to the conference agreement concerned.

(8) If, after taking the Commission's report into account:

(a) the Minister is satisfied of either or both of the matters referred to in subparagraphs 10.45(1)(a)(viii) and (ix); and

(b) the Minister decides to give a direction under subsection (3);

the Minister must:

(c) prepare a statement about the decision; and

(d) cause:

(i) a copy of the statement; and

(ii) a copy of the Commission's report;

to be laid before each House of the Parliament within 15 sittings days of that House after the decision was made.

10.47 Investigation and report by Commission on reference by Minister

(1) The Minister may refer to the Commission for investigation and report the question whether grounds exist for the Minister to be satisfied in relation to a registered conference agreement of one or more specified matters referred to in paragraph 10.45(1)(a).

(2) The Commission shall hold an investigation into the question and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Commission.

10.48 Investigation and report by Commission on own initiative or on application by affected person

(1) A person affected by the operation of a registered conference agreement may apply to the Commission for an investigation into the question whether grounds exist for the Minister to be satisfied

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in relation to the agreement of one or more specified matters referred to in paragraph 10.45(1)(a).

(2) If subsection (1) applies, the Commission may hold an investigation into the question, and, if it decides to do so, it shall inform the Minister of its decision and report to the Minister.

(2A) The Commission may, on its own initiative, hold an investigation into the question whether grounds exist for the Minister to be satisfied in relation to a registered conference agreement of either or both of the matters referred to in subparagraphs 10.45(1)(a)(viii) and (ix).

(2B) If subsection (2A) applies, the Commission must inform the Minister of its decision to hold an investigation and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to such matters (if any) as the Minister requests it to give special consideration.

(4) A request under subsection (3) must be made in writing.

(5) Without limiting subsection (1), each of the following persons shall be taken to be a person affected by the operation of a registered conference agreement:

(a) a party to the agreement;

(b) a designated shipper body;

(c) in the case of an outwards conference agreement—an Australian flag shipping operator;

(d) a shipper who uses, or may reasonably be expected to need to use, outwards liner cargo shipping services or inwards liner cargo shipping services provided, or proposed to be provided, under the agreement;

(e) an association representing shippers who use, or may reasonably be expected to need to use, such services.

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10.49 Undertakings by parties to registered conference agreement

(1) The parties to a registered conference agreement may, at any time, offer to give an undertaking to do, or not to do, a specified act or thing.

(2) The offer must be:
  (a) in the appropriate prescribed form; and
  (b) made to the Minister in accordance with the regulations.

(3) If the Minister accepts the offer, the Minister may do one or more of the following:
  (a) revoke any reference made to the Commission under section 10.47 in relation to the agreement;
  (b) direct the Commission, in writing, to cease holding any investigation being held by it under section 10.48 in relation to the agreement;
  (c) revoke any direction given under subsection 10.44(1) in relation to the agreement.

(4) If the Minister accepts the offer, the parties shall be taken to have given the undertaking, and the Registrar shall immediately register the undertaking by entering particulars of it in the register of conference agreements.

(5) If the Minister revokes a direction given under subsection 10.44(1), the Registrar shall immediately include in the register a notation to the effect that the direction has been revoked.

(6) On the inclusion of the notation, Subdivision A of Division 5 applies in relation to the agreement to the extent to which it would have applied but for the entry of the particulars of the direction.

10.49A Enforcement of undertakings

(1) A party to a registered conference agreement must not contravene an undertaking given under section 10.49.

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(2) Part VI applies in relation to subsection (1) as if that subsection were a provision of Part IV (but not of Division 1A of Part IV).

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Division 9—Obligations of non-conference ocean carriers with substantial market power

10.50 Investigations by Commission into market power of ocean carriers

(1) The Minister may refer to the Commission for investigation and report the question whether an ocean carrier has a substantial degree of market power in the provision of outwards liner cargo shipping services or inwards liner cargo shipping services on a trade route otherwise than because the ocean carrier is a party to a conference agreement.

(2) The Commission shall hold an investigation into the question and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Commission.

10.51 Determination by Minister of market power of ocean carriers

(1) Where:

(a) the Commission reports to the Minister under section 10.50 that an ocean carrier has a substantial degree of market power in the provision of outwards liner cargo shipping services or inwards liner cargo shipping services on a trade route otherwise than because the ocean carrier is a party to a conference agreement; or

(b) an ocean carrier agrees, in writing, to the Minister giving a direction under this subsection in relation to the ocean carrier in relation to a trade route;

the Minister may direct the Registrar to register the ocean carrier as a non-conference ocean carrier with substantial market power in relation to the trade route.

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(2) Where the Minister gives a direction under subsection (1), the Registrar shall immediately enter particulars of the ocean carrier and the trade route in the register of non-conference ocean carriers with substantial market power.

(3) A direction under subsection (1) must be in writing, and the Registrar shall serve a copy of the direction on the ocean carrier concerned.

10.52 Non-conference ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc.

(1) A registered non-conference ocean carrier with substantial market power shall:

(a) take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body;

(b) if the shipper body requests the ocean carrier to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the ocean carrier—make the information available to the shipper body; and

(c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2) The ocean carrier shall give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

(3) In this section:

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eligible Australian contract means:

(a) a contract entered into in Australia; or

(b) a contract where questions arising under the contract are to be determined in accordance with Australian law.

freight rates includes base freight rates, surcharges, rebates and allowances.

negotiable shipping arrangements means:

(a) the arrangements for, or the terms and conditions applicable to, outwards liner cargo shipping services provided, or proposed to be provided, by the ocean carrier on the relevant trade route (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call); or

(b) the arrangements for, or the terms and conditions applicable to, inwards liner cargo shipping services provided, or proposed to be provided, by the ocean carrier on the relevant trade route (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call), where those arrangements or those terms and conditions, as the case may be, are embodied in an eligible Australian contract; or

(c) the arrangements for, or the terms and conditions applicable to, the parts of the inwards liner cargo shipping services provided, or proposed to be provided, by the ocean carrier on the relevant trade route that consist of activities that take place on land in Australia (including, for example, terminal handling charges and charges for inter-terminal transport services).

relevant designated shipper body:

(a) in relation to negotiations connected with outwards liner cargo shipping services—means:

(i) a designated outwards peak shipper body; or

(ii) a designated outwards secondary shipper body nominated by the Registrar (by written notice given to

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the ocean carrier) for the purposes of the relevant trade route; or

(b) in relation to negotiations connected with inwards liner cargo shipping services—means:

(i) a designated inwards peak shipper body; or

(ii) a designated inwards secondary shipper body nominated by the Registrar (by written notice given to the ocean carrier) for the purposes of the relevant trade route.

relevant trade route means the trade route specified in relation to the ocean carrier in the register of non-conference ocean carriers with substantial market power.

10.53 Non-conference ocean carrier with substantial market power not to hinder Australian flag shipping operators etc.

(1) A registered non-conference ocean carrier with substantial market power shall not prevent or hinder an Australian flag shipping operator from engaging efficiently in the provision of outwards liner cargo shipping services to an extent that is reasonable.

(2) For the purposes of subsection (1), in determining what is reasonable, have regard to:

(a) the national interest; and

(b) the interests of the following:

(i) Australian shippers generally;

(ii) Australian shippers in a particular trade;

(iii) Australian shippers of particular kinds of goods;

(iv) shippers in a particular part of Australia; and

(c) any other relevant matters.

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Division 10—Powers of Minister in relation to non-conference ocean carriers with substantial market power

10.54 Powers exercisable by Minister in relation to obligations of non-conference ocean carriers with substantial market power

(1) Subject to sections 10.55 and 10.56, the Minister may, by writing served on a registered non-conference ocean carrier with substantial market power, order the ocean carrier to comply with any of the ocean carrier's obligations under Division 9.

(2) Where the Minister makes an order under subsection (1), the Registrar shall immediately enter particulars of the order in the register of non-conference ocean carriers with substantial market power.

10.55 Circumstances in which Minister may exercise powers

The Minister shall not make an order under subsection 10.54(1) unless:

(a) the Minister is satisfied of either or both of the following matters:

(i) that section 10.52 (non-conference ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc.) applies to the ocean carrier concerned, and that the ocean carrier has contravened, or proposes to contravene, that section;

(ii) that the ocean carrier concerned has contravened, or proposes to contravene, section 10.53 (non-conference ocean carrier with substantial market power not to hinder Australian flag shipping operators etc.);

(b) the Minister has carried on or attempted to carry on, either personally or through authorised officers, consultations with the ocean carrier directed at obtaining an undertaking or

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action by the ocean carrier that would have made an order under subsection 10.54(1) unnecessary; and

(c) either of the following subparagraphs applies:

(i) the Commission has reported to the Minister under section 10.57 or 10.58 in relation to matters referred to in paragraph (a) of which the Minister is satisfied and the Minister has taken the report into account;

(ii) the Minister is satisfied that the special circumstances of the case make it desirable to make the order before he or she receives such a report from the Commission.

10.56 Action to be taken where powers exercised by Minister without first obtaining Commission report

(1) Where the Minister makes an order under subsection 10.54(1) before receiving a report under section 10.57 or 10.58 in relation to matters referred to in paragraph 10.55(a) of which the Minister was satisfied before making the order, the Minister shall immediately refer the matters to the Commission under section 10.57.

(2) The Commission shall report to the Minister within a period of not more than 60 days in relation to those matters and any other matters that the Commission is then investigating under this Division in relation to the ocean carrier concerned.

(3) If, after taking the Commission's report into account, the Minister is satisfied of one or more of the matters referred to in paragraph 10.55(a), the Minister may, within 21 days after receiving the Commission's report, direct the Registrar not to take action under subsection (4) in relation to the ocean carrier, and may also make such further orders under subsection 10.54(1) in relation to the ocean carrier as the Minister considers appropriate.

(4) The Registrar shall delete the particulars of the order under subsection 10.54(1) from the register of non-conference ocean carriers with substantial market power at the end of 21 days after the Minister receives the Commission's report unless the Minister

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has given a direction under subsection (3) in relation to the ocean carrier.

(5) Subsection (1) shall not be taken by implication to limit the matters that may be referred to the Commission under section 10.57.

(6) A direction under subsection (3) must be given in writing, and the Registrar must serve a copy of the direction on the ocean carrier.

10.57 Investigation and report by Commission on reference by Minister

(1) The Minister may refer to the Commission for investigation and report the question whether grounds exist for the Minister to be satisfied in relation to a registered non-conference ocean carrier with substantial market power of one or more specified matters referred to in paragraph 10.55(a).

(2) The Commission shall hold an investigation into the question and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Commission.

10.58 Investigation and report by Commission on application by affected person

(1) A person affected by the conduct of a registered non-conference ocean carrier with substantial market power may apply to the Commission for an investigation into the question whether grounds exist for the Minister to be satisfied in relation to the ocean carrier of one or more specified matters referred to in paragraph 10.55(a).

(2) The Commission may hold an investigation into the question, and, if it decides to do so, it shall inform the Minister of its decision and report to the Minister.

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(3) In its investigation, the Commission shall give special consideration to such matters (if any) as the Minister requests it to give special consideration.

(4) A request under subsection (3) must be made in writing.

(5) Without limiting subsection (1), each of the following persons shall be taken to be a person affected by the conduct of a registered non-conference ocean carrier with substantial market power:

(a) a designated shipper body;

(b) in the case of an investigation relating to outwards liner cargo shipping services—an Australian flag shipping operator;

(c) a shipper who uses, or may reasonably be expected to need to use, outwards liner cargo shipping services or inwards liner cargo shipping services provided, or proposed to be provided, on the trade route specified in relation to the ocean carrier in the register of non-conference ocean carriers with substantial market power;

(d) an association representing shippers who use, or may reasonably be expected to need to use, such services.

10.59 Undertakings by ocean carrier

(1) A registered non-conference ocean carrier with substantial market power may, at any time, offer to give an undertaking to do, or not to do, a specified act or thing.

(2) The offer must be:

(a) in the appropriate prescribed form; and

(b) made to the Minister in accordance with the regulations.

(3) If the Minister accepts the offer, the Minister may do one or more of the following:

(a) revoke any reference made to the Commission under section 10.57 in relation to the ocean carrier;

(b) direct the Commission, in writing, to cease holding any investigation being held by it under section 10.58 in relation to the ocean carrier;

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(c) revoke any order made under subsection 10.54(1) in relation to the ocean carrier.

(4) If the Minister accepts the offer, the ocean carrier shall be taken to have given the undertaking, and the Registrar shall immediately register the undertaking by entering particulars of it in the register of non-conference ocean carriers with substantial market power.

(5) If the Minister revokes an order made under subsection 10.54(1), the Registrar shall immediately include in the register a notation to the effect that the order has been revoked.

10.60 Enforcement of orders and undertakings

(1) An ocean carrier shall not contravene an order made under subsection 10.54(1) or an undertaking given under section 10.59.

(2) Part VI applies in relation to subsection (1) as if that subsection were a provision of Part IV (but not of Division 1A of Part IV).

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Division 11—Unfair pricing practices

10.61 Powers exercisable by Minister in relation to pricing practices etc.

(1) Subject to section 10.62, the Minister may, by writing served on an ocean carrier, order the ocean carrier not to engage in a pricing practice.

(2) Where the Minister makes an order under subsection (1), the Registrar shall immediately enter particulars of the order in the register of obligations concerning unfair pricing practices.

10.62 Circumstances in which Minister may exercise powers

The Minister shall not make an order under subsection 10.61(1) unless:

(a) the Minister is satisfied:

(i) that the ocean carrier concerned has engaged in the pricing practice concerned in relation to outwards liner cargo shipping services or inwards liner cargo shipping services provided on a particular trade route;

(ii) that the practice has resulted in the freight rates charged by the ocean carrier for all or some outwards liner cargo shipping services or inwards liner cargo shipping services provided on the trade route being less than normal freight rates for services of that kind (as determined in accordance with section 10.66);

(iii) that the practice is of such a magnitude or such a recurring or systematic character that it has prevented or hindered, or threatens to prevent or hinder, the provision of outwards liner cargo shipping services or inwards liner cargo shipping services on the trade route that are:

(A) efficient and economical; and

(B) provided at the capacity and frequency reasonably required to meet the needs of

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shippers who use, and shippers who may reasonably be expected to need to use, the services; and

(iv) that the practice is contrary to the national interest (as determined in accordance with section 10.67);

(b) the Minister has carried on or attempted to carry on, either personally or through authorised officers, consultations with the ocean carrier directed at obtaining an undertaking or action by the ocean carrier that would have made an order under subsection 10.61(1) unnecessary; and

(c) the Commission has reported to the Minister under section 10.63 in relation to the ocean carrier in relation to outwards liner cargo shipping services or inwards liner cargo shipping services provided on the trade route and the Minister has taken the report into account.

10.63 Investigation and report by Commission

(1) The Minister may, on the complaint of an affected person or otherwise, refer to the Commission for investigation and report the question whether grounds exist for the Minister to be satisfied, in relation to an ocean carrier in relation to outwards liner cargo shipping services or inwards liner cargo shipping services provided on a trade route, of the matters referred to in paragraph 10.62(a).

(2) The Commission shall hold an investigation into the question and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Commission.

10.64 Undertakings not to engage in pricing practices

(1) An ocean carrier may, at any time, offer to give an undertaking:

(a) not to engage in a pricing practice; and

(b) to give the Registrar such information as the Registrar from time to time requires (verified as the Registrar requires) for

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the purpose of ascertaining whether the ocean carrier is engaging in, or has engaged in, the pricing practice.

(2) The offer must be:
  (a) in the appropriate prescribed form; and
  (b) made to the Minister in accordance with the regulations.

(3) If the Minister accepts the offer, the Minister may do either or both of the following:
  (a) revoke any reference made to the Commission under subsection 10.63(1) in relation to the ocean carrier;
  (b) revoke any order made under subsection 10.61(1) in relation to the ocean carrier.

(4) If the Minister accepts the offer, the ocean carrier shall be taken to have given the undertaking, and the Registrar shall immediately register the undertaking by entering particulars of it in the register of obligations concerning unfair pricing practices.

(5) If the Minister revokes an order made under subsection 10.61(1), the Registrar shall immediately include in the register a notation to the effect that the order has been revoked.

10.65 Enforcement of orders and undertakings

(1) An ocean carrier shall not contravene an order made under subsection 10.61(1) or an undertaking given under section 10.64.

(2) Part VI applies in relation to subsection (1) as if that subsection were a provision of Part IV (but not of Division 1A of Part IV).

10.66 Determination of normal freight rates for shipping services

(1) The normal freight rates for outwards liner cargo shipping services or inwards liner cargo shipping services provided on a trade route are, subject to subsection (2), the freight rates actually charged in the ordinary course of shipping business for the same or similar services on the same or a comparable trade route by ocean carriers

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who do not enjoy non-commercial advantages given by a government (including a government of a foreign country).

(2) If such actual freight rates do not exist or it is not possible to ascertain satisfactorily what they are, the normal freight rates for the services may be determined by:

(a) comparing the costs of the ocean carrier concerned and comparable ocean carriers who do not enjoy non-commercial advantages given by a government (including a government of a foreign country); and

(b) allowing reasonable margins of profit.

(3) The comparison shall:

(a) take into account all costs incurred in the ordinary course of shipping business, whether the costs are fixed or variable; and

(b) allow for reasonable overhead expenses.

10.67 Determination of whether practice contrary to national interest

(1) In determining whether a pricing practice in relation to outwards liner cargo shipping services is contrary to the national interest, regard shall be had, in particular, to:

(a) the effect that the practice has had, or is likely to have, in relation to:

(i) continued access by Australian exporters to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive; and

(ii) stable access to export markets for exporters in all States and Territories;

(b) the extent to which any advantages provided by the practice or similar practices are enjoyed by competitors of Australian exporters; and

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(c) the effect that denial of any advantages provided by the practice would have on the competitiveness of Australian industries.

(2) Subsection (3) applies when determining whether a pricing practice in relation to inwards liner cargo shipping services is contrary to the national interest.

(3) Regard must be had, in particular, to the effect that the practice has had, or is likely to have, in relation to continuous stable access by Australian importers in all States and Territories to inwards liner cargo shipping services that:

(a) are of adequate frequency and reliability; and

(b) are at freight rates that are internationally competitive.

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Division 12—Registration of ocean carrier agents

10.68 Ocean carrier who provides international liner cargo shipping services to have registered agent

(1) Every ocean carrier who provides international liner cargo shipping services shall, at all times, be represented for the purposes of this Act by a person who:

(a) is an individual resident in Australia;

(b) has been appointed by the ocean carrier as the ocean carrier's agent for the purposes of this Act; and

(c) is specified in the register of ocean carrier agents as the ocean carrier's agent.

(2) An ocean carrier who, without reasonable excuse, contravenes subsection (1) commits an offence punishable, on conviction, by a fine not exceeding:

(a) in the case of a natural person—20 penalty units; and

(b) in the case of a body corporate—100 penalty units.

10.69 Representation of ocean carrier by registered agent

(1) Everything done by or in relation to an ocean carrier's registered agent in that capacity shall, for the purposes of this Act, be taken to be done by or in relation to the ocean carrier.

(2) Without limiting subsection (1), a document required or permitted to be served on, or given to, an ocean carrier under or for the purposes of this Act (including the process of any court) may be served on, or given to, the ocean carrier by serving it on, or giving it to, the ocean carrier's registered agent.

(3) A document that is, under subsection (2), permitted to be served on, or given to, an ocean carrier's registered agent may be served on, or given to, the agent by:

(a) delivering it to the agent personally; or

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(b) leaving it at, or sending it by pre-paid post to, the address for service specified in relation to the agent in the register of ocean carrier agents.

(4) Subsection (3) does not affect:

(a) the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorises the service of a document otherwise than as provided in that subsection; or

(b) the power of a court to authorise service of a document otherwise than as provided in that subsection.

10.70 Application by ocean carrier for registration of agent

(1) An ocean carrier may apply for the registration of a person as the ocean carrier's agent for the purposes of this Act.

(2) The person must:

(a) be an individual resident in Australia;

(b) have been appointed by the ocean carrier as the ocean carrier's agent for the purposes of this Act; and

(c) have an address for service in Australia.

(3) The application must be:

(a) made to the Registrar;

(b) made in the prescribed form and in accordance with the regulations; and

(c) accompanied by the prescribed fee.

10.71 Registration of agent

(1) Where an ocean carrier properly applies under section 10.70 for the registration of an agent, the Registrar shall register the agent by entering particulars of the ocean carrier and the agent in the register of ocean carrier agents.

(2) The particulars entered in the register must include:

(a) the name of the ocean carrier; and

(b) the name, and address for service, of the agent.

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10.72 Change of agent etc.

(1) An ocean carrier may, by notice given to the Registrar:
  (a) revoke the appointment of the ocean carrier's registered agent and, subject to subsection (2), appoint a new agent for the purposes of this Act;
  (b) change the address for service of the ocean carrier's registered agent to another address in Australia; or
  (c) request the Registrar to vary any of the particulars entered in the register of ocean carrier agents in relation to the ocean carrier.

(2) A new agent appointed under paragraph (1)(a) must:
  (a) be an individual resident in Australia; and
  (b) have an address for service in Australia.

(3) A notice under paragraph (1)(a), (b) or (c):
  (a) must be in the appropriate prescribed form;
  (b) must be given to the Registrar in accordance with the regulations; and
  (c) may be expressed to take effect on and from a specified future day.

(4) Where an ocean carrier properly gives a notice under paragraph (1)(a) or (b), the Registrar shall immediately make such variations to the particulars entered in the register of ocean carrier agents in relation to the ocean carrier as are necessary to give effect to the notice.

(5) Where an ocean carrier properly gives a notice under paragraph (1)(c), the Registrar shall make such variations (if any) to the particulars entered in the register of ocean carrier agents in relation to the ocean carrier as the Registrar considers necessary or desirable to give effect to the notice.

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Division 12A—Exemption orders for inwards conference agreements etc.

10.72A Exemption orders for inwards conference agreements etc.

(1) The Minister may, by legislative instrument, make an order exempting:

(a) a specified inwards conference agreement; or

(b) specified inwards liner cargo shipping services; or

(c) specified conduct in relation to the provision, or proposed provision, of inwards liner cargo shipping services;

from the scope of any or all of the eligible regulatory provisions.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

(2) The Registrar must enter particulars of any order under subsection (1) in the register of exemption orders.

(4) For the purposes of this section, each of the following provisions is an ***eligible regulatory provision***:

(a) subsection 10.07(2);

(b) section 10.08;

(c) paragraph 10.28(1)(ba);

(d) subsection 10.29(1A);

(e) section 10.40;

(f) section 10.41;

(g) section 10.43;

(h) subparagraph 10.45(1)(a)(iv);

(i) subsection 10.45(3);

(j) subsection 10.45(4);

(k) section 10.52;

(l) subparagraph 10.62(a)(i).

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10.72B Criteria for making exemption order

(1) The Minister must not make an exemption order unless the Minister is of the opinion that it is in the national interest to make the order.

(2) For the purposes of subsection (1), in determining what is in the national interest, the Minister must have regard to each of the following:

(a) Australia's international relations;

(b) Australia's international obligations;

(c) any relevant principle of international law or practice;

(d) the interests of Australian exporters;

(e) the interests of Australian importers;

(f) any other relevant matters.

10.72C Duration of exemption order may be limited

(1) An exemption order may be expressed to be in force for a period specified in the order.

(2) Subsection (1) does not prevent the revocation of an exemption order in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

10.72D Conditions of exemption order

An exemption order may be expressed to be subject to such conditions as are specified in the order.

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Division 13—General provisions relating to registers and conference agreement files

10.73 Form of registers and conference agreement files

(1) The registers and conference agreement files kept by the Registrar may be kept in such form (whether or not documentary form) as the Registrar considers appropriate.

(2) The register of Commission investigations may be kept in such form (whether or not documentary form) as the Commission considers appropriate.

10.74 Deletion of entries wrongly existing in certain registers

Where the Registrar is satisfied that an entry wrongly exists in a register kept by the Registrar, the Registrar shall delete the entry.

10.75 Deletion of obsolete entries in certain registers

Where the Registrar is satisfied that an entry in a register kept by the Registrar is obsolete, the Registrar may delete the entry.

10.76 Correction of clerical errors and other mistakes in certain registers etc.

Where the Registrar is satisfied that a clerical error or other mistake exists in particulars entered in a register kept by the Registrar or that matters included in particulars entered in a register kept by the Registrar are obsolete, the Registrar may vary the particulars for the purpose of correcting the error or mistake or removing the obsolete matters.

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Division 14—Administration

10.77 Registrar of Liner Shipping

There shall be a Registrar of Liner Shipping.

10.78 Appointment of Registrar etc.

The Registrar shall be appointed by the Minister, and holds office during the pleasure of the Minister.

10.79 Acting Registrar

The Minister may appoint a person to act as Registrar:

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

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

10.80 Registrar and staff to be public servants

The Registrar, and any staff of the Registrar, shall be persons engaged under the *Public Service Act 1999*.

10.81 Delegation by Minister

The Minister may, by signed writing, delegate to the Registrar, or to a person occupying a specified office in the Department, all or any of the Minister's powers under or in relation to this Part (other than powers under sections 10.02A and 10.03, subsections 10.06(1) and 10.44(1), sections 10.46, 10.47, 10.48 and 10.50, subsection 10.54(1), sections 10.56, 10.57 and 10.58, subsection 10.61(1) and sections 10.63 and 10.72A).

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10.82 Delegation by Registrar

The Registrar may, by signed writing, delegate to a person occupying a specified office in the Department all or any of the Registrar's powers under this Part.

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Division 14A—Review of decisions of Commission

10.82A Review by Tribunal

(1) For the purposes of this section, each of the following decisions of the Commission is a ***reviewable decision***:

(a) a decision to refuse to hold an investigation under subsection 10.48(2) or 10.58(2);

(b) a decision under section 10.88 to:

(i) exclude a document, or the particulars of a submission, from the register of Commission investigations; or

(ii) refuse to exclude a document, or the particulars of a submission, from the register of Commission investigations.

(2) If the Commission makes a reviewable decision:

(a) a person whose interests are affected by the decision; or

(b) a designated shipper body;

may apply in writing to the Tribunal for a review of the decision.

(3) An application under this section for a review of a decision must be made within 21 days after the Commission made the decision.

(4) If the Tribunal receives an application under this section for a review of a decision, the Tribunal must review the decision.

10.82B Functions and powers of Tribunal

(1) On a review of a decision of the Commission of a kind mentioned in section 10.82A, the Tribunal may make a decision affirming, setting aside or varying the decision of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

(2) A decision by the Tribunal affirming, setting aside or varying a decision of the Commission is taken for the purposes of this Act (other than this Division) to be a decision of the Commission.

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(3) For the purposes of a review by the Tribunal, the member of the Tribunal presiding at the review may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

(4) For the purposes of a review, the Tribunal may have regard to any information given, documents produced or evidence given to the Commission in connection with the making of the decision to which the review relates.

Note: Division 2 of Part IX applies to proceedings before the Tribunal.

10.82C Provisions that do not apply in relation to a Tribunal review

Division 1 of Part IX does not apply in relation to a review by the Tribunal of a decision of the Commission of a kind mentioned in section 10.82A.

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Division 14B—Review of decisions of Minister

10.82D Review by Tribunal

(1) For the purposes of this section, each of the following decisions of the Minister is a ***reviewable decision***:

(a) a decision to:

(i) give; or

(ii) refuse to give;

a direction under subsection 10.44(1), subsection 10.46(3), paragraph 10.49(3)(b), subsection 10.51(1), subsection 10.56(3) or paragraph 10.59(3)(b);

(b) a decision under section 10.49, 10.59 or 10.64 to:

(i) accept an offer; or

(ii) refuse to accept an offer;

(c) a decision under paragraph 10.49(3)(a), 10.59(3)(a) or 10.64(3)(a) to:

(i) revoke a reference; or

(ii) refuse to revoke a reference;

(d) a decision under paragraph 10.49(3)(c) to:

(i) revoke a direction; or

(ii) refuse to revoke a direction;

(e) a decision to:

(i) make; or

(ii) refuse to make;

an order under subsection 10.54(1) or 10.61(1);

(f) a decision under paragraph 10.59(3)(c) or 10.64(3)(b) to:

(i) revoke an order; or

(ii) refuse to revoke an order.

(2) If the Minister makes a reviewable decision:

(a) a person whose interests are affected by the decision; or

(b) a designated shipper body;

may apply in writing to the Tribunal for a review of the decision.

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(3) An application under this section for a review of a decision must be made within 21 days after the Minister made the decision.

(4) If the Tribunal receives an application under this section for a review of a decision, the Tribunal must review the decision.

10.82E Functions and powers of Tribunal

(1) On a review of a decision of the Minister of a kind mentioned in section 10.82D, the Tribunal may make a decision affirming, setting aside or varying the decision of the Minister and, for the purposes of the review, may perform all the functions and exercise all the powers of the Minister.

(2) A decision by the Tribunal affirming, setting aside or varying a decision of the Minister is taken for the purposes of this Act (other than this Division) to be a decision of the Minister.

(3) For the purposes of a review by the Tribunal, the member of the Tribunal presiding at the review may request the Minister to give such information, make such reports and provide such other assistance to the Tribunal as the member specifies. The Minister must comply with such a request.

(4) For the purposes of a review, the Tribunal may have regard to any information given, documents produced or evidence given to the Minister in connection with the making of the decision to which the review relates.

Note: Division 2 of Part IX applies to proceedings before the Tribunal.

10.82F Modifying register after Tribunal review

(1) If:

(a) the Tribunal decides to set aside or vary a decision of the Minister; and

(b) a register kept by the Registrar is not consistent with the decision of the Tribunal;

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the Minister must direct the Registrar to take such action, by way of modifying the register, as is necessary to ensure that the register is consistent with the Tribunal's decision.

(2) The Registrar must comply with a direction under subsection (1).

(3) If, in accordance with subsection (2), the Registrar:

(a) deletes particulars of a direction under subsection 10.44(1) from the register of conference agreements; or

(b) includes in the register of conference agreements a notation to the effect that a direction under subsection 10.44(1) has been set aside;

Subdivision A of Division 5 applies in relation to the conference agreement concerned to the extent to which that Subdivision would have applied but for the entry of the particulars of the direction.

10.82G Provisions that do not apply in relation to a Tribunal review

Division 1 of Part IX does not apply in relation to a review by the Tribunal of a decision of the Minister of a kind mentioned in section 10.82D.

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Division 15—Miscellaneous

10.83 Act not to affect rights under Freedom of Information Act

Nothing in this Part affects a right that a person may have under the *Freedom of Information Act 1982*.

10.84 Review of decisions of Registrar

(1) Application may be made to the Administrative Review Tribunal for review of a reviewable decision.

(2) In subsection (1):

decision has the same meaning as in the *Administrative Review Tribunal Act 2024*.

reviewable decision means a decision of the Registrar under this Part, other than:

(a) a decision to provisionally or finally register a conference agreement; or

(b) a decision as to the form of a register.

10.85 Statement to accompany notices of Registrar

(1) Where the Registrar makes a reviewable decision (within the meaning of section 10.84) and gives to a person whose interests are affected by the decision written notice of the making of the decision, the notice must include:

(a) a statement to the effect that application may be made to the Administrative Review Tribunal under the *Administrative Review Tribunal Act 2024* for review of a decision of the Registrar under this Part; and

(b) a statement to the effect that a person who is entitled to apply to the Administrative Review Tribunal for review of a decision may, under section 268 of that Act, request a statement of reasons (within the meaning of that Act).

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(2) Paragraph (1)(b) does not apply if the person has been given a statement of reasons under the *Administrative Review Tribunal Act 2024* (see subsection 269(7) of that Act).

(3) A contravention of subsection (1) in relation to a decision does not affect the validity of the decision.

10.86 Evidence

(1) A certificate signed by the Registrar stating any matter in relation to the registration under this Part of an ocean carrier, ocean carrier's agent, conference agreement, direction, undertaking, determination or order, or any other matter in relation to a register, or conference agreement file, kept by the Registrar under this Part, is prima facie evidence of the matter.

(2) Without limiting subsection (1), the matters that may be certified under that subsection include:

(a) whether an ocean carrier, ocean carrier's agent, conference agreement, undertaking, determination or order is or is not registered under this Part;

(b) the name and address for service of an ocean carrier's agent; and

(c) the provisions and other particulars of a conference agreement, direction, undertaking, determination or order.

(3) A document purporting to be a certificate under subsection (1) shall, unless the contrary is established, be taken to be such a certificate and to have been properly given.

10.87 Notification by Commission of references etc.

The Commission may make public, in such manner as it considers appropriate:

(a) receipt of references under subsections 10.47(1), 10.50(1), 10.57(1) and 10.63(1); and

(b) decisions made by it under subsections 10.48(2), 10.48(2A) and 10.58(2) to hold investigations.

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10.88 Exclusion of documents etc. from register of Commission investigations

(1) Where:

(a) a person gives a document to the Commission in relation to an investigation; or

(b) a person makes an oral submission to the Commission in relation to an investigation;

the person may, at the same time, request that the document, or the particulars of the submission, be excluded from the register because of the confidential nature of matters contained in the document or submission.

(2) If the Commission is satisfied that the request is justified because disclosure of matters contained in the document or submission would disclose:

(a) trade secrets;

(b) information (other than trade secrets) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(c) any other information concerning a person in relation to the person's business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking, the disclosure of which would, or could reasonably be expected to, unreasonably affect the person adversely in relation to the person's lawful business or professional affairs or the organisation or undertaking in relation to its lawful business, commercial or financial affairs;

the Commission shall exclude the document, or the particulars of the submission, from the register.

(3) If:

(a) the Commission refuses a request to exclude a document from the register; and

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(b) the person who gave the document requests the Commission to return it;

the Commission shall return the document and, in that case, paragraph 10.13(2)(d) does not apply in relation to the document.

(4) If:

(a) the Commission refuses a request to exclude the particulars of an oral submission from the register; and

(b) the person who made the submission withdraws it;

paragraph 10.13(2)(e) does not apply in relation to the submission.

(5) If the Commission is satisfied that it is otherwise desirable to do so, the Commission may exclude a document, or the particulars of a submission, from the register.

(6) If a person makes a request under subsection (1), the document or the particulars of the submission concerned must not be included in the register until the Commission has dealt with the request.

(7) In this section:

document includes a part of a document.

investigation means an investigation under section 10.47, 10.48, 10.50, 10.57, 10.58 or 10.63.

register means the register of Commission investigations.

submission includes a part of a submission.

10.89 Disclosure of confidential information

(1) In this section:

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

give includes permit access to.

officer means a person who is or has been:

(a) the Registrar;

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(b) a member of the staff assisting the Registrar; or

(c) a person to whom powers under this Part have been delegated by the Minister or the Registrar.

produce includes permit access to.

(2) This section applies in relation to information if the information relates to a person and was obtained by an officer, either directly or indirectly, from a part of a document filed with the Registrar, being a part that is not open to public inspection.

(3) This section applies in relation to a part of a document filed with the Registrar, being a part that is not open to public inspection.

(4) An officer shall not:

(a) make a record of any information to which this section applies;

(b) divulge or communicate to a person any information to which this section applies; or

(c) give a person a part of a document to which this section applies;

unless the record is made, the information divulged or communicated or the part of the document given:

(d) for the purposes of this Act; or

(e) in relation to the performance of a duty or the exercise of a power under or in relation to this Act.

Penalty: $5,000 or imprisonment for 2 years, or both.

(5) Subsection (4) applies in relation to the divulging or communicating of information whether directly or indirectly, but does not apply in relation to the divulging or communicating of information to, or the giving of a part of a document to, the Minister.

(6) An officer shall not be required:

(a) to produce in a court a part of a document to which this section applies; or

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(b) to divulge or communicate to a court any information to which this section applies;

except so far as it is necessary to do so for the purposes of carrying into effect the provisions of this Act.

10.90 Fees

(1) The regulations may prescribe fees for the purposes of this Part, including fees payable on applications and requests made under this Part.

(2) The regulations shall not fix fees exceeding:

(a) in the case of an application for provisional registration of a conference agreement—$1,200; and

(b) in the case of an application for final registration of a conference agreement—$700; and

(c) in the case of an application for the registration of a person as an ocean carrier's agent—$160; and

(ca) in the case of variation of the register of ocean carrier agents following a notice under subsection 10.72(1)—$160; and

(d) in the case of an application to obtain a copy of, the whole or any part of, an entry in a register kept under this Part or a conference agreement file kept under this Part—$200.

10.91 Application of Part XID and section 155 to investigations under Part

(1) Part XID and section 155 apply in relation to an investigation by the Commission under this Part as if the investigation were an investigation by the Commission relating to a matter that constitutes, or may constitute, a contravention of this Act.

(2) Subsection (1) shall not be taken to limit by implication any powers that the Commission has apart from that subsection.

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Part XI—Application of the Australian Consumer Law as a law of the Commonwealth

Division 1—Preliminary

130 Definitions

In this Part:

associate: a person (the ***first person***) is an associate of another person if:

(a) the first person holds money or other property on behalf of the other person; or

(b) if the other person is a body corporate—the first person is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of the other person.

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

Chairperson has the same meaning as in subsection 4(1).

corporation has the same meaning as in subsection 4(1).

disclosure notice: see subsection 133D(3).

embargo notice: see subsection 135S(1).

embargo period for an embargo notice means the period specified in the embargo notice under paragraph 135S(3)(c) or (d).

enforcement order: see paragraph 139D(1)(b).

Federal Court means the Federal Court of Australia.

infringement notice means an infringement notice issued under subsection 134A(1).

infringement notice compliance period: see subsection 134F(1).

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infringement notice provision: see subsection 134A(2).

inspector means a person who is appointed as an inspector under subsection 133(1).

listed corporation has the meaning given by section 9 of the *Corporations Act 2001*.

member of the Commission has the same meaning as in subsection 4(1).

occupational liability: see subsection 137(5).

personal injury includes:

(a) prenatal injury; and

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

(c) disease;

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

person assisting: see subsection 135D(2).

professional standards law: see subsection 137(4).

proposed ban notice: see subsection 132(1).

proposed recall notice: see subsection 132A(1).

reckless conduct: see subsection 139A(5).

recreational services: see subsection 139A(2).

search-related powers: see subsections 135A(1) and (2).

search warrant means a warrant issued or signed under section 135Z or 136.

smoking has the same meaning as in the *Public Health (Tobacco and Other Products) Act 2023*.

state of mind, of a person, includes a reference to:

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(a) the knowledge, intention, opinion, belief or purpose of the person; and
(b) the person's reasons for the person's intention, opinion, belief or purpose.

tobacco product has the same meaning as in the *Public Health (Tobacco and Other Products) Act 2023*.

130A Expressions defined in Schedule 2

An expression has the same meaning in this Part as in Schedule 2.

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Division 2—Application of the Australian Consumer Law as a law of the Commonwealth

Subdivision A—Application of the Australian Consumer Law

131 Application of the Australian Consumer Law in relation to corporations etc.

(1) Schedule 2 applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations.

Note: Sections 5 and 6 of this Act extend the application of this Part (and therefore extend the application of the Australian Consumer Law as a law of the Commonwealth).

(2) Without limiting subsection (1):

(a) section 21 of Schedule 2 also applies as a law of the Commonwealth in relation to:

(i) a supply or possible supply of goods or services by any person to a corporation; or

(ii) an acquisition or possible acquisition of goods or services from any person by a corporation; and

(b) section 147 of Schedule 2 also applies as a law of the Commonwealth to, and in relation to, a corporation as a supplier referred to in that section; and

(c) Division 2 of Part 5-1 of Schedule 2 also applies as a law of the Commonwealth to and in relation to a person if the other person referred to in section 219 of Schedule 2 is a corporation; and

(d) section 33 of Schedule 2 also applies as a law of the Commonwealth to, and in relation to, the conduct of any person.

(3) The table of contents in Schedule 2 is additional information that is not part of this Act. Information in the table may be added to or edited in any published version of this Act.

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131A Division does not apply to financial services

(1) Despite section 131, this Division does not apply, other than in relation to the following provisions of Schedule 2 as they apply as a law of the Commonwealth, to the supply, or possible supply, of services that are financial services, or of financial products:

(a) Division 3A of Part 3-2;

(b) Division 3A of Part 4-2;

(c) Part 5-5.

(2) Without limiting subsection (1):

(a) Part 2-1 of Schedule 2 and sections 34 and 156 of Schedule 2 do not apply to conduct engaged in in relation to financial services; and

(b) Part 2-3 of Schedule 2 does not apply to, or in relation to:

(i) contracts that are financial products; or

(ii) contracts for the supply, or possible supply, of services that are financial services; and

(c) if a financial product consists of or includes an interest in land—the following provisions of Schedule 2 do not apply to that interest:

(i) section 30;

(ii) paragraphs 32(1)(c) and (d) and (2)(c) and (d);

(iii) paragraphs 50(1)(c) and (d);

(iv) section 152;

(v) subparagraphs 154(1)(b)(iii) and (iv) and (2)(b)(iii) and (iv);

(vi) subparagraphs 168(1)(b)(iii) and (iv); and

(d) sections 39 and 161 of Schedule 2 do not apply to:

(i) a credit card that is part of, or that provides access to, a credit facility that is a financial product; or

(ii) a debit card that allows access to an account that is a financial product.

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131B Division does not apply to interim bans imposed by State or Territory Ministers

Despite section 131, this Division does not apply to an interim ban that is not imposed by the Commonwealth Minister.

131C Saving of other laws and remedies

(1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, of a State or a Territory.

(2) Section 73 of the Australian Consumer Law does not operate in a State or a Territory to the extent necessary to ensure that no inconsistency arises between:
  (a) that section; and
  (b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with that section.

(3) Despite subsection (1):
  (a) if an act or omission of a person is both:
    (i) an offence against this Part or the Australian Consumer Law; and
    (ii) an offence against a law of a State or a Territory; and
  (b) the person is convicted of either of those offences;

he or she is not liable to be convicted of the other of those offences.

(4) Except as expressly provided by this Part or the Australian Consumer Law, nothing in this Part or the Australian Consumer Law is taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part and the Australian Consumer Law had not been enacted.

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Subdivision B—Effect of other Commonwealth laws on the Australian Consumer Law

131D Effect of Part VIB on Chapter 5 of the Australian Consumer Law

Chapter 5 of the Australian Consumer Law has effect subject to Part VIB.

131E Application of the *Legislation Act 2003*

(1) The following instruments made under the Australian Consumer Law by the Commonwealth Minister are to be made by legislative instrument:
  (a) a determination under subsection 66(1) (display notices);
  (b) a notice under subsection 104(1) (safety standards);
  (c) a notice under subsection 109(1) or (2) (interim bans);
  (d) a notice under section 111 (extensions of interim bans);
  (e) a notice under section 113 (revocation of interim bans);
  (f) a notice under subsection 114(1) or (2) (permanent bans);
  (g) a notice under section 117 (revocation of permanent bans);
  (h) a notice under subsection 122(1) (recall notices);
  (i) a notice under subsection 134(1) (information standards).

(2) The following instruments made under the Australian Consumer Law are not legislative instruments:
  (a) an approval given under paragraph 106(5)(b) (approval to export);
  (b) an approval given under paragraph 118(5)(b) (approval to export);
  (c) a notice under subsection 128(3) (voluntary recalls);
  (d) a notice under subsection 129(1) or (2) (safety warning notices);
  (e) a notice under subsection 130(1) (announcement of results of an investigation);

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(f) a notice under subsection 223(1) or (2) (public warning notices).

(3) To avoid doubt, an instrument made under the Australian Consumer Law by a responsible Minister who is not the Commonwealth Minister, or a regulator that is not the Commission, is not a legislative instrument.

(4) Subsections 104(5) and 134(4) of the Australian Consumer Law have effect despite subsection 14(2) of the *Legislation Act 2003*.

131F Section 4AB of the Crimes Act does not apply

Section 4AB of the *Crimes Act 1914* does not apply to any provision of this Part or the Australian Consumer Law.

131G Application of the *Criminal Code*

Corporate criminal responsibility

(1) Part 2.5 of the *Criminal Code* does not apply to an offence against this Part or the Australian Consumer Law.

Mistake of fact defence

(2) Section 9.2 of the *Criminal Code* does not apply to an offence against Chapter 4 of the Australian Consumer Law.

Note: Section 207 of the Australian Consumer Law provides a mistake of fact defence for offences under Chapter 4 of the Australian Consumer Law.

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Division 3—Conferences for proposed bans and recall notices

Subdivision A—Conference requirements before a ban or compulsory recall

132 Commonwealth Minister must issue a proposed ban notice

(1) The Commonwealth Minister must issue a ***proposed ban notice*** if the Commonwealth Minister proposes to impose an interim ban, or a permanent ban:
  (a) on consumer goods of a particular kind; or
  (b) on product related services of a particular kind.

(2) Subsection (1) does not apply in relation to an interim ban if the Commonwealth Minister has issued a notice under section 132J certifying that the ban should be imposed without delay.

(3) The proposed ban notice must:
  (a) be in writing; and
  (b) be published on the internet; and
  (c) set out a copy of a draft notice for the imposition of the interim ban or permanent ban; and
  (d) set out a summary of the reasons for the proposed imposition of the ban; and
  (e) invite any person who supplies, or proposes to supply:
    (i) consumer goods of that kind; or
    (ii) product related services of that kind;
  to notify the Commission, in writing and within a period specified in the notice, if the person wishes the Commission to hold a conference in relation to the proposed imposition of the ban.

(4) The period specified in the proposed ban notice under paragraph (3)(e):

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(a) must be a period of at least 10 days, or such longer period as the Commonwealth Minister specifies in the notice; and
(b) must not commence before the day on which the notice is published.

(5) A proposed ban notice is not a legislative instrument.

132A Commonwealth Minister must issue a proposed recall notice

(1) The Commonwealth Minister must issue a ***proposed recall notice*** if the Commonwealth Minister proposes to issue a recall notice for consumer goods of a particular kind.

(2) Subsection (1) does not apply in relation to a recall notice if the Commonwealth Minister has issued a notice under section 132J certifying that the recall notice should be issued without delay.

(3) The proposed recall notice must:
(a) be in writing; and
(b) be published on the internet; and
(c) set out a copy of a draft recall notice; and
(d) set out a summary of the reasons for the proposed issue of the recall notice; and
(e) invite any person who supplies, or proposes to supply, consumer goods of that kind to notify the Commission, in writing and within a period specified in the notice, if the person wishes the Commission to hold a conference in relation to the proposed issue of the recall notice.

(4) The period specified in the proposed recall notice under paragraph (3)(e):
(a) must be a period of at least 10 days, or such longer period as the Commonwealth Minister specifies in the notice; and
(b) must not commence before the day on which the notice is published.

(5) A proposed recall notice is not a legislative instrument.

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132B Commonwealth Minister to be notified if no person wishes a conference to be held

(1) If no person notifies the Commission in accordance with a proposed ban notice, or a proposed recall notice, that the person wishes the Commission to hold a conference, the Commission must, in writing, notify the Commonwealth Minister of that fact.

(2) A notice under subsection (1) is not a legislative instrument.

132C Notification of conference

(1) If one or more persons notify the Commission in accordance with a proposed ban notice, or a proposed recall notice, that they wish the Commission to hold a conference, the Commission must:

(a) appoint a day, time and place for the holding of the conference; and

(b) give written notice to the Commonwealth Minister, and to each person who so notified the Commission, of that day, time and place.

(2) The day appointed must be at least 5 days, but not more than 14 days, after the end of the period:

(a) for a proposed ban notice—specified under paragraph 132(3)(e); or

(b) for a proposed recall notice—specified under paragraph 132A(3)(e).

(3) A notice under paragraph (1)(b) is not a legislative instrument.

132D Recommendation after conclusion of conference

(1) As soon as is practicable after the conclusion of a conference held under this Subdivision in relation to the proposed imposition of an interim ban or permanent ban, the Commission must:

(a) by written notice given to the Commonwealth Minister, recommend that the Commonwealth Minister:

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(i) impose the ban in the same terms as the draft notice referred to in paragraph 132(3)(c); or

(ii) impose the ban with such modifications to that notice as are specified by the Commission; or

(iii) not impose the ban; and

(b) cause a copy of the notice given under paragraph (a) to be given to each person who was present or represented at the conference.

(2) As soon as is practicable after the conclusion of a conference held under this Subdivision in relation to the proposed issue of a recall notice, the Commission must:

(a) by written notice given to the Commonwealth Minister, recommend that the Commonwealth Minister:

(i) issue the recall notice in the same terms as the draft recall notice referred to in paragraph 132A(3)(c); or

(ii) issue the recall notice with such modifications to that draft recall notice as are specified by the Commission; or

(iii) not issue the recall notice; and

(b) cause a copy of the notice given under paragraph (a) to be given to each person who was present or represented at the conference.

(3) The Commonwealth Minister must:

(a) have regard to a recommendation made under paragraph (1)(a) or (2)(a); and

(b) if he or she decides to act otherwise than in accordance with the recommendation—the Commonwealth Minister must, by written notice published on the internet, set out the reasons for his or her decision.

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Subdivision B—Conference requirements after an interim ban is imposed

132E Opportunity for a conference after an interim ban has been imposed by the Commonwealth Minister

(1) This section applies if:
  (a) an interim ban on consumer goods of a particular kind, or on product related services of a particular kind, is in force; and
  (b) the interim ban was imposed by the Commonwealth Minister; and
  (c) before the ban was imposed, the Commonwealth Minister published a notice under section 132J certifying that the interim ban should be imposed without delay.

(2) The Commonwealth Minister must, by written notice published on the internet, invite any person who supplied, or proposes to supply:
  (a) consumer goods of that kind; or
  (b) product related services of that kind;
to notify the Commission, in writing and within a period specified in the notice, if the person wishes the Commission to hold a conference in relation to the interim ban.

(3) The period specified in the notice under subsection (2):
  (a) must be a period of at least 10 days, or such longer period as the Commonwealth Minister specifies in the notice; and
  (b) must not commence before the day on which the notice is published.

(4) A notice under subsection (2) is not a legislative instrument.

132F Notification of conference

(1) If one or more persons notify the Commission in accordance with a notice published under subsection 132E(2) that they wish the Commission to hold a conference, the Commission must:

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(a) appoint a day, time and place for the holding of the conference; and

(b) give written notice to the Commonwealth Minister, and to each person who so notified the Commission, of that day, time and place.

(2) The day appointed must be at least 5 days, but not more than 14 days, after the end of the period specified in the notice under subsection 132E(2).

(3) A notice under paragraph (1)(b) is not a legislative instrument.

132G Recommendation after conclusion of conference

(1) As soon as is practicable after the conclusion of a conference held under this Subdivision in relation to an interim ban, the Commission must:

(a) by written notice given to the Commonwealth Minister, recommend that the interim ban remain in force, be varied or be revoked; and

(b) cause a copy of the notice to be given to each person who was present or represented at the conference.

(2) The Commonwealth Minister must:

(a) have regard to a recommendation made under paragraph (1)(a); and

(b) if he or she decides to act otherwise than in accordance with the recommendation—the Commonwealth Minister must, by written notice published on the internet, set out the reasons for his or her decision.

Subdivision C—Conduct of conferences

132H Conduct of conferences

(1) At a conference held under Subdivision A or B of this Division:

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(a) the Commission must be represented by a member or members of the Commission who are nominated by the Chairperson; and

(b) each person who notified the Commission in accordance with whichever of the following is applicable:

(i) a proposed ban notice;

(ii) a proposed recall notice;

(iii) a notice under subsection 132E(2);

is entitled to be present or to be represented; and

(c) any other person whose presence at the conference is considered by the Commission to be appropriate is entitled to be present or to be represented; and

(d) the Commonwealth Minister is, or a person or persons nominated in writing by the Commonwealth Minister are, entitled to be present; and

(e) the procedure to be followed must be as determined by the Commission.

(2) The Commission must cause a record of the proceedings at the conference to be kept.

(3) The Commission must, as far as is practicable, ensure that each person who is entitled to be present, or who is representing such a person, at the conference is given a reasonable opportunity at the conference to present his or her case and in particular:

(a) to inspect any documents (other than a document that contains particulars of a secret formula or process) which the Commission proposes to consider for the purpose of making a recommendation after the conclusion of the conference; and

(b) to make submissions in relation to those documents.

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Subdivision D—Miscellaneous

132J Interim ban and recall notice without delay in case of danger to the public

(1) If it appears to the Commonwealth Minister that consumer goods of a particular kind create an imminent risk of death, serious illness or serious injury, he or she may, by written notice published on the internet, certify that:

(a) an interim ban on consumer goods of that kind should be imposed without delay; or

(b) a recall notice for consumer goods of that kind should be issued without delay.

(2) If it appears to the Commonwealth Minister that product related services of a particular kind create an imminent risk of death, serious illness or serious injury, he or she may, by written notice published on the internet, certify that an interim ban on services of that kind should be imposed without delay.

(3) If:

(a) the Commonwealth Minister publishes a notice under subsection (1) or (2); and

(b) action of any kind has been taken under Subdivision A of this Division in relation to the interim ban or recall notice, but no recommendation has been made under section 132D;

the Commonwealth Minister may impose the interim ban, or issue the recall notice, without regard to that action.

(4) A notice under subsection (1) or (2) is not a legislative instrument.

132K Copy of notices under this Division to be given to suppliers

(1) If the Commonwealth Minister:

(a) issues a proposed ban notice; or

(b) issues a proposed recall notice; or

(c) publishes a notice under subsection 132E(2); or

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(d) publishes a notice under subsection 132J(1) or (2);

he or she must cause a copy of the notice to be given to each person who, to the knowledge of the Commonwealth Minister, supplies the consumer goods, or the product related services, to which the notice relates.

(2) The copy must be given:

(a) within 2 days after the publication or issue of the notice; or

(b) if it is not practicable to give the copy within that period—as soon as practicable after the end of that period.

(3) A failure to comply with subsection (1) does not invalidate the notice.

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Division 4—Enforcement

Subdivision A—Inspectors

133 Appointment of inspectors

(1) The Chairperson may, in writing, appoint a member of the staff assisting the Commission as an inspector.

(2) The Chairperson must not appoint a person as an inspector unless the Chairperson is satisfied that the person has suitable qualifications and experience to exercise properly the powers of an inspector.

(3) An inspector must, in exercising powers as an inspector, comply with any directions of the Chairperson.

(4) If a direction under subsection (3) is given in writing, the direction is not a legislative instrument.

133A Identity cards

(1) The Chairperson must issue an identity card to a person appointed as an inspector.

Form of identity card

(2) The identity card must:
(a) contain the information prescribed by the regulations; and
(b) contain a recent photograph of the person.

Offence

(3) A person commits an offence if:
(a) the person has been issued with an identity card under subsection (1); and
(b) the person ceases to be an inspector; and

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(c) the person does not, as soon as practicable after so ceasing, return the identity card to the Chairperson.

Penalty: 1 penalty unit.

(4) An offence against subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Defence: card lost or destroyed

(5) Subsection (3) does not apply if the identity card was lost or destroyed.

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

Inspector must carry card

(6) An inspector issued with an identity card under subsection (1) must carry his or her identity card at all times when exercising powers as an inspector.

Subdivision B—Premises to which the public is given access

133B Power to enter premises to which the public has access—consumer goods

(1) An inspector may enter premises in or from which a person, in trade or commerce, supplies consumer goods, if the public has access to the premises at the time of entry, for the purpose of ascertaining whether:

(a) any of those consumer goods will or may cause injury to any person; or

(b) a reasonably foreseeable use (including a misuse) of those consumer goods will or may cause injury to any person;

and remain on the premises for such a purpose while the public has access to the premises.

(2) While on the premises, the inspector may:

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(a) take photographs of:
(i) any of those consumer goods; or
(ii) equipment used in the manufacturing, processing or storage any of those consumer goods; and
(b) inspect, handle and measure any of those consumer goods; and
(c) purchase any of those consumer goods.

133C Power to enter premises to which the public has access—product related services

(1) An inspector may enter premises in or from which a person, in trade or commerce, supplies product related services, if the public has access to the premises at the time of entry, for the purposes of ascertaining whether:
(a) as a result of any of those product related services being supplied, any consumer goods will or may cause injury to any person; or
(b) a reasonably foreseeable use (including a misuse) of any consumer goods, to which any of those product related services relate, will or may cause injury to any person as a result of those services being supplied;
and remain on the premises for such a purpose while the public has access to the premises.

(2) While on the premises, the inspector may:
(a) take photographs of:
(i) the premises; or
(ii) equipment used to supply any of those product related services; and
(b) inspect, handle and measure such equipment; and
(c) purchase any of those product related services.

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Subdivision C—Disclosure notices relating to the safety of goods or services

133D Power to obtain information etc.

Consumer goods

(1) The Commonwealth Minister or an inspector may give a disclosure notice to a person (the ***notice recipient***) if the person giving the notice has reason to believe:

(a) that the notice recipient is capable of giving information, producing documents or giving evidence in relation to the supply, or possible supply, in trade or commerce, of consumer goods of a particular kind as specified in the notice; and

(b) that:

(i) consumer goods of that kind will or may cause injury to any person; or

(ii) a reasonably foreseeable use (including a misuse) of consumer goods of that kind will or may cause injury to any person.

Product related services

(2) The Commonwealth Minister or an inspector may give a disclosure notice to a person (the ***notice recipient***) if the person giving the notice has reason to believe:

(a) that the notice recipient is capable of giving information, producing documents or giving evidence in relation to the supply, or possible supply, in trade or commerce, of product related services of a particular kind as specified in the notice; and

(b) that:

(i) as a result of services of that kind being supplied, consumer goods of a particular kind will or may cause injury to any person; or

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(ii) a reasonably foreseeable use (including a misuse) of consumer goods of a particular kind, to which such services relate, will or may cause injury to any person as a result of such services being supplied.

Disclosure notice

(3) A ***disclosure notice*** is a written notice requiring the notice recipient:

(a) to give, in writing signed by the notice recipient, any such information to the person specified in the notice:

(i) in the manner specified in the notice; and

(ii) within such reasonable time as is specified in the notice; or

(b) to produce, in accordance with such reasonable requirements as are specified in the notice, any such documents to the person specified in the notice; or

(c) to appear before the person specified in the notice at such reasonable time, and at such place, as is specified in the notice:

(i) to give any such evidence, on oath or affirmation; and

(ii) to produce any such documents.

(4) The person specified in the notice may be:

(a) the Commonwealth Minister; or

(b) an inspector (whether or not that inspector gave the notice).

133E Self-incrimination

(1) A person is not excused from:

(a) giving information or evidence; or

(b) producing a document;

as required by a disclosure notice given to the person on the ground that the information or evidence, or production of the document, might tend to incriminate the person or expose the person to a penalty.

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(2) However, in the case of an individual:

(a) the information or evidence given, or the document produced; and

(b) giving the information or evidence, or producing the document;

are not admissible in evidence against the individual:

(c) in any proceedings instituted by the individual; or

(d) in any criminal proceedings, other than proceedings against the individual for an offence against section 133F or 133G.

133F Compliance with disclosure notices

(1) A person commits an offence if:

(a) the person is given a disclosure notice; and

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

Penalty:

(a) if the person is a body corporate—200 penalty units; or

(b) if the person is not a body corporate—40 penalty units.

(2) Subsection (1) does not apply if the person complies with the disclosure notice to the extent to which the person is capable of complying with the notice.

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

(3) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

133G False or misleading information etc.

A person commits an offence if:

(a) the person gives information, evidence or a document in purported compliance with a disclosure notice; and

(b) the person does so knowing that the information, evidence or document is false or misleading in a material particular.

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Penalty:

(a) if the person is a body corporate—300 penalty units; or

(b) if the person is not a body corporate—60 penalty units or imprisonment for 12 months, or both.

Subdivision D—Court orders relating to the destruction etc. of goods

133H Court orders relating to consumer goods that do not comply with a safety standard etc.

(1) If a court is satisfied that:

(a) a person possesses or has control of consumer goods of a particular kind; and

(b) any of the following apply:

(i) the consumer goods do not comply with a safety standard that is in force for consumer goods of that kind and the cause of that non-compliance cannot be remedied;

(ii) a permanent ban on consumer goods of that kind is in force;

(iii) a recall notice for consumer goods of that kind is in force and a defect or dangerous characteristic of such consumer goods identified in the notice cannot be remedied;

the court may, on the application of an inspector, make an order of a kind referred to in subsection (2).

(2) The court may make an order under subsection (1) authorising one or more inspectors to do the following in accordance with any requirements specified in the order:

(a) to enter the premises of the person that are specified in the order;

(b) to search the premises for consumer goods of a kind specified in the order;

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(c) to seize any such consumer goods that are found at those premises;
(d) to destroy or otherwise dispose of any such consumer goods that are so seized.

(3) Before making an application under subsection (1), the inspector must:
(a) take reasonable steps to discover who has an interest in the consumer goods; and
(b) if it is practicable to do so, notify each person whom the inspector believes to have such an interest of the proposed application.

(4) A person notified under subsection (3) is entitled to be heard in relation to the application.

133J Recovery of reasonable costs of seizing, and destroying or disposing of, consumer goods

(1) If an inspector seizes, and destroys or otherwise disposes of, consumer goods in accordance with an order made under subsection 133H(1):
(a) the person from whom the consumer goods were seized; or
(b) if that person is not entitled to possess the consumer goods—the owner of the consumer goods;
is liable to pay an amount equal to the costs reasonably incurred by the inspector in seizing, and in destroying or disposing of, the consumer goods.

(2) An amount payable by a person under subsection (1):
(a) is a debt due by the person to the Commonwealth; and
(b) may be recovered by action in a court of competent jurisdiction.

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Division 5—Infringement notices

134 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 an infringement notice provision as an alternative to proceedings for an order under section 224 of the Australian Consumer Law.

(2) This Division does not:
  (a) require an infringement notice to be issued to a person for an alleged contravention of an infringement notice provision; or
  (b) affect the liability of a person to proceedings under Chapter 4 or Part 5-2 of the Australian Consumer Law in relation to an alleged contravention of an infringement notice provision if:
    (i) an infringement notice is not issued to the person for the alleged contravention; or
    (ii) an infringement notice issued to a person for the alleged contravention is withdrawn under section 134G; 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.

134A Issuing an infringement notice

(1) If the Commission has reasonable grounds to believe that a person has contravened an infringement notice provision, the Commission may issue an infringement notice to the person.

(2) Each of the following provisions of the Australian Consumer Law is an ***infringement notice provision***:
  (a) a provision of Part 2-2;
  (b) a provision of Part 3-1 (other than subsection 32(1), 35(1) or 36(1), (2) or (3) or section 40 or 43);
  (c) subsection 66(2);
  (d) a provision of Division 2 of Part 3-2 (other than section 85);

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(e) a provision of Division 3 of Part 3-2 (other than subsection 96(2));
(ea) subsection 99B(1), section 99C, subsection 99D(1), section 99E or subsection 99F(2);
(f) subsection 100(1) or (3), 101(3) or (4), 102(2) or 103(2);
(g) subsection 106(1), (2), (3) or (5), 107(1) or (2), 118(1), (2), (3) or (5), 119(1) or (2), 125(4), 127(1) or (2), 128(2) or (6), 131(1), 132(1), 136(1), (2) or (3) or 137(1) or (2);
(h) subsection 221(1) or 222(1).

(3) The Commission must not issue more than one infringement notice to the person for the same alleged contravention of the infringement notice provision.

(4) The infringement notice does not have any effect if the notice:
(a) is issued more than 12 months after the day on which the contravention of the infringement notice provision is alleged to have occurred; or
(b) relates to more than one alleged contravention of an infringement notice provision by the person.

134B Matters to be included in an infringement notice

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
(e) state how the Commission may be contacted; and
(f) give details of the alleged contravention by the person, including:
(i) the date of the alleged contravention; and
(ii) the particular infringement notice provision that was allegedly contravened; and

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(g) state the maximum pecuniary penalty that the court could order the person to pay under section 224 of the Australian Consumer Law for the alleged contravention; and

(h) specify the penalty that is payable in relation to the alleged contravention; and

(i) state that the penalty is payable within the infringement notice compliance period for the notice; and

(j) state that the penalty is payable to the Commission on behalf of the Commonwealth; and

(k) explain how payment of the penalty is to be made; and

(l) explain the effect of sections 134D, 134E, 134F and 134G.

134C Amount of penalty

The penalty to be specified in an infringement notice that is to be issued to a person, in relation to an alleged contravention of a provision of the Australian Consumer Law, must be a penalty equal to the amount worked out using the following table:

Amount of penalty		
Item	**If the infringement notice is for an alleged contravention of one of the following provisions of the Australian Consumer Law ...**	**the amount is ...**
1	a provision of Part 2-2	(a) if the person is a listed corporation—600 penalty units; or (b) if the person is a body corporate other than a listed corporation—60 penalty units; or (c) if the person is not a body corporate—12 penalty units.

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Amount of penalty		
Item	**If the infringement notice is for an alleged contravention of one of the following provisions of the Australian Consumer Law ...**	**the amount is ...**
2	a provision of Part 3-1 (other than subsection 32(1), 35(1), 36(1), (2) or (3), section 40 or 43 or subsection 47(1))	(a) if the person is a listed corporation—600 penalty units; or (b) if the person is a body corporate other than a listed corporation—60 penalty units; or (c) if the person is not a body corporate—12 penalty units.
3	subsection 47(1)	(a) if the person is a body corporate—10 penalty units; or (b) if the person is not a body corporate—2 penalty units.
4	subsection 66(2)	(a) if the person is a body corporate—55 penalty units; or (b) if the person is not a body corporate—11 penalty units.
5	a provision of Division 2 of Part 3-2 (other than section 85)	(a) if the person is a body corporate—60 penalty units; or (b) if the person is not a body corporate—12 penalty units.

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Amount of penalty		
Item	**If the infringement notice is for an alleged contravention of one of the following provisions of the Australian Consumer Law ...**	**the amount is ...**
6	a provision of Division 3 of Part 3-2 (other than subsection 96(2))	(a) if the person is a body corporate—55 penalty units; or (b) if the person is not a body corporate—11 penalty units.
6A	subsection 99B(1), section 99C, subsection 99D(1), section 99E or subsection 99F(2)	(a) if the person is a body corporate—55 penalty units; or (b) if the person is not a body corporate—11 penalty units.
7	subsection 100(1) or (3) or 101(3) or (4)	(a) if the person is a body corporate—20 penalty units; or (b) if the person is not a body corporate—4 penalty units.
8	subsection 102(2) or 103(2)	(a) if the person is a body corporate—60 penalty units; or (b) if the person is not a body corporate—12 penalty units.

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Amount of penalty		
Item	**If the infringement notice is for an alleged contravention of one of the following provisions of the Australian Consumer Law ...**	**the amount is ...**
9	subsection 106(1), (2), (3) or (5), 107(1) or (2), 118(1), (2), (3) or (5), 119(1) or (2)	(a) if the person is a listed corporation—600 penalty units; or (b) if the person is a body corporate other than a listed corporation—60 penalty units; or (c) if the person is not a body corporate—12 penalty units.
10	subsection 125(4)	(a) if the person is a body corporate—30 penalty units; or (b) if the person is not a body corporate—6 penalty units.
11	subsection 127(1) or (2)	(a) if the person is a listed corporation—600 penalty units; or (b) if the person is a body corporate other than a listed corporation—60 penalty units; or (c) if the person is not a body corporate—12 penalty units.
12	subsection 128(2) or (6), 131(1) or 132(1)	(a) if the person is a body corporate—30 penalty units; or (b) if the person is not a body corporate—6 penalty units.

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Amount of penalty		
Item	**If the infringement notice is for an alleged contravention of one of the following provisions of the Australian Consumer Law ...**	**the amount is ...**
13	subsection 136(1), (2) or (3) or 137(1) or (2)	(a) if the person is a listed corporation—600 penalty units; or (b) if the person is a body corporate other than a listed corporation—60 penalty units; or (c) if the person is not a body corporate—12 penalty units.
14	subsection 221(1)	(a) if the person is a body corporate—30 penalty units; or (b) if the person is not a body corporate—6 penalty units.
15	subsection 222(1)	(a) if the person is a body corporate—50 penalty units; or (b) if the person is not a body corporate—10 penalty units.

134D Effect of compliance with an infringement notice

(1) This section applies if:

(a) an infringement notice for an alleged contravention of an infringement notice provision 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

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(c) the infringement notice is not withdrawn under section 134G.

(2) The person is not, merely because of the payment, regarded as:
(a) having contravened the infringement notice provision; or
(b) having been convicted of an offence constituted by the same conduct that constituted the alleged contravention of the infringement notice provision.

(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:
(a) the alleged contravention of the infringement notice provision; or
(b) an offence constituted by the same conduct that constituted the alleged contravention.

134E Effect of failure to comply with an infringement notice

If:
(a) an infringement notice for an alleged contravention of an infringement notice provision 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 134G;

the person is liable to proceedings under Chapter 4 or Part 5-2 of the Australian Consumer Law in relation to the alleged contravention of the infringement notice provision.

134F 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 on which the infringement notice is issued by the Commission.

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(2) The Commission may extend, by notice in writing, the infringement notice compliance period for the 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.

(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.

134G Withdrawal of an infringement notice

Representations to the Commission

(1) The person to whom an infringement notice has been issued for an alleged contravention of an infringement notice provision 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,

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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
  (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 Chapter 4 or Part 5-2 of the Australian Consumer Law may be started or continued against the person in relation to:
    (i) the alleged contravention of the infringement notice provision; or
    (ii) an offence constituted by the same conduct that constituted the alleged contravention.

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 6—Search, seizure and entry

Subdivision A—Powers of inspectors

135 Inspector may enter premises

Consumer goods

(1) If an inspector has reason to believe that:
   (a) consumer goods of a particular kind will or may cause injury to any person; or
   (b) a reasonably foreseeable use (including a misuse) of consumer goods of a particular kind will or may cause injury to any person;

the inspector may, for the purposes of ascertaining the matter referred to in paragraph (a) or (b):
   (c) enter any premises in or from which the inspector has reason to believe that a person supplies consumer goods of that kind in trade or commerce; and
   (d) exercise search-related powers in relation to the premises.

Product related services

(2) If an inspector has reason to believe that:
   (a) as a result of product related services of a particular kind being supplied, consumer goods of a particular kind will or may cause injury to any person; or
   (b) a reasonably foreseeable use (including a misuse) of consumer goods of a particular kind, to which product related services of a particular kind relate, will or may cause injury to any person as a result of such services being supplied;

the inspector may, for the purposes of ascertaining the matter referred to in paragraph (a) or (b):
   (c) enter any premises in or from which the inspector has reason to believe that a person supplies product related services of that kind in trade or commerce; and

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(d) exercise search-related powers in relation to the premises.

Limitation on entry

(3) However, the inspector is not entitled to enter premises under subsection (1) or (2) unless:

(a) the occupier of the premises has consented to the entry and the inspector has shown his or her identity card if required by the occupier; or

(b) the entry is made under a search warrant; or

(c) the entry is made in circumstances in which the exercise of search-related powers is required without delay in order to protect life or public safety.

Note: For requirements relating to the occupier's consent, see section 135H.

135A Search-related powers of inspectors

Search-related powers—consumer goods

(1) The following are the ***search-related powers*** that an inspector may exercise, under subsection 135(1), in relation to premises in or from which the inspector has reason to believe that a person supplies consumer goods of a particular kind:

(a) if entry to the premises is under a search warrant—the power to seize consumer goods of that kind;

(b) the power to inspect, handle and measure consumer goods of that kind;

(c) the power to take samples of consumer goods of that kind;

(d) the power:

(i) to inspect, handle and read any documents relating to consumer goods of that kind; and

(ii) to make copies of, or take extracts from, those documents;

(e) the power:

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(i) to inspect, handle and measure equipment used in the manufacturing, processing or storage of consumer goods of that kind; and

(ii) if entry to the premises is under a search warrant—to seize such equipment;

(f) the power to make any still or moving image or any recording of:

(i) consumer goods of that kind; or

(ii) the premises; or

(iii) any equipment referred to in subparagraph (e)(i).

Search-related powers—product related services

(2) The following are the ***search-related powers*** that an inspector may exercise, under subsection 135(2), in relation to premises in or from which the inspector has reason to believe that a person supplies product related services of a particular kind:

(a) the power:

(i) to inspect, handle and read any documents relating to services of that kind; and

(ii) to make copies of, or take extracts from, those documents;

(b) the power:

(i) to inspect, handle and measure equipment used to supply services of that kind; and

(ii) if entry to the premises is under a search warrant—to seize such equipment;

(c) the power to make any still or moving image or any recording of:

(i) any consumer goods to which product related services of that kind relate; or

(ii) the premises; or

(iii) any equipment referred to in subparagraph (b)(i).

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135B Inspector may ask questions and seek production of documents

Entry with consent etc.

(1) If an inspector enters premises because the occupier of the premises consents to the entry or in the circumstances referred to in paragraph 135(3)(c), the inspector may ask the occupier to:

(a) answer any questions relating to the reasons for the inspector entering the premises that are put by the inspector; and

(b) produce any document relating to the reasons for the inspector entering the premises that is requested by the inspector.

Entry under a search warrant

(2) If an inspector enters premises under a search warrant, the inspector may require any person on the premises to:

(a) answer any questions relating to the reasons for the inspector entering the premises that are put by the inspector; and

(b) produce any document relating to the reasons for the inspector entering the premises that is requested by the inspector.

135C Failure to answer questions or produce documents

(1) A person commits an offence if:

(a) the person is subject to a requirement under subsection 135B(2); and

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

Penalty:

(a) if the person is a body corporate—150 penalty units; or

(b) if the person is not a body corporate—30 penalty units.

(2) A person is not excused from:

(a) answering a question; or

(b) producing a document;

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as required under subsection 135B(2) on the ground that the answer, or production of the document, might tend to incriminate the person or expose the person to a penalty.

(3) However, in the case of an individual:

(a) the answer, or the document produced; and

(b) giving the answer, or producing the document;

are not admissible in evidence against the individual in any criminal proceedings other than:

(c) proceedings for any offence against subsection (1); or

(d) proceedings for an offence based on the answer or document being false or misleading; or

(e) proceedings for an offence based on the obstruction of public officials.

(4) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

135D Persons assisting inspectors

Inspectors may be assisted by other persons

(1) An inspector may, in entering premises under section 135 and in exercising search-related powers in relation to the premises, be assisted by other persons if that assistance is necessary and reasonable.

(2) A person giving such assistance is a ***person assisting*** the inspector.

Powers of a person assisting the inspector

(3) A person assisting the inspector may:

(a) enter the premises; and

(b) exercise search-related powers in relation to the premises, but only in accordance with a direction given to the person by the inspector.

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(4) A power exercised by a person assisting the inspector as mentioned in subsection (3) is taken for all purposes to have been exercised by the inspector.

135E Use of force in executing a search warrant

In executing a search warrant, an inspector executing the warrant may use such force against persons and things as is necessary and reasonable in the circumstances.

135F Announcement before entry under warrant

(1) An inspector must, before entering premises under a search warrant:

(a) announce that he or she is authorised to enter the premises; and

(b) show his or her identity card to the occupier of the premises, or to another person who apparently represents the occupier, if the occupier or other person is present at the premises; and

(c) give any person at the premises an opportunity to allow entry to the premises.

(2) However, an inspector is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required:

(a) to ensure the safety of a person (including the inspector or a person assisting the inspector); or

(b) to ensure that the effective execution of the warrant is not frustrated.

(3) If:

(a) the inspector does not comply with subsection (1) because of subsection (2); and

(b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises;

the inspector must, as soon as practicable after entering the premises, show his or her identity card to the occupier or other person.

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135G Inspector must be in possession of search warrant

If a search warrant is being executed in relation to premises, an inspector executing the warrant must be in possession of:

(a) the warrant issued under section 135Z or a copy of that warrant; or

(b) the form of warrant completed under subsection 136(7), or a copy of that form.

Subdivision B—Obligations of inspectors

135H Consent

(1) An inspector must, before obtaining the consent of an occupier of premises for the purposes of paragraph 135(3)(a), inform the occupier that the occupier may refuse consent.

(2) A consent has no effect unless the consent is voluntary.

(3) If an inspector enters premises because the occupier of the premises consented to the entry, the inspector, and a person assisting the inspector, must leave the premises if the consent ceases to have effect.

135J Details of search warrant etc. must be given to the occupier of the premises

If:

(a) a search warrant is being executed in relation to premises; and

(b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises;

an inspector executing the warrant must, as soon as practicable:

(c) do one of the following:

(i) if the warrant was issued under section 135Z—make a copy of the warrant available to the occupier or other person (which need not include the signature of the judge who issued it);

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(ii) if the warrant was signed under section 136—make a copy of the form of warrant completed under subsection 136(7) available to the occupier or other person; and

(d) inform the occupier or other person of the rights and responsibilities of the occupier or other person under Subdivision C.

Subdivision C—Occupier's etc. rights and responsibilities

135K Occupier etc. entitled to observe execution of search warrant

(1) If:

(a) a search warrant is being executed in relation to premises; and

(b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises;

the occupier or other person is entitled to observe the execution of the warrant.

(2) The right to observe the execution of the search warrant ceases if the occupier or other person impedes that execution.

(3) This section does not prevent the execution of the search warrant in 2 or more areas of the premises at the same time.

135L Occupier etc. to provide inspector etc. with facilities and assistance

(1) A person commits an offence if:

(a) the person is:

(i) the occupier of premises to which a search warrant relates; or

(ii) another person who apparently represents the occupier of those premises; and

(b) the person fails to provide:

(i) an inspector executing the warrant; and

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(ii) a person assisting the inspector;

with all reasonable facilities and assistance for the effective exercise of their powers.

Penalty:

(a) if the person is a body corporate—600 penalty units; or

(b) if the person is not a body corporate—120 penalty units or imprisonment for 2 years, or both.

(2) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

135M Receipts for seized consumer goods and equipment

(1) If consumer goods are seized under a search warrant, an inspector must provide a receipt for the goods.

(2) If equipment is seized under a search warrant, an inspector must provide a receipt for the equipment.

(3) One receipt may cover:

(a) consumer goods and equipment that have been so seized; and

(b) 2 or more kinds of consumer goods or equipment that have been so seized.

135N Return of seized consumer goods and equipment

(1) Subject to any order under section 135P, if an inspector seizes consumer goods or equipment under a search warrant, the inspector must take reasonable steps to return the consumer goods or equipment if:

(a) the reason for the seizure no longer exists; or

(b) the period of 60 days after the seizure ends;

whichever happens first.

(2) Subsection (1) does not apply if:

(a) the consumer goods are, or the equipment is, forfeited or forfeitable to the Commonwealth; or

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(b) the consumer goods are, or the equipment is, the subject of a dispute as to ownership.

(3) If, apart from this subsection, the inspector would be required to take reasonable steps to return consumer goods or equipment under subsection (1) because of paragraph (b) of that subsection, the inspector is not required to do so if:

(a) the return of the consumer goods or equipment could cause an imminent risk of death, serious illness or serious injury; or

(b) the inspector is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of a State or a Territory) to retain, destroy, dispose of or otherwise deal with the consumer goods or equipment.

(4) Consumer goods that are required to be returned under this section must be returned to the person from whom they were seized (or to the owner if that person is not entitled to possess them).

(5) Equipment that is required to be returned under this section must be returned to the person from whom it was seized (or to the owner if that person is not entitled to possess it).

135P Judge may permit consumer goods or equipment to be retained

(1) An inspector who has seized consumer goods or equipment under a search warrant may, before the end of the period referred to in paragraph 135N(1)(b), apply to a judge of the Federal Court for an order that the inspector may retain the consumer goods or equipment for a further period of up to 60 days.

(2) If:

(a) an application to a judge is made under subsection (1); and

(b) the judge is satisfied that it is necessary in all the circumstances for the inspector to continue to retain the consumer goods or equipment;

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the judge may order that the inspector may retain the consumer goods or equipment for a further period (not exceeding 60 days) specified in the order.

(3) Before making the application under subsection (1), the inspector must:

(a) take reasonable steps to discover who has an interest in the retention of the consumer goods or equipment; and

(b) if it is practicable to do so, notify each person whom the inspector believes to have such an interest of the proposed application.

Subdivision D—Provisions relating to seizure

135Q Recovery of reasonable costs of seizing consumer goods or equipment

(1) If an inspector seizes consumer goods or equipment under a search warrant:

(a) the person from whom the consumer goods were seized, or the equipment was seized; or

(b) if that person is not entitled to possess the consumer goods or equipment—the owner of the consumer goods or equipment;

is liable to pay an amount equal to the costs reasonably incurred by the inspector in seizing the consumer goods or equipment.

(2) An amount payable by a person under subsection (1):

(a) is a debt due by the person to the Commonwealth; and

(b) may be recovered by action in a court of competent jurisdiction.

135R Destruction or disposal of seized consumer goods or equipment

(1) If:

(a) an inspector seizes consumer goods, or equipment used to supply product-related services, under a search warrant; and

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(b) apart from this section, the inspector is required to return the consumer goods or equipment to a person; and

(c) either:

(i) the inspector cannot, despite making reasonable efforts, locate the person; or

(ii) the person has refused to take possession of the consumer goods or equipment;

a court may, on the application of the inspector, make an order authorising the inspector to destroy or otherwise dispose of the consumer goods or equipment.

(2) If subparagraph (1)(c)(ii) applies, the inspector must, before making an application under subsection (1), inform the person referred to in that subparagraph that the inspector proposes to make an application under that subsection.

(3) If:

(a) an order is made under subsection (1); and

(b) subparagraph (1)(c)(ii) applies;

the person referred to in that subparagraph is liable to pay an amount equal to the costs reasonably incurred by the inspector in destroying or disposing of the consumer goods or equipment.

(4) An amount payable by a person under subsection (3):

(a) is a debt due by the person to the Commonwealth; and

(b) may be recovered by action in a court of competent jurisdiction.

Subdivision E—Embargo notices

135S Embargo notices

(1) An inspector who enters premises under a search warrant may give an ***embargo notice*** to the occupier of the premises.

(2) The inspector may give the notice to the occupier of the premises:

(a) by causing a copy of the notice to be served on the occupier; or

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(b) if the occupier cannot be located after all reasonable steps have been taken to do so—by:

(i) causing a copy of the notice to be served on a person on the premises who is reasonably believed to be in regular contact with the occupier; or

(ii) causing a copy of the notice to be affixed to the premises, or to a thing on the premises, in a prominent position.

(3) The embargo notice must:

(a) be in writing; and

(b) specify the consumer goods, or product related services, to which the notice relates; and

(c) if the notice relates to consumer goods—state that the specified consumer goods must not be:

(i) supplied in or from the premises; or

(ii) transferred, moved, altered, destroyed or otherwise interfered with;

during the period specified in the notice; and

(d) if the notice relates to product related services—state that the specified product related services must not be supplied in or from the premises during the period specified in the notice; and

(e) explain the effect of section 135V or 135W.

(4) Despite anything in any other law, a contract for a supply of consumer goods or product related services that is prohibited by an embargo notice is void.

(5) If consumer goods are supplied in contravention of an embargo notice:

(a) the supplier must immediately return or refund to the person who acquired the goods any consideration (or the value of any consideration) that that person gave:

(i) under an agreement for the supply; or

(ii) under a related contract or instrument; and

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(b) if the goods have been removed from the premises in which they were subject to the embargo notice—the person who acquired the goods must:

(i) return the goods to the premises; or

(ii) notify the supplier of the place where the supplier may collect the goods; and

(c) if subparagraph (b)(ii) applies—the supplier must collect the goods from the place notified to the supplier, and return them to the premises.

135T Embargo period for embargo notices

Embargo period

(1) Subject to this section, the embargo period for an embargo notice must not be longer than:

(a) if the inspector giving the notice secures consumer goods under section 135V or secures equipment under section 135W—24 hours; or

(b) otherwise—28 days.

Extensions of embargo period

(2) An inspector may, before the embargo period ends, apply to a judge of the Federal Court for an extension of the period.

(3) If an inspector intends to make an application under subsection (2), the inspector must, before making the application, notify the occupier of the premises to which the embargo notice relates of that intention.

(4) The occupier of the premises is entitled to be heard in relation to the application.

(5) The judge may extend the embargo period for a specified period if the judge is satisfied that the extension is necessary in all the circumstances.

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135U Multiple embargo notices for the same consumer goods or product related services

An inspector must not give an embargo notice in relation to consumer goods, or product related services, of a particular kind if:

(a) an embargo notice (the ***earlier embargo notice***) has already been given in relation to consumer goods, or product related services, of that kind; and

(b) the embargo period for the earlier embargo notice did not end at least 5 days ago.

135V Power of inspectors to secure consumer goods

If:

(a) an embargo notice relates to consumer goods; and

(b) the inspector who gives the notice believes on reasonable grounds that it is necessary to secure the consumer goods in order to ensure that the notice is complied with;

the inspector may, during the embargo period for the embargo notice, do anything that the inspector thinks is necessary to secure those consumer goods (whether by locking them up, placing a guard or otherwise).

135W Power of inspectors to secure equipment used to supply product related services

If:

(a) an embargo notice relates to product related services; and

(b) the inspector who gives the notice believes on reasonable grounds that it is necessary to secure equipment used to supply the services in order to ensure that the notice is complied with;

the inspector may, during the embargo period for the embargo notice, do anything that the inspector thinks is necessary to secure that equipment (whether by locking it up, placing a guard or otherwise).

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135X Consent to supply etc. embargoed consumer goods etc.

(1) If an embargo notice relating to consumer goods has been given, the owner of the goods or another person who has an interest in the goods may, in writing, request consent to do any of the following:
  (a) to supply the goods;
  (b) to transfer, move, alter, destroy or otherwise interfere with the goods.

(2) If an embargo notice relating to product related services has been given, the following persons may, in writing, request consent to supply the services:
  (a) the person who would, but for the embargo notice, supply the services;
  (b) another person whose interests would be affected if the services were not supplied.

(3) If a request for consent is made under subsection (1) or (2), the requested consent may be given, in writing, by the Commonwealth Minister, the Chairperson or any inspector.

(4) A consent given under subsection (3) is not a legislative instrument.

135Y Compliance with embargo notices

(1) A person commits an offence if:
  (a) the person knows that an embargo notice has been given; and
  (b) the person, contrary to the embargo notice, does an act or omits to do an act.

  Penalty:
  (a) if the person is a body corporate—200 penalty units; or
  (b) if the person is not a body corporate—40 penalty units.

(2) A person commits an offence if:
  (a) the person knows that an embargo notice has been given; and
  (b) the person causes another person:

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(i) to do an act that is contrary to the embargo notice; or
(ii) contrary to the embargo notice, to omit to do an act.

Penalty:
(a) if the person is a body corporate—200 penalty units; or
(b) if the person is not a body corporate—40 penalty units.

(3) Subsection (1) or (2) does not apply in relation to:
(a) an act done in accordance with a consent given under section 135X; or
(b) if the embargo notice relates to consumer goods—an act done for the purpose of protecting or preserving the consumer goods; or
(c) if the embargo notice relates to product related services—an act done for the purpose of protecting or preserving equipment used to supply the services.

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

(4) Strict liability applies to paragraphs (1)(b) and (2)(b).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Subdivision F—Issue of search warrants

135Z Issue of search warrants

Application for warrant

(1) An inspector may apply to a judge of the Federal Court for a warrant in relation to premises.

Issue of warrant

(2) The judge may issue the warrant if:
(a) an affidavit has been given to the judge setting out the grounds on which the issue of the warrant is being sought; and

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(b) the applicant, or some other person, has given to the judge such further information (if any) as the judge requires concerning the grounds on which the issue of the warrant is being sought; and

(c) the judge is satisfied that there are reasonable grounds for issuing the warrant.

Content of warrant

(3) The warrant must:

(a) specify the purpose for which the warrant is issued; and

(b) describe the premises to which the warrant relates; and

(c) state that the warrant is issued under this section; and

(d) name one or more inspectors; and

(e) authorise the inspector or inspectors so named:

(i) to enter the premises; and

(ii) to exercise search-related powers in relation to the premises; and

(f) state whether the entry is authorised to be made at any time of the day or night, or during specified hours of the day or night; and

(g) specify a day (which must not be more than 7 days after the day the warrant is issued) on which the warrant ceases to be in force.

136 Search warrants by telephone, fax etc.

Application for warrant

(1) An inspector may apply to a judge of the Federal Court by telephone, fax or other electronic means for a warrant under section 135Z in relation to premises if the inspector believes on reasonable grounds that the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

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Voice communication

(2) The judge may require communication by voice to the extent that it is practicable in the circumstances.

Affidavit

(3) Before applying for the warrant, the inspector must prepare an affidavit of the kind mentioned in paragraph 135Z(2)(a).

(4) If it is necessary to do so, the inspector may apply for the warrant before the affidavit has been sworn.

Signing of warrant

(5) If the judge is satisfied:
   (a) after considering the terms of the affidavit; and
   (b) after receiving such further information (if any) as the judge requires concerning the grounds on which the issue of the warrant is being sought;

that there are reasonable grounds for issuing the warrant, the judge may complete and sign the same warrant that the judge would issue under section 135Z if the application had been made under that section.

Notification

(6) If the judge completes and signs the warrant, the judge must inform the inspector, by telephone, fax or other electronic means, of:
   (a) the terms of the warrant; and
   (b) the day on which and the time at which the warrant was signed.

Form of warrant

(7) The inspector must then complete a form of warrant in the same terms as the warrant completed and signed by the judge, stating on the form the name of the judge and the day on which and the time at which the warrant was signed.

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Completed form of warrant to be given to judge

(8) The inspector must also, not later than the day after the day on which the warrant ceased to be in force or the day of execution of the warrant, whichever is the earlier, send to the judge:
  (a) the form of warrant completed by the inspector; and
  (b) the affidavit referred to in subsection (3), which must have been duly sworn.

Attachment

(9) The judge must attach to the documents provided under subsection (8) the warrant signed by the judge.

Authority of warrant

(10) A form of warrant duly completed under subsection (7) is authority for the same powers as are authorised by the warrant signed by the judge.

(11) If:
  (a) it is material, in any proceedings, for a court to be satisfied that an exercise of a power was authorised by this section; and
  (b) the warrant signed by the judge authorising the exercise of the power is not produced in evidence;

the court must assume, unless the contrary is proved, that the exercise of the power was not authorised by such a warrant.

136A Offence relating to warrants by telephone, fax etc.

An inspector commits an offence if the inspector:
  (a) states in a document that purports to be a form of warrant under section 136 the name of a judge unless that judge signed the warrant; or
  (b) states on a form of warrant under that section a matter that, to the inspector's knowledge, departs in a material particular

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from the terms of the warrant signed by the judge under that section; or

(c) purports to execute, or presents to another person, a document that purports to be a form of warrant under that section that the inspector knows:
  (i) has not been approved by a judge under that section; or
  (ii) departs in a material particular from the terms of a warrant signed by a judge under that section; or

(d) gives to a judge a form of warrant under that section that is not the form of warrant that the inspector purported to execute.

Penalty: 120 penalty units or imprisonment for 2 years, or both.

Subdivision G—Miscellaneous

136B Powers of judges

Powers conferred personally

(1) A power conferred on a judge by this Division is conferred on the judge:
  (a) in a personal capacity; and
  (b) not as a court or a member of a court.

Powers need not be accepted

(2) The judge need not accept the power conferred.

Protection and immunity

(3) A judge exercising a power conferred by this Division has the same protection and immunity as if he or she were exercising the power:
  (a) as the court of which the judge is a member; or
  (b) as a member of the court of which the judge is a member.

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Division 7—Remedies

137 Limit on occupational liability

State or Territory professional standards law limits liability

(1) A professional standards law of a State or Territory applies to limit occupational liability relating to an action for a contravention of section 18 of the Australian Consumer Law in the same way as it limits occupational liability arising under a law of the State or Territory.

(2) However, the professional standards law applies for that purpose:
  (a) only in relation to a scheme that was prescribed by the regulations at the time (the ***contravention time***) of the contravention; and
  (b) as if the scheme were in force under that law at the contravention time, in the form the scheme would have been in if:
    (i) the scheme had not been amended or revoked under that law since the scheme was first prescribed; and
    (ii) any additions, omissions, substitutions and other modifications prescribed by the regulations at the contravention time had been made to the scheme.

Operation of choice of law rules

(3) For the purposes of working out whether a professional standards law of a particular State or Territory applies under subsection (1) in relation to a particular contravention of section 18 of the Australian Consumer Law, choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort.

Professional standards laws

(4) A ***professional standards law*** is a law that provides for the limitation of occupational liability by reference to schemes for

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limiting that liability that were formulated and published in accordance with that law.

Occupational liability

(5) ***Occupational liability*** is civil liability arising directly or vicariously from anything done or omitted by a person who:
  (a) does or omits to do the thing in the course of his or her profession, trade or occupation; and
  (b) is a member of a body:
    (i) that represents the interests of persons who have the same profession, trade or occupation; and
    (ii) whose membership is limited principally to such persons.

137A Contributory acts or omissions to reduce compensation in defective goods actions

(1) If the loss or damage to which a defective goods action under section 138 or 139 of the Australian Consumer Law relates was caused by both:
  (a) an act or omission of:
    (i) the individual who suffers the injuries referred to in that section; or
    (ii) a person for whom that individual is responsible; and
  (b) a safety defect of the goods to which the action relates;

the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in the responsibility for the loss or damage.

(2) If the loss or damage to which a defective goods action under section 140 or 141 of the Australian Consumer Law relates was caused by both:
  (a) an act or omission of:
    (i) the person who suffered the loss or damage; or
    (ii) another person for whom that person is responsible; and
  (b) a safety defect of the goods to which the action relates;

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the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to the person's share in the responsibility for the loss or damage.

137B Reduction of the amount of loss or damage if the claimant fails to take reasonable care

If:

(a) a person (the ***claimant***) makes a claim under subsection 236(1) of the Australian Consumer Law in relation to economic loss, or damage to property, suffered by the claimant because of the conduct of another person; and

(b) the conduct contravened section 18 of the Australian Consumer Law; and

(c) the claimant suffered the loss or damage as result:

(i) partly of the claimant's failure to take reasonable care; and

(ii) partly of the conduct of the other person; and

(d) the other person did not intend to cause the loss or damage and did not fraudulently cause the loss or damage;

the amount of the loss or damage that the claimant may recover under subsection 236(1) of the Australian Consumer Law is to be reduced to the extent to which a court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

137C Limits on recovery of amounts for death or personal injury

(1) A person is not entitled to recover an amount of loss or damage by action under subsection 236(1) of the Australian Consumer Law to the extent to which:

(a) the action would be based on the conduct contravening a provision of Part 2-1 or 3-1 of the Australian Consumer Law; and

(b) the loss or damage is, or results from, death or personal injury; and

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(c) the death or personal injury does not result from smoking or other use of tobacco products.

(2) Divisions 2 and 7 of Part VIB of this Act apply to an action under subsection 236(1) of the Australian Consumer Law for loss or damage a person suffers to the extent to which:

(a) the action is based on the conduct contravening a provision of Part 2-1 or 3-1 of the Australian Consumer Law; and

(b) the loss or damage is, or results from, death or personal injury; and

(c) the death or personal injury results from smoking or other use of tobacco products;

as if the action were a proceeding to which Part VIB of this Act applied.

Note 1: Division 2 of Part VIB of this Act deals with the limitation periods that apply for claims for damages or compensation for death or personal injury and, to the extent to which that Division is applied to the action by this subsection, it overrides subsection 236(2) of the Australian Consumer Law.

Note 2: Division 7 of Part VIB of this Act deals with structured settlements for claims for damages or compensation for death or personal injury.

137D Compensation orders etc. arising out of unconscionable conduct or unfair contract term

In determining whether to make an order under subsection 237(1) or 238(1) of the Australian Consumer Law in relation to a contravention of a provision of Part 2-2 or 2-3 of the Australian Consumer Law, the court may have regard to the conduct of the parties to the proceeding referred to in that subsection since the contravention occurred.

137E Limits on compensation orders etc. for death or personal injury

(1) A court must not make an order under subsection 237(1) or 238(1) of the Australian Consumer Law to compensate a person for loss or

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damage the person suffers because of the conduct of another person to the extent to which:

(a) the action would be based on the conduct contravening a provision of Part 2-1 or 3-1 of the Australian Consumer Law; and

(b) the loss or damage is, or results from, death or personal injury; and

(c) the death or personal injury does not result from smoking or other use of tobacco products.

(2) Division 2 of Part VIB of this Act applies to an application for an order under subsection 237(1) of the Australian Consumer Law to compensate a person for loss or damage the person suffers because of the conduct of another person to the extent to which:

(a) the action would be based on the conduct contravening a provision of Part 2-1 or 3-1 of the Australian Consumer Law; and

(b) the loss or damage is, or results from, death or personal injury; and

(c) the death or personal injury results from smoking or other use of tobacco products;

as if the proceeding in relation to the application were a proceeding to which Part VIB of this Act applies and as if the making of the application were the commencement of the proceeding.

Note: Division 2 of Part VIB of this Act deals with the limitation periods that apply for claims for damages or compensation for death or personal injury and, to the extent to which that Division is applied to the application by this subsection, it overrides subsection 237(3) of the Australian Consumer Law.

(3) Division 7 of Part VIB of this Act applies to a proceeding in which an order under subsection 237(1) or 238(1) of the Australian Consumer Law to compensate a person for loss or damage the person suffers because of the conduct of another person is made, to the extent to which:

(a) the action would be based on the conduct contravening a provision of Part 2-1 or Part 3-1 of the Australian Consumer Law; and

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(b) the loss or damage is, or results from, death or personal injury; and

(c) the death or personal injury results from smoking or other use of tobacco products;

as if the proceeding were a proceeding to which Part VIB of this Act applied.

Note: Division 7 of Part VIB of this Act deals with structured settlements for claims for damages or compensation for death or personal injury.

137F Court may make orders for the purpose of preserving money or other property held by a person

(1) A court may, on the application of the Commonwealth Minister or the Commission, make an order or orders mentioned in subsection (3) if:

(a) proceedings of a kind referred to in subsection (2) have been taken against a person, or proceedings of a kind referred to in paragraph (2)(d) may be taken against a person; and

(b) the court is satisfied that it is necessary or desirable to make the order or orders for the purpose of preserving money or other property held by, or on behalf of, the person if the person is liable, or may become liable, under the Australian Consumer Law:

(i) to pay money by way of a fine, damages, compensation, refund or otherwise; or

(ii) to transfer, sell or refund other property; and

(c) the court is satisfied that the making of such an order or orders will not unduly prejudice the rights and interests of any other person.

Kinds of proceedings taken against the person

(2) For the purposes of paragraph (1)(a), the kinds of proceedings taken against the person are:

(a) proceedings against the person for an offence against a provision of Chapter 4 of the Australian Consumer Law; or

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(b) an application under section 232 of the Australian Consumer Law for an injunction against the person in relation to a contravention of a provision of Chapter 2, 3 or 4 of the Australian Consumer Law; or

(c) an action under subsection 236(1) of the Australian Consumer Law against the person in relation to a contravention of a provision of Part 2-1 or 2-3, or of Chapter 3, of the Australian Consumer Law; or

(d) an application for an order under subsection 237(1) or 239(1) of the Australian Consumer Law against the person in relation to a contravention of a provision of Chapter 2, 3 or 4 of the Australian Consumer Law.

Kinds of orders that may be made

(3) The court may make the following orders under subsection (1) of this section in a relation to money or other property held by, or on behalf of, a person (the ***respondent***):

(a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the respondent, or to an associate of the respondent, from making a payment, in total or partial discharge of the debt:

(i) to the respondent; or

(ii) to another person at the direction or request of the respondent;

(b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the respondent, or on behalf of an associate of the respondent:

(i) from paying all or any of the money to the respondent, or to another person at the direction or request of the respondent; or

(ii) from transferring the other property to the respondent, or to another person at the direction or request of the respondent, or otherwise parting with possession of that property;

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(c) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of money of the respondent, or of an associate of the respondent, to a place outside the State or Territory in which the money is held;

(d) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the respondent, or of an associate of the respondent, to a place outside the State or Territory in which that property is located;

(e) if the respondent is a natural person—an order appointing a receiver or trustee of the property, or of part of the property, of the respondent with such powers as are specified in the order.

Operation of order

(4) If the court makes such an order, the order operates:

(a) for the period specified in the order (which must not be longer than 30 days if the application for the order was an ex parte application); or

(b) if proceedings in relation to which the order is made are concluded before the end of that period—until the conclusion of those proceedings.

Other

(5) This section:

(a) has effect subject to the *Bankruptcy Act 1966*; and

(b) does not affect any other powers of the court.

137G Compliance with orders made under section 137F

(1) A person commits an offence if:

(a) an order made under section 137F applies to the person; and

(b) the person contravenes, or refuses or fails to comply with, the order.

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Penalty:

(a) if the person is a body corporate—900 penalty units; or

(b) if the person is not a body corporate—180 penalty units.

(2) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

137H Findings and admissions of fact in proceedings to be evidence

(1) In:

(a) an action against a person under subsection 236(1) of the Australian Consumer Law; or

(b) proceedings for an order against a person under subsection 237(1), 239(1), 243A(1) or 243B(1) of the Australian Consumer Law;

a finding of any fact made by a court, or an admission of any fact made by the person, is prima facie evidence of that fact if the finding or admission is made in proceedings to which subsection (3) of this section applies.

(2) The finding or admission may be proved by production of:

(a) in any case—a document under the seal of the court from which the finding or admission appears; or

(b) in the case of an admission—a document from which the admission appears that is filed in the court.

(3) This subsection applies to proceedings under section 228, 232, 246, 247 or 248 of the Australian Consumer Law, or for an offence against a provision of Chapter 4 of the Australian Consumer Law, in which the person has been found:

(a) to have contravened a provision of Chapter 2, 3 or 4 of the Australian Consumer Law; or

(b) to have attempted to contravene such a provision; or

(c) to have aided, abetted, counselled or procured a person to contravene such a provision; or

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(d) to have induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or

(e) to have been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) to have conspired with others to contravene such a provision.

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Division 8—Jurisdictional matters

138 Conferring jurisdiction on the Federal Court

(1) Jurisdiction is conferred on the Federal Court in relation to any matter arising under this Part or the Australian Consumer Law in respect of which a civil proceeding has been instituted under this Part or the Australian Consumer Law.

(2) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:
  (a) the jurisdiction of the Federal Circuit and Family Court of Australia (Division 2) under section 138A; and
  (b) the jurisdiction of the several courts of the States and Territories under section 138B; and
  (c) the jurisdiction of the High Court under section 75 of the Constitution.

138A Conferring jurisdiction on the Federal Circuit and Family Court of Australia (Division 2)

(1) Subject to this section, jurisdiction is conferred on the Federal Circuit and Family Court of Australia (Division 2) in relation to any matter arising under this Part or the Australian Consumer Law in respect of which a civil proceeding is instituted by a person other than the Commonwealth Minister.

(2) If proceedings under Part 3-5, or section 236, of the Australian Consumer Law are instituted in, or transferred to, the Federal Circuit and Family Court of Australia (Division 2), the Court does not have jurisdiction to award an amount for loss or damage that exceeds:
  (a) $750,000; or
  (b) if another amount is specified in the regulations—that other amount.

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Note: For transfers from the Federal Court to the Federal Circuit and Family Court of Australia (Division 2): see section 32AB of the *Federal Court of Australia Act 1976*.

138B Conferring jurisdiction on State and Territory Courts

(1) Jurisdiction is conferred on the several courts of the States and Territories in relation to any matter arising under this Part or the Australian Consumer Law in respect of which a civil proceeding is instituted by a person other than the Commonwealth Minister or the Commission.

(3) The jurisdiction conferred by subsection (1) on the several courts of the States is conferred within the limits of their several jurisdictions, whether those limits are as to locality, subject matter or otherwise.

(4) The jurisdiction conferred by subsection (1) on the several courts of the Territories is conferred to the extent that the Constitution permits.

(5) This section is not to be taken to enable an inferior court of a State or a Territory to grant a remedy other than a remedy of a kind that the court is able to grant under the law of that State or Territory.

138C Transfer of matters by the Federal Court

(1) Subject to subsection (2), if:

(a) a civil proceeding instituted by a person (other than the Commonwealth Minister or the Commission) is pending in the Federal Court; and

(b) a matter for determination in the proceeding arises under this Part or the Australian Consumer Law;

the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the matter, and any other matter for determination in the proceeding, to a court of a State or a Territory.

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(2) The Federal Court must not transfer a matter to another court under subsection (1) unless:

(a) the other court has power to grant the remedies sought before the Federal Court in the matter; and

(b) it appears to the Federal Court that:

(i) the matter arises out of, or is related to, a proceeding that is pending in the other court; or

(ii) it is otherwise in the interests of justice that the matter be determined by the other court.

(4) If the Federal Court transfers a matter to another court under subsection (1):

(a) further proceedings in the matter must be as directed by the other court; and

(b) the judgment of the other court in the matter is enforceable throughout Australia and the external Territories as if it were a judgment of the Federal Court.

138D Transfer of matters by a State or Territory court

(1) This section applies if:

(a) a proceeding is pending in a court (other than the Supreme Court) of a State or a Territory; and

(b) a matter for determination in the proceeding arises under this Part or the Australian Consumer Law, other than under Chapter 4 of the Australian Consumer Law.

(2) The court must, if directed to do so by the Federal Court, transfer to the Federal Court:

(a) the matter; and

(b) such other matters for determination in the proceeding, the determination of which would (apart from any law of a State or of the Northern Territory relating to cross-vesting of jurisdiction) be within the jurisdiction of the Federal Court, as the Federal Court determines.

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(3) Subject to subsection (4), the court may, on the application of a party to the proceeding or of its own motion, transfer the matter to a court (other than the Supreme Court) of another State or Territory.

(4) The court (the ***first court***) must not transfer a matter to another court under subsection (3) unless:

(a) the other court has power to grant the remedies sought before the first court in the matter; and

(b) it appears to the first court that:

(i) the matter arises out of, or is related to, a proceeding that is pending in the other court; or

(ii) it is otherwise in the interests of justice that the matter be determined by the other court.

(5) If the court transfers a matter to another court under subsection (3), further proceedings in the matter must be as directed by the other court.

138E Transfer of proceedings to the Federal Circuit and Family Court of Australia (Division 1)

(1) If:

(a) a civil proceeding is pending in the Federal Court; and

(b) a matter for determination in the proceeding arises under this Part or the Australian Consumer Law;

the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the proceeding to the Federal Circuit and Family Court of Australia (Division 1).

(2) Subject to subsection (3), if a proceeding is transferred to the Federal Circuit and Family Court of Australia (Division 1) under subsection (1):

(a) the Court has jurisdiction to hear and determine the proceeding; and

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(b) the Court also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether because of paragraph (a) or otherwise):
  (i) that are associated with matters arising in the proceeding; or
  (ii) that, apart from subsection 32(1) of the *Federal Court of Australia Act 1976*, the Federal Court would have had jurisdiction to hear and determine in the proceeding; and

(c) the Federal Circuit and Family Court of Australia (Division 1) may, in and in relation to the proceeding:
  (i) grant such remedies; and
  (ii) make orders of such kinds; and
  (iii) issue, and direct the issue of, writs of such kinds;
  as the Federal Court could have granted, made, issued or directed the issue of, in and in relation to the proceeding; and

(d) remedies, orders and writs granted, made or issued by the Federal Circuit and Family Court of Australia (Division 1) in and in relation to the proceeding have effect, and may be enforced by that Court, as if they had been granted, made or issued by the Federal Court; and

(e) appeals lie from judgments of the Federal Circuit and Family Court of Australia (Division 1) given in and in relation to the proceeding as if the judgments were judgments of the Federal Court constituted by a single Judge of that Court, and do not otherwise lie; and

(f) subject to paragraphs (a) to (e) of this subsection, this Act, the regulations, the *Federal Court of Australia Act 1976*, the Rules of Court made under that Act, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:
  (i) a reference to the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to the Federal Circuit and Family Court of Australia (Division 1); and
  (ii) a reference to a Judge of the Federal Court (other than in the expression ***the Court or a Judge***) included a

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reference to a Judge of the Federal Circuit and Family Court of Australia (Division 1); and

(iii) a reference to the expression ***the Court or a Judge*** when used in relation to the Federal Court included a reference to a Judge of the Federal Circuit and Family Court of Australia (Division 1) sitting in Chambers; and

(iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Federal Circuit and Family Court of Australia (Division 1); and

(v) any other necessary changes were made.

(3) If any difficulty arises in the application of paragraphs (2)(c), (d) and (f) in or in relation to a particular proceeding, the Federal Circuit and Family Court of Australia (Division 1) may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.

(4) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Act to the Federal Circuit and Family Court of Australia (Division 1).

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Division 9—Miscellaneous

139 Intervention by the Commission

(1) The Commission may, with the leave of a court and subject to any conditions imposed by the court, intervene in any proceeding instituted under this Part or the Australian Consumer Law.

(2) If the Commission intervenes in a proceeding, the Commission is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

139A Terms excluding consumer guarantees from supplies of recreational services

(1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the Australian Consumer Law only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law; or

(b) the exercise of a right conferred by such a provision; or

(c) any liability of the person for a failure to comply with a guarantee that applies under that Subdivision to the supply.

(2) ***Recreational services*** are services that consist of participation in:

(a) a sporting activity or a similar leisure time pursuit; or

(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

(3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:

(a) death; or

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(b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or

(c) the contraction, aggravation or acceleration of a disease of an individual; or

(d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:

(i) that is or may be harmful or disadvantageous to the individual or community; or

(ii) that may result in harm or disadvantage to the individual or community.

(4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.

(5) The supplier's conduct is ***reckless conduct*** if the supplier:

(a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and

(b) engages in the conduct despite the risk and without adequate justification.

139B Conduct of directors, employees or agents of bodies corporate

(1) If, in a proceeding under this Part or the Australian Consumer Law in respect of conduct that is engaged in by a body corporate and to which this Part or the Australian Consumer Law applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show:

(a) that a director, employee or agent of the body corporate engaged in that conduct within the scope of the actual or apparent authority of the director, employee or agent; and

(b) that the director, employee or agent had that state of mind.

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(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent; or

(b) by any other person:

(i) at the direction of a director, employee or agent of the body corporate; or

(ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;

if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

139C Conduct of employees or agents of persons other than bodies corporate

(1) If, in a proceeding under this Part or the Australian Consumer Law in respect of conduct that is engaged in by a person (the ***principal***) other than a body corporate and to which this Part or the Australian Consumer Law applies, it is necessary to establish the state of mind of the principal, it is sufficient to show:

(a) that an employee or agent of the principal engaged in that conduct within the scope of the actual or apparent authority of the employee or agent; and

(b) the employee or agent had that state of mind.

(2) Any conduct engaged in on behalf of a person (the ***principal***) other than a body corporate:

(a) by an employee or agent of the principal within the scope of the actual or apparent authority of the employee or agent; or

(b) by any other person:

(i) at the direction of an employee or agent of the principal; or

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(ii) with the consent or agreement (whether express or implied) of such an employee or agent;

if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the principal.

(3) If:

(a) a person other than a body corporate is convicted of an offence; and

(b) subsection (1) or (2) applied in relation to the conviction on the basis that the person was the principal mentioned in that subsection; and

(c) the person would not have been convicted of the offence if that subsection had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

139D Enforcement and recovery of certain fines

(1) If a person defaults in paying a fine that has been imposed on the person for an offence against a provision of Chapter 4 of the Australian Consumer Law or section 137G of this Act, a court may:

(a) exercise any power that the court has apart from this section in relation to the enforcement and recovery of the fine; or

(b) make an order (the ***enforcement order***), on the application of the Commonwealth Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the court.

(2) If:

(a) the court makes an enforcement order; and

(b) the person gives security for the payment of the fine;

the court must cancel the enforcement order.

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(3) If the court makes an enforcement order, the court may, at any time before the enforcement order is executed:
  (a) allow the person a specified time in which to pay the fine; or
  (b) allow the person to pay the fine by specified instalments.

(4) If the court allows the person a specified time in which to pay the fine:
  (a) the enforcement order must not be executed unless the person fails to pay the fine within that time; and
  (b) if the person pays the fine within that time—the enforcement order is taken to have been discharged.

(5) If the court allows the person to pay the fine by specified instalments:
  (a) the enforcement order must not be executed unless the person fails to pay such an instalment at or before the time when it becomes payable; and
  (b) if the person pays all those instalments—the enforcement order is taken to have been discharged.

(6) The term of a sentence of imprisonment imposed by an order under a law of a State or a Territory applied by section 15A of the *Crimes Act 1914* (including an order described in subsection 15A(1AA) of that Act) in respect of a fine is to be calculated at the rate of one day's imprisonment for each $25 of the amount of the fine that is from time to time unpaid.

139DA Application of section 229 of the Australian Consumer Law to a person other than a body corporate

If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:
  (a) convicted of an offence (the ***relevant offence***) against subsection 229(1) of the Australian Consumer Law; or
  (b) convicted of an offence (the ***relevant offence***) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection 229(1) of the Australian Consumer Law;

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the relevant offence is taken to be punishable on conviction by a fine not exceeding $550.

139E Cessation of enforcement orders etc.

(1) Subject to this section, an enforcement order in relation to a fine ceases to have effect:
  (a) on payment of the fine; or
  (b) if the fine is not paid—on full compliance with the enforcement order.

(2) Subject to this section, if a person is required under one or more enforcement orders to serve periods of imprisonment, those periods must be served consecutively.

(3) If:
  (a) a person would, but for this subsection, be required under one or more enforcement orders that relate to 3 or more fines to serve periods of imprisonment that in aggregate are longer than 3 years; and
  (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions:
    (i) that occurred within a period of 2 years; and
    (ii) that appear to a court to have been of the same nature or of a substantially similar nature;

  the court must, by order, declare that the enforcement order or orders cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment.

(4) If subsection (3) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the court must make an order under that subsection in relation to only one of those periods.

(5) The order under subsection (4) must relate to the period which would give the person the maximum benefit under subsection (3).

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(6) For the purposes of subsection (4), the court may vary or revoke an order made under subsection (3).

139F Compensation for acquisition of property

(1) If the operation of this Part (including Schedule 2 as applied by this Part) would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

139G Regulations

(1) The Governor-General may make regulations prescribing matters:
  (a) required or permitted by Schedule 2 to be prescribed; or
  (b) necessary or convenient to be prescribed for carrying out or giving effect to that Schedule.

(2) Before the Governor-General makes a regulation for the purposes of paragraph 25(n) of Schedule 2 prescribing a kind of term of a contract, or a kind of effect that such a term has, the Commonwealth Minister must take into consideration:
  (a) the detriment that a term of that kind would cause to consumers; and
  (aa) the detriment that a term of that kind would cause to persons who carry on a business and employ fewer than 100 persons; and

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(b) the impact on business generally of prescribing that kind of term or effect; and

(c) the public interest.

(2A) Before the Governor-General makes a regulation prescribing a law for the purposes of subsection 28(4) of Schedule 2:

(a) the Commonwealth Minister must be satisfied that the law provides enforceable protections for persons who carry on a business and employ fewer than 100 persons that are equivalent to the protections provided by Part 2-3, together with Parts 5-1 and 5-2, of Schedule 2; and

(b) the Commonwealth Minister must take into consideration:

(i) any detriment to businesses of that kind resulting from prescribing the law; and

(ii) the impact on business generally resulting from prescribing the law; and

(iii) the public interest.

(3) Before the Governor-General makes a regulation under subsection (1) for the purposes of paragraph 65(1)(a) of Schedule 2 in relation to supplies of a particular kind, the Commonwealth Minister must be satisfied that:

(a) the laws of the Commonwealth; and/or

(b) the laws of the States and Territories;

adequately provide for consumer rights in relation to supplies of that kind.

(4) The regulations may, either unconditionally or subject to such conditions as are specified in the regulations, exempt from the application of Schedule 2 or of specified provisions of Schedule 2:

(a) conduct engaged in by a specified organisation or body that performs functions in relation to the marketing of primary products; or

(b) any of the following:

(i) a specified contract or proposed contract made;

(ii) contracts included in a specified class of contracts made;

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(iii) specified conduct entered into;

pursuant to or for the purposes of a specified agreement, arrangement or understanding between the Government of Australia and the Government of a foreign country; or

(c) prescribed conduct engaged in in the course of a business carried on by the Commonwealth or by a prescribed authority of the Commonwealth.

(5) Strict compliance with a form of application or notice prescribed for the purposes of Schedule 2 is not, and is taken never to have been, required and substantial compliance is, and is taken always to have been, sufficient.

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Part XIAA—Application of the Australian Consumer Law as a law of a State or Territory

140 Definitions

In this Part:

application law means:

(a) a law of a participating jurisdiction that applies the applied Australian Consumer Law, either with or without modifications, as a law of the participating jurisdiction; or

(b) any regulations or other legislative instrument made under a law described in paragraph (a); or

(c) the applied Australian Consumer Law, applying as a law of the participating jurisdiction, either with or without modifications.

applied Australian Consumer Law means (according to the context):

(a) the text described in section 140B; or

(b) that text, applying as a law of a participating jurisdiction, either with or without modifications.

apply, in relation to the applied Australian Consumer Law, means apply the applied Australian Consumer Law by reference:

(a) as in force from time to time; or

(b) as in force at a particular time.

Commonwealth entity means:

(a) an authority of the Commonwealth; or

(b) an officer of the Commonwealth.

imposes a duty has the meaning given by section 140G.

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modifications includes additions, omissions and substitutions.

officer, in relation to the Commonwealth, includes the following:

(a) a Minister;

(b) a person who holds:

(i) an office established by or under an Act; or

(ii) an appointment made under an Act; or

(iii) an appointment made by the Governor-General or a Minister but not under an Act;

(c) a person who is a member or officer of an authority of the Commonwealth;

(d) a person who is:

(i) in the service or employment of the Commonwealth, or of an authority of the Commonwealth; or

(ii) employed or engaged under an Act.

participating jurisdiction means a participating State or participating Territory.

participating State means a State that is a party to the Intergovernmental Agreement for the Australian Consumer Law and applies the applied Australian Consumer Law as a law of the State, either with or without modifications.

participating Territory means a Territory that is a party to the Intergovernmental Agreement for the Australian Consumer Law and applies the applied Australian Consumer Law as a law of the Territory, either with or without modifications.

Territory means the Australian Capital Territory or the Northern Territory.

140A Object of this Part

The object of this Part is to facilitate the application of the Australian Consumer Law by participating States and participating Territories.

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140B The applied Australian Consumer Law

The applied Australian Consumer Law consists of:

(a) Schedule 2; and

(b) the regulations made under section 139G of this Act.

140C Federal Court may exercise jurisdiction under application laws of Territories

The Federal Court may exercise jurisdiction (whether original or appellate) conferred on that Court by an application law of a Territory with respect to matters arising under the applied Australian Consumer Law.

140D Exercise of jurisdiction under cross-vesting provisions

This Part does not affect the operation of any other law of the Commonwealth, or any law of a State or Territory, relating to cross-vesting of jurisdiction.

140E Commonwealth consent to conferral of functions etc. on Commonwealth entities

(1) An application law may confer functions or powers, or impose duties, on a Commonwealth entity for the purposes of the applied Australian Consumer Law.

Note: Section 140G sets out when such a law imposes a duty on a Commonwealth entity.

(2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by an application 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 Commonwealth entity; or

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

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(3) The Commonwealth entity cannot perform a duty or function, or exercise a power, under an application 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.

140F How duty is imposed

Application

(1) This section applies if an application law purports to impose a duty on a Commonwealth entity.

Note: Section 140G sets out when such a law imposes a duty on a Commonwealth entity.

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:

(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 entity.

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 140E 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.

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(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 entity.

(6) Subsections (1) to (5) do not limit section 140E.

140G When an application law imposes a duty

For the purposes of this Part, an application law ***imposes a duty*** on a Commonwealth entity if:
  (a) the law confers a function or power on the entity; and
  (b) the circumstances in which the function or power is conferred give rise to an obligation on the entity to perform the function or to exercise the power.

140H Application laws may operate concurrently with this Act

This Act is not intended to exclude the operation of any application law, to the extent that the application law is capable of operating concurrently with this Act.

140J No doubling-up of liabilities

(1) If:
  (a) an act or omission is an offence against this Act and is also an offence against an application law; and
  (b) the offender has been punished for the offence under the application law;

the offender is not liable to be punished for the offence against this Act.

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(2) If a person has been ordered to pay a pecuniary penalty under an application law, the person is not liable to a pecuniary penalty under this Act in respect of the same conduct.

140K References in instruments to the Australian Consumer Law

(1) A reference in any instrument to the Australian Consumer Law is a reference to:

(a) the Australian Consumer Law as applied under Division 2 of Part XI; and

(b) the applied Australian Consumer Laws of any or all of the participating jurisdictions.

(2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

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Part XIA—The Competition Code

150A Definitions

In this Part, unless the contrary intention appears:

application law means:

(a) a law of a participating jurisdiction that applies the Competition Code, either with or without modifications, as a law of the participating jurisdiction; or

(b) any regulations or other legislative instrument made under a law described in paragraph (a); or

(c) the Competition Code, applying as a law of the participating jurisdiction, either with or without modifications.

apply, in relation to the Competition Code, means apply the Competition Code by reference:

(a) as in force from time to time; or

(b) as in force at a particular time.

Commonwealth entity means:

(a) an authority of the Commonwealth; or

(b) an officer of the Commonwealth.

Competition Code means (according to the context):

(a) the text described in section 150C; or

(b) that text, applying as a law of a participating jurisdiction, either with or without modifications.

modifications includes additions, omissions and substitutions.

officer, in relation to the Commonwealth, includes the following:

(a) a Minister;

(b) a person who holds:

(i) an office established by or under an Act;

(ii) an appointment made under an Act;

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(iii) an appointment made by the Governor-General or a Minister but not under an Act;

(c) a person who is a member or officer of an authority of the Commonwealth;

(d) a person who is in the service or employment of the Commonwealth, or of an authority of the Commonwealth, or is employed or engaged under an Act.

participating jurisdiction means a participating State or Territory.

participating State means a State that is a party to the Conduct Code Agreement and applies the Competition Code as a law of the State, either with or without modifications.

participating Territory means a Territory that is a party to the Conduct Code Agreement and applies the Competition Code as a law of the Territory, either with or without modifications.

Schedule version of Part IV means the text that is set out in Part 1 of Schedule 1 to this Act.

Territory means the Australian Capital Territory or the Northern Territory.

150B Objects of this Part

The objects of this Part are:

(a) to facilitate the application of the Competition Code by participating Territories; and

(b) to facilitate the application of the Competition Code by participating States.

150C The Competition Code

(1) The Competition Code consists of:

(a) the Schedule version of Part IV;

(b) the remaining provisions of this Act (except sections 2A, 5, 6 and 172), so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV;

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(c) the regulations under this Act, so far as they relate to any provision covered by paragraph (a) or (b).

(2) For the purpose of forming part of the Competition Code, the provisions referred to in paragraphs (1)(b) and (c) are to be modified as necessary to fit in with the Schedule version of Part IV. In particular:

(a) references to corporations are to include references to persons who are not corporations; and

(b) paragraphs 51ABB(1)(d) to (f) and 51ABC(2)(b) are to be omitted.

150D Federal Court may exercise jurisdiction under application laws of Territories

The Federal Court may exercise jurisdiction (whether original or appellate) conferred on that Court by an application law of a Territory with respect to matters arising under the Competition Code.

150E Exercise of jurisdiction under cross-vesting provisions

This Part does not affect the operation of any other law of the Commonwealth, or any law of a State or Territory, relating to cross-vesting of jurisdiction.

150F Commonwealth consent to conferral of functions etc. on Commonwealth entities

(1) An application law may confer functions or powers, or impose duties, on a Commonwealth entity for the purposes of the Competition Code.

Note: Section 150FB sets out when such a law imposes a duty on a Commonwealth entity.

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

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

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

(3) The Commonwealth entity cannot perform a duty or function, or exercise a power, under an application 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.

150FA How duty is imposed

Application

(1) This section applies if an application law purports to impose a duty on a Commonwealth entity.

Note: Section 150FB sets out when such a law imposes a duty on a Commonwealth entity.

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:

(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 entity.

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 150F to the imposition of the duty by that law).

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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 entity.

(5A) To avoid doubt, neither this Act (nor any other law of the Commonwealth) imposes a duty on the Commonwealth entity to the extent to which imposing such a duty would:
  (a) contravene any constitutional doctrine restricting the duties that may be imposed on a Commonwealth entity; or
  (b) otherwise exceed the legislative power of the Commonwealth.

(6) Subsections (1) to (5) do not limit section 150F.

150FAA Imposing a duty under State or Territory law

(1) This section:
  (a) applies only for the purposes of the application of the provisions of the Competition Code or another law of the Commonwealth (with or without modification) as a law of a participating State or participating Territory by a provision of an application law; and

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(b) does not apply for those purposes if the application law otherwise provides.

(2) If the application law purports to impose a duty on a Commonwealth entity to do a particular thing, the duty is taken to be imposed by the application law to the extent to which imposing the duty:

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

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

(3) To avoid doubt, the application law does not impose the duty on the Commonwealth entity to the extent to which imposing the duty would:

(a) contravene any constitutional doctrine restricting the duties that may be imposed on a Commonwealth entity; or

(b) otherwise exceed the legislative powers of the State or Territory.

(4) If imposing on the Commonwealth entity the duty to do that thing would:

(a) contravene any constitutional doctrine restricting the duties that may be imposed on a Commonwealth entity; or

(b) otherwise exceed the legislative powers of both the State or Territory and the Commonwealth;

the application law is taken instead to confer on the Commonwealth entity a power to do that thing at the discretion of the Commonwealth entity.

150FB When an application law imposes a duty

For the purposes of sections 150F and 150FA, an application law ***imposes a duty*** on a Commonwealth entity if:

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

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

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150G Application laws may operate concurrently with this Act

This Act is not intended to exclude the operation of any application law, to the extent that the application law is capable of operating concurrently with this Act.

150H No doubling-up of liabilities

(1) If:

(a) an act or omission is an offence against this Act and is also an offence against an application law; and

(b) the offender has been punished for the offence under the application law;

the offender is not liable to be punished for the offence against this Act.

(2) If a person has been ordered to pay a pecuniary penalty under an application law, the person is not liable to a pecuniary penalty under this Act in respect of the same conduct.

150I References in instruments to the Competition Code

(1) A reference in any instrument to the Competition Code is a reference to the Competition Codes of any or all of the participating jurisdictions.

(2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

150J Authorisations etc. under this Act may relate also to Competition Code

The validity of an authorisation, notification, determination or any other thing given or done for the purposes of this Act is not affected only because it was given or done also for the purposes of the Competition Code.

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150K Gazettal of jurisdictions that excessively modify the Code

(1) If the Minister is satisfied that the laws of a participating jurisdiction have made significant modifications to the Competition Code in its application to persons within the legislative competence of the participating jurisdiction, the Minister may publish a notice in the *Gazette* stating that the Minister is so satisfied.

(2) The Minister may, by further notice in the *Gazette*, revoke a notice published under subsection (1).

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Chapter 7—Further provisions relating to particular industries etc.

Part XIB—The Telecommunications Industry: Anti-competitive conduct and record-keeping rules

Division 1—Introduction

151AA Simplified outline

The following is a simplified outline of this Part:

- This Part sets up a special regime for regulating anti-competitive conduct in the telecommunications industry. The regime applies in addition to Part IV.
- The Part sets out the circumstances in which carriers and carriage service providers are said to ***engage in anti-competitive conduct***.
- A carrier or carriage service provider must not engage in anti-competitive conduct. This rule is called the ***competition rule***.
- The Commission may issue a notice stating that a specified carrier or carriage service provider has engaged, or is engaging, in anti-competitive conduct. The notice is called a ***Part A competition notice***.
- Proceedings for the enforcement of the competition rule (other than proceedings for injunctive relief) must not be instituted unless the alleged conduct is of a kind dealt with in a Part A

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competition notice that was in force at the time when the alleged conduct occurred.

- The Commission may issue a notice stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule. The notice is called a ***Part B competition notice***.
- A Part B competition notice is prima facie evidence of the matters in the notice.
- The Commission may make an order exempting specified conduct from the scope of the definition of ***anti-competitive conduct***. The order is called an ***exemption order***.
- The Commission may make record-keeping rules that apply to carriers and carriage service providers.
- Carriers and carriage service providers may be directed by the Commission to make certain reports available. The direction is called a ***disclosure direction***.

151AB Definitions

In this Part, unless the contrary intention appears:

anti-competitive conduct has the meaning given by section 151AJ.

carriage service has the same meaning as in the *Telecommunications Act 1997*.

carriage service provider has the same meaning as in the *Telecommunications Act 1997*.

carrier has the same meaning as in the *Telecommunications Act 1997*.

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carrier licence has the same meaning as in the *Telecommunications Act 1997*.

competition notice means:

(a) a Part A competition notice; or

(b) a Part B competition notice.

competition rule means the rule set out in section 151AK.

content service has the same meaning as in the *Telecommunications Act 1997*.

data processing device means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.

disclosure direction means a direction under subsection 151BUB(2), 151BUC(2), 151BUDB(2) or 151BUDC(2).

eligible partnership has the same meaning as in the *Telecommunications Act 1997*.

exemption order means an order under section 151BA.

facility has the same meaning as in the *Telecommunications Act 1997*.

Federal Court means the Federal Court of Australia.

listed carriage service has the same meaning as in the *Telecommunications Act 1997*.

Ministerially-directed report has the meaning given by section 151BUAA.

NBN corporation has the same meaning as in the *National Broadband Network Companies Act 2011*.

Part A competition notice means a notice issued under subsection 151AKA(1) or (2).

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Part B competition notice means a notice issued under subsection 151AL(1).

person includes a partnership.

Note: Section 151CH sets out additional rules about partnerships.

record-keeping rule means a rule under section 151BU.

service provider rule has the same meaning as in the *Telecommunications Act 1997*.

telecommunications market has the meaning given by section 151AF.

151AC Extension to external Territories

(1) This Part, and the other provisions of this Act so far as they relate to this Part, extend to each eligible Territory (within the meaning of the *Telecommunications Act 1997*).

(2) The operation of this Part, and the other provisions of this Act so far as they relate to this Part, in relation to Norfolk Island is not affected by the amendments made by Division 1 of Part 1 of Schedule 5 to the *Territories Legislation Amendment Act 2016*.

151AD Continuity of partnerships

For the purposes of this Part, a change in the composition of a partnership does not affect the continuity of the partnership.

151AE Additional operation of Part

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

(2) This Part has, by force of this subsection, the effect it would have if:

(a) any references in this Part to a carrier were, by express provision, confined to a carrier that is a corporation; and

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(b) any references in this Part to a carriage service provider were, by express provision, confined to a carriage service provider that is a corporation.

(3) In addition to the effect that this Part has as provided by subsection (2), this Part has, by force of this subsection, the effect it would have if subsections 151AJ(2) and (3) 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:

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

(b) trade or commerce among the States; or

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

(d) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth.

151AF Telecommunications market

For the purposes of this Part, a ***telecommunications market*** is a market in which any of the following goods or services are supplied or acquired:

(a) carriage services;

(b) goods or services for use in connection with a carriage service;

(c) access to facilities;

(d) content services.

Note: ***Market*** has a meaning affected by section 4E.

151AG When a body corporate is related to a partnership

For the purposes of this Part, if:

(a) a carrier or a carriage service provider is a partnership; and

(b) a body corporate is related to a partner in the partnership;

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the body corporate is taken to be ***related to*** the carrier or carriage service provider, as the case requires.

151AH Degree of power in a telecommunications market

(1) For the purposes of this Part, if:
  (a) a body corporate is related to:
    (i) a carrier; or
    (ii) a carriage service provider; and
  (b) the body corporate has a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a ***substantial degree of power*** in that market.

(2) For the purposes of this Part, if:
  (a) 2 or more bodies corporate are related to the one:
    (i) carrier; or
    (ii) carriage service provider; and
  (b) those bodies corporate together have a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a ***substantial degree of power*** in that market.

(3) For the purposes of this Part, if:
  (a) a body corporate is related to:
    (i) a carrier; or
    (ii) a carriage service provider; and
  (b) the body corporate and the carrier or carriage service provider, as the case may be, together have a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a ***substantial degree of power*** in that market.

(4) For the purposes of this Part, if:
  (a) 2 or more bodies corporate are related to:
    (i) a carrier; or

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(ii) a carriage service provider; and

(b) those bodies corporate and that carrier or carriage service provider, as the case may be, together have a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a ***substantial degree of power*** in that market.

(5) In determining, for the purposes of this Part, the degree of power that a person has, or that persons have, in a telecommunications market, regard must be had to the extent to which the conduct of the person or any of those persons in that market is constrained by the conduct of:

(a) competitors, or potential competitors, of the person or of any of those persons in that market; or

(b) persons to whom or from whom the person or any of those persons supplies or acquires goods or services in that market.

(5A) In determining, for the purposes of this Part, the degree of power that a person has, or that persons have, in a telecommunications market, regard may be had to the power that the person has, or that the persons have, in that market that results from:

(a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the person has or may have, or that the persons have or may have, with another party or parties; and

(b) any covenants, or proposed covenants, that the person is or would be, or that the persons are or would be, bound by or entitled to the benefit of.

(6) Subsections (5) and (5A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this Part, the degree of power that a person has, or that persons have, in a telecommunications market.

(6A) For the purposes of this Part, without limiting the matters to which the Court may have regard for the purpose of determining whether a person has a substantial degree of power in a telecommunications

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market, a person may have a substantial degree of power in a telecommunications market even though:

(a) the person does not substantially control the market; or

(b) the person does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the person in that market; or

(ii) persons to whom or from whom the person supplies or acquires goods or services in that market.

(6B) To avoid doubt, for the purposes of this Part, more than 1 person may have a substantial degree of power in a telecommunications market.

(7) In this Part:

(a) a reference to ***power*** is a reference to market power; and

(b) a reference to power in relation to, or to conduct in, a telecommunications 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.

151AI Interpretation of Part IV, IVA or VII not affected by this Part

In determining the meaning of a provision of Part IV, IVA or VII, the provisions of this Part are to be ignored.

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Division 2—Anti-competitive conduct

151AJ Anti-competitive conduct

(1) This section sets out the 2 circumstances in which:
  (a) a carrier; or
  (b) a carriage service provider;
is said to ***engage in anti-competitive conduct*** for the purposes of this Part.

(2) A carrier or carriage service provider ***engages in anti-competitive conduct*** if the carrier or carriage service provider:
  (a) has a substantial degree of power in a telecommunications market; and
  (b) either:
    (i) takes advantage of that power in that or any other market with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or
    (ii) takes advantage of that power in that or any other market, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.

(2A) Without limiting the matters to which regard may be had for the purpose of determining whether a carrier or carriage service provider has engaged in anti-competitive conduct as defined in subsection (2), regard may be had to:
  (a) any conduct of the carrier or carriage service provider that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the carrier or carriage service provider of supplying such goods or services; and
  (b) the reasons for that conduct.

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(3) A carrier or carriage service provider ***engages in anti-competitive conduct*** if the carrier or carriage service provider:

(a) engages in conduct in contravention of section 45AJ, 45AK, 45, 47 or 48; and

(b) the conduct relates to a telecommunications market.

(4) For the purposes of the application of subsection (3) to a carrier, or a carriage service provider, that is not a corporation, in determining whether conduct of the carrier or provider is in contravention of section 45AJ, 45AK, 45, 47 or 48, the following assumptions are to be made:

(a) the assumption that each reference to a corporation in:

(i) those sections; and

(ii) sections 45AL and 45AM;

included a reference to a carrier, or a carriage service provider, that is not a corporation;

(b) the assumption that subsections 45(8) and 47(12) and section 45AN had not been enacted.

(5) For the purposes of the application of subsection (3) to a carrier, or a carriage service provider, that is not a corporation or a partnership, in determining whether conduct of the carrier or provider is in contravention of section 45, 47 or 48, the following assumptions are to be made:

(a) the assumption that subparagraphs 45(3)(a)(ii) and (b)(ii) had not been enacted;

(b) the assumption that the expression "or a body corporate related to the corporation" were omitted from paragraph 45(4)(b);

(e) the assumption that the expression "or from a competitor of a body corporate related to the corporation" were omitted from each of the following provisions:

(i) paragraphs 47(2)(d) and (e);

(ii) paragraphs 47(3)(d) and (e);

(iii) subparagraphs 47(8)(a)(i) and (ii);

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(f) the assumption that the expression "not being a body corporate related to the corporation" were omitted from subsections 47(6) and (7) and paragraphs 47(8)(c) and 47(9)(d);

(g) the assumption that the expression "or from a competitor of a body corporate related to the corporation" were omitted from paragraphs 47(9)(a) and (b);

(h) the assumption that the expression ", or by a body corporate related to the corporation," were omitted from paragraph 47(10)(b);

(i) the assumption that the expression "or any body corporate related to that corporation" were omitted from subparagraph 47(13)(b)(i);

(j) the assumption that the expression "or any body corporate related to either of those corporations" were omitted from paragraph 47(13)(c) and the expression "any body corporate related to the last-mentioned corporation" were substituted;

(k) the assumption that the expression "where the second person mentioned in that paragraph is a corporation" were omitted from subsection 96(2).

(6) A person may be taken to have engaged in anti-competitive conduct even if the conduct involves the exercise, or proposed exercise, of an existing legal or equitable right (whether under a contract or otherwise).

(7) Despite anything in this section, a carrier or carriage service provider does not engage in anti-competitive conduct if that conduct does not constitute a contravention of section 45AJ, 45AK, 45, 47 or 48:

(a) because an authorisation is in force; or

(b) because of the operation of subsection 45AL(1) or 45(8A) or section 93; or

(c) because of the operation of subsection 45(9); or

(e) because of the operation of section 45AM.

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(8) A carrier or carriage service provider does not engage in anti-competitive conduct if that conduct occurred before 1 July 1997.

(9) Despite anything in this section, a person does not engage in anti-competitive conduct if, under section 577BA of the *Telecommunications Act 1997*, the conduct is authorised for the purposes of subsection 51(1) of this Act.

(10) Despite anything in this section, a person does not engage in anti-competitive conduct if, under section 151DA, the conduct is authorised for the purposes of subsection 51(1).

151AK The competition rule

(1) A carrier or carriage service provider must not engage in anti-competitive conduct.

(2) For the purposes of this Part, the rule set out in subsection (1) is to be known as the ***competition rule***.

Note: For enforcement of the competition rule, see Division 7.

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Division 3—Competition notices and exemption orders

Subdivision A—Competition notices

151AKA Part A competition notices

Particular anti-competitive conduct

(1) The Commission may issue a written notice stating that a specified carrier or carriage service provider has engaged, or is engaging, in a specified instance of anti-competitive conduct.

Kind of anti-competitive conduct

(2) The Commission may issue a written notice stating that a specified carrier or carriage service provider has engaged, or is engaging, in at least one instance of anti-competitive conduct of a kind described in the notice.

Part A competition notice

(3) A notice under subsection (1) or (2) is to be known as a ***Part A competition notice***.

Part A competition notices under subsection (2)

(4) For the purposes of this Part, a kind of anti-competitive conduct described in a Part A competition notice under subsection (2) is taken to be conduct of a kind dealt with in the notice.

(5) To avoid doubt, a Part A competition notice under subsection (2) is not required to specify any instance of anti-competitive conduct.

(6) In deciding how to describe a kind of anti-competitive conduct in a Part A competition notice under subsection (2), the Commission may have regard to:

(a) whether the carrier or carriage service provider concerned could, by varying its conduct, continue to engage in

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anti-competitive conduct and avoid proceedings against it under one or more provisions of Division 7; and

(b) any other matters that the Commission thinks are relevant.

Threshold for issuing Part A competition notices

(7) The Commission may issue a Part A competition notice under subsection (1) that specifies an instance of anti-competitive conduct if the Commission has reason to believe that the carrier or carriage service provider concerned has engaged, or is engaging, in that instance of anti-competitive conduct.

(8) The Commission may issue a Part A competition notice under subsection (2) that describes a kind of anti-competitive conduct if the Commission has reason to believe that the carrier or carriage service provider concerned has engaged, or is engaging, in at least one instance of anti-competitive conduct of that kind.

Procedural fairness

(9) The Commission is not required to observe any requirements of procedural fairness in relation to the issue of a Part A competition notice.

Note: For the effect of a Part A competition notice, see subsections 151BY(3), 151CB(3), 151CC(3) and 151CE(5).

151AL Part B competition notices

(1) The Commission may issue a written notice:

(a) stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule; and

(b) setting out particulars of that contravention.

(2) A notice under subsection (1) is to be known as a ***Part B competition notice***.

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Threshold for issuing Part B competition notices

(3) The Commission may issue a Part B competition notice relating to a particular contravention if the Commission has reason to believe that the carrier or carriage service provider concerned has committed, or is committing, the contravention.

Notice may be issued after proceedings have been instituted

(4) To avoid doubt, a Part B competition notice may be issued even if any relevant proceedings under Division 7 have been instituted.

Note: For the effect of a Part B competition notice, see subsection 151AN(1).

151AM Competition notice to be given to carrier or carriage service provider

As soon as practicable after issuing a competition notice, the Commission must give a copy of the competition notice to the carrier or carriage service provider concerned.

151AN Evidentiary effect of competition notice

(1) In any proceedings under, or arising out of, this Part, a Part B competition notice is prima facie evidence of the matters in the notice.

(2) A document purporting to be a competition notice must, unless the contrary is established, be taken to be a competition notice and to have been properly issued.

(3) The Commission may certify that a document is a copy of a competition notice.

(4) This section applies to the certified copy as if it were the original.

151AO Duration of Part A competition notice

(1) A Part A competition notice comes into force:

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(a) when it is issued; or

(b) if the notice specifies a later time—at that later time;

and, unless sooner revoked, remains in force until the end of the period specified in the notice. The period must not be longer than 12 months.

(2) If a Part A competition notice expires, this Part does not prevent the Commission from issuing a fresh Part A competition notice under section 151AKA that relates to the same matter as the expired notice.

151AOA Variation of competition notice

(1) If a competition notice is in force in relation to a carrier or carriage service provider, the Commission may vary the competition notice so long as the variation is of a minor nature.

(2) If a Part A competition notice is in force in relation to a carrier or carriage service provider, the Commission may vary the competition notice by omitting the time at which the notice is expressed to come into force and substituting a later time.

(3) If a competition notice is varied, the Commission must give the carrier or carriage service provider concerned a written notice setting out the terms of the variation.

151AOB Revocation of competition notice

(1) The Commission may revoke a competition notice.

(2) If a competition notice is revoked, the Commission must give the carrier or carriage service provider concerned a written notice stating that the notice has been revoked.

151AP Guidelines

(1) In deciding whether to issue a competition notice, the Commission must have regard to:

(a) any guidelines in force under subsection (2); and

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(b) such other matters as the Commission considers relevant.

(2) The Commission must, by written instrument, formulate guidelines for the purposes of subsection (1).

(3) Guidelines under subsection (2) must address the appropriateness of the Commission issuing a competition notice as opposed to the Commission taking other action under this Act.

(4) The Commission must take all reasonable steps to ensure that guidelines under subsection (2) comply with subsection (3) within 12 months after the commencement of this subsection.

151AQ Commission to act expeditiously

(1) If the Commission has reason to suspect that a carrier or carriage service provider has contravened, or is contravening, the competition rule, the Commission must act expeditiously in deciding whether to issue a competition notice in relation to that contravention.

(2) A failure to comply with subsection (1) does not affect the validity of a competition notice.

151AQA Stay of proceedings relating to competition notices

(1) Paragraphs 15(1)(a) and (b) and 15A(1)(a) and (b) of the *Administrative Decisions (Judicial Review) Act 1977* do not apply to a decision to issue a competition notice.

(2) If a person applies to the Federal Court under subsection 39B(1) of the *Judiciary Act 1903* for a writ or injunction in relation to a decision to issue a competition notice, the Court must not make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the application. However, this subsection does not apply to an order under subsection (3).

(3) If:

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(a) either:

(i) a person applies to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* for review of a decision to issue a competition notice; or

(ii) a person applies to the Federal Court under subsection 39B(1) of the *Judiciary Act 1903* for a writ or injunction in relation to a decision to issue a competition notice; and

(b) any relevant proceedings have been instituted under Division 7 of this Part;

the Federal Court or a Judge of the Federal Court may, by order, on such conditions as the Court or the Judge thinks fit, stay those proceedings.

(4) If:

(a) a person applies to the Federal Circuit and Family Court of Australia (Division 2) under the *Administrative Decisions (Judicial Review) Act 1977* for review of a decision to issue a competition notice; and

(b) any relevant proceedings have been instituted under Division 7 of this Part;

the Federal Circuit and Family Court of Australia (Division 2) or a Judge of the Court may, by order, on such conditions as the Court or the Judge thinks fit, stay those proceedings.

151AQB Advisory notices

Issue of advisory notice

(1) The Commission may give a carrier or carriage service provider a written notice (an ***advisory notice***) advising the carrier or provider of the action it should take, or consider taking, in order to ensure that it does not engage, or continue to engage, in anti-competitive conduct.

(2) The Commission does not have a duty to consider whether to issue an advisory notice in relation to:

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(a) a particular instance of anti-competitive conduct; or

(b) a particular kind of anti-competitive conduct;

before it issues a Part A competition notice in relation to that instance or kind of conduct.

Nature of advisory notice

(3) An advisory notice is an instrument of an advisory character.

Varying or revoking advisory notice

(5) The Commission may vary or revoke an advisory notice.

(6) If an advisory notice is varied, the Commission must give the carrier or carriage service provider concerned a written notice setting out the terms of the variation.

(7) If an advisory notice is revoked, the Commission must give the carrier or carriage service provider concerned a written notice stating that the advisory notice has been revoked.

Publication of advisory notice

(8) If the Commission is satisfied that:

(a) the publication of an advisory notice would result, or be likely to result, in a benefit to the public; and

(b) that benefit would outweigh any substantial prejudice to the commercial interests of a person that would result, or be likely to result, if the advisory notice were published;

the Commission may publish the advisory notice in such manner as it thinks fit.

151AR Register of competition notices

(1) The Commission must keep a Register in relation to competition notices.

(2) The Register must include particulars of all competition notices (including notices that have expired).

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(3) The Register may be maintained by electronic means.

(4) A person may, on payment of the fee (if any) specified in the regulations:
(a) inspect the Register; and
(b) make a copy of, or take extracts from, the Register.

(5) For the purposes of this section, if the Register is maintained by electronic means, a person is taken to have made a copy of, or taken an extract from, the Register if the Commission gives the person a printout of, or of the relevant parts of, the Register.

(6) If a person requests that a copy be provided in an electronic form, the Commission may provide the relevant information:
(a) on a data processing device; or
(b) by way of electronic transmission.

Subdivision B—Exemption orders

151AS Exemption orders

(1) A person may apply to the Commission for an order exempting specified conduct of the person from the scope of section 151AJ (which deals with anti-competitive conduct). The order is called an ***exemption order***.

(2) An exemption order is not invalid only because the conduct specified in the order is conduct of a kind that, apart from the order, is outside the scope of section 151AJ (which deals with anti-competitive conduct).

151AT Form of application

An application for an exemption order must be:
(a) in writing; and
(b) in a form approved in writing by the Commission; and
(c) accompanied by the prescribed fee.

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151AU Further information

(1) The Commission may request an applicant for an exemption order to give the Commission further information about the application.

(2) The Commission may refuse to consider the application until the applicant gives the Commission the information.

(3) The Commission may withdraw its request for further information, in whole or in part.

151AV Withdrawal of application

An applicant for an exemption order may withdraw the application by written notice given to the Commission.

151AW Commission must publicise receipt of applications

If the Commission receives an application for an exemption order, the Commission must publicise the receipt of the application in such manner as it thinks fit.

151AX Commission may refuse to consider application if it relates to the same conduct as an authorisation application

(1) This section applies if:
  (a) the Commission receives, or has received, an application for an exemption order; and
  (b) the Commission receives, or has received, an application for an authorisation under Division 1 of Part VII; and
  (c) the application for the exemption order and the application for the authorisation relate to the same conduct.

(2) The Commission may refuse to:
  (a) consider the application for the exemption order; or
  (b) convene a conference under section 151AZ to discuss the application for the exemption order;

until:

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(c) the Commission has made a determination under section 90 in relation to the application for the authorisation; or

(d) if the Commission makes such a determination—the expiry of the time limit allowed for a person to apply to the Tribunal for a review of the determination; or

(e) if a person applies to the Tribunal for a review of the determination—the review (including any court proceedings arising out of the review) is finalised.

151AY Commission may refuse to consider application if it relates to the same conduct as a Part VII notification

(1) This section applies if:

(a) the Commission receives, or has received, an application for an exemption order; and

(b) the Commission receives, or has received, a notice under subsection 93(1) or 93AB(1A) or (1); and

(c) the application for the exemption order and the notice relate to the same conduct.

(2) The Commission may refuse to:

(a) consider the application for the exemption order; or

(b) convene a conference under section 151AZ to discuss the application for the exemption order;

until:

(c) the Commission decides whether or not to give a notice under subsection 93(3) or (3A) or 93AC(1) or (2); or

(d) if the Commission gives such a notice—the expiry of the time limit allowed for a person to apply to the Tribunal for review of the decision; or

(e) if a person applies to the Tribunal for a review of the decision—the review (including any court proceedings arising out of the review) is finalised.

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151AZ Commission may convene conference to discuss application

(1) If the Commission receives an application for an exemption order, the Commission may convene a conference to discuss the application.

(2) If the Commission decides to convene a conference, the Commission must give:
   (a) the applicant (or a representative of the applicant); and
   (b) any other persons whom the Commission considers interested;
   a reasonable opportunity to attend and take part in the conference.

(3) This Act does not prevent a conference under this section from being combined with a conference under section 90A or 93A if the combined conference relates to the same conduct.

151BA Commission must grant or reject application

If the Commission receives an application for an exemption order, the Commission must either:
   (a) make the order; or
   (b) refuse to make the order.

151BB Commission to give opportunity for submissions

Before making an exemption order, the Commission must give:
   (a) the applicant; and
   (b) any other person whom the Commission considers interested;
a reasonable opportunity to make submissions to the Commission about the order.

151BC Criteria for making exemption order

(1) The Commission must not make an exemption order in relation to particular conduct of a person unless it is satisfied that:
   (a) both:

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(i) the conduct will result, or is likely to result, in a benefit to the public; and

(ii) that benefit outweighs, or will outweigh, the detriment to the public constituted by any lessening of competition that will result, or is likely to result, from engaging in the conduct; or

(b) the conduct is not anti-competitive conduct.

(2) In determining whether the Commission is satisfied about the matters referred to in paragraph (1)(a), the Commission may have regard to the following matters:

(a) the extent to which the conduct relates to the supply of goods or services on favourable terms and conditions to:

(i) a financially disadvantaged individual; or

(ii) an individual who is disadvantaged on health grounds; or

(iii) a registered charity; or

(iiia) a community organisation that is a not-for-profit entity and is not a charity; or

(iv) an educational institution; or

(v) a health facility;

(b) the extent to which the conduct relates to the supply of goods or services for:

(i) community, charitable or educational purposes; or

(ii) the promotion of health or safety;

on favourable terms and conditions;

(c) the need to satisfy any applicable universal service obligation;

(d) the extent to which the conduct prevents or reduces, or is likely to prevent or reduce, pollution or other forms of degradation of environmental amenity;

(e) the extent to which the conduct contributes, or is likely to contribute, to technical innovation, or the development of new goods or services, by Australian industry.

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(3) Subsection (2) does not, by implication, limit the matters to which the Commission may have regard.

(6) In this section:

environment includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings.

151BD Notification of decision

(1) If the Commission makes an exemption order, the Commission must give the applicant a written notice setting out the order and the reasons for the order.

(2) If the Commission refuses to make an exemption order, the Commission must give the applicant a written notice stating that the order has been refused and setting out the reasons for the refusal.

151BE Duration of exemption order may be limited

An exemption order may be expressed to be in force for a period specified in the order.

151BF Conditions of exemption order

An exemption order may be expressed to be subject to such conditions as are specified in the order.

151BG Revocation of exemption order

(1) If:
  (a) an exemption order is in force in relation to a person; and
  (b) the Commission is satisfied that:
    (i) the order was made on the basis of information that was false or misleading in a material particular; or

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(ii) a condition to which the order is subject has been contravened; or

(iii) there has been a material change of circumstances since the order was made;

the Commission may revoke the order.

(2) The Commission must not revoke an exemption order unless the Commission has first:

(a) published a draft notice of revocation and invited people to make submissions to the Commission on the draft notice; and

(b) considered any submissions that were received within the time limit specified by the Commission when it published the draft notice.

(3) The Commission may make a further exemption order under section 151BA in substitution for the revoked order.

(4) If the Commission revokes an exemption order relating to a person, the Commission must give the person a written notice stating that the order has been revoked and setting out the reasons for the revocation.

(5) A revocation of an exemption order takes effect:

(a) at the time when notice of the revocation is given; or

(b) if a later time is specified in the notice of the revocation—at that later time.

151BH Register of exemption orders

(1) The Commission must keep a Register in relation to exemption orders.

(2) The Register must include the following:

(a) particulars of all exemption orders (including orders that have expired);

(b) applications for exemption orders received by the Commission (including applications that have been withdrawn);

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(c) particulars of decisions refusing to make exemption orders;
(d) particulars of decisions revoking, or refusing to revoke, exemption orders;
(e) particulars of the Commission's reasons for making exemption orders.

(3) Despite subsection (2), the Register must not set out information covered by subsection (2) if the disclosure of the information could reasonably be expected to prejudice substantially the commercial interests of the person, or any of the persons, to whom the information relates.

(4) The Register may be maintained by electronic means.

(5) A person may, on payment of the fee (if any) specified in the regulations:
(a) inspect the Register; and
(b) make a copy of, or take extracts from, the Register.

(6) For the purposes of this section, if the Register is maintained by electronic means, a person is taken to have made a copy of, or taken an extract from, the Register if the Commission gives the person a printout of, or of the relevant parts of, the Register.

(7) If a person requests that a copy be provided in an electronic form, the Commission may provide the relevant information:
(a) on a data processing device; or
(b) by way of electronic transmission.

Subdivision C—Miscellaneous

151BJ *Conduct* includes proposed conduct

A reference in this Division to ***conduct*** includes a reference to proposed conduct.

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Division 6—Record-keeping rules and disclosure directions

151BU Commission may make record-keeping rules

(1) The Commission may, by written instrument, make rules for and in relation to requiring one or more specified carriers or one or more specified carriage service providers to keep and retain records. Rules under this subsection may also require those carriers or carriage service providers to prepare reports consisting of information contained in those records. Rules under this subsection may also require those carriers or carriage service providers to give any or all of the reports to the Commission. Rules under this subsection are to be known as ***record-keeping rules***.

Note 1: Carriers and carriage service providers may be specified by name, by inclusion in a specified class or in any other way.

Note 2: For enforcement of the record-keeping rules, see Division 7.

(2) The rules may specify the manner and form in which the records are to be kept.

(2A) The rules may specify the manner and form in which reports are to be prepared.

(2B) The rules may provide for:

(a) the preparation of reports as and when required by the Commission; or

(b) the preparation of periodic reports relating to such regular intervals as are specified in the rules.

(2C) The rules may require or permit a report prepared in accordance with the rules to be given to the Commission, in accordance with specified software requirements and specified authentication requirements:

(a) on a specified kind of data processing device; or

(b) by way of a specified kind of electronic transmission.

(2D) Subsections (2), (2A), (2B) and (2C) do not limit subsection (1).

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(3) If the rules apply to a particular carrier or carriage service provider, the Commission must give the carrier or provider a copy of the rules.

(4) The Commission must not exercise its powers under this section so as to require the keeping or retention of records unless the records contain, or will contain, information that is relevant to:

(a) ascertaining whether the competition rule has been, or is being, complied with; or

(c) the operation of this Part (other than this Division); or

(d) the operation of Part XIC (which deals with access); or

(da) the operation of the *National Broadband Network Companies Act 2011* or regulations under that Act; or

(db) the operation of Part 8 of the *Telecommunications Act 1997* (which deals with local access lines); or

(dc) the operation of Part 3 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the funding of fixed wireless broadband and satellite broadband); or

(dd) the operation of the *Telecommunications (Regional Broadband Scheme) Charge Act 2020*; or

(e) the operation of Division 3 of Part 20 of the *Telecommunications Act 1997* (which deals with Rules of Conduct relating to dealings with international telecommunications operators); or

(f) the operation of Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the regulation of the charges of designated Telstra successor companies).

(4A) The Commission must review any rules for keeping or retaining records containing information relevant to the operation of Division 12 of this Part at least once in each of the following periods:

(a) the period of 1 year after the commencement of this subsection;

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(b) the period of 5 years after the completion of the previous review.

(4B) In reviewing rules under subsection (4A), the Commission must have regard to:

(a) whether the information is publicly available; and

(b) whether consumer demand for the goods and services to which the information relates has changed; and

(c) the usefulness of the information to consumers, industry, the Minister and Parliament.

(5) Record-keeping rules made before 1 July 1997 come into force on 1 July 1997.

(6) This section does not limit section 155 (which is about the general information-gathering powers of the Commission).

151BUAA Minister may give directions to Commission

(1) The Minister may, by legislative instrument, give a direction to the Commission in relation to the exercise of its powers under section 151BU, 151BUDA, 151BUDB or 151BUDC.

(1A) The Minister may only give a direction under subsection (1) that:

(a) requires the Commission to exercise its powers under section 151BU, 151BUDA, 151BUDB or 151BUDC; or

(b) requires the Commission to exercise its powers under section 151BU, 151BUDA, 151BUDB or 151BUDC in a particular way.

(1B) The Minister may, by legislative instrument, give a direction to the Commission requiring it, in the event that it receives a specified Ministerially-directed report, to:

(a) prepare a specified kind of analysis of the report; and

(b) publish the analysis within a specified period after receiving the report.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

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(1C) The Minister may, by legislative instrument, give a direction to the Commission requiring it, in the event that it receives a report in a specified series of Ministerially-directed periodic reports, to:

(a) prepare a specified kind of analysis of the report; and

(b) publish the analysis within a specified period after receiving the report.

(2) The Commission must comply with a direction under this section.

(3) If:

(a) a record-keeping rule is made as a result of a direction under subsection (1); and

(b) the rule requires the preparation of a report;

then:

(c) the rule must contain a statement to the effect that the rule was made as a result of a Ministerial direction; and

(d) a report prepared under the rule is to be known as a ***Ministerially-directed report***.

151BUAB Request for disclosure

(1) A person may request the Commission to exercise its powers under:

(a) section 151BUA or 151BUB in relation to a particular report; or

(b) section 151BUC in relation to a particular series of periodic reports.

(2) The request must be in writing.

(3) The Commission must consider the request.

(4) However, the Commission need not consider the request if it considers that the request is frivolous, vexatious or was not made in good faith.

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151BUA Commission gives access to reports

(1) This section applies to a particular report given to the Commission by a carrier, or a carriage service provider, in accordance with the record-keeping rules.

Criteria for disclosure

(2) If the Commission is satisfied that the disclosure of the report, or the disclosure of particular extracts from the report, would be likely to:

(a) promote competition in markets for listed carriage services; or

(b) facilitate the operation of:

(i) this Part (other than this Division); or

(ii) Part XIC (which deals with access); or

(iia) the *National Broadband Network Companies Act 2011* or regulations under that Act; or

(iib) the operation of Part 8 of the *Telecommunications Act 1997* (which deals with local access lines); or

(iic) the operation of Part 3 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the funding of fixed wireless broadband and satellite broadband); or

(iid) the operation of the *Telecommunications (Regional Broadband Scheme) Charge Act 2020*; or

(iii) Division 3 of Part 20 of the *Telecommunications Act 1997* (which deals with Rules of Conduct relating to dealings with international telecommunications operators); or

(iv) Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the regulation of the charges of designated Telstra successor companies);

the Commission may give the carrier or carriage service provider concerned:

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(c) a written notice stating that the Commission intends to make copies of the report or extracts, together with other relevant material (if any) specified in the notice, available for inspection and purchase by the public as soon as practicable after the end of the period specified in the notice; or

(d) a written notice stating that the Commission intends to make copies of the report or extracts, together with other relevant material (if any) specified in the notice, available for inspection and purchase:

(i) by such persons as are specified in the notice; and

(ii) on such terms and conditions (if any) as are specified in the notice;

as soon as practicable after the end of the period specified in the notice.

Note: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

Period specified in notice

(3) The period specified in a notice under subsection (2) must run for at least 28 days after the notice was given.

Criteria for giving notice

(4) In deciding whether to give a notice under subsection (2), the Commission must have regard to:

(a) the legitimate commercial interests of the carrier or carriage service provider concerned; and

(b) such other matters as the Commission considers relevant.

Consultation before giving notice

(5) The Commission must not give the carrier or carriage service provider concerned a notice under subsection (2) unless the Commission has first:

(a) given the carrier or carriage service provider a written notice:

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(i) setting out a draft version of the notice under subsection (2); and

(ii) inviting the carrier or carriage service provider to make a submission to the Commission on the draft by a specified time limit; and

(b) considered any submission that was received within that time limit.

The time limit specified in a notice under paragraph (a) must be at least 28 days after the notice was given.

Public access

(6) If the Commission gives the carrier or carriage service provider concerned a notice under paragraph (2)(c), the Commission:

(a) must make copies of the report or extracts, together with the other material (if any) specified in the notice, available for inspection and purchase by the public as soon as practicable after the end of the period specified in the notice; and

(b) may also give a written direction to the carrier or carriage service provider concerned requiring it to take such action as is specified in the direction to inform the public, or such persons as are specified in the direction, that the report is, or the extracts are, so available.

Note: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

(7) A person must comply with a direction under paragraph (6)(b).

Limited access

(8) If the Commission gives the carrier or carriage service provider concerned a notice under paragraph (2)(d), the Commission must:

(a) make copies of the report or extracts, together with the other material (if any) specified in the notice, available for inspection and purchase by the persons specified in the notice as soon as practicable after the end of the period specified in the notice; and

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(b) take reasonable steps to inform the persons who inspect or purchase copies of the report or extracts of the terms and conditions (if any) that are specified in the notice.

(9) If, in accordance with subsection (8), a person inspects or purchases a copy of the report or extracts, the person must comply with the terms and conditions (if any) that are specified in the notice concerned.

Offences

(10) A person who contravenes subsection (7) commits an offence punishable on conviction by a fine not exceeding 20 penalty units.

(11) A person who contravenes subsection (9) commits an offence punishable on conviction by a fine not exceeding 100 penalty units.

151BUB Carrier or carriage service provider gives access to reports

(1) This section applies to a report prepared by a carrier, or a carriage service provider, in accordance with the record-keeping rules.

Disclosure direction

(2) If the Commission is satisfied that the disclosure of the report, or the disclosure of particular extracts from the report, would be likely to:

(a) promote competition in markets for listed carriage services; or

(b) facilitate the operation of:

(i) this Part (other than this Division); or

(ii) Part XIC (which deals with access); or

(iia) the *National Broadband Network Companies Act 2011* or regulations under that Act; or

(iib) the operation of Part 8 of the *Telecommunications Act 1997* (which deals with local access lines); or

(iic) the operation of Part 3 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

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(which deals with the funding of fixed wireless broadband and satellite broadband); or

(iid) the operation of the *Telecommunications (Regional Broadband Scheme) Charge Act 2020*; or

(iii) Division 3 of Part 20 of the *Telecommunications Act 1997* (which deals with Rules of Conduct relating to dealings with international telecommunications operators); or

(iv) Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the regulation of the charges of designated Telstra successor companies);

the Commission may give the carrier or carriage service provider concerned:

(c) a written direction requiring it to make copies of the report or extracts, together with other relevant material (if any) specified in the direction, available for inspection and purchase by the public as soon as practicable after the end of the period specified in the direction; or

(d) a written direction requiring it to make copies of the report or extracts, together with other relevant material (if any) specified in the direction, available for inspection and purchase:

(i) by such persons as are specified in the direction; and

(ii) on such terms and conditions (if any) as are specified in the direction;

as soon as practicable after the end of the period specified in the direction.

Note: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

(3) The period specified in a direction under subsection (2) must run for at least 28 days after the direction was given.

(4) A direction under paragraph (2)(d) is also taken to require the carrier or carriage service provider concerned to take reasonable steps to inform the persons who inspect or purchase copies of the

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report or extracts of the terms and conditions (if any) that are specified in the direction.

Criteria for giving direction

(5) In deciding whether to give a direction under subsection (2), the Commission must have regard to:

(a) the legitimate commercial interests of the carrier or carriage service provider concerned; and

(b) such other matters as the Commission considers relevant.

Consultation before giving direction

(6) The Commission must not give the carrier or carriage service provider concerned a direction under subsection (2) unless the Commission has first:

(a) given the carrier or carriage service provider a written notice:

(i) setting out a draft version of the direction; and

(ii) inviting the carrier or carriage service provider to make a submission to the Commission on the draft by a specified time limit; and

(b) considered any submission that was received within that time limit.

The time limit specified in the notice must be at least 28 days after the notice was given.

Direction to give information about availability of report

(7) If the Commission gives the carrier or carriage service provider concerned a direction under paragraph (2)(c), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the public that the report is, or extracts are, available for inspection and purchase.

(8) If the Commission gives the carrier or carriage service provider concerned a direction under paragraph (2)(d), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the persons specified in the

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paragraph (2)(d) direction that the report is, or the extracts are, available for inspection and purchase.

(9) A person must comply with a direction under subsection (7) or (8).

Reasonable charge

(10) The price charged by the carrier or carriage service provider concerned for the purchase of a copy of the report or extracts and the other material (if any) must not exceed the reasonable costs incurred by the carrier or carriage service provider concerned in making the copy of the report or extracts and the other material (if any) available for purchase.

Compliance with terms and conditions

(11) If, in accordance with a direction under paragraph (2)(d), a person inspects or purchases a copy of the report or extracts, the person must comply with the terms and conditions (if any) that are specified in the direction.

Offences

(12) A person who contravenes subsection (9) commits an offence punishable on conviction by a fine not exceeding 20 penalty units.

(13) A person who contravenes subsection (11) commits an offence punishable on conviction by a fine not exceeding 100 penalty units.

Section 151BUC does not limit this section

(14) Section 151BUC does not limit this section.

151BUC Carrier or carriage service provider gives access to periodic reports

(1) This section applies to a particular series of periodic reports that are required to be prepared by a carrier, or a carriage service provider, in accordance with the record-keeping rules.

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Disclosure direction

(2) If the Commission is satisfied that the disclosure of each of the reports in that series, or the disclosure of particular extracts from each of the reports in that series, would be likely to:

(a) promote competition in markets for listed carriage services; or

(b) facilitate the operation of:

(i) this Part (other than this Division); or

(ii) Part XIC (which deals with access); or

(iia) the *National Broadband Network Companies Act 2011* or regulations under that Act; or

(iib) the operation of Part 8 of the *Telecommunications Act 1997* (which deals with local access lines); or

(iic) the operation of Part 3 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the funding of fixed wireless broadband and satellite broadband); or

(iid) the operation of the *Telecommunications (Regional Broadband Scheme) Charge Act 2020*; or

(iii) Division 3 of Part 20 of the *Telecommunications Act 1997* (which deals with Rules of Conduct relating to dealings with international telecommunications operators); or

(iv) Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with the regulation of the charges of designated Telstra successor companies);

the Commission may give the carrier or carriage service provider concerned:

(c) a written direction requiring it to make copies of each of those reports or extracts, together with other relevant material (if any) specified in the direction, available for inspection and purchase by the public by such times as are ascertained in accordance with the direction; or

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(d) a written direction requiring it to make copies of each of those reports or extracts, together with other relevant material (if any) specified in the direction, available for inspection and purchase:

(i) by such persons as are specified in the direction; and

(ii) on such terms and conditions (if any) as are specified in the direction;

by such times as are ascertained in accordance with the direction.

Note 1: For example, a direction under paragraph (2)(c) could require that each report in a particular series of quarterly reports be made available by the 28th day after the end of the quarter to which the report relates.

Note 2: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

(3) In the case of the first report in the series (or extracts from that report), the applicable time ascertained in accordance with a direction under subsection (2) must be later than the 28th day after the day on which the direction was given.

(4) A direction under paragraph (2)(d) is also taken to require the carrier or carriage service provider concerned to take reasonable steps to inform the persons who inspect or purchase copies of the report or extracts of the terms and conditions (if any) that are specified in the direction.

Criteria for giving direction

(5) In deciding whether to give a direction under subsection (2), the Commission must have regard to:

(a) the legitimate commercial interests of the carrier or carriage service provider concerned; and

(b) such other matters as the Commission considers relevant.

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Consultation before giving direction

(6) The Commission must not give the carrier or carriage service provider concerned a direction under subsection (2) unless the Commission has first:

(a) given the carrier or carriage service provider a written notice:

(i) setting out a draft version of the direction; and

(ii) inviting the carrier or carriage service provider to make a submission to the Commission on the draft by a specified time limit; and

(b) considered any submission that was received within that time limit.

The time limit specified in the notice must be at least 28 days after the notice was given.

Direction to give information about availability of reports

(7) If the Commission gives the carrier or carriage service provider concerned a direction under paragraph (2)(c), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the public that each of those reports is, or extracts are, available for inspection and purchase.

(8) If the Commission gives the carrier or carriage service provider concerned a direction under paragraph (2)(d), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the persons specified in the paragraph (2)(d) direction that each of those reports is, or the extracts are, available for inspection and purchase.

(9) A person must comply with a direction under subsection (7) or (8).

Reasonable charge

(10) The price charged by the carrier or carriage service provider concerned for the purchase of a copy of the report or extracts and the other material (if any) must not exceed the reasonable costs incurred by the carrier or carriage service provider concerned in

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making the copy of the report or extracts and the other material (if any) available for purchase.

Compliance with terms and conditions

(11) If, in accordance with a direction under paragraph (2)(d), a person inspects or purchases a copy of the report or extracts, the person must comply with the terms and conditions (if any) that are specified in the direction.

Offences

(12) A person who contravenes subsection (9) commits an offence punishable on conviction by a fine not exceeding 20 penalty units.

(13) A person who contravenes subsection (11) commits an offence punishable on conviction by a fine not exceeding 100 penalty units.

151BUD Exemption of reports from access requirements

Full exemption

(1) The Commission may, by legislative instrument, make a determination exempting specified reports from the scope of sections 151BUA, 151BUB and 151BUC, either:

(a) unconditionally; or

(b) subject to such conditions (if any) as are specified in the determination.

The determination has effect accordingly.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

(2) If all of the information contained in a report (the ***first report***) is, or is to be, set out in a report under Division 12A, the first report is exempt from the scope of sections 151BUA, 151BUB and 151BUC.

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Partial exemption

(3) The Commission may, by legislative instrument, make a determination that specified information is ***exempt information*** for the purposes of this section, either:

(a) unconditionally; or

(b) subject to such conditions (if any) as are specified in the determination.

The determination has effect accordingly.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

(4) If some, but not all, of the information contained in a report is, or is to be, set out in a report under Division 12A, so much of the information as is, or is to be, set out in the Division 12A report is ***exempt information*** for the purposes of this section.

(5) If a report contains exempt information, sections 151BUA, 151BUB and 151BUC apply as if:

(a) the exempt information were not part of the report; and

(b) so much of the report as does not consist of the exempt information were a report in its own right.

151BUDA Commission gives access to Ministerially-directed reports

(1) This section applies to a particular Ministerially-directed report given to the Commission by a carrier, or a carriage service provider, in accordance with the record-keeping rules.

Public access

(2) The Commission:

(a) may make:

(i) copies of the report or copies of extracts from the report; and

(ii) such other relevant material (if any) as the Commission determines;

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available to the public; and

(b) may also give a written direction to the carrier or provider requiring it to take such action as is specified in the direction to inform the public, or such persons as are specified in the direction, that the report is, or the extracts are, so available.

Note: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

Limited access

(3) The Commission may make:

(a) copies of the report or copies of extracts from the report; and

(b) such other relevant material (if any) as the Commission determines;

available:

(c) to particular persons; and

(d) on such terms and conditions (if any) as the Commission determines.

(4) If subsection (3) applies, the Commission must take reasonable steps to inform the persons who access copies of the report or extracts of the terms and conditions (if any) on which the copies are available.

(5) If, in accordance with subsection (3), a person accesses a copy of the report or extracts, the person must comply with the terms and conditions (if any) on which the copy is available.

Offences

(6) A person commits an offence if:

(a) the person is subject to a direction under paragraph (2)(b); and

(b) the person omits to do an act; and

(c) the omission breaches the direction.

Penalty: 20 penalty units.

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(7) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (5); and
  (b) the person does an act or omits to do an act; and
  (c) the act or omission breaches the requirement.

Penalty: 100 penalty units.

Exercise of power by Commission

(8) The Commission may only exercise a power under this section as required by a direction in force under section 151BUAA.

Application of section 151BUA

(9) This section does not limit section 151BUA.

151BUDB Carrier or carriage service provider gives access to Ministerially-directed reports

(1) This section applies to a Ministerially-directed report prepared by a carrier, or a carriage service provider, in accordance with the record-keeping rules.

Disclosure direction

(2) The Commission may give the carrier or provider:
  (a) a written direction requiring it to make copies of the report or copies of particular extracts from the report, together with other relevant material (if any) specified in the direction, available:
    (i) to the public; and
    (ii) in the manner specified in the direction; and
    (iii) as soon as practicable after the end of the period specified in the direction; or
  (b) a written direction requiring it to make copies of the report or copies of particular extracts from the report, together with

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other relevant material (if any) specified in the direction, available:

(i) to such persons as are specified in the direction; and

(ii) on such terms and conditions (if any) as are specified in the direction; and

(iii) in the manner specified in the direction; and

(iv) as soon as practicable after the end of the period specified in the direction.

Note: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

(3) A direction under paragraph (2)(b) is also taken to require the carrier or provider to take reasonable steps to inform the persons who access the copies of the report or extracts of the terms and conditions (if any) that are specified in the direction.

Direction to give information about availability of report

(4) If the Commission gives the carrier or provider a direction under paragraph (2)(a), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the public:

(a) that the report is, or extracts are, available; and

(b) of the way in which the report or extracts may be accessed.

(5) If the Commission gives the carrier or provider a direction under paragraph (2)(b), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the persons specified in the paragraph (2)(b) direction that:

(a) the report is, or the extracts are, available; and

(b) of the way in which the report or extracts may be accessed.

Compliance with terms and conditions

(6) If, in accordance with a direction under paragraph (2)(b), a person accesses a copy of the report or extracts, the person must comply

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with the terms and conditions (if any) that are specified in the direction.

Offences

(7) A person commits an offence if:
  (a) the person is subject to a direction under subsection (4) or (5); and
  (b) the person omits to do an act; and
  (c) the omission breaches the direction.

Penalty: 20 penalty units.

(8) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (6); and
  (b) the person does an act or omits to do an act; and
  (c) the act or omission breaches the requirement.

Penalty: 100 penalty units.

Exercise of power by Commission

(9) The Commission may only exercise a power under this section as required by a direction in force under section 151BUAA.

Application of section 151BUB

(10) This section does not limit section 151BUB.

Application of section 151BUDC

(11) Section 151BUDC does not limit this section.

151BUDC Carrier or carriage service provider gives access to Ministerially-directed periodic reports

(1) This section applies to a particular series of Ministerially-directed periodic reports that are required to be prepared by a carrier, or a

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carriage service provider, in accordance with the record-keeping rules.

Disclosure direction

(2) The Commission may give the carrier or provider:

(a) a written direction requiring it to make copies of each of the reports in that series or copies of particular extracts from each of the reports in that series, together with other relevant material (if any) specified in the direction, available:

(i) to the public; and

(ii) in the manner specified in the direction; and

(iii) by such times as are ascertained in accordance with the direction; or

(b) a written direction requiring it to make copies of each of the reports in the series or copies of particular extracts from each of the reports in the series, together with other relevant material (if any) specified in the direction, available:

(i) to such persons as are specified in the direction; and

(ii) on such terms and conditions (if any) as are specified in the direction; and

(iii) in the manner specified in the direction; and

(iv) by such times as are ascertained in accordance with the direction.

Note 1: For example, a direction under paragraph (2)(a) could require that each report in a particular series of quarterly reports be made available by the 28th day after the end of the quarter to which the report relates.

Note 2: For specification by class, see subsection 33(3AB) of the *Acts Interpretation Act 1901*.

(3) A direction under paragraph (2)(b) is also taken to require the carrier or provider to take reasonable steps to inform the persons who access the copies of the report or extracts of the terms and conditions (if any) that are specified in the direction.

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Direction to give information about availability of report

(4) If the Commission gives the carrier or provider a direction under paragraph (2)(a), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the public:
  (a) that each of those reports is, or extracts are, available; and
  (b) of the way in which those reports or extracts may be accessed.

(5) If the Commission gives the carrier or provider a direction under paragraph (2)(b), the Commission may also give it a written direction requiring it to take such action as is specified in the direction to inform the persons specified in the paragraph (2)(b) direction:
  (a) that each of those reports is, or extracts are, available; and
  (b) of the way in which those reports or extracts may be accessed.

Compliance with terms and conditions

(6) If, in accordance with a direction under paragraph (2)(b), a person accesses a copy of the report or extracts, the person must comply with the terms and conditions (if any) that are specified in the direction.

Offences

(7) A person commits an offence if:
  (a) the person is subject to a direction under subsection (4) or (5); and
  (b) the person omits to do an act; and
  (c) the omission breaches the direction.

Penalty: 20 penalty units.

(8) A person commits an offence if:

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(a) the person is subject to a requirement under subsection (6); and
(b) the person does an act or omits to do an act; and
(c) the act or omission breaches the requirement.

Penalty: 100 penalty units.

Exercise of power by Commission

(9) The Commission may only exercise a power under this section as required by a direction in force under section 151BUAA.

Application of section 151BUC

(10) This section does not limit section 151BUC.

Application of section 151BUDB

(11) Section 151BUDB does not limit this section.

151BUE Access via the internet

If the Commission, a carrier or a carriage service provider is required under this Division to make copies of a report, extracts or other material available for inspection and purchase, the Commission, carrier or carriage service provider, as the case may be, may comply with that requirement by making the report, extracts or other material available for inspection and purchase on the internet.

151BUF Self-incrimination

(1) An individual is not excused from giving a report under the record-keeping rules, or from making a report or extracts available under this Division, on the ground that the report or extracts might tend to incriminate the individual or expose the individual to a penalty.

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(2) However:

(a) giving the report or making the report or extracts available; or

(b) any information, document or thing obtained as a direct or indirect consequence of giving the report or making the report or extracts available;

is not admissible in evidence against the individual in:

(c) criminal proceedings other than proceedings under, or arising out of, section 151BV; or

(d) proceedings under section 151BY for recovery of a pecuniary penalty in relation to a contravention of a disclosure direction.

151BV Incorrect records

(1) A person must not, in purported compliance with a requirement imposed by the record-keeping rules, make a record of any matter or thing in such a way that it does not correctly record the matter or thing.

(2) A person who contravenes subsection (1) commits an offence punishable on conviction by imprisonment for a term not exceeding 6 months.

Note: See also sections 4AA and 4B of the *Crimes Act 1914*.

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Division 7—Enforcement of the competition rule, record-keeping rules and disclosure directions

151BW Person involved in a contravention of the competition rule, a record-keeping rule or a disclosure direction

A reference in this Division to a person involved in a contravention of the competition rule, a record-keeping rule or a disclosure direction is a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

151BX Pecuniary penalties for breach of the competition rule, a record-keeping rule or a disclosure direction

(1) If the Federal Court is satisfied that a person:

(a) has contravened the competition rule, a record-keeping rule or a disclosure direction; or

(b) has attempted to contravene the competition rule, a record-keeping rule or a disclosure direction; or

(c) has been involved in a contravention of the competition rule, a record-keeping rule or a disclosure direction;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate.

(2) In determining a pecuniary penalty, the Court must have regard to all relevant matters, including:

(a) the nature and extent of the contravention; and

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(b) the nature and extent of any loss or damage suffered as a result of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

(3) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

(a) in the case of a contravention of the competition rule—for each contravention, the greater of the following:

(i) if the contravention continued for 21 days or fewer—the sum of $100 million and $1 million for each day that the contravention continued;

(ii) if the contravention continued for more than 21 days—the sum of $121 million and $3 million for each day in excess of 21 that the contravention continued;

(iii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the contravention—3 times the value of that benefit;

(iv) if the Court cannot determine the value of that benefit—30% of the body corporate's adjusted turnover during the breach turnover period for the contravention; or

(c) in the case of a contravention of a record-keeping rule or of a disclosure direction—$250,000 for each contravention.

(4) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:

(a) in the case of a contravention of a record-keeping rule or of a disclosure direction—$50,000 for each contravention; or

(b) in the case of a contravention of the competition rule—$2.5 million for each contravention.

(5) If conduct constitutes a contravention of:

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(b) 2 or more record-keeping rules; or

(c) 2 or more disclosure directions;

proceedings may be instituted under this Act against a person in relation to the contravention of any one or more of the record-keeping rules or disclosure directions. However, the person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

(6) If a person's conduct gives rise to a liability to pay a pecuniary penalty under:

(a) this Part; and

(b) Part VI;

proceedings relating to the conduct may be instituted against the person under this Part or under Part VI. However, the person is not liable to more than one pecuniary penalty in respect of the same conduct.

(7) Section 4AB of the *Crimes Act 1914* does not apply to this section.

151BY Civil action for recovery of pecuniary penalties

(1) The Commission may institute a proceeding in the Federal Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 151BX.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

(3) A proceeding under subsection (1) must not be instituted in relation to:

(a) a contravention of the competition rule; or

(b) attempting to contravene the competition rule; or

(c) aiding, abetting, counselling or procuring a person to contravene the competition rule; or

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(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene the competition rule; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a person of the competition rule; or

(f) conspiring with others to contravene the competition rule;

unless:

(g) in a case where paragraph (a) applies—the alleged conduct is of a kind dealt with in a Part A competition notice that was in force in relation to the carrier or carriage service provider concerned at the time when the alleged conduct occurred; or

(h) in any other case—the alleged conduct is related to conduct of a kind dealt with in a Part A competition notice that was in force in relation to the carrier or carriage service provider concerned at the time when the alleged conduct occurred.

151BZ Criminal proceedings not to be brought for contraventions of the competition rule, record-keeping rules or disclosure directions

(1) Criminal proceedings do not lie against a person only because the person:

(a) has contravened the competition rule, a record-keeping rule or a disclosure direction; or

(b) has attempted to contravene the competition rule, a record-keeping rule or a disclosure direction; or

(c) has been involved in a contravention of the competition rule, a record-keeping rule or a disclosure direction.

(3) To avoid doubt, subsection (1) does not apply in relation to proceedings for an offence against section 45AF or 45AG.

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151CA Injunctions

(1) Subject to subsection (3), if the Federal Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of the competition rule, a record-keeping rule or a disclosure direction; or

(b) attempting to contravene the competition rule, a record-keeping rule or a disclosure direction; or

(c) aiding, abetting, counselling or procuring a person to contravene the competition rule, a record-keeping rule or a disclosure direction; or

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene the competition rule, a record-keeping rule or a disclosure direction; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the competition rule, a record-keeping rule or a disclosure direction; or

(f) conspiring with others to contravene the competition rule, a record-keeping rule or a disclosure direction;

the Court may, on the application of the Commission or any other person, grant an injunction in such terms as the Court determines to be appropriate.

(2) If:

(a) an application for an injunction under subsection (1) has been made; and

(b) the Court determines it to be appropriate to do so;

the Court may grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

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(3) If, in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

(4) The Court may rescind or vary an injunction granted under subsection (1) or (3).

(5) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
  (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
  (b) whether or not the person has previously engaged in conduct of that kind; and
  (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(6) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
  (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
  (b) whether or not the person has previously refused or failed to do that act or thing; and
  (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

(7) If the Commission makes an application to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

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151CB Orders to disclose information or publish an advertisement—breach of the competition rule

(1) If, on the application of the Commission, the Federal Court is satisfied that a person (the ***first person***) has engaged in conduct constituting a contravention of the competition rule, the Court may make either or both of the following orders:

(a) an order requiring the first person, or a person involved in the contravention, to disclose to the public, or to one or more specified persons, in such manner as is specified in the order, specified information, where the information is:

(i) in the possession of the first person; or

(ii) information to which the first person has access;

(b) an order requiring the first person, or a person involved in the contravention, to publish, at the person's own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

(2) Subsection (1) does not limit section 151CA.

(3) An application under subsection (1) must not be made in relation to a contravention of the competition rule unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force in relation to the carrier or carriage service provider concerned at the time when the alleged conduct occurred.

151CC Actions for damages—breach of the competition rule

(1) A person who suffers loss or damage by conduct of another person that was done in contravention of the competition rule may recover the amount of the loss or damage by action against:

(a) that other person; or

(b) any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

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(3) An action under subsection (1) must not be brought in relation to a contravention of the competition rule unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force in relation to the carrier or carriage service provider concerned at the time when the alleged conduct occurred.

151CD Finding of fact in proceedings to be evidence

(1) This section applies to a finding of any fact by a court made in proceedings under section 151BY, 151CA or 151CB in which a person has been found to have contravened, or to have been involved in a contravention of, the competition rule.

(2) In:

(a) a proceeding under section 151CC against the person; or

(b) an application under subsection 151CE(1) for an order against the person;

the finding:

(c) is prima facie evidence of that fact; and

(d) may be proved by production of a document under the seal of the court from which the finding appears.

151CE Other orders—compensation for breach of the competition rule

(1) If, in a proceeding instituted under this Division in relation to a contravention of the competition rule, the Federal Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of the competition rule, the Court may, on the application of a party to the proceedings, make such orders as it thinks appropriate against:

(a) the person who engaged in the conduct; or

(b) a person who was involved in the contravention;

if the Court considers that the orders concerned will:

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(c) compensate the first-mentioned person, in whole or in part, for the loss or damage; or

(d) prevent or reduce the loss or damage.

(2) The Federal Court may make an order under subsection (1) whether or not it:

(a) grants an injunction under section 151CA; or

(b) makes an order under section 151BX, 151CB or 151CC.

(3) Subsection (1) does not, by implication, limit section 151CA.

(4) The Federal Court's orders include, but are not limited to, the following:

(a) an order declaring the whole or any part of:

(i) a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct; or

(ii) a collateral arrangement relating to such a contract;

to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(c) an order refusing to enforce any or all of the provisions of such a contract or collateral arrangement;

(d) an order directing:

(i) the person who engaged in the conduct; or

(ii) a person who was involved in the contravention constituted by the conduct;

to refund money or return property to the person who suffered the loss or damage;

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(e) an order directing:

(i) the person who engaged in the conduct; or

(ii) a person who was involved in the contravention constituted by the conduct;

to pay to the person who suffered the loss or damage the amount of the loss or damage;

(f) an order directing:

(i) the person who engaged in the conduct; or

(ii) a person who was involved in the contravention constituted by the conduct;

at the person's own expense, to supply specified goods or services to the person who suffered, or is likely to suffer, the loss or damage.

(5) An application under subsection (1) must not be made in relation to a contravention of the competition rule unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force in relation to the carrier or carriage service provider concerned at the time when the alleged conduct occurred.

(6) The powers conferred on the Federal Court by this section in relation to a contract do not affect any powers that any other court may have in relation to the contract in proceedings instituted in that other court in respect of the contract.

151CF Conduct by directors, employees or agents

Part 32 of the *Telecommunications Act 1997* applies in relation to proceedings under this Division in a corresponding way to the way in which it applies to proceedings under that Act (as defined by section 574 of that Act).

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Division 8—Disclosure of documents by Commission

151CG Disclosure of documents by Commission

(1) This section applies to a person if:

(a) the person makes an application to the Commission for an exemption order; or

(b) under section 151BG, the Commission gives the person an opportunity to make a submission to the Commission about a proposal to revoke an exemption order; or

(c) the Commission institutes a proceeding against the person under Division 7.

(2) The Commission must, at the request of the person and on payment of the fee (if any) specified in the regulations, give to the person:

(a) a copy of each document that has been given to, or obtained by, the Commission in connection with the matter to which the application, proposal or proceeding relates and tends to establish the person's case; and

(b) a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connection with the matter and to which the application, proposal or proceeding relates and tends to establish the person's case;

so long as the document is not obtained from the person or prepared by an officer or professional adviser of the Commission.

(3) If the Commission does not comply with a request under subsection (2), the Federal Court must, upon application by the person, make an order directing the Commission to comply with the request. This rule has effect subject to subsection (4).

(4) The Federal Court may refuse to make an order under subsection (3) about a document or a part of a document if the Federal Court considers it inappropriate to make the order on the grounds that the disclosure of the contents of the document or part

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of the document would prejudice any person, or for any other reason.

(5) Before the Federal Court gives a decision on an application under subsection (3), the Federal Court may require any documents to be produced to it for inspection.

(6) An order under this section may be expressed to be subject to such conditions as are specified in the order.

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Division 9—Treatment of partnerships

151CH Treatment of partnerships

This Part applies to a partnership as if the partnership was a person, but it applies with the following changes:

(a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;

(b) any offence against this Part that would otherwise be committed by the partnership is taken to have been committed by each partner who:

(i) aided, abetted, counselled or procured the relevant act or omission; or

(ii) 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).

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Division 10—Review of decisions

151CI Review by Tribunal

(1) If the Commission makes a decision under section 151BA to refuse to make an exemption order relating to conduct of a person, the person may apply to the Tribunal for a review of the decision.

(2) If the Commission makes a decision under section 151BG to revoke an exemption order relating to conduct of a person, the person may apply to the Tribunal for a review of the decision.

(3A) If the Commission:

(a) makes a decision under section 151BUA to make a report obtained from a person, or an extract from such a report, available for inspection and purchase; or

(b) makes a decision under section 151BUB or 151BUC to give a person a written direction to make a report or extract available for inspection and purchase;

the person may apply to the Tribunal for a review of the decision.

(4) An application under this section for a review of a decision must be:

(a) in writing; and

(b) in the case of an application under subsection (1) or (2)—made within 21 days after the Commission made the decision; and

(c) in the case of an application under subsection (3)—made within 7 days after the Commission made the decision; and

(d) in the case of an application under subsection (3A)—made within 28 days after the Commission made the decision.

(5) If the Tribunal receives an application under this section for a review of a decision, the Tribunal must review the decision.

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151CJ Functions and powers of Tribunal

Decision on review

(1) On a review of a decision of the Commission of a kind mentioned in section 151CI, the Tribunal may make a decision:

(a) in any case—affirming the Commission's decision; or

(b) in the case of a review of a decision of the Commission under section 151BA refusing to make an exemption order—both:

(i) setting aside the Commission's decision; and

(ii) in substitution for the decision so set aside, making an exemption order; or

(c) in the case of a review of a decision of the Commission under section 151BG to revoke an exemption order—setting aside the Commission's decision; or

(d) in the case of a review of a decision of the Commission under section 151BUA, 151BUB or 151BUC—setting aside or varying the Commission's decision;

and, for the purposes of the review, the Tribunal may perform all the functions and exercise all the powers of the Commission.

(2) A decision by the Tribunal:

(a) affirming a decision of the Commission; or

(b) setting aside a decision of the Commission; or

(c) made in substitution for a decision of the Commission; or

(d) varying a decision of the Commission;

is taken, for the purposes of this Act (other than this Division), to be a decision of the Commission.

Conduct of review

(3) For the purposes of a review by the Tribunal, the member of the Tribunal presiding at the review may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

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(4) For the purposes of a review, the Tribunal may have regard to any information given, documents produced or evidence given to the Commission in connection with the making of the decision to which the review relates.

Note: Division 2 of Part IX applies to proceedings before the Tribunal.

151CK Provisions that do not apply in relation to a Tribunal review

Division 1 of Part IX does not apply in relation to a review by the Tribunal of a decision of the Commission of a kind mentioned in section 151CI.

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Division 11—Reviews of competitive safeguards within the telecommunications industry

151CL Reviews of competitive safeguards within the telecommunications industry

(1) The Commission must review, and report each financial year on, competitive safeguards within the telecommunications industry, including:

(a) matters relating to the operation of this Part and Part XIC; and

(b) such other matters relating to competition in the telecommunications industry as the Commission thinks appropriate.

(2) The Commission must publish a report under subsection (1) on its website as soon as practicable and no later than 6 months after the end of the financial year concerned.

(3) The Commission must, if directed in writing to do so by the Minister, review, and report to the Minister on, specified matters relating to competitive safeguards within the telecommunications industry.

(4) The Commission must give a report under subsection (3) to the Minister before the end of the period specified in the direction.

(5) The Minister must cause a copy of a report under subsection (3) to be laid before each House of the Parliament within 15 sitting days of that House after receiving the report.

(7) In this section:

telecommunications industry has the same meaning as in the *Telecommunications Act 1997*.

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Division 12—Monitoring of telecommunications charges paid by consumers

151CM Monitoring of telecommunications charges paid by consumers

(1) The Commission must monitor, and report each financial year on, charges paid by consumers in telecommunications markets.

(2) The Commission may decide which charges to monitor and report on, having regard to which goods or services are most commonly used by consumers.

(3) The Commission must publish the report on its website as soon as practicable and no later than 6 months after the end of the financial year concerned.

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Division 12A—Reports about competition in the telecommunications industry

151CMA Public reports about competition in the telecommunications industry

(1) The Commission must monitor, and report to the Minister on, such matters relating to competition in the telecommunications industry as are specified in a determination made by the Minister for the purposes of this subsection.

Note: For examples of matters that may be specified in a determination under subsection (1), see section 151CMC.

(2) Reports under subsection (1) are to be given to the Minister in respect of such regular intervals as are specified in a determination made by the Minister for the purposes of this subsection.

(3) Reports under subsection (1) must comply with such requirements in relation to the protection of confidential information as are specified in a determination made by the Minister for the purposes of this subsection. For this purpose, information is ***confidential information*** if, and only if, the publication of the information could reasonably be expected to prejudice substantially the commercial interests of a person.

(4) The Commission must give a report under subsection (1) to the Minister as soon as practicable after the end of the regular interval to which the report relates.

(5) The Minister must cause a copy of a report under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after receiving the report.

(6) The Minister may, by legislative instrument, make a determination for the purposes of subsection (1), (2) or (3).

(7) In this section:

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telecommunications industry has the same meaning as in the *Telecommunications Act 1997*.

151CMB Confidential reports about competition in the telecommunications industry

(1) The Commission must monitor, and report to the Minister on, such matters relating to competition in the telecommunications industry as are specified in a determination made by the Minister for the purposes of this subsection.

Note: For examples of matters that may be specified in a determination under subsection (1), see section 151CMC.

(2) Reports under subsection (1) are to be given to the Minister in respect of such regular intervals as are specified in a determination made by the Minister for the purposes of this subsection.

(3) The Commission must give a report under subsection (1) to the Minister as soon as practicable after the end of the regular interval to which the report relates.

(4) The Minister may, by legislative instrument, make a determination for the purposes of subsection (1) or (2).

(5) In this section:

telecommunications industry has the same meaning as in the *Telecommunications Act 1997*.

151CMC Examples of matters that may be specified in a determination under section 151CMA or 151CMB

The following are examples of matters that may be specified in a determination made for the purposes of subsection 151CMA(1) or 151CMB(1):

(a) charges for:

(i) carriage services; or

(ii) goods for use in connection with a carriage service; or

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(iii) services for use in connection with a carriage service;

(b) carriers' and carriage service providers' respective shares of the total supply of:

(i) carriage services; or

(ii) goods for use in connection with a carriage service; or

(iii) services for use in connection with a carriage service;

(c) carriers' and carriage service providers' revenues relating to their respective shares of the total supply of:

(i) carriage services; or

(ii) goods for use in connection with a carriage service; or

(iii) services for use in connection with a carriage service;

(d) other indicators (whether quantitative or qualitative) relating to the supply of:

(i) carriage services; or

(ii) goods for use in connection with a carriage service; or

(iii) services for use in connection with a carriage service.

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Division 15—Voluntary undertakings originally given by Telstra

151CMD Voluntary undertakings originally given by Telstra

Scope

(1) This section applies if an undertaking is in force under section 577A of the *Telecommunications Act 1997*.

Note: Section 577A of the *Telecommunications Act 1997* deals with undertakings about structural separation.

Commission must have regard to the conduct of a designated Telstra successor company

(2) If a designated Telstra successor company has engaged, or is required to engage, in conduct in order to comply with the undertaking, then, in performing a function, or exercising a power, under this Part in relation to the designated Telstra successor company, the Commission must have regard to the conduct to the extent that the conduct is relevant.

151CQ Voluntary undertakings given by Telstra

Scope

(1) This section applies if an undertaking given by Telstra is in force under section 577C or 577E of the *Telecommunications Act 1997*.

Note 2: Section 577C of the *Telecommunications Act 1997* deals with undertakings about hybrid fibre-coaxial networks.

Note 3: Section 577E of the *Telecommunications Act 1997* deals with undertakings about subscription television broadcasting licences.

Commission must have regard to Telstra's conduct

(2) If Telstra has engaged, or is required to engage, in conduct in order to comply with the undertaking, then, in performing a function, or

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exercising a power, under this Part in relation to Telstra, the Commission must have regard to the conduct to the extent that the conduct is relevant.

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Division 16—NBN corporations

151DA Authorised conduct—subsection 51(1)

Objects

(1) The objects of this section are:
  (a) to promote the national interest in structural reform of the telecommunications industry; and
  (b) to promote uniform national pricing of eligible services supplied by NBN corporations by authorising, for the purposes of subsection 51(1), certain conduct engaged in by NBN corporations.

Note 1: If conduct is authorised for the purposes of subsection 51(1), the conduct is disregarded in deciding whether a person has contravened Part IV.

Note 2: See also subsection 151AJ(10).

Authorised conduct—points of interconnection

(2) If:
  (a) an NBN corporation is a carrier or carriage service provider; and
  (b) the NBN corporation:
    (i) owns or controls one or more facilities; or
    (ii) is a nominated carrier in relation to one or more facilities; and
  (c) the NBN corporation refuses to permit interconnection of those facilities at a particular location with one or more facilities of:
    (i) a service provider; or
    (ii) a utility; and
  (d) the location is not a listed point of interconnection; and

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(e) the refusal is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities;

the refusal is authorised for the purposes of subsection 51(1).

Note: For ***listed point of interconnection***, see section 151DB.

Authorised conduct—bundling of designated access services

(3) If:

(a) an NBN corporation is a carrier or carriage service provider; and

(b) the NBN corporation:

(i) refuses to supply; or

(ii) refuses to offer to supply;

a designated access service to a service provider or utility unless the service provider or utility acquires, or agrees to acquire, one or more other designated access services (other than voice telephony facilitation services) from the NBN corporation; and

(c) the refusal is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities;

the refusal is authorised for the purposes of subsection 51(1).

Authorised conduct—uniform national pricing

(4) If an NBN corporation engages in conduct that is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities, that conduct is authorised for the purposes of subsection 51(1).

Uniform national pricing

(5) For the purposes of this section, uniform national pricing of an eligible service supplied, or offered to be supplied, by an NBN corporation to service providers and utilities is achieved, if, and only if, the price-related terms and conditions on which the NBN

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corporation supplies, or offers to supply, the eligible service to service providers and utilities are the same throughout Australia.

(6) For the purposes of this section, in determining whether there is uniform national pricing of an eligible service supplied, or offered to be supplied, by an NBN corporation, disregard any discrimination by the NBN corporation against another person on the grounds that the NBN corporation has reasonable grounds to believe that the other person would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation supplies, or on which the NBN corporation is reasonably likely to supply, the eligible service.

(6A) Examples of grounds for believing as mentioned in subsection (6) include:

(a) evidence that the other person is not creditworthy; and

(b) repeated failures by the other person to comply with the terms and conditions on which the same or a similar eligible service has been supplied (whether or not by the NBN corporation).

(7) For the purposes of this section, in determining whether eligible services are characterised as:

(a) the same eligible service; or

(b) different eligible services;

it is immaterial whether the services are supplied, or offered to be supplied, using:

(c) the same facilities or kinds of facilities; or

(d) different facilities or kinds of facilities.

(8) For example, the same eligible service could be supplied, or offered to be supplied, using:

(a) an optical fibre line; or

(b) terrestrial radiocommunications equipment; or

(c) a satellite.

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Definitions

(9) In this section:

access virtual circuit service means an eligible service that is known as:

(a) an access virtual circuit service; or

(b) the access virtual circuit component of a fibre access service.

connectivity virtual circuit service means an eligible service that is known as:

(a) a connectivity virtual circuit service; or

(b) the connectivity virtual circuit component of a fibre access service.

designated access service means:

(a) an access virtual circuit service; or

(b) a connectivity virtual circuit service; or

(c) a network-network interface service; or

(d) a user network interface service; or

(e) a voice telephony facilitation service.

eligible service has the same meaning as in section 152AL.

listed point of interconnection has the meaning given by section 151DB.

network-network interface service means an eligible service that is known as:

(a) a network-network interface service; or

(b) the network-network interface component of a fibre access service.

nominated carrier has the same meaning as in the *Telecommunications Act 1997*.

point of interconnection means a location for the interconnection of facilities.

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price-related terms and conditions means terms and conditions relating to price or a method of ascertaining price.

service provider has the same meaning as in the *Telecommunications Act 1997.*

special access undertaking has the same meaning as in Part XIC.

telecommunications industry has the same meaning as in the *Telecommunications Act 1997*.

uniform national pricing has the meaning given by subsections (5) and (6).

use, in relation to a facility, means use:

(a) in isolation; or

(b) in conjunction with one or more other things.

user network interface service means an eligible service that is known as:

(a) a user network interface service; or

(b) the user network interface service component of a fibre access service.

utility means:

(a) Airservices Australia; or

(b) a State or Territory transport authority; or

(c) a rail corporation (within the meaning of the *National Broadband Network Companies Act 2011*); or

(d) an electricity supply body (within the meaning of that Act); or

(e) a gas supply body (within the meaning of that Act); or

(f) a water supply body (within the meaning of that Act); or

(g) a sewerage services body (within the meaning of that Act); or

(h) a storm water drainage services body (within the meaning of that Act); or

(i) a State or Territory road authority (within the meaning of that Act).

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voice telephony facilitation service means a service that facilitates the supply of a carriage service that is a carriage service for the purpose of voice telephony.

151DB Listed points of interconnection

(1) The Commission:

(a) must prepare a written list setting out points of interconnection; and

(b) may, by writing, vary that list.

(2) For the purposes of this Division, a point of interconnection specified in a list in force under subsection (1) is a ***listed point of interconnection***.

(3) The Commission must publish on its website a copy of a list in force under subsection (1).

(4) A list under subsection (1) is not a legislative instrument.

(5) A variation of a list under subsection (1) is not a legislative instrument.

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Part XIC—Telecommunications access regime

Division 1—Introduction

152AA Simplified outline

The following is a simplified outline of this Part:

- This Part sets out a telecommunications access regime.
- A carriage service, or a related service, supplied, or capable of being supplied, by a carrier (other than an NBN corporation) or a carriage service provider (other than an NBN corporation) is a ***declared service*** if:
  - (a) the Commission has declared the service to be a ***declared service***; or
  - (b) the service is supplied by the carrier or carriage service provider, and a special access undertaking given by the carrier or carriage service provider is in operation in relation to the service.
- A carriage service, or a related service, supplied, or capable of being supplied, by an NBN corporation is a ***declared service*** if:
  - (a) the Commission has declared the service to be a ***declared service***; or
  - (b) the NBN corporation has formulated a standard form of access agreement that relates to access to the service; or
  - (c) the service is supplied by the NBN corporation, and a special access undertaking given by the NBN corporation is in operation in relation to the service.

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- Carriers and carriage service providers who provide declared services are required to comply with ***standard access obligations*** in relation to those services.
- The ***standard access obligations*** facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services.
- The terms and conditions on which carriers and carriage service providers are required to comply with the ***standard access obligations*** are subject to agreement.
- If agreement cannot be reached, but the carrier or carriage service provider has given an ***access undertaking***, the terms and conditions are as set out in the access undertaking.
- If agreement cannot be reached, no access undertaking is in operation, but the Commission has made binding rules of conduct, the terms and conditions are as specified in the binding rules of conduct.
- If agreement cannot be reached, no access undertaking is in operation, and no binding rules of conduct have been made, the terms and conditions are as specified in an access determination made by the Commission.
- A carrier, carriage service provider or related body must not prevent or hinder the fulfilment of a standard access obligation.

Note: Even though this section mentions binding rules of conduct, binding rules of conduct may only be made if the Commission considers that there is an urgent need to do so.

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152AB Object of this Part

Object

(1) The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Promotion of the long-term interests of end-users

(2) For the purposes of this Part, in determining whether a particular thing promotes the long-term interests of end-users of either of the following services (the ***listed services***):

(a) carriage services;

(b) services supplied by means of carriage services;

regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

(c) the objective of promoting competition in markets for listed services;

(d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in:

(i) the infrastructure by which listed services are supplied; and

(ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

Subsection (2) limits matters to which regard may be had

(3) Subsection (2) is intended to limit the matters to which regard may be had.

Promoting competition

(4) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in

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paragraph (2)(c), regard must be had to the extent to which the thing will remove obstacles to end-users of listed services gaining access to listed services.

Subsection (4) does not limit matters to which regard may be had

(5) Subsection (4) does not, by implication, limit the matters to which regard may be had.

Encouraging efficient use of infrastructure etc.

(6) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(e), regard must be had to the following matters:
  (a) whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
    (i) the technology that is in use, available or likely to become available; and
    (ii) whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable; and
    (iii) the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks;
  (b) the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope;
  (c) the incentives for investment in:
    (i) the infrastructure by which the services are supplied; and
    (ii) any other infrastructure by which the services are, or are likely to become, capable of being supplied.

Subsection (6) does not limit matters to which regard may be had

(7) Subsection (6) does not, by implication, limit the matters to which regard may be had.

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Investment risks

(7A) For the purposes of paragraph (6)(c), in determining incentives for investment, regard must be had to the risks involved in making the investment.

(7B) Subsection (7A) does not, by implication, limit the matters to which regard may be had.

Achieving any-to-any connectivity

(8) For the purposes of this section, the objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.

152AC Definitions

In this Part, unless the contrary intention appears:

access has the meaning given by section 152AF.

access agreement has the meaning given by section 152BE.

access determination means a determination under section 152BC.

access seeker has the meaning given by section 152AG.

access undertaking means a special access undertaking.

binding rules of conduct means rules made under subsection 152BD(1).

carriage service has the same meaning as in the *Telecommunications Act 1997*, and includes a proposed carriage service.

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carriage service provider has the same meaning as in the *Telecommunications Act 1997*.

carrier has the same meaning as in the *Telecommunications Act 1997*.

carrier licence has the same meaning as in the *Telecommunications Act 1997*.

category A standard access obligation has the meaning given by section 152AR.

category B standard access obligation has the meaning given by section 152AXB.

conditional-access customer equipment means customer equipment that:

(a) consists of or incorporates a conditional access system that allows a service provider to determine whether an end-user is able to receive a particular service; and

(b) either:

(i) is for use in connection with the supply of a content service; or

(ii) is of a kind specified in the regulations.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

content service has the same meaning as in the *Telecommunications Act 1997*, and includes a proposed content service.

customer equipment has the same meaning as in the *Telecommunications Act 1997*.

data processing device means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.

declared service has the meaning given by section 152AL.

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facility has the same meaning as in the *Telecommunications Act 1997*.

Federal Court means the Federal Court of Australia.

final access determination means an access determination other than an interim access determination.

final migration plan has the same meaning as in the *Telecommunications Act 1997*.

fixed principles provision has the meaning given by section 152BCD.

fixed principles term or condition has the meaning given by section 152CBAA.

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

Ministerial pricing determination means a determination under section 152CH.

modifications includes additions, omissions and substitutions.

NBN Co has the same meaning as in the *National Broadband Network Companies Act 2011*.

NBN corporation has the same meaning as in the *National Broadband Network Companies Act 2011*.

nominated carrier has the same meaning as in the *Telecommunications Act 1997*.

person includes a partnership.

Note: Section 152EN sets out additional rules about partnerships.

Procedural Rules means Procedural Rules made under section 152ELA.

quarter means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

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service provider has the same meaning as in the *Telecommunications Act 1997.*

special access undertaking means an undertaking under Subdivision B of Division 5.

standard access obligation means:

(a) a category A standard access obligation; or

(b) a category B standard access obligation.

telecommunications network has the same meaning as in the *Telecommunications Act 1997.*

variation agreement has the meaning given by subsection 152BE(3).

152AD This Part binds the Crown

(1) The following provisions of this Act bind the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory:

(a) this Part;

(b) the other provisions of this Act so far as they relate to this Part.

(2) This Part does not make 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.

152AE Extension to external Territories

(1) This Part, and the other provisions of this Act so far as they relate to this Part, extend to each eligible Territory (within the meaning of the *Telecommunications Act 1997)*.

(2) The operation of this Part, and the other provisions of this Act so far as they relate to this Part, in relation to Norfolk Island is not

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affected by the amendments made by Division 1 of Part 1 of Schedule 5 to the *Territories Legislation Amendment Act 2016*.

152AF Access

(1) A reference in this Part to ***access***, in relation to a declared service, is a reference to access by a service provider in order that the service provider can provide carriage services and/or content services.

(2) For the purposes of this Part, anything done by a carrier or carriage service provider in fulfilment of a standard access obligation is taken to be an aspect of access to a declared service.

(3) For the purposes of this Part, if an access determination imposes a requirement on a carrier or carriage service provider as mentioned in paragraph 152BC(3)(e), anything done by the carrier or provider in fulfilment of the requirement is taken to be an aspect of access to a declared service.

152AG Access seeker

(1) This section sets out the circumstances in which a person is taken to be an ***access seeker*** in relation to a declared service for the purposes of this Part.

(2) A service provider is an ***access seeker*** in relation to a declared service if the provider makes, or proposes to make, a request in relation to that service under section 152AR (which deals with the category A standard access obligations) or section 152AXB (which deals with the category B standard access obligations), whether or not:

(a) the request is refused; or

(b) the request is being complied with.

(3) A service provider is an ***access seeker*** in relation to a declared service if:

(a) the provider wants access to the service; or

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(b) the provider wants to change some aspect of the provider's existing access to the service; or

(c) the supplier of the service wants to change some aspect of the provider's existing access to the service.

152AH Reasonableness—terms and conditions

(1) For the purposes of this Part, in determining whether particular terms and conditions are reasonable, regard must be had to the following matters:

(a) whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;

(b) the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;

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

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

(e) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;

(f) the economically efficient operation of a carriage service, a telecommunications network or a facility.

(2) Subsection (1) does not, by implication, limit the matters to which regard may be had.

152AI When public inquiry commences

For the purposes of this Part, a public inquiry held by the Commission under Part 25 of the *Telecommunications Act 1997* ***commences*** when the Commission publishes the notice under section 498 of that Act about the inquiry.

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152AJ Interpretation of Part IIIA not affected by this Part

In determining the meaning of a provision of Part IIIA, the provisions of this Part (other than section 152CK) are to be ignored.

152AK 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.

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Division 2—Declared services

152AL Declared services

Eligible service

(1) For the purposes of this section, an ***eligible service*** is:

(a) a listed carriage service (within the meaning of the *Telecommunications Act 1997*); or

(b) a service that facilitates the supply of a listed carriage service (within the meaning of that Act);

where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons).

Declaration made after public inquiry—services not supplied by an NBN corporation

(3) The Commission may, by written instrument, declare that a specified eligible service is a ***declared service*** if:

(a) the Commission has held a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make the declaration; and

(b) the Commission has prepared a report about the inquiry under section 505 of the *Telecommunications Act 1997*; and

(c) the report was published during the 180-day period ending when the declaration was made; and

(d) the Commission is satisfied that the making of the declaration will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Note: Eligible services may be specified by name, by inclusion in a specified class or in any other way.

(3A) A declaration under subsection (3) does not apply to an eligible service to the extent to which the service is supplied, or is capable

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of being supplied, by an NBN corporation (whether to itself or to other persons).

(3B) Before commencing to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make a declaration under subsection (3) in relation to an eligible service, the Commission must consider whether to hold a public inquiry under that Part about a proposal to make a declaration under subsection (8A) in relation to the service.

Note: For combined public inquiries, see section 152AN.

Declaration has effect

(4) A declaration under subsection (3) has effect accordingly.

Gazettal of declaration

(5) A copy of a declaration under subsection (3) is to be published in the *Gazette*.

Related services

(6) A reference in paragraph (1)(b) to a service that facilitates the supply of a carriage service does not include a reference to the use of intellectual property except to the extent that it is an integral but subsidiary part of the first-mentioned service.

Services covered by special access undertakings—services not supplied by an NBN corporation

(7) If:

(a) a person (other than an NBN corporation) gives the Commission a special access undertaking in relation to a service or a proposed service; and

(b) the undertaking is in operation; and

(c) the person supplies the service or proposed service (whether to itself or to other persons);

the service supplied by the person is a ***declared service***. To avoid doubt, if the undertaking is subject to limitations, the service

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supplied by the person is a ***declared service*** only to the extent to which the service falls within the scope of the limitations.

(8) The Commission may declare a service under subsection (3) even if the service is, to any extent, covered by subsection (7).

Declaration made after public inquiry—services supplied by an NBN corporation

(8A) The Commission may, by written instrument, declare that a specified eligible service, to the extent to which the service is supplied, or is capable of being supplied, by a specified NBN corporation (whether to itself or to other persons), is a ***declared service*** if:

(a) the Commission has held a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make the declaration; and

(b) the Commission has prepared a report about the inquiry under section 505 of the *Telecommunications Act 1997*; and

(c) the report was published during the 180-day period ending when the declaration was made; and

(d) the Commission is satisfied that the making of the declaration will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

If the Commission does so, the declared service ***relates to*** the NBN corporation for the purposes of subsections 152AXB(2) and 152AXC(7).

Note: Eligible services may be specified by name, by inclusion in a specified class or in any other way.

(8B) A declaration under subsection (8A) has effect accordingly.

(8C) A copy of a declaration under section (8A) is to be published in the *Gazette*.

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Services supplied by an NBN corporation—standard form of access agreement

(8D) If:

(a) an eligible service is supplied, or is capable of being supplied, by an NBN corporation (whether to itself or to other persons); and

(b) the NBN corporation is a carrier or a carriage service provider; and

(c) the NBN corporation has formulated a standard form of access agreement that relates to access to the service; and

(d) the standard form of access agreement is available on the NBN corporation's website;

then:

(e) the service, to the extent to which it is supplied, or is capable of being supplied, by the NBN corporation (whether to itself or to other persons) is a ***declared service***; and

(f) the declared service ***relates to*** the NBN corporation for the purposes of subsections 152AXB(2) and 152AXC(7).

Services covered by special access undertakings—services supplied by an NBN corporation

(8E) If:

(a) an NBN corporation gives the Commission a special access undertaking in relation to a service or a proposed service; and

(b) the undertaking is in operation; and

(c) the NBN corporation supplies the service or proposed service (whether to itself or to other persons);

then:

(d) the service supplied by the NBN corporation is a ***declared service***; and

(e) the declared service ***relates to*** the NBN corporation for the purposes of subsections 152AXB(2) and 152AXC(7).

To avoid doubt, if the undertaking is subject to limitations, the service supplied by the NBN corporation is a ***declared service*** only

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to the extent to which the service falls within the scope of the limitations.

(8F) The Commission may declare a service under subsection (8A) even if the service is, to any extent, covered by subsection (8E).

Declaration is not a legislative instrument

(9) A declaration under this section is not, and is taken never to have been, a legislative instrument.

(10) A variation of a declaration made under this section is not, and is taken never to have been, a legislative instrument.

(11) A revocation of a declaration made under this section is not, and is taken never to have been, a legislative instrument.

(12) If:

(a) a declaration was made under this section before the commencement of this subsection; and

(b) the declaration ceased to be in force before the commencement of this subsection;

then:

(c) the declaration is taken never to have been a legislative instrument; and

(d) if the declaration was varied or revoked before the commencement of this subsection—the variation or revocation is taken never to have been a legislative instrument.

(13) For the purposes of paragraph (12)(b), assume that the *Legislation Act 2003* had never been enacted.

(14) Subsections (9) to (12) are enacted for the avoidance of doubt.

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152ALA Duration of declaration

Expiry date

(1) A declaration under section 152AL must specify an expiry date for the declaration.

(2) In specifying an expiry date, the Commission must have regard to:
  (a) the principle that the expiry date for a declaration should occur in the period:
    (i) beginning 3 years after the declaration was made; and
    (ii) ending 5 years after the declaration was made;
  unless, in the Commission's opinion, there are circumstances that warrant the expiry date occurring in a shorter or longer period; and
  (b) such other matters (if any) as the Commission considers relevant.

(3) Subsection (2) has effect subject to subsection (4).

Extension of expiry date

(4) The Commission may, by notice published in the *Gazette*, extend or further extend the expiry date of a specified declaration under section 152AL, so long as the extension or further extension is for a period of not more than 5 years.

Duration of declaration

(5) Unless sooner revoked, a declaration under section 152AL ceases to be in force on the expiry date of the declaration.

Fresh declaration

(6) If a declaration under section 152AL expires, this Part does not prevent the Commission from making a fresh declaration under section 152AL in the same terms as the expired declaration.

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(6A) If the fresh declaration comes into force immediately after the expiry of the expired declaration, the fresh declaration is taken to be a declaration that ***replaces*** the expired declaration.

Public inquiry during 18-month period ending on the expiry date of a declaration

(7) The Commission must:

(a) during the 18-month period ending on the expiry date of a declaration, hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about:

(i) whether to extend or further extend the expiry date of the declaration; and

(ii) whether to revoke the declaration; and

(iii) whether to vary the declaration; and

(iv) whether to allow the declaration to expire without making a new declaration under section 152AL; and

(v) whether to allow the declaration to expire and then to make a new declaration under section 152AL; and

(vi) whether to extend or further extend the expiry date of a declaration by a period of not more than 12 months and then to allow the declaration to expire without making a new declaration under section 152AL; and

(b) prepare a report about the inquiry under section 505 of the *Telecommunications Act 1997*; and

(c) publish the report during the 180-day period ending on the expiry date of the first-mentioned declaration.

(8) If:

(a) after holding a public inquiry under subsection (7) in relation to a declaration, the Commission allows the declaration to expire and then makes a new declaration under section 152AL; and

(b) the report mentioned in paragraph (7)(b) was published during the 180-day period ending when the new declaration was made;

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the Commission is taken to have complied with paragraphs 152AL(3)(a), (b) and (c), or paragraphs 152AL(8A)(a), (b) and (c), as the case requires, in relation to the new declaration.

(9) If:

(a) after holding a public inquiry under subsection (7) in relation to a declaration, the Commission revokes or varies the declaration; and

(b) the report mentioned in paragraph (7)(b) was published during the 180-day period ending at the time of the revocation or variation;

the Commission is taken to have complied with paragraphs 152AL(3)(a), (b) and (c), or paragraphs 152AL(8A)(a), (b) and (c), as the case requires, in relation to the revocation or variation (as those paragraphs apply to the power of revocation and variation because of subsection 152AO(1)).

Extension notice is not a legislative instrument

(10) A notice under subsection (4) is not, and is taken never to have been, a legislative instrument.

(11) If:

(a) a declaration was made under section 152AL before the commencement of this subsection; and

(b) a notice relating to the declaration was published under subsection (4) of this section before the commencement of this subsection; and

(c) the declaration ceased to be in force before the commencement of this subsection;

the notice is taken never to have been a legislative instrument.

(12) For the purposes of paragraph (11)(c), assume that the *Legislation Act 2003* had never been enacted.

(13) Subsections (10) and (11) are enacted for the avoidance of doubt.

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152AM Inquiries about proposals to declare services

(1) This section applies to a public inquiry of a kind mentioned in paragraph 152AL(3)(a) or (8A)(a) or 152ALA(7)(a).

(2) The Commission may hold the inquiry:
  (a) on its own initiative; or
  (b) if requested in writing to do so by a person.

(3) The Commission does not have a duty to consider whether to hold a public inquiry of a kind mentioned in paragraph 152AL(3)(a) or (8A)(a) if the Commission is requested to do so by a person.

(4) The Commission must give the ACMA a copy of the report about the inquiry prepared in accordance with section 505 of the *Telecommunications Act 1997.*

(5) If the inquiry is held at the request of a person, the Commission must give the person a copy of the report about the inquiry prepared under section 505 of the *Telecommunications Act 1997.*

152AN Combined inquiries about proposals to declare services

(1) The Commission may decide to combine 2 or more public inquiries of a kind mentioned in paragraph 152AL(3)(a), or (8A)(a) or 152ALA(7)(a).

(2) If the Commission makes such a decision:
  (a) the Commission may publish a single notice relating to the combined inquiry under section 498 of the *Telecommunications Act 1997*; and
  (b) the Commission may prepare a single discussion paper about the combined inquiry under section 499 of that Act; and
  (c) the Commission may hold hearings relating to the combined inquiry under section 501 of that Act; and
  (d) the Commission must ensure that each inquiry is covered by a report under section 505 of that Act, whether the report relates:
    (i) to a single one of those inquiries; or

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(ii) to any 2 or more of those inquiries.

152AO Variation or revocation of declaration

(1) Subsection 33(3) of the *Acts Interpretation Act 1901* applies to a power conferred on the Commission by section 152AL, but it applies with the following changes.

(1A) If:

(a) a declaration under section 152AL relates to a particular service; and

(b) in the Commission's opinion, the service is of minor importance;

the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to revoke the declaration.

(3) If a variation of a declaration under subsection 152AL(3) or (8A) is a variation that, under the Procedural Rules, is taken to be a variation of a minor nature, the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about the proposed variation.

152AQ Register of declared services

(1) The Commission must keep a Register in relation to declarations under section 152AL.

(2) The Register must include the following:

(a) particulars of all such declarations (including declarations that have been revoked);

(b) particulars of variations and revocations of such declarations;

(c) copies of reports prepared in accordance with section 505 of the *Telecommunications Act 1997* in relation to inquiries mentioned in paragraph 152AL(3)(a) or (8A)(a) or 152ALA(7)(a) of this Act.

(3) The Register is to be maintained by electronic means.

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(4) The Register is to be made available for inspection on the Commission's website.

(5) The Register is not a legislative instrument.

152AQC Compensation for acquisition of property

(1) If the operation of any or all of the following provisions:

(a) subsection 152AL(9), (10), (11), (12), (13) or (14);

(b) subsection 152ALA(10), (11), (12) or (13);

would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

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Division 3—Standard access obligations

Subdivision A—Category A standard access obligations

152AR Category A standard access obligations

(1) This section sets out the ***category A standard access obligations***.

Access provider and active declared services

(2) For the purposes of this section, if a carrier (other than an NBN corporation) or a carriage service provider (other than an NBN corporation) supplies declared services, whether to itself or to other persons:

(a) the carrier or provider is an ***access provider***; and

(b) the declared services are ***active declared services***.

Supply of active declared service to service provider

(3) An access provider must, if requested to do so by a service provider:

(a) supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and

(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and

(c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

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Limit on paragraph (3)(a) obligation

(4) Paragraph (3)(a) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have any of the following effects:

(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the request was made;

(b) preventing the access provider from obtaining a sufficient amount of the service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made;

(c) preventing a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person's actual requirements;

(d) depriving any person of a protected contractual right;

(da) preventing a designated Telstra successor company from complying with an undertaking in force under section 577A of the *Telecommunications Act 1997*;

(e) preventing Telstra from complying with an undertaking in force under section 577C or 577E of the *Telecommunications Act 1997*; or

(f) if a final migration plan is in force—requiring a designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.

Ordering and provisioning—paragraph (3)(b)

(4A) To avoid doubt, ordering and provisioning are taken to be aspects of technical and operational quality referred to in paragraph (3)(b).

(4B) The regulations may provide that, for the purposes of subsection (4A), a specified act or thing is taken to be ordering.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

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(4C) The regulations may provide that, for the purposes of subsection (4A), a specified act or thing is taken to be provisioning.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

Interconnection of facilities

(5) If an access provider:

(a) owns or controls one or more facilities; or

(b) is a nominated carrier in relation to one or more facilities;

the access provider must, if requested to do so by a service provider:

(c) permit interconnection of those facilities with the facilities of the service provider for the purpose of enabling the service provider to be supplied with active declared services in order that the service provider can provide carriage services and/or content services; and

(d) take all reasonable steps to ensure that:

(i) the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself; and

(ii) if a standard is in force under section 384 of the *Telecommunications Act 1997*—the interconnection complies with the standard; and

(e) take all reasonable steps to ensure that the service provider receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

Provision of billing information

(6) If a service provider uses active declared services supplied by an access provider in accordance with subsection (3), the access provider must, if requested to do so by the service provider, give the service provider billing information in connection with matters

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associated with, or incidental to, the supply of those active declared services.

Timing and content of billing information

(7) The billing information referred to in subsection (6) must:
  (a) be given at such times or intervals as are ascertained in accordance with the regulations; and
  (b) be given in a manner and form ascertained in accordance with the regulations; and
  (c) set out such particulars as are ascertained in accordance with the regulations.

Conditional-access customer equipment

(8) If an access provider supplies an active declared service by means of conditional-access customer equipment, the access provider must, if requested to do so by a service provider who has made a request referred to in subsection (3), supply to the service provider any service that is necessary to enable the service provider to supply carriage services and/or content services by means of the active declared service and using the equipment.

Exceptions

(9) This section does not impose an obligation on an access provider if there are reasonable grounds to believe that:
  (a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or
  (b) the access seeker would fail, in connection with that obligation, to protect:
    (i) the integrity of a telecommunications network; or
    (ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

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Examples—paragraph (9)(a) grounds

(10) Examples of grounds for believing as mentioned in paragraph (9)(a) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the access provider).

Starting date for obligations

(11) An obligation imposed by this section does not arise before 1 July 1997.

Definitions

(12) In this section:

pre-request right, in relation to a request made for the purposes of paragraph (3)(a), means a right under a contract that was in force at the time when the request was made.

protected contractual right means a right under a contract that was in force at the beginning of 13 September 1996.

152ASA Anticipatory class exemptions from category A standard access obligations

Determination providing for exemption

(1) The Commission may, by written instrument, determine that, in the event that a specified service or proposed service becomes an active declared service, each of the members of a specified class of carrier or of a specified class of carriage service provider are exempt from any or all of the obligations referred to in section 152AR, to the extent to which the obligations relate to the active declared service.

(1A) A service or a proposed service must not be specified in a determination under this section if, at the time when the

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determination is made, the service or proposed service is a declared service.

(2) A determination under this section may be unconditional or subject to such conditions or limitations as are specified in the determination.

Note: For judicial enforcement of conditions and limitations, see section 152BBAA.

(2A) A determination under this section may:

(a) provide that the determination must not be varied; or

(b) provide that the determination must not be varied except in such circumstances as are specified in the determination.

(2B) A determination under this section may:

(a) provide that the determination must not be revoked; or

(b) provide that the determination must be revoked except in such circumstances as are specified in the determination.

(3) A determination under this section has effect accordingly.

Criteria for making determination

(4) The Commission must not make a determination under this section unless the Commission is satisfied that the making of the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services.

Expiry time of determination

(8) A determination under this section must specify the expiry time of the determination. If a determination expires, this Part does not prevent the Commission from making a fresh determination under this section in the same terms as the expired determination.

(9) The expiry time of the determination may be described by reference to the end of a period beginning when the service or proposed service becomes an active declared service.

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(10) Subsection (9) does not, by implication, limit subsection (8).

Consultation

(11) If, in the Commission's opinion, the making of a determination under this section is likely to have a material effect on the interests of a person, then, before making the determination, the Commission must first:

(a) publish a draft of the determination and invite people to make submissions to the Commission on the question of whether the draft determination should be made; and

(b) consider any submissions that were received within the time limit specified by the Commission when it published the draft determination.

Variation or revocation of determination

(11A) Subsection 33(3) of the *Acts Interpretation Act 1901* applies to a power conferred on the Commission by subsection (1), but it applies with the following changes.

(11B) A provision referred to in paragraph (2A)(a) or (b) or (2B)(a) or (b) cannot be varied or removed.

(11C) A determination under this section must not be varied or revoked in a manner that is inconsistent with a provision referred to in paragraph (2A)(a) or (b) or (2B)(a) or (b).

Determination is not a legislative instrument

(12) A determination made under subsection (1) is not a legislative instrument.

Definition

(13) In this section:

active declared service has the same meaning as in section 152AR.

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152ATA Anticipatory individual exemptions from category A standard access obligations

Application for exemption order

(1) A person who is, or expects to be, a carrier or a carriage service provider may apply to the Commission for a written order that, in the event that a specified service or proposed service becomes an active declared service, the person is exempt from any or all of the obligations referred to in section 152AR, to the extent to which the obligations relate to the active declared service.

(2) An application under subsection (1) must be:
  (a) in writing; and
  (b) in a form approved in writing by the Commission for the purposes of this paragraph.

(2A) Before the Commission makes a decision under subsection (3) in relation to the application, the applicant may, by written notice given to the Commission within the time allowed by the Procedural Rules, modify the application, so long as the modification is a modification that, under the Procedural Rules, is taken to be a modification of a minor nature.

Commission must make exemption order or refuse application

(3) After considering the application, the Commission must:
  (a) make a written order that, in the event that the service or proposed service becomes an active declared service, the applicant is exempt from one or more of the obligations referred to in section 152AR, to the extent to which the obligations relate to the active declared service; or
  (b) refuse the application.

(3A) A service or a proposed service must not be specified in an order under paragraph (3)(a) if, at the time when the order is made, the service or proposed service is a declared service.

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(4) An order under paragraph (3)(a) may be unconditional or subject to such conditions or limitations as are specified in the order.

Note: For judicial enforcement of conditions and limitations, see section 152BBAA.

(4A) An order under paragraph (3)(a) may:

(a) provide that the order must not be varied; or

(b) provide that the order must not be varied except in such circumstances as are specified in the order.

(4B) An order under paragraph (3)(a) may:

(a) provide that the order must not be revoked; or

(b) provide that the order must not be revoked except in such circumstances as are specified in the order.

(5) An order under paragraph (3)(a) has effect accordingly.

Criteria for making exemption order

(6) The Commission must not make an order under paragraph (3)(a) unless the Commission is satisfied that the making of the order will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Serial applications

(7) If:

(a) a person makes an application (the ***first application***) under subsection (1) for an order in relation to a service or proposed service; and

(b) the Commission refuses the first application; and

(c) the person subsequently makes another application under subsection (1); and

(d) the Commission is satisfied that:

(i) the first application and the other application have material similarities; or

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(ii) the grounds on which the person made the first application are materially similar to the grounds on which the person has made the other application;

the Commission may refuse to consider the other application.

Expiry time for exemption order

(10) An order under paragraph (3)(a) must specify the expiry time for the order. If an order expires, this Part does not prevent the Commission from making a fresh order under paragraph (3)(a) in the same terms as the expired order.

(10A) The expiry time for the order may be described by reference to the end of a period beginning when the service or proposed service becomes an active declared service.

(10B) Subsection (10A) does not, by implication, limit subsection (10).

Consultation

(11) If, in the Commission's opinion, the making of an order under paragraph (3)(a) is likely to have a material effect on the interests of a person, then, before making the order, the Commission must first:

(a) publish the application for the order and invite people to make submissions to the Commission on the question of whether the order should be made; and

(b) consider any submissions that were received within the time limit specified by the Commission when it published the application.

Commission to make decision within 6 months

(12) If the Commission does not make a decision on an application under this section within 6 months after receiving the application, the Commission is taken to have made, at the end of that 6-month period, an order under paragraph (3)(a) in accordance with the terms of the application.

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(13) In calculating the 6-month period referred to in subsection (12), disregard:

(a) if the Commission has published the application under subsection (11)—a day in the period:

(i) beginning on the date of publication; and

(ii) ending at the end of the time limit specified by the Commission when it published the application; and

(b) if the Commission has requested further information under section 152AU in relation to the application—a day during any part of which the request, or any part of the request, remains unfulfilled.

Extension of decision-making period

(14) The Commission may, by written notice given to the applicant, extend or further extend the 6-month period referred to in subsection (12), so long as:

(a) the extension or further extension is for a period of not more than 3 months; and

(b) the notice includes a statement explaining why the Commission has been unable to make a decision on the application within that 6-month period or that 6-month period as previously extended, as the case may be.

(15) As soon as practicable after the Commission gives a notice under subsection (14), the Commission must cause a copy of the notice to be made available on the internet.

Notification of refusal of application

(16) If the Commission makes a decision refusing an application under subsection (1), the Commission must give the applicant a written statement setting out the reasons for the refusal.

(16A) Subsection 33(3) of the *Acts Interpretation Act 1901* applies to a power conferred on the Commission by paragraph (3)(a), but it applies with the following changes.

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(16B) A provision referred to in paragraph (4A)(a) or (b) or (4B)(a) or (b) cannot be varied or removed.

(16C) An order under paragraph (3)(a) must not be varied or revoked in a manner that is inconsistent with a provision referred to in (4A)(a) or (b) or (4B)(a) or (b).

Definition

(18) In this section:

active declared service has the same meaning as in section 152AR.

152AU Individual exemptions—request for further information

(1) This section applies to an application under subsection 152ATA(1).

(2) The Commission may request the applicant to give the Commission further information about the application.

(2A) If:

(a) the Procedural Rules make provision for or in relation to a time limit for giving the information; and

(b) the applicant does not give the Commission the information within the time limit allowed by the Procedural Rules;

the Commission may, by written notice given to the applicant, refuse the application.

(2B) Subsection (2A) has effect despite anything in this Division.

(3) If the Procedural Rules do not make provision for or in relation to a time limit for giving the information, the Commission may refuse to consider the application until the applicant gives the Commission the information.

(4) The Commission may withdraw its request for further information, in whole or in part.

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152AXA Statement of reasons for decision—specification of documents

If the Commission:

(a) makes a decision under section 152ATA; and

(b) gives a person a written statement setting out the reasons for the decision;

the statement must specify the documents that the Commission examined in the course of making the decision.

Subdivision B—Category B standard access obligations

152AXB Category B standard access obligations

(1) This section sets out the ***category B standard access obligations***.

Supply of declared service to service provider

(2) If:

(a) an NBN corporation is a carrier or carriage service provider; and

(b) under subsection 152AL(8A), (8D) or (8E), a declared service relates to the NBN corporation;

the NBN corporation must, if requested to do so by a service provider, supply the service to the service provider in order that the service provider can provide carriage services and/or content services.

Note: For declared services, see subsections 152AL(8A), (8D) and (8E).

Limit on subsection (2) obligations

(3) Subsection (2) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have any of the following effects:

(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably

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anticipated requirements, measured at the time when the request was made;

(b) preventing the NBN corporation from obtaining a sufficient amount of the service to be able to meet the NBN corporation's reasonably anticipated requirements, measured at the time when the request was made;

(c) preventing a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person's actual requirements.

(3A) Subsection (2) does not impose an obligation on an NBN corporation to supply a service in circumstances where a refusal by the NBN corporation to supply the service is authorised under section 151DA for the purposes of subsection 51(1).

Interconnection of facilities

(4) If:

(a) an NBN corporation is a carrier or carriage service provider; and

(b) the NBN corporation:

(i) owns or controls one or more facilities; or

(ii) is a nominated carrier in relation to one or more facilities;

the NBN corporation must, if requested to do so by a service provider:

(c) permit interconnection of those facilities with the facilities of the service provider for the purpose of enabling the service provider to be supplied with declared services in order that the service provider can provide carriage services and/or content services; and

(d) take all reasonable steps to ensure that, if a standard is in force under section 384 of the *Telecommunications Act 1997*, the interconnection complies with the standard.

(4A) Subsection (4) does not apply to an interconnection at a location that is not a listed point of interconnection (within the meaning of section 151DB).

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Conditional-access customer equipment

(5) If:

(a) an NBN corporation is a carrier or carriage service provider; and

(b) the NBN corporation supplies a declared service by means of conditional-access customer equipment;

the NBN corporation must, if requested to do so by a service provider who has made a request referred to in subsection (2), supply to the service provider any service that is necessary to enable the service provider to supply carriage services and/or content services by means of the declared service and using the equipment.

Exceptions

(6) This section does not impose an obligation on an NBN corporation if there are reasonable grounds to believe that:

(a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with that obligation; or

(b) the access seeker would fail, in connection with that obligation, to protect:

(i) the integrity of a telecommunications network; or

(ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

Examples—paragraph (6)(a) grounds

(7) Examples of grounds for believing as mentioned in paragraph (6)(a) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).

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Definition

(8) In this section:

pre-request right, in relation to a request made for the purposes of subsection (2), means a right under a contract that was in force at the time when the request was made.

152AXC NBN corporation to supply declared services on a non-discriminatory basis

No discrimination between access seekers

(1) An NBN corporation must not, in complying with any of its category B standard access obligations, discriminate between access seekers.

Note: For explanatory material, see section 152CJH.

(2) The rule in subsection (1) does not prevent discrimination against an access seeker if the NBN corporation has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant obligation.

(3) Examples of grounds for believing as mentioned in subsection (2) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).

No discrimination by an NBN corporation in favour of itself

(7) If:

(a) an NBN corporation is a carrier or carriage service provider; and

(b) under subsection 152AL(8A), (8D) or (8E), a declared service relates to the NBN corporation; and

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(c) the NBN corporation is subject to a category B standard access obligation in relation to the service;

the NBN corporation must not discriminate in favour of itself in relation to the supply of the service.

Authorised conduct

(12) If conduct is authorised under section 151DA for the purposes of subsection 51(1), the conduct is taken not to be discrimination for the purposes of this section.

152AXD NBN corporation to carry on related activities on a non-discriminatory basis

(1) An NBN corporation must not, in carrying on any of the following activities, discriminate between access seekers:

(a) developing a new eligible service;

(b) enhancing a declared service;

(c) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;

(d) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;

(e) an activity that is preparatory to the supply of a declared service;

(f) an activity that is ancillary or incidental to the supply of a declared service;

(g) giving information to service providers about any of the above activities.

Note: For explanatory material, see section 152CJH.

(5A) If conduct is authorised under section 151DA for the purposes of subsection 51(1), the conduct is taken not to be discrimination for the purposes of this section.

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Definition

(6) In this section:

eligible service has the same meaning as in section 152AL.

Subdivision C—Compliance with standard access obligations

152AY Compliance with standard access obligations

(1) This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

(2) The carrier or carriage service provider must comply with the obligations:

(a) if an access agreement between:

(i) the carrier or carriage service provider, as the case requires; and

(ii) the access seeker;

is in operation and specifies terms and conditions about a particular matter—on such terms and conditions relating to that matter as are set out in the agreement; or

(b) if:

(i) paragraph (a) does not apply in relation to terms and conditions about a particular matter; and

(ii) a special access undertaking given by the carrier or carriage service provider is in operation, and the undertaking specifies terms and conditions about that matter—on such terms and conditions relating to that matter as are set out in the undertaking; or

(c) if:

(i) neither paragraph (a) nor (b) applies to terms and conditions about a particular matter; and

(ii) binding rules of conduct specify terms and conditions about that matter;

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on such terms and conditions relating to that matter as are set out in the binding rules of conduct; or

(d) if:

(i) none of the above paragraphs applies to terms and conditions about a particular matter; and

(ii) an access determination specifies terms and conditions about that matter;

on such terms and conditions relating to that matter as are set out in the access determination.

Note 1: Sections 152BCC, 152BDB, 152BDE, 152CBIA, 152CBIB and 152CBIC, which deal with inconsistency, should be read and applied before this section is read and applied.

Note 2: Even though subsection (2) mentions binding rules of conduct, binding rules of conduct may only be made if the Commission considers that there is an urgent need to do so.

Note 3: For transitional provisions, see Division 2 of Part 2 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

152AYA Ancillary obligations—confidential information

If:

(a) a carrier or carriage service provider is required to comply with a standard access obligation that arose because of a request made by an access seeker; and

(b) at or after the time when the request was made, the access seeker gives particular information to the carrier or carriage service provider to enable the carrier or carriage service provider to comply with the standard access obligation; and

(c) at or before the time when the information was given, the access seeker gave the carrier or carriage service provider a written notice to the effect that:

(i) that information; or

(ii) a class of information that includes that information;

is to be regarded as having been given on a confidential basis for the purpose of enabling the carrier or carriage service provider to comply with the standard access obligation;

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the carrier or carriage service provider must not, without the written consent of the access seeker, use that information for a purpose other than enabling the carrier or carriage service provider to comply with:

(d) the standard access obligation; or

(e) any other standard access obligation that arose because of a request made by the access seeker; or

(f) any other obligation imposed by a law.

152AZ Carrier licence condition

A carrier licence held by a carrier is subject to a condition that the carrier must comply with:

(a) any standard access obligations that are applicable to the carrier; and

(aa) any rule in section 152AXC or 152AXD that is applicable to the carrier; and

(b) any obligations under section 152AYA that are applicable to the carrier.

152BA Service provider rule

(1) In addition to the rules mentioned in section 98 of the *Telecommunications Act 1997*, the rule set out in subsection (2) of this section is a service provider rule for the purposes of that Act.

(2) A carriage service provider must comply with:

(a) any standard access obligations that are applicable to the provider; and

(aa) any rule in section 152AXC or 152AXD that is applicable to the provider; and

(b) any obligations under section 152AYA that are applicable to the provider.

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152BB Judicial enforcement of standard access obligations

(1) If the Federal Court is satisfied that a carrier or carriage service provider has contravened any of the standard access obligations that are applicable to the carrier or provider, the Court may, on the application of:

(a) the Commission; or

(b) any person whose interests are affected by the contravention;

make all or any of the following orders:

(c) an order directing the carrier or provider to comply with the obligation;

(d) an order directing the carrier or provider to compensate any other person who had suffered loss or damage as a result of the contravention;

(e) any other order that the Court thinks appropriate.

(1AB) If the Federal Court is satisfied that an NBN corporation has contravened the rule in subsection 152AXC(1) or (7) or 152AXD(1), the Court may, on the application of:

(a) the Commission; or

(b) any person whose interests are affected by the contravention;

make all or any of the following orders:

(c) an order directing the NBN corporation to comply with that rule;

(d) an order directing the NBN corporation to compensate any other person who had suffered loss or damage as a result of the contravention;

(e) any other order that the Court thinks appropriate.

(1A) If the Federal Court is satisfied that a carrier or carriage service provider has contravened an obligation imposed by section 152AYA, the Court may, on the application of:

(a) the Commission; or

(b) the access seeker who gave the information concerned;

make all or any of the following orders:

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(c) an order directing the carrier or carriage service provider to comply with the obligation;

(d) an order directing the carrier or carriage service provider to compensate any other person who has suffered loss or damage as a result of the contravention;

(e) any other order that the Court thinks appropriate.

(2) The Federal Court may discharge or vary an order granted under this section.

(3) This section does not limit section 152BBAA.

152BBAA Judicial enforcement of conditions and limitations of exemption determinations and orders

(1) If the Federal Court is satisfied that a person has contravened any of the conditions or limitations of:

(a) a determination under section 152ASA; or

(b) an order under section 152ATA;

the Court may, on the application of:

(c) the Commission; or

(d) any person whose interests are affected by the contravention;

make all or any of the following orders:

(e) an order directing the person to comply with the condition or limitation;

(f) an order directing the person to compensate any other person who had suffered loss or damage as a result of the contravention;

(g) any other order that the Court thinks appropriate.

(2) The Federal Court may discharge or vary an order granted under this section.

(3) This section does not limit section 152BB.

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152BBA Commission may give directions in relation to negotiations

(1) This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

(2) If the following parties:

(a) the carrier or carriage service provider, as the case requires;

(b) the access seeker;

propose to negotiate, or are negotiating, with a view to agreeing on terms and conditions as mentioned in paragraph 152AY(2)(a), the Commission may, for the purposes of facilitating those negotiations, if requested in writing to do so by either party, give a party a written procedural direction requiring the party to do, or refrain from doing, a specified act or thing relating to the conduct of those negotiations.

(3) The following are examples of the kinds of procedural directions that may be given under subsection (2):

(a) a direction requiring a party to give relevant information to the other party;

(b) a direction requiring a party to carry out research or investigations in order to obtain relevant information;

(c) a direction requiring a party not to impose unreasonable procedural conditions on the party's participation in negotiations;

(d) a direction requiring a party to respond in writing to the other party's proposal or request in relation to the time and place of a meeting;

(e) a direction requiring a party, or a representative of a party, to attend a mediation conference;

(f) a direction requiring a party, or a representative of a party, to attend a conciliation conference.

(4) For the purposes of paragraph (3)(c), if a party (the ***first party***) imposes, as a condition on the first party's participation in negotiations, a requirement that the other party must not disclose to the Commission any or all information, or the contents of any or all

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documents, provided in the course of negotiations, that condition is taken to be an unreasonable procedural condition on the first party's participation in those negotiations.

(5) A person must not contravene a direction under subsection (2).

(6) A person must not:
  (a) aid, abet, counsel or procure a contravention of subsection (5); or
  (b) induce, whether by threats or promises or otherwise, a contravention of subsection (5); or
  (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (5); or
  (d) conspire with others to effect a contravention of subsection (5).

(7) In deciding whether to give a direction under subsection (2), the Commission must have regard to:
  (a) any guidelines in force under subsection (8); and
  (b) such other matters as the Commission considers relevant.

(8) The Commission may, by written instrument, formulate guidelines for the purposes of subsection (7).

(9) In addition to its effect apart from this subsection, this section also has the effect it would have if:
  (a) each reference to a carrier were, by express provision, confined to a carrier that is a constitutional corporation; and
  (b) each reference to a carriage service provider were, by express provision, confined to a carriage service provider that is a constitutional corporation; and
  (c) each reference to an access seeker were, by express provision, confined to an access seeker that is a constitutional corporation.

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152BBB Enforcement of directions

(1) If the Federal Court is satisfied that a person has contravened subsection 152BBA(5) or (6), the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate.

(2) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including:
  (a) the nature and extent of the contravention; and
  (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
  (c) the circumstances in which the contravention took place; and
  (d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

(3) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed $250,000 for each contravention.

(4) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed $50,000 for each contravention.

(5) The Commission may institute a proceeding in the Federal Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in subsection (1).

(6) A proceeding under subsection (5) may be commenced within 6 years after the contravention.

(7) Criminal proceedings do not lie against a person only because the person has contravened subsection 152BBA(5) or (6).

152BBC Commission's role in negotiations

(1) This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

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(2) If the following parties:
  (a) the carrier or carriage service provider, as the case requires;
  (b) the access seeker;
propose to negotiate, or are negotiating, with a view to agreeing on terms and conditions as mentioned in paragraph 152AY(2)(a), the parties may jointly request the Commission in writing to arrange for a representative of the Commission to attend, or mediate at, those negotiations.

(3) The Commission may comply with the request if the Commission considers that compliance with the request would be likely to facilitate those negotiations.

(4) For the purposes of this section, each of the following persons may be a representative of the Commission:
  (a) a member, or associate member, of the Commission; or
  (b) a person referred to in subsection 27(1); or
  (c) a person engaged under section 27A.

152BBD Reaching agreement on terms and conditions of access

(1) The Commission must, in exercising its powers under sections 152BBA and 152BBC in relation to any of the category A standard access obligations, have regard to the desirability of access providers (within the meaning of section 152AR) and access seekers agreeing on terms and conditions as mentioned in paragraph 152AY(2)(a) in a timely manner.

(2) The Commission must, in exercising its powers under sections 152BBA and 152BBC in relation to any of the category B standard access obligations, have regard to the desirability of NBN corporations and access seekers agreeing on terms and conditions as mentioned in paragraph 152AY(2)(a) in a timely manner.

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Division 4—Access determinations

Subdivision A—Commission may make access determinations

152BC Access determinations

(1) The Commission may make a written determination relating to access to a declared service.

(2) A determination under subsection (1) is to be known as an ***access determination***.

(3) An access determination may:

(a) specify any or all of the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to the carrier or provider; or

(b) specify any other terms and conditions of an access seeker's access to the declared service; or

(c) require a carrier or carriage service provider to comply with any or all of the standard access obligations applicable to the carrier or provider in a manner specified in the determination; or

(d) require a carrier or carriage service provider to extend or enhance the capability of a facility by means of which the declared service is supplied; or

(e) impose other requirements on a carrier or carriage service provider in relation to access to the declared service; or

(f) specify the terms and conditions on which a carrier or carriage service provider is to comply with any or all of those other requirements; or

(g) require access seekers to accept, and pay for, access to the declared service; or

(h) provide that any or all of the obligations referred to in section 152AR are not applicable to a carrier or carriage service provider, either:

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(i) unconditionally; or

(ii) subject to such conditions or limitations as are specified in the determination; or

(i) restrict or limit the application to a carrier or carriage service provider of any or all of the obligations referred to in section 152AR; or

(j) deal with any other matter relating to access to the declared service.

(4) Subsection (3) does not limit subsection (1).

(4A) An access determination may be expressed to be an NBN-specific access determination.

(4B) An access determination does not apply in relation to access to a declared service to the extent to which the service is supplied, or is capable of being supplied, by an NBN corporation unless the access determination is expressed to be an NBN-specific access determination.

(4C) If an access determination is expressed to be an NBN-specific access determination, the access determination does not apply in relation to access to a declared service to the extent to which the service is supplied, or is capable of being supplied, by a person other than an NBN corporation.

(5) An access determination may make different provision with respect to:

(a) different carriers or carriage service providers; or

(b) different classes of carriers or carriage service providers; or

(c) different access seekers; or

(d) different classes of access seekers.

(6) Subsection (5) does not, by implication, limit subsection 33(3A) of the *Acts Interpretation Act 1901*.

(7) An access determination may provide for the Commission to perform functions, and exercise powers, under the determination.

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(8) Terms and conditions specified in an access determination as mentioned in paragraph (3)(a), (b) or (f) must include terms and conditions relating to price or a method of ascertaining price.

(9) An access determination is not a legislative instrument.

152BCA Matters that the Commission must take into account

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

(a) whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;

(b) the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service;

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

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

(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;

(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

(2) If a carrier or carriage service provider who supplies, or is capable of supplying, the declared service supplies one or more other eligible services, then, in making an access determination that is applicable to the carrier or provider, as the case may be, the Commission may take into account:

(a) the characteristics of those other eligible services; and

(b) the costs associated with those other eligible services; and

(c) the revenues associated with those other eligible services; and

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(d) the demand for those other eligible services.

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

(4) This section does not apply to an interim access determination.

(5) In this section:

eligible service has the same meaning as in section 152AL.

152BCB Restrictions on access determinations

(1) The Commission must not make an access determination that would have any of the following effects:

(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the access seeker made a request in relation to the service under section 152AR or 152AXB;

(b) preventing a carrier or carriage service provider from obtaining a sufficient amount of the service to be able to meet the carrier's or provider's reasonably anticipated requirements, measured at the time when the access seeker made a request in relation to the service under section 152AR or 152AXB;

(c) preventing a person from obtaining, by the exercise of a pre-determination right, a sufficient level of access to the declared service to be able to meet the person's actual requirements;

(d) depriving any person of a protected contractual right;

(e) resulting in an access seeker becoming the owner (or one of the owners) of any part of a facility without the consent of the owner of the facility;

(f) requiring a person (other than an access seeker) to bear an unreasonable amount of the costs of:

(i) extending or enhancing the capability of a facility; or

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(ii) maintaining extensions to or enhancements of the capability of a facility;

(g) requiring a carrier or carriage service provider to provide an access seeker with access to a declared service if there are reasonable grounds to believe that:

(i) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the carrier or provider provides, or is reasonably likely to provide, that access; or

(ii) the access seeker would fail, in connection with that access, to protect the integrity of a telecommunications network or to protect the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

(2) Examples of grounds for believing as mentioned in subparagraph (1)(g)(i) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the carrier or carriage service provider).

(3) The Commission must not make an access determination that is inconsistent with any of the standard access obligations that are, or will be, applicable to a carrier or carriage service provider.

(3A) If a final migration plan is in force and imposes obligations or prohibitions on a designated Telstra successor company, the Commission must not make an access determination that would have the effect of requiring the designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.

(3B) The Commission must not make an access determination that would have the effect of:

(a) requiring an NBN corporation to engage in conduct that is inconsistent with conduct authorised under

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subsection 151DA(2) or (3) for the purposes of subsection 51(1); or

(b) preventing an NBN corporation from giving a refusal that is authorised under subsection 151DA(3) for the purposes of subsection 51(1).

(3C) The Commission must not make an access determination that would have the effect of preventing an NBN corporation from engaging in conduct that is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities.

(3D) In subsection (3C), ***eligible services***, ***uniform national pricing*** and ***utilities*** have the same meaning as in section 151DA.

(4) If the Commission makes an access determination that has the effect of depriving a person (the ***second person***) of a pre-determination right to require the carrier or provider to provide access to the declared service to the second person, the determination must also require the access seeker:

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

(4A) The Commission must not make an access determination that:

(a) relates to any or all of the category B standard access obligations applicable to an NBN corporation; and

(b) has the effect (whether direct or indirect) of discriminating between access seekers.

Note: For explanatory material, see section 152CJH.

(4B) Subsection (4A) does not prevent discrimination against an access seeker if the Commission has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with

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the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant obligation.

(4C) Examples of grounds for believing as mentioned in subsection (4B) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).

(5) An access determination is of no effect to the extent to which it contravenes subsection (1), (3), (3A), (3B), (3C) or (4A).

(6) In this section:

pre-determination right means a right under a contract that was in force:

(a) if the access determination is one of a series of 2 or more successive access determinations—immediately before the first access determination came into force; or

(b) otherwise—immediately before the access determination came into force.

protected contractual right means a right under a contract that was in force at the beginning of 13 September 1996.

152BCC Access agreements prevail over inconsistent access determinations

If an access determination is applicable to the following parties:

(a) a carrier or carriage service provider;

(b) an access seeker;

the access determination has no effect to the extent to which it is inconsistent with an access agreement that is applicable to those parties.

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152BCCA Final migration plan prevails over inconsistent access determinations

If a final migration plan is in force and imposes obligations or prohibitions on a designated Telstra successor company, an access determination has no effect to the extent to which it would have the effect of:

(a) preventing the designated Telstra successor company from complying with the final migration plan; or

(b) requiring the designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.

152BCCB Statutory infrastructure provider standards and rules prevail over inconsistent access determinations

An access determination has no effect to the extent to which it is inconsistent with:

(a) a standard determined, or a benchmark set, under section 360U of the *Telecommunications Act 1997*; or

(b) rules made under section 360V of that Act.

152BCD Fixed principles provisions

(1) An access determination may include a provision that is specified in the determination to be a fixed principles provision.

(2) If a fixed principles provision is included in an access determination, the determination must provide that a specified date is the nominal termination date for the fixed principles provision. The nominal termination date may be later than the expiry date for the determination.

(3) If:

(a) an access determination (the ***replacement access determination***) is expressed to replace a previous access determination; and

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(b) the previous access determination included a fixed principles provision; and

(c) the nominal termination date for the fixed principles provision is later than the day on which the replacement access determination comes into force;

then:

(d) the replacement access determination must include a provision in the same terms as the fixed principles provision; and

(e) the provision must be specified in the replacement access determination to be a fixed principles provision; and

(f) the nominal termination date for the fixed principles provision so included in the replacement access determination must be the same as, or later than, the nominal termination date for the fixed principles provision included in the previous access determination; and

(g) if the previous access determination provided that the previous access determination must not be varied so as to alter or remove the fixed principles provision—the replacement access determination must provide that the replacement access determination must not be varied so as to alter or remove the fixed principles provision; and

(h) if the previous access determination provided that the previous access determination must not be varied so as to alter or remove the fixed principles provision except in such circumstances as are specified in the previous access determination:

(i) the replacement access determination must provide that the replacement access determination must not be varied so as to alter or remove the fixed principles provision except in such circumstances as are specified in the replacement access determination; and

(ii) those circumstances must be the same as the circumstances specified in the previous access determination.

(4) If:

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(a) a fixed principles provision is included in an access determination; and

(b) the access determination ceases to be in force before the nominal termination date for the fixed principles provision;

the fixed principles provision ceases to be in force when the access determination ceases to be in force.

Note: Even though a fixed principles provision ceases to be in force when the access determination ceases to be in force, subsection (3) requires that a replacement access determination include a provision in the same terms as the fixed principles provision.

(5) If a fixed principles provision is included in an access determination, the access determination must:

(a) provide that the access determination must not be varied so as to alter or remove the fixed principles provision; or

(b) provide that the access determination must not be varied so as to alter or remove the fixed principles provision except in such circumstances as are specified in the access determination.

152BCE Access determinations may be set out in the same document

Two or more access determinations may be set out in the same document.

152BCF Duration of access determination

(1) An access determination relating to access to a declared service:

(a) comes into force on the day specified in the determination as the day on which the determination is to come into force; and

(b) unless sooner revoked, ceases to be in force on the expiry date for the determination.

(2) The specified day may be earlier than the day on which the determination was made.

(2A) The specified day must not be earlier than the date of commencement of this section.

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(3) If the declared service is covered by a declaration under section 152AL, and the declaration is not a fresh declaration that replaces a previous declaration, the specified day must not be earlier than the day on which the declaration came into force.

(3A) If the declared service is covered by subsection 152AL(7), the specified day must not be earlier than the day on which the service became a declared service under that subsection.

(3B) If the declared service is covered by subsection 152AL(8D), the specified day must not be earlier than the day on which the service became a declared service under that subsection.

(3C) If the declared service is covered by subsection 152AL(8E), the specified day must not be earlier than the day on which the service became a declared service under that subsection.

(4) If:

(a) an access determination is expressed to replace a previous access determination relating to access to the declared service; and

(b) the previous access determination is not an interim access determination;

the specified day must be the first day after the expiry of the previous access determination.

(4A) If:

(a) an access determination is expressed to replace a previous access determination relating to access to the declared service; and

(b) the previous access determination is an interim access determination; and

(c) the declared service is covered by a declaration under section 152AL;

the specified day must not be earlier than the day on which the declaration came into force.

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Expiry date

(5) An access determination must specify an expiry date for the determination.

(6) In specifying an expiry date for an access determination, the Commission must have regard to:

(a) in a case where the declared service is covered by a declaration under section 152AL—the principle that the expiry date for the determination should be the same as the expiry date for the declaration (as that declaration stood at the time when the access determination was made) unless, in the Commission's opinion, there are circumstances that warrant the specification of another date as the expiry date for the access determination; and

(b) such other matters (if any) as the Commission considers relevant.

(7) If an access determination expires, this Part does not prevent the Commission from making a fresh access determination under section 152BC in the same terms as the expired access determination.

Automatic revocation of access determination

(8) If:

(a) an access determination relating to access to a declared service is in force; and

(b) the declared service is covered by a declaration under section 152AL, and the declaration ceases to be in force; and

(c) the Commission does not make a fresh declaration under section 152AL that replaces the declaration referred to in paragraph (b) of this subsection;

the access determination is taken to be revoked at the time of the cessation.

(9) If:

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(a) an access determination relating to access to a declared service is in force; and

(b) the declared service is covered by a declaration under section 152AL, and the declaration is revoked; and

(c) the Commission does not make a fresh declaration under section 152AL that replaces the declaration referred to in paragraph (b) of this subsection;

the access determination is taken to be revoked at the time of the revocation of the declaration.

(9A) If:

(a) an interim access determination relating to access to a declared service is in force; and

(b) a final access determination relating to access to the declared service comes into force;

the interim access determination is taken to be revoked at the time when the final access determination comes into force.

Extension of access determination

(10) If:

(a) an access determination (the ***original access determination***) relating to access to a declared service is in force; and

(b) the Commission has commenced to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make another access determination in relation to access to the service; and

(c) the Commission considers that it will make the other access determination, but will not be in a position to do so before the expiry date for the original access determination;

the Commission may, by writing, declare that the expiry date for the original access determination is taken to be the day immediately before the day on which the other access determination comes into force.

(11) The Commission must publish a declaration under subsection (10) on the Commission's website.

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(12) If:

(a) after holding a public inquiry under subsection 152ALA(7) in relation to a section 152AL declaration, the Commission:

(i) extends or further extends the expiry date for the declaration by a period of not more than 12 months; and

(ii) decides to allow the declaration to expire after the end of that period; and

(b) an access determination is in force in relation to access to the declared service;

the Commission may, by writing, extend the expiry date for the access determination by the same period.

(13) The Commission must publish an instrument under subsection (12) on the Commission's website.

(14) The Commission is not required to observe any requirements of procedural fairness in relation to a decision under subsection (10) or (12).

(15) A declaration under subsection (10) is not a legislative instrument.

(16) An instrument under subsection (12) is not a legislative instrument.

152BCG Interim access determinations

(1) If:

(a) the Commission makes a declaration under section 152AL after the commencement of this section; and

(b) the declaration is not a fresh declaration that replaces a previous declaration; and

(c) the Commission has commenced to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination in relation to access to the declared service; and

(d) either:

(i) the Commission considers that it is unlikely that a final access determination in relation to access to the service

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will be made within 6 months after the commencement of the public inquiry; or

(ii) the Commission considers that there is an urgent need to make an access determination in relation to access to the service before the completion of the public inquiry;

the Commission must make an interim access determination in relation to access to the service.

(2) If:

(a) a declaration is in force under section 152AL; and

(b) no access determination has previously been made in relation to access to the declared service;

the Commission may make an interim access determination in relation to access to the service.

(3) The day specified in an interim access determination as the day on which the determination is to come into force must not be earlier than the day on which the declaration mentioned in paragraph (1)(a) or (2)(a), as the case may be, came into force.

(4) The Commission is not required to observe any requirements of procedural fairness in relation to the making of an interim access determination.

(5) The Commission must not make an interim access determination otherwise than in accordance with this section.

152BCGA Stay of access determinations

(1) Paragraphs 15(1)(a) and (b) and 15A(1)(a) and (b) of the *Administrative Decisions (Judicial Review) Act 1977* do not apply to a decision of the Commission to make an access determination.

(2) If a person applies to the Federal Court under subsection 39B(1) of the *Judiciary Act 1903* for a writ or injunction in relation to a decision of the Commission to make an access determination, the Court must not make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the application.

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Subdivision B—Public inquiries about proposals to make access determinations

152BCH Access determination to be made after public inquiry

(1) The Commission must not make an access determination unless:

(a) the Commission has held a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make the determination; and

(b) the Commission has prepared a report about the inquiry under section 505 of the *Telecommunications Act 1997*; and

(c) the report was published during the 180-day period ending when the determination was made.

(2) Subsection (1) does not apply to an interim access determination.

(3) Subsection (1) has effect subject to section 152BCI.

152BCI When public inquiry must be held

(1) If:

(a) the Commission makes a declaration under section 152AL after the commencement of this section; and

(b) no access determination has previously been made in relation to access to the declared service;

the Commission must, within 30 days after the declaration is made, commence to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service.

(2) If:

(a) a declaration is in force under section 152AL immediately after the commencement of this section; and

(b) no access determination has previously been made in relation to access to the declared service;

the Commission must, during the 12-month period beginning at the commencement of this section, commence to hold a public inquiry

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under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service.

(3) If:

(a) a declaration is in force under section 152AL; and

(b) an access determination has previously been made in relation to access to the declared service;

the Commission must, during the period:

(c) beginning 18 months before the expiry date for the access determination; and

(d) ending 6 months before the expiry date for the access determination;

commence to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service.

(4) Subsection (3) has effect subject to subsections (5), (6) and (7).

(5) If:

(a) a declaration (the ***current declaration***) is in force under section 152AL; and

(b) an access determination has previously been made in relation to access to the declared service; and

(c) the expiry date of the current declaration is extended or further extended for a period of not more than 12 months; and

(d) the Commission decides to allow the current declaration to expire without making a new declaration under section 152AL;

the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service.

(6) If:

(a) a declaration is in force under section 152AL; and

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(b) an access determination (the ***current determination***) is in force in relation to access to the declared service; and

(c) the Commission commences to hold a public inquiry under subsection 152ALA(7) in relation to the declaration;

then:

(d) the Commission may defer holding a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service until the Commission decides whether to extend or further extend the expiry date for the declaration; and

(e) if the Commission decides to extend or further extend the expiry date for the declaration—the Commission must commence to hold such a public inquiry before the expiry date for the current access determination; and

(f) if the Commission decides not to extend or further extend the expiry date for the declaration—the Commission is not required to hold such a public inquiry.

(7) If:

(a) a declaration is in force under section 152AL; and

(b) an access determination has previously been made in relation to access to the declared service; and

(c) after holding a public inquiry under subsection 152ALA(7) in relation to the declaration, the Commission decides to allow the declaration to expire without making a new declaration under section 152AL;

the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service.

Note: If a service is a declared service under subsection 152AL(7) (which deals with special access undertakings), there is no need for the Commission to make a declaration of the service under section 152AL.

(8) Despite anything else in this section, if:

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(a) the Commission makes binding rules of conduct that relate to access to a declared service; and

(b) no access determination is in force in relation to access to the declared service;

the Commission must, within 30 days after the binding rules of conduct are made, commence to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the declared service.

152BCJ Combined inquiries about proposals to make access determinations

(1) The Commission may decide to combine 2 or more public inquiries of a kind mentioned in section 152BCH.

(2) If the Commission makes such a decision:

(a) the Commission may publish a single notice relating to the combined inquiry under section 498 of the *Telecommunications Act 1997*; and

(b) the Commission may prepare a single discussion paper about the combined inquiry under section 499 of that Act; and

(c) the Commission may hold hearings relating to the combined inquiry under section 501 of that Act; and

(d) the Commission must ensure that each inquiry is covered by a report under section 505 of that Act, whether the report relates:

(i) to a single one of those inquiries; or

(ii) to any 2 or more of those inquiries.

152BCK Time limit for making an access determination

(1) This section applies if the Commission commences to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination, and the declared service to which the access determination relates is not covered by subsection 152AL(8D).

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(2) The Commission must make a final access determination within 6 months after that commencement.

Extension of decision-making period

(3) The Commission may, by written notice published on its website, extend or further extend the 6-month period referred to in subsection (2), so long as:

(a) the extension or further extension is for a period of not more than 6 months; and

(b) the notice includes a statement explaining why the Commission has been unable to make a final access determination within that 6-month period or that 6-month period as previously extended, as the case may be.

Note: The Commission may be required to make an interim access determination—see section 152BCG.

Subdivision C—Variation or revocation of access determinations

152BCN Variation or revocation of access determinations

(1) Subsection 33(3) of the *Acts Interpretation Act 1901* applies to a power conferred on the Commission by section 152BC, but it applies with the following changes.

(2) The Commission is not required to hold a public inquiry under Part 25 the *Telecommunications Act 1997* about a proposal to vary an access determination if:

(a) the variation is of a minor nature; or

(b) each:

(i) carrier or carriage service provider; and

(ii) access seeker;

whose interests are likely to be affected by the variation has consented in writing to the variation.

(3) The Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to

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revoke an access determination if the Commission is satisfied that each:

(a) carrier or service provider; and

(b) access seeker;

whose interests are likely to be affected by the revocation has consented in writing to the revocation.

(4) If a fixed principles provision is included in an access determination:

(a) a provision referred to in paragraph 152BCD(5)(a) or (b) cannot be varied or removed; and

(b) the access determination must not be varied in a manner that is inconsistent with a provision referred to in paragraph 152BCD(5)(a) or (b).

(5) The Commission does not have a duty to consider whether to exercise the power to vary or revoke an access determination, whether the Commission is requested to do so by another person, or in any other circumstances.

(6) If the Commission has commenced to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to vary an access determination, the Commission may alter the proposed variation.

(7) Notice of the alteration is to be published in the same way in which a notice relating to the public inquiry was published under section 498 of the *Telecommunications Act 1997*.

(8) Subsection (7) does not apply in relation to an alteration if:

(a) the alteration is of a minor nature; or

(b) each:

(i) carrier or carriage service provider; and

(ii) access seeker;

whose interests are likely to be affected by the alteration has consented in writing to the alteration.

(9) Despite anything else in this section, if:

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(a) the Commission makes binding rules of conduct that relate to access to a declared service; and

(b) an access determination is in force in relation to access to the declared service;

the Commission must, within 30 days after the binding rules of conduct are made, commence to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to vary the access determination.

Subdivision D—Compliance with access determinations

152BCO Carrier licence condition

A carrier licence held by a carrier is subject to a condition that the carrier must comply with any access determinations that are applicable to the carrier.

152BCP Service provider rule

(1) In addition to the rules mentioned in section 98 of the *Telecommunications Act 1997*, the rule set out in subsection (2) of this section is a service provider rule for the purposes of that Act.

(2) A carriage service provider must comply with any access determinations that are applicable to the provider.

Subdivision E—Private enforcement of access determinations

152BCQ Private enforcement of access determinations

(1) If the Federal Court is satisfied, on the application of:

(a) an access seeker; or

(b) a carrier; or

(c) a carriage service provider;

that a person has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of an access determination, the Court may make any or all of the following orders:

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(d) an order granting an injunction on such terms as the Court thinks appropriate:
(i) restraining the person from engaging in the conduct; or
(ii) if the conduct involves refusing or failing to do something—requiring the person to do that thing;
(e) an order directing the person to compensate the applicant for loss or damage suffered as a result of the contravention;
(f) any other order that the Court thinks appropriate.

(2) The revocation or expiry of an access determination does not affect any remedy under subsection (1) in respect of a contravention of the access determination that occurred when the access determination was in force.

(3) 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.

(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.

152BCR Consent injunctions

On an application for an injunction under section 152BCQ, 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.

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152BCS Interim injunctions

The Federal Court may grant an interim injunction pending determination of an application under section 152BCQ.

152BCT Factors relevant to granting a restraining injunction

The power of the Federal Court to grant an injunction under section 152BCQ 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.

152BCU Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 152BCQ 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

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

152BCV Discharge or variation of injunction or other order

The Federal Court may discharge or vary an injunction or order granted under this Subdivision.

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Subdivision F—Register of Access Determinations

152BCW Register of Access Determinations

(1) The Commission is to maintain a register, to be known as the Register of Access Determinations, in which the Commission includes all access determinations in force.

(2) The Register is to be maintained by electronic means.

(3) The Register is to be made available for inspection on the Commission's website.

(4) The Register is not a legislative instrument.

(5) If the Commission is satisfied that:

(a) publication of a particular provision of an access determination could reasonably be expected to prejudice substantially the commercial interests of a person; and

(b) the prejudice outweighs the public interest in the publication of the provision;

the Commission may remove the provision from the version of the access determination that is included in the Register.

(6) If the Commission does so, the Commission must include in the Register an annotation to that effect.

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Division 4A—Binding rules of conduct

Subdivision A—Commission may make binding rules of conduct

152BD Binding rules of conduct

(1) The Commission may make written rules that:

(a) specify any or all of the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to the carrier or provider in relation to a specified declared service; or

(b) require a carrier or carriage service provider to comply with any or all of the standard access obligations applicable to the carrier or provider in relation to a specified declared service in a manner specified in the rules;

if the Commission considers that there is an urgent need to do so.

Note: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(2) Rules under subsection (1) are to be known as ***binding rules of conduct***.

(3) Binding rules of conduct may be of general application or may be limited as provided in the rules.

(4) In particular, binding rules of conduct may be limited to:

(a) particular carriers or carriage service providers; or

(b) particular classes of carriers or carriage service providers; or

(c) particular access seekers; or

(d) particular classes of access seekers.

(4A) Binding rules of conduct may be expressed to be NBN-specific binding rules of conduct.

(4B) Binding rules of conduct do not apply in relation to access to a declared service to the extent to which the service is supplied, or is

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capable of being supplied, by an NBN corporation unless the binding rules of conduct are expressed to be NBN-specific binding rules of conduct.

(4C) If binding rules of conduct are expressed to be NBN-specific binding rules of conduct, the binding rules of conduct do not apply in relation to access to a declared service to the extent to which the service is supplied, or is capable of being supplied, by a person other than an NBN corporation.

(5) Subsection (4) does not, by implication, limit subsection 33(3A) of the *Acts Interpretation Act 1901*.

(6) The Commission is not required to observe any requirements of procedural fairness in relation to the making of binding rules of conduct.

(7) The Commission does not have a duty to consider whether to make binding rules of conduct, whether at the request of a person or in any other circumstances.

(8) Binding rules of conduct may provide for the Commission to perform functions, and exercise powers, under the rules.

(9) An instrument under subsection (1) is not a legislative instrument.

152BDAA Matters that the Commission must take into account

(1) The Commission must take the following matters into account in making binding rules of conduct:

(a) whether the binding rules of conduct will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;

(b) the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service;

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

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(d) the direct costs of providing access to the declared service;
(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else;
(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

(2) If a carrier or carriage service provider who supplies, or is capable of supplying, the declared service supplies one or more other eligible services, then, in making binding rules of conduct that are applicable to the carrier or provider, as the case may be, the Commission may take into account:
(a) the characteristics of those other eligible services; and
(b) the costs associated with those other eligible services; and
(c) the revenues associated with those other eligible services; and
(d) the demand for those other eligible services.

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

(4) The Commission is not required by subsection (1) or (2) to take a matter into account if it is not reasonably practicable for the Commission to do so, having regard to the urgent need to make the binding rules of conduct.

(5) For the purposes of taking a particular matter into account under this section, the Commission is not required to obtain information, or further information, that is not already in the possession of the Commission if it is not reasonably practicable for the Commission to do so, having regard to the urgent need to make the binding rules of conduct.

(6) In this section:

eligible service has the same meaning as in section 152AL.

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152BDA Restrictions on binding rules of conduct

(1) The Commission must not make binding rules of conduct that would have any of the following effects:

(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the access seeker made a request in relation to the service under section 152AR or 152AXB;

(b) preventing a carrier or carriage service provider from obtaining a sufficient amount of the service to be able to meet the carrier's or provider's reasonably anticipated requirements, measured at the time when the access seeker made a request in relation to the service under section 152AR or 152AXB;

(c) preventing a person from obtaining, by the exercise of a pre-rules right, a sufficient level of access to the declared service to be able to meet the person's actual requirements;

(d) depriving any person of a protected contractual right;

(e) resulting in an access seeker becoming the owner (or one of the owners) of any part of a facility without the consent of the owner of the facility;

(f) requiring a person (other than an access seeker) to bear an unreasonable amount of the costs of:

(i) extending or enhancing the capability of a facility; or

(ii) maintaining extensions to or enhancements of the capability of a facility;

(g) requiring a carrier or carriage service provider to provide an access seeker with access to a declared service if there are reasonable grounds to believe that:

(i) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the carrier or provider provides, or is reasonably likely to provide, that access; or

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(ii) the access seeker would fail, in connection with that access, to protect the integrity of a telecommunications network or to protect the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

(2) Examples of grounds for believing as mentioned in subparagraph (1)(g)(i) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the carrier or carriage service provider).

(3) The Commission must not make binding rules of conduct that are inconsistent with any of the standard access obligations that are, or will be, applicable to a carrier or carriage service provider.

(3A) If a final migration plan is in force and imposes obligations or prohibitions on a designated Telstra successor company, the Commission must not make binding rules of conduct that would have the effect of requiring the designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.

(3B) The Commission must not make binding rules of conduct that would have the effect of:

(a) requiring an NBN corporation to engage in conduct that is inconsistent with conduct authorised under subsection 151DA(2) or (3) for the purposes of subsection 51(1); or

(b) preventing an NBN corporation from giving a refusal that is authorised under subsection 151DA(3) for the purposes of subsection 51(1).

(3C) The Commission must not make binding rules of conduct that would have the effect of preventing an NBN corporation from engaging in conduct that is reasonably necessary to achieve

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uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities.

(3D) In subsection (3C), ***eligible services***, ***uniform national pricing*** and ***utilities*** have the same meaning as in section 151DA.

(4) If the Commission makes binding rules of conduct that have the effect of depriving a person (the ***second person***) of a pre-rules right to require the carrier or provider to provide access to the declared service to the second person, the rules must also require the access seeker:

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

(4A) The Commission must not make binding rules of conduct that:

(a) relate to any or all of the category B standard access obligations applicable to an NBN corporation; and

(b) have the effect (whether direct or indirect) of discriminating between access seekers.

Note: For explanatory material, see section 152CJH.

(4B) Subsection (4A) does not prevent discrimination against an access seeker if the Commission has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant obligation.

(4C) Examples of grounds for believing as mentioned in subsection (4B) include:

(a) evidence that the access seeker is not creditworthy; and

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(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the NBN corporation).

(5) Binding rules of conduct are of no effect to the extent to which they contravene subsection (1), (3), (3A), (3B), (3C) or (4A).

(6) In this section:

pre-rules right means a right under a contract that was in force immediately before the binding rules of conduct came into force.

protected contractual right means a right under a contract that was in force at the beginning of 13 September 1996.

152BDB Access agreements prevail over inconsistent binding rules of conduct

If binding rules of conduct are applicable to the following parties:

(a) a carrier or carriage service provider;

(b) an access seeker;

the binding rules of conduct have no effect to the extent to which they are inconsistent with an access agreement that is applicable to those parties.

152BDC Duration of binding rules of conduct

(1) Binding rules of conduct come into force on the day specified in the rules as the day on which the rules are to come into force.

(2) Binding rules of conduct must specify an expiry date for the rules.

(3) An expiry date must occur in the 12-month period beginning when the rules were made.

(4) Unless sooner revoked, binding rules of conduct cease to be in force on the expiry date for the rules.

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152BDCA Final migration plan prevails over inconsistent binding rules of conduct

If a final migration plan is in force and imposes obligations or prohibitions on a designated Telstra successor company, binding rules of conduct have no effect to the extent to which they would have the effect of:

(a) preventing the designated Telstra successor company from complying with the final migration plan; or

(b) requiring the designated Telstra successor company to engage in conduct in connection with matters covered by the final migration plan.

152BDCB Statutory infrastructure provider standards and rules prevail over inconsistent binding rules of conduct

Binding rules of conduct have no effect to the extent to which they are inconsistent with:

(a) a standard determined, or a benchmark set, under section 360U of the *Telecommunications Act 1997*; or

(b) rules made under section 360V of that Act.

152BDD Commission must give copy of binding rules of conduct to carrier etc.

If binding rules of conduct are limited to a particular carrier, carriage service provider or access seeker, as soon as practicable after making the rules, the Commission must give a copy of the rules to the carrier, carriage service provider or access seeker, as the case may be.

152BDE Access determinations that are inconsistent with binding rules of conduct

If a provision of an access determination (other than a fixed principles provision) is inconsistent with binding rules of conduct, the provision has no effect to the extent of the inconsistency.

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152BDEA Stay of binding rules of conduct

(1) Paragraphs 15(1)(a) and (b) and 15A(1)(a) and (b) of the *Administrative Decisions (Judicial Review) Act 1977* do not apply to a decision of the Commission to make binding rules of conduct.

(2) If a person applies to the Federal Court under subsection 39B(1) of the *Judiciary Act 1903* for a writ or injunction in relation to a decision of the Commission to make binding rules of conduct, the Court must not make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the application.

Subdivision B—Compliance with binding rules of conduct

152BDF Carrier licence condition

A carrier licence held by a carrier is subject to a condition that the carrier must comply with any binding rules of conduct that are applicable to the carrier.

152BDG Service provider rule

(1) In addition to the rules mentioned in section 98 of the *Telecommunications Act 1997*, the rule set out in subsection (2) of this section is a service provider rule for the purposes of that Act.

(2) A carriage service provider must comply with any binding rules of conduct that are applicable to the provider.

Subdivision C—Private enforcement of binding rules of conduct

152BDH Private enforcement of binding rules of conduct

(1) If the Federal Court is satisfied, on the application of:
  (a) an access seeker; or
  (b) a carrier; or

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(c) a carriage service provider;

that a person has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of binding rules of conduct, the Court may make any or all of the following orders:

(d) an order granting an injunction on such terms as the Court thinks appropriate:

(i) restraining the person from engaging in the conduct; or

(ii) if the conduct involves refusing or failing to do something—requiring the person to do that thing;

(e) an order directing the person to compensate the applicant for loss or damage suffered as a result of the contravention;

(f) any other order that the Court thinks appropriate.

(2) The revocation or expiry of binding rules of conduct does not affect any remedy under subsection (1) in respect of a contravention of the rules that occurred when the rules were in force.

(3) 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.

(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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152BDI Consent injunctions

On an application for an injunction under section 152BDH, 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.

152BDJ Interim injunctions

The Federal Court may grant an interim injunction pending determination of an application under section 152BDH.

152BDK Factors relevant to granting a restraining injunction

The power of the Federal Court to grant an injunction under section 152BDH 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.

152BDL Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 152BDH 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

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

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152BDM Discharge or variation of injunction or other order

The Federal Court may discharge or vary an injunction or order granted under this Subdivision.

Subdivision D—Register of Binding Rules of Conduct

152BDN Register of Binding Rules of Conduct

(1) The Commission is to maintain a register, to be known as the Register of Binding Rules of Conduct, in which the Commission includes all binding rules of conduct in force.

(2) The Register is to be maintained by electronic means.

(3) The Register is to be made available for inspection on the Commission's website.

(4) The Register is not a legislative instrument.

(5) If the Commission is satisfied that:

(a) publication of a particular provision of binding rules of conduct could reasonably be expected to prejudice substantially the commercial interests of a person; and

(b) the prejudice outweighs the public interest in the publication of the provision;

the Commission may remove the provision from the version of the rules that is included in the Register.

(6) If the Commission does so, the Commission must include in the Register an annotation to that effect.

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Division 4B—Access agreements

152BE Access agreements

(1) For the purposes of this Part, an ***access agreement*** is an agreement, where:

(a) the agreement is in writing; and

(b) the agreement is legally enforceable; and

(c) the agreement relates to access to a declared service; and

(d) the parties to the agreement are:

(i) an access seeker; and

(ii) the carrier or carriage service provider who supplies, or proposes to supply, the declared service; and

(e) any of the following subparagraphs applies:

(i) the agreement embodies any or all of the terms and conditions on which the carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to the carrier or provider;

(ii) if an access determination imposes requirements on a carrier or carriage service provider in relation to access to the declared service, as mentioned in paragraph 152BC(3)(e)—the agreement embodies any or all of the terms and conditions on which the carrier or carriage service provider is to comply with any or all of those requirements;

(iii) the agreement embodies any other terms and conditions of the access seeker's access to the declared service;

(iv) the agreement requires the carrier or carriage service provider to comply with any or all of the standard access obligations applicable to the carrier or provider in a manner specified in the agreement;

(v) the agreement requires the carrier or carriage service provider to extend or enhance the capability of a facility by means of which the declared service is supplied;

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(vi) the agreement imposes other requirements on the carrier or carriage service provider in relation to access to the declared service;

(vii) the agreement specifies the terms and conditions on which the carrier or carriage service provider is to comply with any or all of those other requirements;

(viii) the agreement requires the access seeker to accept, and pay for, access to the declared service;

(ix) the agreement provides that any or all of the obligations referred to in section 152AR are not applicable to the carrier or carriage service provider, either unconditionally or subject to such conditions or limitations as are specified in the agreement;

(x) the agreement restricts or limits the application to the carrier or carriage service provider of any or all of the obligations referred to in section 152AR;

(xi) the agreement deals with any other matter relating to access to the declared service.

(1A) Paragraph (1)(b) does not apply to the agreement to the extent (if any) to which the agreement is covered by subparagraph (1)(e)(ix) or (x).

(2) If:

(a) an agreement relates to access to an eligible service (within the meaning of section 152AL); and

(b) at the time the agreement was entered into to, the eligible service was a not a declared service; and

(c) at a later time (the ***declaration time***), the eligible service becomes a declared service; and

(d) if the agreement had been entered into immediately after the declaration time, the agreement would have been an access agreement;

the agreement becomes an ***access agreement*** immediately after the declaration time.

(3) If:

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(a) an access agreement is varied by another agreement (the ***variation agreement***); and
(b) the variation agreement is in writing; and
(c) the variation agreement is legally enforceable;

a reference in this Part to the ***access agreement*** is a reference to the access agreement as varied by the variation agreement.

(4) It is immaterial whether an access agreement or variation agreement was entered into before or after the commencement of this section.

(5) An access agreement is not a legislative instrument.

(6) A variation agreement is not a legislative instrument.

152BEA Quarterly reports about access agreements

(1) Within 30 days after the end of each quarter, a carrier or carriage service provider who supplies, or proposes to supply, a declared service must give the Commission a written statement setting out details of any access agreement in relation to the service in force at any time during that quarter.

(2) The details that must be given under subsection (1) are:
(a) the parties to the agreement; and
(b) the service to which the agreement relates; and
(c) the date the agreement was entered into; and
(d) the period of the agreement; and
(e) if the agreement was varied during the quarter—the details referred to in paragraphs (a) to (d) and (g) in relation to the variation agreement; and
(f) if the agreement was terminated, rescinded or cancelled before the expiry of the agreement—the date the agreement was terminated, rescinded or cancelled; and
(g) such information (if any) about the agreement as is specified in an instrument in force under subsection (3).

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(3) The Commission may, by writing, specify information for the purposes of paragraph (2)(g).

(4) An instrument under subsection (3) (including the instrument as amended) ceases to be in force 5 years after the day it is made (unless it is revoked sooner).

(5) The Commission must publish an instrument under subsection (3) on the Commission's website.

(6) An instrument under subsection (3) is not a legislative instrument.

(7) The Commission may, by writing, require information in a statement given to the Commission under this section to be verified by statutory declaration.

(8) This section does not limit section 155.

152BEB Commission may request copy of access agreement or variation agreement

(1) The Commission may, by writing, request a carrier or carriage service provider who supplies, or proposes to supply, a declared service to provide a copy of either or both of the following:

(a) an access agreement in relation to the service;

(b) a variation agreement for an access agreement in relation to the service.

Note: The Procedural Rules may provide for the practice and procedure to be followed by the Commission in making a request under this subsection.

(2) The carrier or carriage service provider must provide a copy of the document within 10 days after the day the request was made under subsection (1).

(3) An instrument under subsection (1) is not a legislative instrument.

(4) This section does not limit section 155.

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152BEBA NBN corporation to give the Commission a statement about the differences between an access agreement and a standard form of access agreement

Access agreement

(1) If:

(a) an access agreement is covered by subsection 152BE(1); and

(b) the carrier or carriage service provider who supplies, or proposes to supply, the declared service is an NBN corporation; and

(c) immediately before the access agreement was entered into, a standard form of access agreement relating to access to the service was available on the NBN corporation's website; and

(d) the terms and conditions set out in the access agreement are not the same as the terms and conditions set out in the standard form of access agreement;

the NBN corporation must, within 7 days after the day on which the access agreement was entered into, give the Commission a statement, in a form approved in writing by the Commission:

(e) identifying the parties to the access agreement; and

(f) describing the differences between the terms and conditions set out in the access agreement and the terms and conditions set out in the standard form of access agreement; and

(j) setting out such other information (if any) about the access agreement as is required by the form.

Variation agreement

(2) If:

(a) a variation agreement is entered into after the commencement of this section; and

(b) the carrier or carriage service provider who supplies, or proposes to supply, the service to which the relevant access agreement relates is an NBN corporation; and

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(c) immediately before the variation agreement was entered into, a standard form of access agreement relating to access to the service was available on the NBN corporation's website; and

(d) the terms and conditions set out in the relevant access agreement (as varied by the variation agreement) are not the same as the terms and conditions set out in the standard form of access agreement;

the NBN corporation must, within 7 days after the day on which the variation agreement was entered into, give the Commission a statement, in a form approved in writing by the Commission:

(e) identifying the parties to the relevant access agreement (as varied by the variation agreement); and

(f) describing the differences between the terms and conditions set out in the relevant access agreement (as varied by the variation agreement) and the terms and conditions set out in the standard form of access agreement; and

(j) setting out such other information (if any) about the relevant access agreement (as varied by the variation agreement) as is required by the form.

152BEBB NBN corporation to give the Commission a statement about the differences between an access agreement and a special access undertaking

Access agreement

(1) If:

(a) an access agreement is covered by subsection 152BE(1); and

(b) the carrier or carriage service provider who supplies, or proposes to supply, the declared service is an NBN corporation; and

(c) immediately before the access agreement was entered into, a special access undertaking that:

(i) relates to access to the service; and

(ii) was given by the NBN corporation;

was in operation; and

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(d) the terms and conditions set out in the access agreement are not the same as the terms and conditions set out in the special access undertaking;

the NBN corporation must, within 7 days after the day on which the access agreement was entered into, give the Commission a statement, in a form approved in writing by the Commission:

(e) identifying the parties to the access agreement; and

(f) describing the differences between the terms and conditions set out in the access agreement and the terms and conditions set out in the special access undertaking; and

(j) setting out such other information (if any) about the access agreement as is required by the form.

Variation agreement

(2) If:

(a) a variation agreement is entered into after the commencement of this section; and

(b) the carrier or carriage service provider who supplies, or proposes to supply, the service to which the relevant access agreement relates is an NBN corporation; and

(c) immediately before the variation agreement was entered into, a special access undertaking that:

(i) relates to access to the service; and

(ii) was given by the NBN corporation;

was in operation; and

(d) the terms and conditions set out in the relevant access agreement (as varied by the variation agreement) are not the same as the terms and conditions set out in the special access undertaking;

the NBN corporation must, within 7 days after the day on which the variation agreement was entered into, give the Commission a statement, in a form approved in writing by the Commission:

(e) identifying the parties to the relevant access agreement (as varied by the variation agreement); and

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(f) describing the differences between the terms and conditions set out in the relevant access agreement (as varied by the variation agreement) and the terms and conditions set out in the special access undertaking; and

(j) setting out such other information (if any) about the relevant access agreement (as varied by the variation agreement) as is required by the form.

152BEBC NBN corporation to give the Commission a statement about the differences between an access agreement and an access determination

Access agreement

(1) If:

(a) an access agreement is covered by subsection 152BE(1); and

(b) the carrier or carriage service provider who supplies, or proposes to supply, the declared service is an NBN corporation; and

(c) immediately before the access agreement was entered into, an access determination relating to access to the service was in force; and

(d) the terms and conditions set out in the access agreement are not the same as the terms and conditions set out in the access determination;

the NBN corporation must, within 7 days after the day on which the access agreement was entered into, give the Commission a statement, in a form approved in writing by the Commission:

(e) identifying the parties to the access agreement; and

(f) describing the differences between the terms and conditions set out in the access agreement and the terms and conditions set out in the access determination; and

(j) setting out such other information (if any) about the access agreement as is required by the form.

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Variation agreement

(2) If:

(a) a variation agreement is entered into after the commencement of this section; and

(b) the carrier or carriage service provider who supplies, or proposes to supply, the service to which the relevant access agreement relates is an NBN corporation; and

(c) immediately before the variation agreement was entered into, an access determination relating to access to the service was in force; and

(d) the terms and conditions set out in the relevant access agreement (as varied by the variation agreement) are not the same as the terms and conditions set out in the access determination;

the NBN corporation must, within 7 days after the day on which the variation agreement was entered into, give the Commission a statement, in a form approved in writing by the Commission:

(e) identifying the parties to the relevant access agreement (as varied by the variation agreement); and

(f) describing the differences between the terms and conditions set out in the relevant access agreement (as varied by the variation agreement) and the terms and conditions set out in the access determination; and

(j) setting out such other information (if any) about the relevant access agreement (as varied by the variation agreement) as is required by the form.

152BEBD Register of NBN Access Agreement Statements

(1) The Commission is to maintain a register, to be known as the Register of NBN Access Agreement Statements, in which the Commission includes all statements given to it under the following provisions:

(a) section 152BEBA;

(b) section 152BEBB;

(c) section 152BEBC.

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(2) The Register is to be maintained by electronic means.

(3) The Register is to be made available for inspection on the Commission's website.

(4) The Register is not a legislative instrument.

(5) If the Commission is satisfied that:

(a) publication of particular material contained in a statement could reasonably be expected to prejudice substantially the commercial interests of a person; and

(b) the prejudice outweighs the public interest in the publication of the matter;

the Commission may remove the material from the version of the statement that is included in the Register.

(6) If the Commission does so, the Commission must include in the Register an annotation to that effect.

152BEBH Statutory infrastructure provider standards prevail over inconsistent access agreements

(1) An access agreement entered into after the commencement of this section has no effect to the extent to which it is inconsistent with a standard determined, or a benchmark set, under section 360U of the *Telecommunications Act 1997*.

(2) Subsection (1) does not apply to an access agreement covered by subsection 360U(5) of the *Telecommunications Act 1997*.

152BEBI Statutory infrastructure provider rules prevail over inconsistent access agreements

(1) An access agreement entered into after the commencement of this section has no effect to the extent to which it is inconsistent with rules made under section 360V of the *Telecommunications Act 1997*.

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(2) Subsection (1) does not apply to an access agreement covered by subsection 360V(3) of the *Telecommunications Act 1997*.

152BEC Carrier licence condition

A carrier licence held by a carrier is subject to a condition that the carrier must comply with sections 152BEA, 152BEB, 152BEBA, 152BEBB and 152BEBC.

152BED Service provider rule

(1) In addition to the rules mentioned in section 98 of the *Telecommunications Act 1997*, the rule set out in subsection (2) of this section is a service provider rule for the purposes of that Act.

(2) A carriage service provider must comply with sections 152BEA, 152BEB, 152BEBA, 152BEBB and 152BEBC.

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Division 5—Access undertakings

Subdivision B—Special access undertakings

152CBA What is a *special access undertaking*?

Scope

(1) This section applies to:

(a) a person (other than an NBN corporation) who is, or expects to be, a carrier or a carriage service provider supplying:

(i) a listed carriage service (within the meaning of the *Telecommunications Act 1997*); or

(ii) a service that facilitates the supply of a listed carriage service (within the meaning of that Act);

whether to itself or to other persons, so long as the service is not a declared service; or

(b) a person who is an NBN corporation and who is, or expects to be, a carrier or carriage service provider supplying or capable of supplying:

(i) a listed carriage service (within the meaning of the *Telecommunications Act 1997*); or

(ii) a service that facilitates the supply of a listed carriage service (within the meaning of that Act);

whether to itself or to other persons, so long as:

(iii) the service is not a declared service under subsection 152AL(8A); and

(iv) there is no access determination that applies in relation to access to the service.

Undertaking

(2) The person may give a written undertaking (a ***special access undertaking***) to the Commission in connection with the provision of access to the service.

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(3) If paragraph (1)(a) applies, the undertaking must state that, in the event that the person supplies the service (whether to itself or to other persons), the person:

(a) agrees to be bound by the obligations referred to in section 152AR, to the extent that those obligations would apply to the person in relation to the service if the service were treated as an active declared service; and

(b) undertakes to comply with the terms and conditions specified in the undertaking in relation to the obligations referred to in paragraph (a).

Note: The undertaking need not specify all terms and conditions—see subparagraph 152AY(2)(b)(ii).

(3A) If paragraph (1)(b) applies, the undertaking must state that, in the event that the person supplies, or becomes capable of supplying, the service (whether to itself or to other persons), the person:

(a) agrees to be bound by the obligations referred to in section 152AXB, to the extent that those obligations would apply to the person in relation to the service if the service were treated as a declared service; and

(b) undertakes to comply with the terms and conditions specified in the undertaking in relation to the obligations referred to in section 152AXB.

Note: The undertaking need not specify all terms and conditions—see subparagraph 152AY(2)(b)(ii).

(3B) The undertaking may also state, in the event that the person supplies the service (whether to itself or to other persons), the person:

(a) will engage in specified conduct in relation to access to the service; and

(b) will do so on such terms and conditions as are specified in the undertaking.

(3C) If the person is an NBN corporation, the undertaking may also state that the NBN corporation will engage in specified conduct in relation to:

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(a) developing a new eligible service (within the meaning of section 152AL); or
(b) enhancing a declared service; or
(c) extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied; or
(d) planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied; or
(e) an activity that is preparatory to the supply of a declared service; or
(f) an activity that is ancillary or incidental to the supply of a declared service; or
(g) giving information to service providers about any of the above activities.

(3D) For the purposes of this Part, in determining whether the undertaking relates to a particular service or proposed service, disregard a statement included in the undertaking in accordance with subsection (3C).

(4) The undertaking must be in a form approved in writing by the Commission.

(5) The undertaking may be without limitations or may be subject to such limitations as are specified in the undertaking.

Expiry time

(6) The undertaking must specify the expiry time of the undertaking.

(7) The expiry time of the undertaking may be described by reference to the end of a period beginning:
(a) when the undertaking comes into operation; or
(b) when the person begins to supply the service (whether to itself or to other persons).

(8) Subsection (7) does not, by implication, limit subsection (6).

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(9) The undertaking may provide for the person to extend, or further extend, the expiry time of the undertaking, so long as:

(a) the extension or further extension is approved by the Commission; and

(b) the undertaking sets out criteria that are to be applied by the Commission in deciding whether to approve the extension or further extension.

(10) If the undertaking expires, this Part does not prevent the person from giving a fresh special access undertaking in the same terms as the expired undertaking.

Commission may perform functions or exercise powers

(10A) 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, in accordance with the undertaking.

Related services

(11) A reference in subparagraphs (1)(a)(ii) and (b)(ii) to a service that facilitates the supply of a carriage service does not include a reference to the use of intellectual property except to the extent that it is an integral but subsidiary part of the first-mentioned service.

Definition

(12) In this section:

active declared service has the same meaning as in section 152AR (disregarding subsection 152AL(7)).

Note: A service includes a proposed service—see section 152CBJ.

152CBAA Fixed principles terms and conditions

(1) A special access undertaking may provide that a term or condition specified in the undertaking is a ***fixed principles term or condition***

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for a period that, under the undertaking, is expressed to be the ***notional fixed period*** for the fixed principles term or condition.

(2) If the undertaking does so, the undertaking may also provide that one or more specified circumstances are ***qualifying circumstances*** in relation to the fixed principles term or condition.

(3) The notional fixed period for a fixed principles term or condition must:

(a) begin when the undertaking comes into operation; and

(b) end:

(i) at the expiry time of the undertaking; or

(ii) if an earlier time is ascertained in accordance with the undertaking—at that earlier time; or

(iii) if a later time is ascertained in accordance with the undertaking—at that later time.

(4) If:

(a) a fixed principles term or condition is specified in a special access undertaking; and

(b) the undertaking ceases to be in operation before the end of the notional fixed period for the fixed principles term or condition;

the fixed principles term or condition ceases to be in operation when the undertaking ceases to be in operation.

Note: Even though the fixed principles term or condition ceases to be in operation when the undertaking ceases to be in operation, subsection (5) ensures that a fresh undertaking can include an identical fixed principles term or condition.

Consequences—acceptance of other undertaking

(5) If:

(a) a special access undertaking (the ***original undertaking***) given by a person in relation to a particular service contained a fixed principles term or condition (the ***original fixed principles term or condition***); and

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(b) the original undertaking was accepted by the Commission; and

(c) during the notional fixed period for the original fixed principles term or condition, the person gives the Commission another special access undertaking (the ***other undertaking***) in relation to the service; and

(d) the other undertaking contains a fixed principles term or condition (the ***corresponding fixed principles term or condition***) that is identical to the original fixed principles term or condition; and

(e) the notional fixed period for the corresponding fixed principles term or condition ends at or before the end of the notional fixed period for the original fixed principles term or condition; and

(f) if there are qualifying circumstances in relation to the original fixed principles term or condition:

(i) there are qualifying circumstances in relation to the corresponding fixed principles term or condition; and

(ii) those qualifying circumstances are identical to the qualifying circumstances in relation to the original fixed principles term or condition; and

(g) if there are qualifying circumstances in relation to the original fixed principles term or condition—none of those circumstances exist;

then:

(h) the Commission must not reject the other undertaking for a reason that concerns:

(i) the corresponding fixed principles term or condition; or

(ii) the notional fixed period for the corresponding fixed principles term or condition; or

(iii) if there are qualifying circumstances in relation to the corresponding fixed principles term or condition—the specification of those circumstances; and

(i) paragraphs 152CBD(2)(a), (b), (c) and (ca) do not apply to:

(i) the corresponding fixed principles term or condition; or

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(ii) the notional fixed period for the corresponding fixed principles term or condition; or

(iii) if there are qualifying circumstances in relation to the corresponding fixed principles term or condition—those circumstances; and

(j) if the corresponding fixed principles term or condition is the only term or condition contained in the other undertaking—paragraph 152CBD(2)(d) does not apply to the other undertaking; and

(k) if the corresponding fixed principles term or condition is not the only term or condition contained in the other undertaking—subparagraph 152CBD(2)(d)(ii) does not require the Commission to consider any submissions to the extent to which they relate to:

(i) the corresponding fixed principles term or condition; or

(ii) the notional fixed period for the corresponding fixed principles term or condition; or

(iii) if there are qualifying circumstances in relation to the corresponding fixed principles term or condition—those circumstances.

Consequences—variation of undertaking

(6) If:

(a) a special access undertaking given by a person in relation to a particular service contains a fixed principles term or condition (the ***original fixed principles term or condition***); and

(b) the undertaking has been accepted by the Commission; and

(c) during the notional fixed period for the original fixed principles term or condition, the person gives the Commission a variation of the undertaking; and

(d) the varied undertaking contains a fixed principles term or condition (the ***corresponding fixed principles term or condition***) that is identical to the original fixed principles term or condition; and

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(e) the notional fixed period for the corresponding fixed principles term or condition is identical to the notional fixed period for the original fixed principles term or condition; and

(f) if there are qualifying circumstances in relation to the original fixed principles term or condition:

(i) there are qualifying circumstances in relation to the corresponding fixed principles term or condition; and

(ii) those qualifying circumstances are identical to the qualifying circumstances in relation to the original fixed principles term or condition; and

(g) if there are qualifying circumstances in relation to the original fixed principles term or condition—none of those circumstances exist;

the Commission must not reject the variation for a reason that concerns:

(h) the corresponding fixed principles term or condition; or

(i) the notional fixed period for the corresponding fixed principles term or condition; or

(j) if there are qualifying circumstances in relation to the corresponding fixed principles term or condition—the specification of those circumstances.

152CBB Further information about undertaking

(1) This section applies if a person gives a special access undertaking to the Commission.

(2) The Commission may request the person to give the Commission further information about the undertaking.

(2A) If:

(a) the Procedural Rules make provision for or in relation to a time limit for giving the information; and

(b) the person does not give the Commission the information within the time limit allowed by the Procedural Rules;

the Commission may, by written notice given to the person, reject the undertaking.

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(2B) Subsection (2A) has effect despite anything in this Division.

(2C) If the Commission makes a decision under subsection (2A) to reject the undertaking, subsection 152CBC(5) has effect as if the decision had been made under subsection 152CBC(2).

(3) If the Procedural Rules do not make provision for or in relation to a time limit for giving the information, the Commission may refuse to consider the undertaking until the person gives the Commission the information.

(4) The Commission may withdraw its request for further information, in whole or in part.

152CBC Commission to accept or reject access undertaking

(1) This section applies if a person gives a special access undertaking to the Commission.

(1A) Before the Commission makes a decision under subsection (2) in relation to the undertaking, the person may, by written notice given to the Commission within the time allowed by the Procedural Rules, modify the undertaking, so long as the modification is a modification that, under the Procedural Rules, is taken to be of a minor nature.

Decision to accept or reject undertaking

(2) After considering the undertaking, the Commission must:
(a) accept the undertaking; or
(b) reject the undertaking.

Notice of decision

(3) If the Commission accepts the undertaking, the Commission must give the person a written notice stating that the undertaking has been accepted.

(4) If the Commission rejects the undertaking, the Commission must give the person a written notice:

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(a) stating that the undertaking has been rejected; and
(b) setting out the reasons for the rejection.

Commission to make decision within 6 months

(5) If the Commission does not make a decision under subsection (2) about the undertaking within 6 months after receiving the undertaking, the Commission is taken to have made, at the end of that 6-month period, a decision under subsection (2) to accept the undertaking.

(6) In calculating the 6-month period referred to in subsection (5), disregard:

(aa) if:
(i) the Commission has given a notice under section 152CBDA in relation to the undertaking; and
(ii) no varied undertaking was given to the Commission in response to the notice;
a day in the period specified in the notice; and

(ab) if:
(i) the Commission has given a notice under section 152CBDA in relation to the undertaking; and
(ii) a varied undertaking was given to the Commission in response to the notice; and
(iii) the Commission did not publish the varied undertaking under paragraph 152CBD(2)(d);
a day in the period:
(iv) beginning on the day in which the notice was given; and
(v) ending when the varied undertaking was given to the Commission in response to the notice; and

(ac) if:
(i) the Commission has given a notice under section 152CBDA in relation to the undertaking; and
(ii) a varied undertaking was given to the Commission in response to the notice; and

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(iii) the varied undertaking was published under paragraph 152CBD(2)(d);

a day in the period:

(iv) beginning on the day on which the notice was given; and

(v) ending at the end of the time specified by the Commission when it published the varied undertaking; and

(a) if paragraph (ac) does not apply and the Commission has published the undertaking under paragraph 152CBD(2)(d)—a day in the period:

(i) beginning on the date of publication; and

(ii) ending at the end of the time limit specified by the Commission when it published the undertaking; and

(b) if the Commission has requested further information under section 152CBB in relation to the undertaking—a day during any part of which the request, or any part of the request, remains unfulfilled.

Extension of decision-making period

(7) The Commission may, by written notice given to the person, extend or further extend the 6-month period referred to in subsection (5), so long as:

(a) the extension or further extension is for a period of not more than 3 months; and

(b) the notice includes a statement explaining why the Commission has been unable to make a decision on the undertaking within that 6-month period or that 6-month period as previously extended, as the case may be.

(8) As soon as practicable after the Commission gives a notice under subsection (7), the Commission must cause a copy of the notice to be made available on the internet.

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152CBCA Serial undertakings

If:

(a) a person gives a special access undertaking (the ***first special access undertaking***) to the Commission; and

(b) the Commission rejects the first special access undertaking; and

(c) the person subsequently gives another special access undertaking to the Commission; and

(d) the Commission is satisfied that any or all of the provisions of the first special access application are materially similar to any or all of the provisions of the other special access undertaking;

the Commission may refuse to consider the other special access undertaking.

152CBD Criteria for accepting access undertaking

(1) This section applies if a person gives the Commission a special access undertaking relating to a service.

(2) The Commission must not accept the undertaking unless:

(a) if paragraph 152CBA(1)(a) applies—the Commission is satisfied that:

(i) the terms and conditions referred to in paragraph 152CBA(3)(b) would be consistent with the obligations referred to in paragraph 152CBA(3)(a); and

(ii) those terms and conditions are reasonable; and

(b) if paragraph 152CBA(1)(b) applies—the Commission is satisfied that:

(i) the terms and conditions referred to in subsection 152CBA(3A) would be consistent with the obligations referred to in section 152AXB; and

(ii) those terms and conditions are reasonable; and

(c) the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; and

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(ca) if subsection 152CBA(3B) applies—the Commission is satisfied that:

(i) the conduct referred to in paragraph 152CBA(3B)(a) will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services; and

(ii) the terms and conditions referred to in paragraph 152CBA(3B)(b) are reasonable; and

(cb) if subsection 152CBA(3C) applies—the Commission is satisfied that the conduct specified in accordance with that subsection will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services; and

(d) the Commission has:

(i) published the undertaking and invited people to make submissions to the Commission on the undertaking; and

(ii) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking.

Note: Section 152AH contains a list of matters to be taken into account in determining whether terms and conditions are reasonable.

(3) Subsection (2) has effect subject to subsection 152CBAA(5) (fixed principles terms and conditions).

(4) If the undertaking provides that a term or condition specified in the undertaking is a ***fixed principles term or condition*** for a period that, under the undertaking, is expressed to be the ***notional fixed period*** for the fixed principles term or condition, the Commission must refuse to accept the undertaking if the Commission considers that:

(a) the fixed principles term or condition should not be a fixed principles term or condition; or

(b) that notional fixed period should not be the notional fixed period for the fixed principles term or condition; or

(c) if the undertaking provides that one or more specified circumstances are qualifying circumstances in relation to the

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fixed principles term or condition—any of the qualifying circumstances should not be qualifying circumstances in relation to the fixed principles term or condition; or

(d) if the undertaking does not provide that particular circumstances are qualifying circumstances in relation to the fixed principles term or condition—those circumstances should be qualifying circumstances in relation to the fixed principles term or condition.

(5) Subsection (4) has effect subject to subsection 152CBAA(5) (fixed principles terms and conditions).

(5A) If:

(a) the undertaking contains price-related terms and conditions relating to the supply of a service; and

(b) the price-related terms and conditions are reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities;

then:

(c) the Commission must not reject the undertaking for a reason that concerns the price-related terms and conditions; and

(d) paragraph (2)(b) does not apply to the price-related terms and conditions.

(5B) In subsection (5A), ***eligible services***, ***price-related terms and conditions***, ***uniform national pricing*** and ***utilities*** have the same meaning as in section 151DA.

(5C) If a refusal is authorised under subsection 151DA(2) or (3) for the purposes of subsection 51(1):

(a) the Commission must not reject the undertaking for a reason that concerns that refusal; and

(b) paragraph (2)(b) of this section does not apply to that refusal.

(6) If a special access undertaking is given to the Commission in response to a notice under section 152CBDA, the Commission is

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not required to publish the undertaking under paragraph (2)(d) of this section unless the Commission is satisfied that:

(a) the variations specified in the notice are not of a minor nature; or

(b) the variations specified in the notice are likely to have a material adverse effect on the legitimate commercial interests of any person.

152CBDA Variation of special access undertaking

(1) This section applies if a person gives a special access undertaking (the ***original undertaking***) to the Commission.

(2) The Commission may give the person a written notice stating that, if the person:

(a) makes such variations to the original undertaking as are specified in the notice; and

(b) gives the varied undertaking to the Commission within the period specified in the notice;

the Commission will consider the varied undertaking under section 152CBC as if the varied undertaking had been given to the Commission instead of the original undertaking.

(3) If the person gives the Commission a varied undertaking in response to the notice, the Commission must consider the varied undertaking under section 152CBC as if the varied undertaking had been given to the Commission instead of the original undertaking.

(4) The Commission does not have a duty to consider whether to give a notice under subsection (2).

152CBE Extension of access undertaking

(1) This section applies if:

(a) a special access undertaking is given by a person; and

(b) the undertaking is in operation; and

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(c) the undertaking provides for the person to extend the expiry time of the undertaking, so long as the extension is approved by the Commission; and

(d) the undertaking sets out criteria that are to be applied by the Commission in deciding whether to approve the extension.

(2) The person may apply to the Commission for approval of the extension. The application must be made in the 12-month period ending at the expiry time.

(3) An application under subsection (2) must be:

(a) in writing; and

(b) in a form approved in writing by the Commission.

(4) After considering the application, the Commission must decide whether to:

(a) approve the extension; or

(b) refuse to approve the extension.

(5) The Commission must approve the extension if the Commission is satisfied that the criteria referred to in paragraph (1)(d) have been met.

(6) If the Commission approves the extension, the Commission must give the person a written notice stating that the extension has been approved.

(7) If the Commission refuses to approve the extension, the Commission must give the person a written notice:

(a) stating that the Commission has refused to approve the extension; and

(b) setting out the reasons for the refusal.

(8) In this section, a reference to an ***extension*** includes a reference to a further extension.

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152CBF Duration of access undertaking

(1) This section applies if a person gives the Commission a special access undertaking relating to a service.

(2) If the Commission accepts the undertaking:

(a) the undertaking comes into operation at the time of acceptance; and

(b) the undertaking continues in operation until:

(i) it expires; or

(ii) it is withdrawn as mentioned in section 152CBI;

even if, in the case of an undertaking covered by subsection 152CBA(3), the service becomes an active declared service.

(3) In this section:

active declared service has the same meaning as in section 152AR (disregarding subsection 152AL(7)).

152CBG Variation of access undertakings

(1) This section applies if a special access undertaking given by a person is in operation.

(2) The person may give the Commission a variation of the undertaking.

(2A) Before the Commission makes a decision under subsection (3) in relation to the variation, the person may, by written notice given to the Commission within the time allowed by the Procedural Rules, modify the variation, so long as the modification is a modification that, under the Procedural Rules, is taken to be a modification of a minor nature.

Decision to accept or reject variation

(3) After considering the variation, the Commission must decide to:

(a) accept the variation; or

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(b) reject the variation.

(4) Section 152CBD applies to the variation in a corresponding way to the way in which it applies to an undertaking. However, if the variation is a variation that, under the Procedural Rules, is taken to be a variation of a minor nature, the Commission is not required to comply with paragraph 152CBD(2)(d) in relation to the variation.

(4A) Subsection (4) has effect subject to subsection 152CBAA(6) (fixed principles terms and conditions).

Notice of decision

(5) If the Commission accepts the variation, the Commission must give the person a written notice:
(a) stating that the variation has been accepted; and
(b) setting out the terms of the variation.

(6) If the Commission rejects the variation, the Commission must give the person a written notice:
(a) stating that the variation has been rejected; and
(b) setting out the reasons for the rejection.

Commission to make decision within 6 months

(7) If the Commission does not make a decision under subsection (3) about the variation within 6 months after receiving the variation, the Commission is taken to have made, at the end of that 6-month period, a decision under subsection (3) to accept the variation.

(8) In calculating the 6-month period referred to in subsection (7), disregard:
(a) if the Commission has published the variation under paragraph 152CBD(2)(d)—a day in the period:
(i) beginning on the date of publication; and
(ii) ending at the end of the time limit specified by the Commission when it published the variation; and
(b) if the Commission has requested further information under section 152CBH in relation to the variation—a day during

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any part of which the request, or any part of the request, remains unfulfilled.

Extension of decision-making period

(9) The Commission may, by written notice given to the person, extend or further extend the 6-month period referred to in subsection (7), so long as:

(a) the extension or further extension is for a period of not more than 3 months; and

(b) the notice includes a statement explaining why the Commission has been unable to make a decision on the variation within that 6-month period or that 6-month period as previously extended, as the case may be.

(10) As soon as practicable after the Commission gives a notice under subsection (9), the Commission must cause a copy of the notice to be made available on the internet.

152CBH Further information about variation of access undertaking

(1) This section applies if a person gives the Commission a variation of a special access undertaking.

(2) The Commission may request the person to give the Commission further information about the variation.

(2A) If:

(a) the Procedural Rules make provision for or in relation to a time limit for giving the information; and

(b) the person does not give the Commission the information within the time limit allowed by the Procedural Rules;

the Commission may, by written notice given to the person, reject the variation.

(2B) Subsection (2A) has effect despite anything in this Division.

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(2C) If the Commission makes a decision under subsection (2A) to reject the variation, subsection 152CBG(7) has effect as if the decision had been made under subsection 152CBG(3).

(3) If the Procedural Rules do not make provision for or in relation to a time limit for giving the information, the Commission may refuse to consider the variation until the person gives the Commission the information.

(4) The Commission may withdraw its request for further information, in whole or in part.

152CBI Voluntary withdrawal of undertaking

(1) This section applies if a special access undertaking given by a person is in operation.

(2) The person may, by written notice given to the Commission, withdraw the undertaking if:

(a) the service to which the undertaking relates is a declared service when the notice is given; or

(b) both:

(i) the service to which the undertaking relates is not a declared service when the notice is given; and

(ii) at least 12 months before the notice is given, the person informed the Commission in writing that the person proposed to withdraw the undertaking.

(3) For the purposes of this section, in determining whether a service is a declared service, disregard subsections 152AL(7) and (8E).

152CBIA Special access undertakings prevail over inconsistent access determinations

An access determination has no effect to the extent to which it is inconsistent with a special access undertaking that is in operation.

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152CBIB Special access undertakings prevail over inconsistent binding rules of conduct

Binding rules of conduct have no effect to the extent to which they are inconsistent with a special access undertaking that is in operation.

152CBIC Access agreements prevail over special access undertakings

A special access undertaking has no effect to the extent to which it is inconsistent with an access agreement.

152CBID Statutory infrastructure provider standards and rules prevail over inconsistent special access undertakings

A special access undertaking has no effect to the extent to which it is inconsistent with:

(a) a standard determined, or a benchmark set, under section 360U of the *Telecommunications Act 1997*; or

(b) rules made under section 360V of that Act.

152CBJ Proposed service

In this Subdivision, a reference to a ***service*** includes a reference to a proposed service.

Subdivision C—General provisions

152CC Register of access undertakings

(1) The Commission is to maintain a Register in which the Commission includes:

(a) all access undertakings that have been accepted by the Commission (including those that are no longer in operation); and

(b) all variations of access undertakings.

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(2) The Register is to be maintained by electronic means.

(3) The Register is to be made available for inspection on the Commission's website.

(4) The Register is not a legislative instrument.

152CD Enforcement of access undertakings

(1) This section applies if an access undertaking given by a person (the ***first person***) is in operation.

(2) If:

(a) the Commission; or

(b) any person (the ***affected person***) whose interests are affected by the undertaking;

thinks that the first person has breached the access undertaking, the Commission or affected person may apply to the Federal Court for an order under subsection (3).

(3) If the Federal Court is satisfied that the first person has breached the undertaking, the Court may make all or any of the following orders:

(a) an order directing the first person to comply with the undertaking;

(b) an order directing the first person 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.

(4) The Federal Court may discharge or vary an order granted under this section.

152CDA Deferral of consideration of an access undertaking etc.

(1) The Procedural Rules may authorise the Commission to defer consideration of:

(a) an access undertaking; or

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(b) a variation of an access undertaking.

(2) Subsection (1) has effect despite anything in this Division.

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Division 6—Ministerial pricing determinations

152CH Ministerial pricing determinations

(1) The Minister may, by legislative instrument, make a determination setting out principles dealing with price-related terms and conditions relating to the standard access obligations. The determination is to be known as a ***Ministerial pricing determination***.

Note 3A: Subsection 152CBD(2) provides that the Commission must not accept a special access undertaking unless the undertaking is consistent with any Ministerial pricing determination.

Note 4: Subsection 152CI(1) provides that a provision of an access undertaking has no effect to the extent that the provision is inconsistent with any Ministerial pricing determination.

Note 5: Subsection 152CI(2) provides that a provision of an access determination has no effect to the extent that the provision is inconsistent with any Ministerial pricing determination.

Note 5A: Subsection 152CI(3) provides that a provision of binding rules of conduct have no effect to the extent that the provision is inconsistent with any Ministerial pricing determination.

(3) In this section:

price-related terms and conditions means terms and conditions relating to price or a method of ascertaining price.

152CI Undertakings, access determinations and binding rules of conduct that are inconsistent with Ministerial pricing determinations

(1) If a provision of an access undertaking is inconsistent with any Ministerial pricing determination, the provision has no effect to the extent of the inconsistency.

(2) If a provision of an access determination is inconsistent with any Ministerial pricing determination, the provision has no effect to the extent of the inconsistency.

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(3) If a provision of binding rules of conduct is inconsistent with any Ministerial pricing determination, the provision has no effect to the extent of the inconsistency.

152CJ Register of Ministerial pricing determinations

(1) The Commission must keep a Register of Ministerial pricing determinations.

(2) The Register is to be maintained by electronic means.

(3) The Register is to be made available for inspection on the Commission's website.

(4) The Register is not a legislative instrument.

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Division 6A—Supply of services by NBN corporations

152CJA Supply of services by NBN corporations

(1) An NBN corporation must not supply an eligible service (within the meaning of section 152AL) to another person unless:

(a) the service is a declared service under subsection 152AL(8A); or

(b) both:

(i) the NBN corporation has formulated a standard form of access agreement that relates to access to the service; and

(ii) the standard form of access agreement is available on the NBN corporation's website; or

(c) both:

(i) a special access undertaking given by the NBN corporation is in operation; and

(ii) the undertaking relates to the service.

(2) If:

(a) as the result of a request made by an access seeker under section 152AXB, an NBN corporation is subject to a category B standard access obligation in relation to a declared service; and

(b) the NBN corporation has formulated a standard form of access agreement that relates to access to the service; and

(c) the standard form of access agreement is available on the NBN corporation's website; and

(d) the access seeker requests the NBN corporation to enter into an access agreement that:

(i) relates to access to the service; and

(ii) sets out terms and conditions that are the same as the terms and conditions set out in the standard form of access agreement;

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the NBN corporation must comply with the request mentioned in paragraph (d).

Note: An NBN corporation will not be subject to a category B standard access obligation in the circumstances set out in subsection 152AXB(3) or (6).

(3) If an access seeker does not make a request under paragraph (2)(d), this Part does not, by implication, prevent the NBN corporation and the access seeker from entering into an access agreement that sets out terms and conditions that are not the same as the terms and conditions set out in the standard form of access agreement.

152CJB Mandatory NBN services

Scope

(1) This section applies if a condition of a carrier licence held by an NBN corporation requires the NBN corporation to comply with this section in relation to a specified eligible service (within the meaning of section 152AL) that is supplied, or is capable of being supplied, by the NBN corporation (whether to itself or other persons).

Note 1: See section 41 of the *National Broadband Network Companies Act 2011*.

Note 2: For declaration of carrier licence conditions, see section 63 of the *Telecommunications Act 1997*.

Compliance by NBN corporation

(2) The NBN corporation must, within 90 days after the carrier licence condition comes into force:

(a) both:

(i) formulate a standard form of access agreement that relates to access to the service; and

(ii) make the standard form of access agreement available on the NBN corporation's website; or

(b) give the Commission a special access undertaking in connection with the provision of access to the service.

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(3) If:

(a) the NBN corporation, in accordance with paragraph (2)(b), gives the Commission a special access undertaking in connection with the provision of access to the service; and

(b) the Commission rejects the undertaking;

the NBN corporation must, within 90 days after the rejection of the undertaking:

(c) formulate a standard form of access agreement that relates to access to the service; and

(d) make the standard form of access agreement available on the NBN corporation's website.

(4) If the NBN corporation, in accordance with

(a) subparagraph (2)(a)(ii); or

(b) paragraph (3)(d);

makes a standard form of access agreement available on the NBN corporation's website, the NBN corporation must ensure that a standard form of access agreement that:

(c) relates to access to the service; and

(d) is formulated by the NBN corporation;

is available on the NBN corporation's website at all times during the remainder of the period when the carrier licence condition is in force.

(5) If:

(a) the NBN corporation, in accordance with paragraph (2)(b), gives the Commission a special access undertaking in connection with the provision of access to the service; and

(b) the Commission accepts the undertaking; and

(c) the undertaking subsequently ceases to be in operation;

the NBN corporation must ensure that a standard form of access agreement that:

(d) relates to access to the service; and

(e) is formulated by the NBN corporation;

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is available on the NBN corporation's website at all times during the remainder of the period when the carrier licence condition is in force.

152CJC Carrier licence condition

A carrier licence held by an NBN corporation is subject to a condition that the NBN corporation must comply with any rules in section 152CJA that are applicable to the NBN corporation.

Note: See also section 62D of the *Telecommunications Act 1997*.

152CJD Service provider rule

(1) In addition to the rules mentioned in section 98 of the *Telecommunications Act 1997*, the rule set out in subsection (2) of this section is a service provider rule for the purposes of that Act.

(2) If an NBN corporation is a service provider, the NBN corporation must comply with any rules in section 152CJA that are applicable to the NBN corporation.

152CJE Judicial enforcement of obligations

(1) If the Federal Court is satisfied that an NBN corporation has contravened an obligation imposed by section 152CJA or 152CJB, the Court may, on the application of:

(a) the Commission; or

(b) any person whose interests are affected by the contravention;

make all or any of the following orders:

(c) an order directing the NBN corporation to comply with the obligation;

(d) an order directing the NBN corporation to compensate any other person who has suffered loss or damage as a result of the contravention;

(e) any other order that the Court thinks appropriate.

(2) The Federal Court may discharge or vary an order granted under this section.

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152CJF Standard form of access agreement

For the purposes of this Part, if, at a particular time, a service is not a declared service, a standard form of access agreement relating to access to the service may be formulated by an NBN corporation at that time on the assumption that the service is a declared service.

152CJG When NBN corporation is not capable of supplying a carriage service

Condition of a carrier licence

(1) If a condition of a carrier licence held by an NBN corporation prohibits the NBN corporation from supplying a specified carriage service to carriers or service providers, then, for the purposes of:

(a) this Part; and

(b) subsections 41(1) and (2) of the *National Broadband Network Companies Act 2011*;

the NBN corporation is taken not to be capable of supplying the service.

Note: See subsection 41(3) of the *National Broadband Network Companies Act 2011*.

Avoidance of doubt

(2) Subsection (1) is enacted for the avoidance of doubt.

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Division 6B—Explanatory material relating to anti-discrimination provisions

152CJH Explanatory material relating to anti-discrimination provisions

The Commission must:

(a) as soon as practicable after the commencement of this section, publish on its website explanatory material relating to the following provisions:

(i) section 152AXC;

(ii) section 152AXD;

(iii) subsections 152BCB(4A) to (4C);

(iv) subsections 152BDA(4A) to (4C); and

(b) keep that statement up-to-date.

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Division 7—Relationship between this Part and Part IIIA

152CK Relationship between this Part and Part IIIA

(1) A notification must not be given under section 44S in relation to an access dispute if:

(a) the dispute relates to one or more aspects of access to a declared service (within the meaning of this Part); and

(b) the third party referred to in that section is a service provider (within the meaning of this Part).

(2) The Commission must not accept an undertaking under section 44ZZA that relates to a declared service (within the meaning of this Part) if the terms and conditions set out in the undertaking relate to the provision of access to one or more service providers (within the meaning of this Part).

(3) If:

(a) an undertaking under section 44ZZA is in operation in relation to a particular service; and

(b) at a particular time, the service becomes a declared service (within the meaning of this Part);

the undertaking ceases to be in operation to the extent (if any) to which it sets out terms and conditions relating to the provision of access to one or more service providers (within the meaning of this Part).

(4) For the purposes of this section, if a special access undertaking given by a person other than an NBN corporation is in operation, assume that subsection 152AL(7) has effect in relation to the undertaking as if paragraph 152AL(7)(c) had not been enacted.

(5) For the purposes of this section, if a special access undertaking given by an NBN corporation is in operation, assume that subsection 152AL(8E) has effect in relation to the undertaking as if paragraph 152AL(8E)(c) had not been enacted.

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Division 10—Hindering the fulfilment of a standard access obligation etc.

152EF Prohibition on hindering the fulfilment of a standard access obligation etc.

(1) A person must not engage in conduct for the purpose of preventing or hindering the fulfilment of:

(a) a standard access obligation; or

(b) a requirement imposed by an access determination; or

(ba) a requirement imposed by binding rules of conduct;

if the person is:

(c) a carrier or a carriage service provider who supplies a declared service; or

(d) a service provider to whom a declared service is being supplied by a carrier or carriage service provider; or

(e) a body corporate that is related to a carrier or provider referred to in paragraph (c) or (d).

(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) Subsection (1) does not have effect before 1 July 1997.

152EG Enforcement of prohibition on hindering the fulfilment of a standard access obligation etc.

(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

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section 152EF, 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.

152EH Consent injunctions

On an application for an injunction under section 152EG, 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.

152EI Interim injunctions

(1) The Federal Court may grant an interim injunction pending determination of an application under section 152EG.

(2) If the Commission makes an application under section 152EG 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.

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152EJ Factors relevant to granting a restraining injunction

The power of the Federal Court to grant an injunction under section 152EG 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.

152EK Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 152EG 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

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

152EL 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 10A—Procedural Rules

152ELA Procedural Rules

(1) The Commission may, by written instrument, make rules:

(a) making provision for or in relation to the practice and procedure to be followed by the Commission in performing functions, or exercising powers, under this Part; or

(b) making provision for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Commission under this Part; or

(c) prescribing matters required or permitted by any other provision of this Part to be prescribed by the Procedural Rules.

(2) Rules under subsection (1) are to be known as Procedural Rules.

(3) The Procedural Rules may make provision for or in relation to any or all of the following:

(a) the confidentiality of information or documents given to the Commission by:

(i) an applicant for an order under subsection 152ATA(1); or

(ii) a person who gave the Commission an access undertaking or a variation of an access undertaking;

(c) the form and content of applications, undertakings, variations or other documents given to the Commission under this Part.

(4) Subsection (3) does not limit subsection (1).

(5) The Procedural Rules may make provision for or in relation to a matter by empowering the Commission to make decisions of an administrative character.

(6) Subsection (5) does not limit subsection (1).

(8) An instrument under subsection (1) is a legislative instrument.

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Note: For variation and revocation of instruments under subsection (1), see subsection 33(3) of the *Acts Interpretation Act 1901*.

152ELC Plan for the development of Procedural Rules

(1) Within 6 months after the commencement of this section, the Commission must:

(a) prepare a written plan setting out:

(i) an outline of the Commission's proposals for making Procedural Rules; and

(ii) an indicative timetable for making those Procedural Rules; and

(b) make a copy of the plan available on the Commission's website.

(2) A failure to comply with the plan does not affect the validity of an instrument under subsection 152ELA(1).

(3) The plan is not a legislative instrument.

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Division 11—Miscellaneous

152ELD Compensation for acquisition of property

(1) If the operation of this Part would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

this Part includes Division 2 of Part 2 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

152EM Continuity of partnerships

For the purposes of this Part, a change in the composition of a partnership does not affect the continuity of the partnership.

152EN Treatment of partnerships

This Part applies to a partnership as if the partnership were a person, but it applies with the following changes:

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(a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;

(b) any offence against this Part that would otherwise be committed by the partnership is taken to have been committed by each partner who:

(i) aided, abetted, counselled or procured the relevant act or omission; or

(ii) 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).

152EO Conduct by directors, servants or agents

(1) If, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and

(b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or

(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.

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(3) A reference in subsection (1) 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.

(4) 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.

152EP 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).

152EQ Assistance to independent telecommunications adjudicator

(1) For the purposes of this section, the ***independent telecommunications adjudicator*** is a company that:
  (a) is limited by guarantee; and
  (b) is identified, in an undertaking in force under section 577A of the *Telecommunications Act 1997*, as the independent telecommunications adjudicator for the purpose of this section.

(2) The Commission may assist the independent telecommunications adjudicator.

(3) The assistance may include the following:
  (a) the provision of information (including protected information within the meaning of section 155AAA);
  (b) the provision of advice;
  (c) the making available of resources and facilities (including secretariat services and clerical assistance).

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152EQA Voluntary undertakings originally given by Telstra

Scope

(1) This section applies if an undertaking is in force under section 577A of the *Telecommunications Act 1997*.

Note: Section 577A of the *Telecommunications Act 1997* deals with undertakings about structural separation.

Commission must have regard to the conduct of a designated Telstra successor company

(2) If a designated Telstra successor company has engaged, or is required to engage, in conduct in order to comply with the undertaking, then, in performing a function, or exercising a power, under this Part in relation to the designated Telstra successor company, the Commission must have regard to the conduct to the extent that the conduct is relevant.

Commission must not prevent a designated Telstra successor company from complying with the undertaking

(3) The Commission must not perform a function, or exercise a power, under this Part so as to prevent a designated Telstra successor company from complying with the undertaking.

152ER Voluntary undertakings given by Telstra

Scope

(1) This section applies if an undertaking given by Telstra is in force under section 577C or 577E of the *Telecommunications Act 1997*.

Note 2: Section 577C of the *Telecommunications Act 1997* deals with undertakings about hybrid fibre-coaxial networks.

Note 3: Section 577E of the *Telecommunications Act 1997* deals with undertakings about subscription television broadcasting licences.

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Commission must have regard to Telstra's conduct

(2) If Telstra has engaged, or is required to engage, in conduct in order to comply with the undertaking, then, in performing a function, or exercising a power, under this Part in relation to Telstra, the Commission must have regard to the conduct to the extent that the conduct is relevant.

Commission must not prevent Telstra from complying with the undertaking

(3) The Commission must not perform a function, or exercise a power, under this Part so as to prevent Telstra from complying with the undertaking.

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Part XICA—The Electricity Industry

Division 1—Preliminary

153A Simplified outline of this Part

This Part deals with prohibited conduct by corporations in relation to electricity. It ceases to be in force on 1 January 2031.

Division 2 of this Part sets out the circumstances in which a corporation engages in ***prohibited conduct***.

Responses to a corporation engaging in prohibited conduct include the following:

(a) the Commission may issue a public warning notice;

(b) the Commission may give the corporation an infringement notice;

(c) the Commission may give the corporation a ***prohibited conduct notice*** that sets out proposed orders (and the Commission may later give the Treasurer a ***prohibited conduct recommendation*** that recommends orders);

(d) if the Commission has given the Treasurer a prohibited conduct recommendation, the Treasurer may:

(i) make a ***contracting order*** that requires making offers to enter into electricity financial contracts; and

(ii) apply to the Court for a ***divestiture order*** that requires divestment of interests in assets and securities.

153B Part etc. ceases to be in force

The following cease to be in force on 1 January 2031:

(a) this Part;

(b) any other provision of this Act, to the extent that the provision relates to this Part.

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153C Interpretation

In this Part:

associate has the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975*.

connected body corporate has the meaning given by section 153D.

contracting order means an order of the Treasurer under section 153X.

Court means the Federal Court of Australia.

divestiture order means an order of the Court under section 153ZB.

electricity financial contract: a contract is an ***electricity financial contract*** if:

(a) rights under the contract are derived from or relate to the price of electricity on an electricity spot market; and

(b) the operator of that electricity spot market is not a party to the contract.

electricity market means any of the following:

(a) a market in relation to the supply of electricity;

(b) a market for electricity financial contracts.

electricity spot market means a spot market for the supply of electricity.

interest, in an asset or a security, has the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975*.

no Treasurer action notice means a notice under section 153U.

prohibited conduct: a corporation engages in ***prohibited conduct*** if the corporation engages in conduct that contravenes section 153E, 153F, 153G or 153H.

prohibited conduct notice means a notice under section 153P.

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prohibited conduct recommendation means a notice under section 153S.

residential customer means a customer who purchases, or proposes to purchase, electricity principally for personal, household or domestic use at premises.

small business customer means a customer who purchases, or proposes to purchase, electricity at a rate less than 100 MWh a financial year and is not a residential customer in relation to that electricity.

small customer means a residential customer or a small business customer.

153D Meaning of *connected body corporate* in relation to prohibited conduct

(1) A corporation is a ***connected body corporate*** in relation to prohibited conduct engaged in by the corporation.

(2) A body corporate is a ***connected body corporate*** in relation to prohibited conduct engaged in by a corporation if:
  (a) the body corporate is related to the corporation; and
  (b) any of the following conditions are satisfied:
    (i) the prohibited conduct involves the direct or indirect use of assets held by the body corporate;
    (ii) the prohibited conduct involves direct or indirect dealings between the body corporate and the corporation.

(3) A body corporate is a ***connected body corporate*** in relation to prohibited conduct if:
  (a) the body corporate is a holding company of another body corporate; and
  (b) the other body corporate is a connected body corporate in relation to the prohibited conduct because of a previous operation of this section.

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Division 2—Prohibited conduct

153E Prohibited conduct—retail pricing

(1) A corporation contravenes this section if:

(a) the corporation offers to supply electricity, or supplies electricity, to small customers; and

(b) the corporation fails to make reasonable adjustments to the price of those offers, or to the price of those supplies, to reflect sustained and substantial reductions in its underlying cost of procuring electricity.

Note 1: The Treasurer cannot make a contracting order in respect of a contravention of this section (see paragraph 153W(e)).

Note 2: The Treasurer cannot apply for a divestiture order in respect of a contravention of this section (see paragraph 153ZA(e)).

(2) Despite subsection (1), the corporation does not contravene this section if the price is a standing offer price (within the meaning of the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*).

(3) Despite subsection (1), the corporation does not contravene this section if the adjustments would contravene:

(a) an Act of the Commonwealth, a State or a Territory; or

(b) an instrument made under such an Act.

153F Prohibited conduct—electricity financial contract liquidity

A corporation contravenes this section if:

(a) any of the following conditions are satisfied:

(i) the corporation generates electricity;

(ii) a body corporate that is related to the corporation generates electricity; and

(b) the corporation does any of the following:

(i) fails to offer electricity financial contracts;

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(ii) limits or restricts its offers to enter into electricity financial contracts;

(iii) offers to enter into electricity financial contracts in a way that has, or on terms that have, the effect or likely effect of preventing, limiting or restricting acceptance of those offers; and

(c) the corporation does so for the purpose of substantially lessening competition in any electricity market.

Note: The Treasurer cannot apply for a divestiture order in respect of a contravention of this section (see paragraph 153ZA(e)).

153G Prohibited conduct—electricity spot market (basic case)

A corporation contravenes this section if:

(a) the corporation:

(i) bids or offers to supply electricity in relation to an electricity spot market; or

(ii) fails to bid or offer to supply electricity in relation to an electricity spot market; and

(b) the corporation does so:

(i) fraudulently, dishonestly or in bad faith; or

(ii) for the purpose of distorting or manipulating prices in that electricity spot market.

Note 1: The Treasurer cannot make a contracting order in respect of a contravention of this section (see paragraph 153W(e)).

Note 2: The Treasurer cannot apply for a divestiture order in respect of a contravention of this section (see paragraph 153ZA(e)).

153H Prohibited conduct—electricity spot market (aggravated case)

A corporation contravenes this section if:

(a) the corporation:

(i) bids or offers to supply electricity in relation to an electricity spot market; or

(ii) fails to bid or offer to supply electricity in relation to an electricity spot market; and

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(b) the corporation does so fraudulently, dishonestly or in bad faith, for the purpose of distorting or manipulating prices in that electricity spot market.

153J Prohibited conduct—purpose

(1) This section:

(a) applies for the purposes of sections 153F, 153G and 153H; and

(b) does not limit the manner in which the purpose of a person may be established for the purposes of any other provision of this Act.

(2) A corporation may be taken to have done something:

(a) for the purpose of substantially lessening competition in an electricity market; or

(b) for the purpose of distorting or manipulating prices in an electricity spot market;

even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

153K Prohibited conduct may be covered by other provisions

To avoid doubt, this Division does not limit the operation of any other provision of this Act.

Example: Particular conduct of a corporation could result in the corporation contravening both section 46 and section 153F.

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Division 3—Commission responses

Subdivision A—Public warning notices

153L Commission may give draft public warning notice

(1) The Commission may give a corporation a notice in writing if the Commission reasonably believes that:

(a) any of the following conditions are satisfied:

(i) the corporation has engaged in prohibited conduct;

(ii) the corporation is engaging in prohibited conduct; and

(b) one or more 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.

(2) The notice must:

(a) state the day on which the notice is given; and

(b) identify:

(i) the corporation 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 corporation 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 153M in relation to the prohibited conduct after those 21 days have passed.

(3) A notice given under subsection (1) is not a legislative instrument.

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153M Commission may issue public warning notice

(1) This section applies if:

(a) the Commission gave a corporation a notice under section 153L in relation to prohibited conduct; and

(b) at least 21 days have passed since the Commission gave the corporation the notice; and

(c) no more than 90 days have passed since the Commission gave the corporation the notice.

(2) The Commission may issue to the public a written notice containing a warning about the prohibited conduct if the Commission reasonably believes that:

(a) any of the following conditions are satisfied:

(i) the corporation has engaged in the prohibited conduct;

(ii) the corporation is engaging in the prohibited conduct; and

(b) one or more 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.

(3) The notice must:

(a) state the day on which the notice is issued; and

(b) identify:

(i) the corporation mentioned in paragraph (2)(a); and

(ii) the prohibited conduct mentioned in paragraph (2)(a).

(4) A notice issued under subsection (2) is not a legislative instrument.

Subdivision B—Infringement notices

153N Infringement notices

(1) Subject to subsection (2), Division 5 of Part V applies in relation to an alleged contravention of section 153E, 153F, 153G or 153H in the same way in which it applies in relation to an alleged

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contravention of an infringement notice provision (within the meaning of that Part).

(2) For the purposes of applying Division 5 of Part V in accordance with subsection (1), treat the reference in paragraph 60L(5)(b) to 60 penalty units as being a reference to 600 penalty units.

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Division 4—Procedure before contracting order or divestiture order

Subdivision A—Prohibited conduct notices

153P Prohibited conduct notices

(1) The Commission may give a corporation a notice (a ***prohibited conduct notice***) in writing, stating one or more recommendations for the kind or kinds of order the Treasurer or the Court could make under Division 5 or 6, if the Commission reasonably believes that:

(a) any of the following conditions are satisfied:

(i) the corporation has engaged in prohibited conduct;

(ii) the corporation is engaging in prohibited conduct; and

(b) the Treasurer or the Court making that kind or those kinds of order in relation to the corporation, or any other connected body corporate in relation to the prohibited conduct, is a proportionate means of preventing the corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future; and

(c) if that kind of order is, or those kinds of order include, a divestiture order—the following conditions are satisfied:

(i) such a divestiture order will result, or is likely to result, in a benefit to the public;

(ii) if such a divestiture order will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.

(2) The notice must:

(a) be expressed to be given under this section; and

(b) state the day on which the notice is given; and

(c) identify:

(i) the corporation; and

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(ii) the prohibited conduct mentioned in paragraph (1)(a); and

(iii) each connected body corporate in relation to the prohibited conduct (other than the corporation); and

(d) state the recommendations mentioned in subsection (1); and

(e) explain the reasons why the Commission reasonably believes that:

(i) the requirements in paragraphs (1)(a) and (b) are met; and

(ii) if paragraph (1)(c) applies—the requirement in that paragraph is met; and

(f) state that the corporation may, within the period mentioned in subsection (3), make representations to the Commission regarding the conduct mentioned in subparagraph (c)(ii) and the recommendations mentioned in paragraph (d).

(3) For the purposes of paragraph (2)(f), the period:

(a) starts on the day on which the notice is given; and

(b) ends:

(i) if subparagraph (ii) does not apply—45 days after that day; or

(ii) if the Commission allows a later day—that later day.

(4) A failure to comply with subparagraph (2)(c)(iii) does not affect the validity of the notice.

(5) The Commission must give a copy of the notice to each body corporate identified in the notice (in accordance with subparagraph (2)(c)(iii)) as soon as practicable after issuing it.

(6) A prohibited conduct notice is not a legislative instrument.

153Q Commission may vary or revoke prohibited conduct notice

(1) The Commission may, in writing, vary or revoke a prohibited conduct notice given to a corporation.

(2) A variation or revocation under subsection (1) must:

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(a) state the day on which it is made; and
(b) in the case of a variation—state that the corporation may, within the period mentioned in subsection (3), make representations to the Commission regarding the prohibited conduct notice as varied.

(3) For the purposes of paragraph (2)(b), the period:
(a) starts on the day on which the Commission gives the corporation the copy of the variation; and
(b) ends:
(i) if subparagraph (ii) does not apply—45 days after that day; or
(ii) if the Commission allows a later day—that later day.

(4) The Commission must give each of the following a copy of a variation or revocation under subsection (1) as soon as practicable after making it:
(a) the corporation;
(b) each body corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(iii));
(c) each connected body corporate in relation to the prohibited conduct (other than a body corporate mentioned in paragraph (b)) identified in the prohibited conduct notice as varied.

(5) A variation or revocation under subsection (1) is not a legislative instrument.

(6) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a prohibited conduct notice.

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Subdivision B—Prohibited conduct recommendations and no Treasurer action notices

153R Commission must give Treasurer prohibited conduct recommendation or no Treasurer action notice

(1) If the Commission has given a corporation a prohibited conduct notice, the Commission must, within 45 days after the end of the period mentioned in subsection (3), give the Treasurer:
  (a) a prohibited conduct recommendation in respect of the prohibited conduct notice; or
  (b) a no Treasurer action notice in respect of the prohibited conduct notice.

(2) Subsection (1) does not apply if the prohibited conduct notice has been revoked under section 153Q.

(3) The period is:
  (a) unless paragraph (b) applies—the period mentioned in subsection 153P(3) for the prohibited conduct notice; or
  (b) if there has been a variation of the prohibited conduct notice under section 153Q—the period mentioned in subsection 153Q(3) for the variation.

(4) Subsection (5) applies if:
  (a) the Commission has given the Treasurer a no Treasurer action notice in respect of the prohibited conduct notice, in accordance with paragraph (1)(b); and
  (b) the Commission has made a revocation of the no Treasurer action notice under subsection 153V(1).

(5) The Commission must, within 45 days after making the revocation:
  (a) give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice; or
  (b) give the corporation a new prohibited conduct notice in respect of the prohibited conduct identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(ii)).

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153S Prohibited conduct recommendations

(1) The Commission may give the Treasurer a notice in writing (a ***prohibited conduct recommendation***) in respect of the prohibited conduct notice, stating one or more recommendations for the kind or kinds of order the Treasurer or the Court could make under Division 5 or 6, if the Commission reasonably believes that:

(a) any of the following conditions are satisfied:

(i) the corporation has engaged in the kind of prohibited conduct specified in the prohibited conduct notice;

(ii) the corporation is continuing to engage in the kind of prohibited conduct specified in the prohibited conduct notice; and

(b) the Treasurer or the Court making that kind or those kinds of order in relation to the corporation, or any other connected body corporate in relation to the prohibited conduct, is a proportionate means of preventing the corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future; and

(c) if that kind of order is, or those kinds of order include, a divestiture order—the following conditions are satisfied:

(i) such a divestiture order will result, or is likely to result, in a benefit to the public;

(ii) if such a divestiture order will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.

(2) The notice must:

(a) be expressed to be given under this section; and

(b) state the day on which the notice is given; and

(c) identify:

(i) the corporation; and

(ii) the prohibited conduct mentioned in paragraph (1)(a); and

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(iii) each connected body corporate in relation to the prohibited conduct (other than the corporation); and

(d) state the recommendations mentioned in subsection (1); and

(e) explain the reasons why the Commission reasonably believes that:

(i) the requirements in paragraphs (1)(a) and (b) are met; and

(ii) if paragraph (1)(c) applies—the requirement in that paragraph is met.

(3) To avoid doubt, the recommendations stated in the notice (in accordance with paragraph (2)(d)) may be different from the recommendations stated in the prohibited conduct notice (in accordance with paragraph 153P(2)(d)).

(4) A failure to comply with subparagraph (2)(c)(iii) does not affect the validity of the notice.

(5) To avoid doubt, the bodies corporate identified in the notice (in accordance with subparagraph (2)(c)(iii)) need not be the same as the bodies corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(iii)).

(6) A prohibited conduct recommendation is not a legislative instrument.

153T Commission may vary or revoke prohibited conduct recommendation

(1) The Commission may, in writing, vary or revoke a prohibited conduct recommendation.

(2) The Commission cannot make a variation or revocation under subsection (1) later than 45 days after:

(a) unless paragraph (b) applies—the day on which the Commission made the prohibited conduct recommendation; or

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(b) if there has been a previous variation of the prohibited conduct recommendation under this section—the day on which the Commission made the previous variation.

(3) The Commission cannot make a variation or revocation under subsection (1) if:

(a) the Treasurer has made a contracting order in relation to the prohibited conduct recommendation; or

(b) the Treasurer has applied to the Court for a divestiture order in relation to the prohibited conduct recommendation.

(4) The Commission cannot make a variation under subsection (1) unless the Commission is satisfied that:

(a) the variation is minor or insubstantial; or

(b) all of the following conditions are met:

(i) the corporation or any related body corporate gave the Commission information relevant to the prohibited conduct notice that is false or misleading in a material particular, or failed to give the Commission information relevant to the prohibited conduct notice that is not publicly available;

(ii) the variation is reasonably necessary to address the circumstances described in subparagraph (i); or

(c) the variation is reasonably necessary to address information that was not in existence, or that the Commission did not have, when the prohibited conduct notice was given.

(5) A variation or revocation under subsection (1) must state the day on which it is made.

(6) The Commission must give a copy of a variation or revocation under subsection (1) to the Treasurer as soon as practicable after making it.

(7) A variation or revocation under subsection (1) is not a legislative instrument.

(8) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a prohibited conduct recommendation.

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153U No Treasurer action notice

(1) The Commission must give the Treasurer a notice in writing (a ***no Treasurer action notice***) in respect of the prohibited conduct notice mentioned in section 153R if the Commission considers that it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice.

(2) The notice must:
  (a) be expressed to be given under this section; and
  (b) state the day on which the notice is given; and
  (c) explain the reasons why the Commission considers that it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice.

(3) The Commission must give a copy of the notice to the corporation:
  (a) unless paragraph (b) applies—45 days after issuing it; or
  (b) if the Commission and the Treasurer agree that it is appropriate to give a copy of the notice to the corporation at an earlier time—at that earlier time.

(4) A no Treasurer action notice is not a legislative instrument.

153V Commission may vary or revoke no Treasurer action notice

(1) The Commission may, in writing, vary or revoke a no Treasurer action notice.

(2) The Commission cannot make a variation or revocation under subsection (1) later than 45 days after:
  (a) unless paragraph (b) applies—the day on which the Commission made the no Treasurer action notice; or
  (b) if there has been a previous variation of the no Treasurer action notice under this section—the day on which the Commission made the previous variation.

(3) The Commission cannot make a variation under subsection (1) unless the Commission is satisfied that the variation is minor or insubstantial.

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(4) The Commission cannot make a revocation under subsection (1) unless the Commission is satisfied that the conditions in subsections (5) and (6) are met.

(5) The condition in this subsection is met if the Commission reasonably believes that it is appropriate to:

(a) give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice; or

(b) give the corporation a new prohibited conduct notice in respect of the prohibited conduct identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(ii)).

(6) The condition in this subsection is met if the Commission reasonably believes that:

(a) all of the following conditions are met:

(i) the corporation or any related body corporate gave the Commission information relevant to the prohibited conduct notice that is false or misleading in a material particular, or failed to give the Commission information relevant to the prohibited conduct notice that is not publicly available;

(ii) the revocation is reasonably necessary to address the circumstances described in subparagraph (i); or

(b) the revocation is reasonably necessary to address information that was not in existence, or that the Commission did not have, when the prohibited conduct notice was given.

(7) A variation or revocation under subsection (1) must state the day on which it is made.

(8) The Commission must give a copy of a variation or revocation under subsection (1) to the Treasurer as soon as practicable after making it.

(9) The Commission must give a copy of a variation or revocation under subsection (1) to the corporation as soon as practicable after making it.

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(10) If the no Treasurer action notice has not yet been given to the corporation in accordance with subsection 153U(3) by the time the Commission makes a variation or revocation under subsection (1):

(a) in the case of a variation:

(i) for the purposes of subsection 153U(3), the Commission must give the corporation a copy of the no Treasurer action notice as varied; and

(ii) despite subsection (9), the Commission must not give the corporation a copy of the variation; or

(b) in the case of a revocation:

(i) despite subsection 153U(3), the Commission must not give the corporation a copy of the no Treasurer action notice; and

(ii) despite subsection (9), the Commission must not give the corporation a copy of the revocation.

(11) A variation or revocation under subsection (1) is not a legislative instrument.

(12) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a no Treasurer action notice.

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Division 5—Contracting orders

Subdivision A—Treasurer may make contracting orders

153W Conditions for making contracting order

The Treasurer may make an order under section 153X in respect of a body corporate if the Treasurer is satisfied that the following conditions are met:

(a) the Commission has given the Treasurer a prohibited conduct recommendation under section 153S;

(b) the body corporate is identified in the recommendation (in accordance with subparagraph 153S(2)(c)(i) or (iii));

(c) the order is made no later than 45 days after:

(i) unless subparagraph (ii) applies—the day on which the Commission gave the Treasurer the recommendation; or

(ii) if there has been a variation of the recommendation under section 153T—the day on which the Commission made the variation;

(d) the order is of a kind stated in the recommendation (in accordance with paragraph 153S(2)(d));

(e) the conduct identified in the recommendation (in accordance with subparagraph 153S(2)(c)(ii)):

(i) is prohibited conduct engaged in by the corporation identified in the recommendation (in accordance with subparagraph 153S(2)(c)(i)) (the ***relevant corporation***); and

(ii) is, or includes, prohibited conduct under section 153F (electricity financial contract liquidity) or section 153H (electricity spot market (aggravated case));

(f) the order is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future;

(g) any of the following generate electricity:

(i) the body corporate;

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(ii) another body corporate that is related to the body corporate.

153X Treasurer may make contracting order

(1) The Treasurer may, in writing, order the body corporate to make offers to enter into electricity financial contracts.

(2) The order must:
  (a) be expressed to be made under this section; and
  (b) state the day on which the order is made; and
  (c) identify:
    (i) the body corporate; and
    (ii) if the body corporate is not the relevant corporation—the relevant corporation; and
    (iii) the prohibited conduct mentioned in paragraph 153W(e); and
  (d) explain the reasons why the Treasurer is satisfied that the conditions in paragraphs 153W(e) and (f) are met; and
  (e) specify the matters mentioned in subsection (3).

(3) The matters are as follows:
  (a) the kind of offers that the body corporate must make to enter into electricity financial contracts;
  (b) the manner in which the body corporate must make those offers;
  (c) the kind of entities to which those offers must be made;
  (d) the period or periods during which the body corporate must make those offers;
  (e) any other matter that the Treasurer considers necessary for the order to be effective.

(4) The order may specify the kind of offers that the body corporate must make in any of the following ways:
  (a) the kind of electricity financial contracts that must be offered;

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(b) the price or range of prices in respect of electricity under the electricity financial contracts that must be offered, or a method or methods of working out that price or that range;

(c) the minimum number of megawatt hours of electricity to which the electricity financial contracts that must be offered must relate.

(5) In determining the minimum number of megawatt hours to specify for the purposes of paragraph (4)(c), the Treasurer must have regard to the following matters:

(a) the total electricity generation capacity of the electricity generation assets held by each connected body corporate in relation to the prohibited conduct and related bodies corporate;

(b) the nature and location of those electricity generation assets;

(c) the commitments that the body corporate has, and related bodies corporate have, to supply electricity to customers;

(d) any other matter that the Treasurer considers to be relevant.

(6) The specified period or periods during which the body corporate must make those offers must:

(a) start no earlier than 6 months after the order is made; and

(b) end no later than 3 years after the order is made.

(7) The Treasurer must publish, by electronic or other means, the following information:

(a) the fact that the order has been made;

(b) the day on which the order is made;

(c) the name of the body corporate.

153Y Variation and revocation of contracting order

(1) The Treasurer may, in writing, vary or revoke a contracting order in respect of a body corporate, on the Treasurer's own initiative or on application made by the body corporate.

(2) The Treasurer cannot make a variation under subsection (1) unless the Treasurer is satisfied that:

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(a) the order as varied is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in the kind of prohibited conduct (mentioned in the order) in the future; and

(b) if the body corporate does not consent to the variation—the variation is minor or insubstantial, or all of the following conditions are met:

(i) the corporation or any related body corporate gave the Treasurer or the Commission information relevant to the prohibited conduct recommendation that is false or misleading in a material particular, or failed to give the Treasurer or the Commission information relevant to the prohibited conduct recommendation that is not publicly available;

(ii) the variation is reasonably necessary to address the circumstances described in subparagraph (i).

(3) A variation can be of a kind that results in the order, as varied, not being of a kind recommended in the prohibited conduct recommendation (in accordance with paragraph 153S(2)(d)).

(4) The Treasurer need not consider an application by the body corporate to vary or revoke a contracting order if the application is made after:

(a) if there is only one period mentioned in paragraph 153X(3)(d)—that period has ended; or

(b) if there is more than one such period—all of those periods have ended.

(5) The Treasurer must publish, by electronic or other means, the following information:

(a) the fact that the variation or revocation has been made;

(b) the day on which the variation or revocation is made;

(c) the name of the body corporate.

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Subdivision B—Enforcement of contracting orders

153Z Enforcement of contracting orders

(1) This section applies if the Treasurer has made a contracting order in respect of a body corporate.

(2) If the Commission considers that the body corporate has failed to comply with the contracting order, the Commission may apply to the Court for an order under subsection (3).

(3) If the Court is satisfied that the body corporate has failed to comply with the contracting order, the Court may make all or any of the following orders:

(a) an order directing the body corporate to comply with the contracting order;

(b) if the period or periods specified in the contracting order (in accordance with paragraph 153X(3)(d)) have already passed—an order directing the body corporate to comply with the contracting order, within a new period, or new periods, specified in the order;

(c) any other order that the Court considers appropriate.

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Division 6—Electricity divestiture orders

153ZA Treasurer may apply to Federal Court for divestiture order

The Treasurer may apply to the Court for an order under subsection 153ZB(2) or (3) in respect of a body corporate if the Treasurer is satisfied that the following conditions are met:

(a) the Commission has given the Treasurer a prohibited conduct recommendation under section 153S;

(b) the body corporate is identified in the recommendation (in accordance with subparagraph 153S(2)(c)(i) or (iii));

(c) the application is made no later than 45 days after:

(i) unless subparagraph (ii) applies—the day on which the Commission gave the Treasurer the recommendation; or

(ii) if there has been a variation of the recommendation under section 153T—the day on which the Commission made the variation;

(d) the order applied for is of a kind stated in the recommendation (in accordance with paragraph 153S(2)(d));

(e) the conduct identified in the recommendation (in accordance with subparagraph 153S(2)(c)(ii)):

(i) is prohibited conduct engaged in by the corporation identified in the recommendation (in accordance with subparagraph 153S(2)(c)(i)) (the ***relevant corporation***); and

(ii) is, or includes, prohibited conduct under section 153H (electricity spot market (aggravated case));

(f) the order applied for is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future;

(g) the following conditions are satisfied:

(i) the order applied for will result, or is likely to result, in a benefit to the public;

(ii) if the order applied for will result, or is likely to result, in a detriment to the public—the benefit mentioned in

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subparagraph (i) would, or is likely to, outweigh that detriment.

153ZB Making of divestiture order

(1) The Court may, on the application of the Treasurer under section 153ZA, make an order under subsection (2) or (3) in relation to the body corporate if:

(a) the Court finds, or has in another proceeding instituted under this Act found, that the conduct identified in the recommendation (in accordance with subparagraph 153S(2)(c)(ii)):

(i) is prohibited conduct engaged in by the relevant corporation; and

(ii) is, or includes, prohibited conduct under section 153H (electricity spot market (aggravated case)); and

(b) the Court is satisfied that the order is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future.

(2) If the body corporate is not an authority of the Commonwealth or an authority of a State or Territory, the Court may order the body corporate to:

(a) dispose of interests in securities or assets, other than to any of the following:

(i) another body corporate that is related to the body corporate;

(ii) an associate of the body corporate; and

(b) comply with conditions (if any) specified in the order in accordance with subsection (7).

(3) If the body corporate is an authority of the Commonwealth or an authority of a State or Territory, the Court may order the body corporate to:

(a) dispose of interests in securities or assets to:

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(i) if the body corporate is an authority of the Commonwealth—an authority of the Commonwealth that is genuinely in competition in relation to electricity markets with the body corporate in relation to which the order is made and that the Commonwealth has a controlling interest in that is equal to or greater than the controlling interest that the Commonwealth has in that body corporate; and

(ii) if the body corporate is an authority of a State or Territory—an authority of that State or Territory that is genuinely in competition in relation to electricity markets with the body corporate in relation to which the order is made and that the State or Territory has a controlling interest in that is equal to or greater than the controlling interest that the State or Territory has in that body corporate; and

(b) comply with conditions (if any) specified in the order in accordance with subsection (7).

(4) To avoid doubt, the Court cannot make an order under subsection (3) for the body corporate to dispose of interests in securities or assets otherwise than in accordance with paragraph (3)(a).

(5) An order under subsection (2) or (3) must specify:

(a) the interests in the securities and assets, or the kinds of interests in the securities and assets, that the body corporate must dispose of; and

(b) the day by which the disposal must be made; and

(c) any other matter that the Court considers necessary for the order to be effective.

(6) The day by which the disposal must be made must be no earlier than 12 months after the day on which the order is made.

(7) The order may specify conditions with which the body corporate must comply during the period between the making of the order

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and the disposal of an interest, if the Court is satisfied that those conditions are necessary to preserve any of the following:

(a) the value of the interest;

(b) in the case of an interest in an asset—the commercial operation of the asset.

(8) Without limiting the scope of subsection (7), those conditions may relate to any of the following:

(a) the interest to be disposed;

(b) if the interest is a share or other security in a body corporate—the exercise of rights attached to the share or other security.

(9) If a body corporate disposes of interests in assets to another body corporate as required by an order made under this section, then for the purposes of paragraph 311(1)(d) or 768AD(1)(d) of the *Fair Work Act 2009*, there is taken to be a connection between the body corporate and the other body corporate as described in subsection 311(3) or 768AD(2), as the case may be, of that Act.

Note: This means any employees of the body corporate who become employees of the other body corporate and satisfy paragraphs 311(1)(a) to (c) or 768AD(1)(a) to (c) will be transferring employees in relation to a transfer of business for the purposes of Part 2-8 or Part 6-3A of that Act.

153ZBA Arrangements or undertakings in relation to employees

(1) This section applies if:

(a) a body corporate (the ***old employer***) has made arrangements or undertakings in relation to employees of the body corporate (whether or not those arrangements or undertakings bind the old employer); and

(b) the Court makes an order under subsection 153ZB(2) or (3) for the old employer to dispose of assets; and

(c) the old employer disposes of the assets to another entity (the ***new employer***); and

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(d) regulations made for the purposes of this paragraph before the disposal specify requirements in respect of arrangements or undertakings in relation to employees; and

(e) the arrangements or undertakings satisfy those requirements.

(2) The new employer must comply with the arrangements or undertakings.

(3) Subsection (2) applies despite anything in the *Fair Work Act 2009*.

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Division 7—Miscellaneous

153ZC Acquisition of property

Scope

(1) This section applies to the following:
  (a) Divisions 5 and 6;
  (b) any other provision of this Act, to the extent to which the provision relates to Division 5 or 6.

Effect of provision

(2) The provision has no effect to the extent (if any) to which its 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).

153ZD No orders under subsection 76(1) against certain individuals

(1) Nothing in subsection 76(1) authorises the making of an order against an individual covered under subsection (2) because the individual:
  (a) has aided, abetted, counselled or procured a corporation to contravene section 153E, 153F, 153G or 153H; or
  (b) has induced, or attempted to induce, a corporation, whether by threats or promises or otherwise, to contravene section 153E, 153F, 153G or 153H; or
  (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a corporation of section 153E, 153F, 153G or 153H; or
  (d) has conspired with others for a corporation to contravene section 153E, 153F, 153G or 153H.

(2) An individual is covered under this section unless the individual is a director, secretary or senior manager (within the meaning of the *Corporations Act 2001*) of the corporation.

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Part XICB—Access to CS services

Division 1—Preliminary

153ZEA Objects of Part

The objects of this Part are to:

(a) facilitate access to CS services on terms and conditions, including pricing, that are transparent, non-discriminatory, fair and reasonable; and

(b) support the long-term interests of the Australian market by delivering outcomes that are consistent with those that might be expected in a competitive market for CS services; and

(c) address the imbalance in bargaining power between providers of CS services and access seekers in Australia; and

(d) provide incentives for providers of CS services to negotiate commercial and non-discriminatory terms of access with access seekers of the CS services in Australia; and

(e) provide for the timely resolution of access disputes between providers of CS services and access seekers, if they arise; and

(f) discourage providers of CS services from exerting market power to the detriment of competition in upstream and downstream markets.

153ZEB Definitions

In this Part:

access dispute means an access dispute notified under section 153ZEM.

access seeker, for a CS service, means a person who wants access to the CS service or wants a change to some aspect of the person's existing access to the CS service.

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Australian CS facility licence has the same meaning as in the *Corporations Act 2001*.

constitutional trade or commerce has the same meaning as in section 53B.

covered by a declaration: see subsection 153ZEF(3).

CS facility means a clearing and settlement facility (within the meaning of the *Corporations Act 2001*).

CS facility licensee has the same meaning as in the *Corporations Act 2001*.

CS service has the same meaning as in section 828 of the *Corporations Act 2001*.

declared CS service: a CS service is a ***declared CS service*** if:

(a) the provider of the CS service is a CS facility licensee or a person that is related to a CS facility licensee; and

(b) the CS facility licensee holds an Australian CS facility licence that authorises the CS facility licensee to operate a CS facility; and

(c) the CS service can only be provided because it has access to, or to data used in the operation of, the CS facility; and

(d) the CS service is covered by a declaration under section 153ZEF.

determination means:

(a) a final determination made under paragraph 153ZEP(1)(a); and

(b) an interim determination made under paragraph 153ZEP(1)(b).

linked: a CS facility is ***linked to*** a CS service if:

(a) the CS service is a declared CS service; and

(b) the CS facility is the CS facility mentioned in paragraphs (b) and (c) of the definition of declared CS service.

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153ZEC How this Part applies to partnerships and joint ventures

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

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

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

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

(5) If:

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

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

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

(6) If:

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

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

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

153ZED Constitutional limits on operation of this Part

This Part does not apply in relation to an access seeker's access to a CS service unless:

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

(b) the access seeker is a corporation; or

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

153ZEE 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—Declaration of CS services

153ZEF Minister may declare a CS service

(1) The Minister may, by legislative instrument, make a declaration specifying any of the following as services to which access may be the subject of negotiation or arbitration under this Part:
  (a) one or more CS services;
  (b) one or more classes of CS services.

(2) A declaration under subsection (1) may also specify one or more CS services that are taken not to be covered by the declaration.

(3) A CS service is covered by a declaration if:
  (a) the CS service is specified, or is in a class of CS services specified, in a declaration under subsection (1) that is in force; and
  (b) the CS service is not specified as a CS service that is taken not to be covered by a declaration in a declaration under subsection (1) that is in force.

Matters to which the Minister has regard

(4) In considering whether to make a declaration under subsection (1), the Minister:
  (a) must have regard to:
    (i) the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of making the declaration; and
    (ii) the likely regulatory impact of the declaration; and
    (iii) the extent to which a provider of a CS service that will be affected by the declaration has a monopoly or significant market power over the provision of the CS service; and

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(b) must have regard to the matters (if any) raised by the Commission in advice provided under subsection (5) in relation to the declaration; and

(c) may have regard to any other matters that the Minister considers relevant.

Note: Matters that the Minister may have regard to under paragraph (c) may, for example, include any relevant international standards and international commitments.

Commission may advise Minister

(5) The Commission may (on its own initiative) and must (at the request of the Minister):

(a) consider whether a declaration should be made under subsection (1); and

(b) advise the Minister accordingly.

Commission may request advice from ASIC or Reserve Bank

(6) The Commission may request advice from ASIC or the Reserve Bank of Australia for the purposes of informing its consideration and advice under subsection (5).

(7) ASIC and the Reserve Bank of Australia may give advice to the Commission relating to whether a declaration should be made under subsection (1).

153ZEG Amendment and revocation of declarations

(1) The Minister may amend or revoke a declaration under subsection 153ZEF(1) in like manner and subject to like conditions (see subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*).

(2) The amendment or revocation of a declaration does not affect:

(a) the arbitration of an access dispute that was notified under subsection 153ZEM(2) before the amendment or revocation; or

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(b) the operation or enforcement of any determination made in the arbitration of an access dispute that was notified under subsection 153ZEM(2) before the amendment or revocation.

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Division 3—Negotiation of access

153ZEH Notification of negotiations under this Division

(1) This section applies in relation to a CS service if it is a declared CS service.

(2) An access seeker for the CS service may notify the provider that it wishes to negotiate under this Division over one or more specified issues relating to any aspect of access to the CS service, including:
  (a) whether access can be granted; and
  (b) the price and other terms and conditions of the access.

(3) The notification must set out the following matters:
  (a) a contact person for the access seeker;
  (b) contact details for the contact person;
  (c) the specified issues mentioned in subsection (2);
  (d) if regulations made for the purposes of this paragraph specify other matters—those matters.

Notifying the Commission

(4) The access seeker must give a copy of the notification to the Commission as soon as practicable after notifying the provider under subsection (2).

153ZEI Ending negotiations under this Division

(1) The access seeker may give notice to the provider that the negotiation is at an end, whether or not the access seeker also refers or has referred a related access dispute to arbitration under this Part.

(2) The provider may give notice to the access seeker that the negotiation is at an end for the purposes of this Part if the CS service ceases to be a declared CS service.

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Timing

(3) The negotiation is taken to have ended for the purposes of this Part when the notice under subsection (1) or (2) is given.

Notifying the Commission

(4) If the negotiation ends under subsection (1) or (2), the following person must notify the Commission as soon as practicable:
  (a) if subsection (1) applies—the access seeker;
  (b) if subsection (2) applies—the provider.

153ZEJ Conducting negotiations under this Division

Parties to the negotiation

(1) The parties to the negotiation are:
  (a) the access seeker; and
  (b) the provider; and
  (c) any other person that the access seeker and the provider agree to include as a party to the negotiations.

Good faith

(2) Each party to the negotiation must participate in the negotiation in good faith.

Timetable for negotiations

(3) Each party to the negotiation must seek to accommodate all reasonable requirements of the other parties regarding the timetable for the negotiation.

Subject of negotiations

(4) The negotiation must be about:
  (a) the specified issues mentioned in subsection 153ZEH(2); and
  (b) any other issue that the parties to the negotiation agree, in writing, that they wish to negotiate over.

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Notifying the Commission if agreement reached

(5) If the parties to the negotiation reach agreement over each issue mentioned in subsection (4), they must ensure that a written notification of the agreement is given to the Commission as soon as practicable.

153ZEK Information request by bargaining party—general

(1) A party (the ***requesting party***) to the negotiation may give another party (the ***responding party***) a request that the responding party give the requesting party specified information if:
  (a) the information is held by the responding party or a related body corporate of the responding party; and
  (b) it is reasonable for the requesting party to make the request for the purposes of this Division.

(2) The request must:
  (a) be made in writing; and
  (b) set out reasons why it is reasonable for the requesting 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.

(3) After the request is made, the responding party must ensure that:
  (a) the request is complied with no later than 21 days after the request was given to the responding party, or any later date the requesting party agrees to; and
  (b) the information requested is given in a readily readable form, including (where requested) in electronic file format with all underlying data files and inputs; and
  (c) the information given is, or is relevant to, the specified information mentioned in subsection (1); and
  (d) if regulations made for the purposes of this paragraph specify other requirements for that information—those requirements are satisfied.

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Duty of good faith

(4) Each party to a negotiation under this Division must request or provide information under this section in a manner and at a time consistent with the duty of the party to negotiate in good faith under subsection 153ZEJ(2).

153ZEL Information request by bargaining party—miscellaneous rules

(1) Nothing in section 153ZEK requires or authorises the giving of information that is personal information (within the meaning of the *Privacy Act 1988*).

(2) If the responding party gives information to the requesting party in order to comply with subsection 153ZEK(3), the requesting party must ensure that the information is not used for a purpose other than a purpose relating to this Part.

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Division 4—Notification of access disputes

153ZEM Notification of access disputes

(1) This section applies in relation to a CS service if it is a declared CS service.

(2) If:

(a) an access seeker for the CS service is unable to agree with the provider on one or more aspects of access to the CS service that are or have been the subject of a negotiation under Division 3; and

(b) the access seeker and the provider are or were parties to the negotiation;

either party may notify the Commission in writing that an access dispute exists.

Note: An example of one of the things on which a provider and an access seeker for a CS service might disagree is whether a previous determination ought to be varied.

(3) The notification must include information about:

(a) the issues (if any) on which agreement has been reached in the negotiation under Division 3; and

(b) the issues that are in dispute; and

(c) if regulations made for the purposes of this paragraph specify other matters—those matters.

(4) On receiving the notification, the Commission must give notice in writing of the access dispute, as soon as practicable, to:

(a) the provider, if the access seeker notified the access dispute; and

(b) the access seeker, if the provider notified the access dispute; and

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

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153ZEN Withdrawal of notifications

(1) A notification under subsection 153ZEM(2) 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 access seeker 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 access seeker notified the dispute, the access seeker 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 access seeker 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.

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Division 5—Arbitration of access disputes

153ZEO Parties to the arbitration

The parties to the arbitration of an access dispute notified under subsection 153ZEM(2) regarding access to a CS service are:

(a) the provider mentioned in the notification; and

(b) the access seeker mentioned in the notification; and

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

153ZEP Determination by Commission

(1) Unless it terminates the arbitration under section 153ZEU, the Commission:

(a) must make a written final determination; and

(b) may make a written interim determination;

on access by the access seeker to the CS service.

(2) A determination may deal with any matter relating to access to the CS service by the access seeker, including matters that were not the basis for notification of the access dispute.

Example: A determination may do any of the following:

(a) require the provider to provide access to the CS service by the access seeker;

(b) require the access seeker to accept, and pay for, access to the CS service;

(c) specify the terms and conditions of the access seeker's access to the CS service;

(d) vary or revoke an earlier determination relating to access to the CS service by the access seeker.

(3) Before making a determination, the Commission must:

(a) give a draft determination to the parties; and

(b) consult ASIC and the Reserve Bank of Australia about the determination.

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

Note: The Commission must also publish a written report about a final determination it makes (see section 153ZET).

(5) A determination is not a legislative instrument.

153ZEQ 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 that is not related to the provider from obtaining sufficient access to the CS 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 that is not related to the provider from obtaining, by the exercise of a pre-notification right, sufficient access to the CS service to be able to meet the person's actual requirements;

(d) resulting in the access seeker becoming the owner (or one of the owners) of any part of the CS facility that is linked to the CS service, or of extensions of the CS facility, without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the CS facility;

(f) requiring the provider to bear some or all of the costs of maintaining extensions of the CS facility.

(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the access seeker 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 access seeker and the provider.

(3) A determination is of no effect to the extent it has any of the effects mentioned in subsection (1).

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(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 CS service to the second person, the determination must also require the access seeker:

(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 CS service equal to the difference between the total amount of CS service the person was entitled to under a pre-notification right and the amount that the person actually needs to meet the person's actual requirements.

(5) If the provider is not the holder of the Australian CS facility licence that authorises the operation of the CS facility, this section applies in relation to the holder in the same way as it applies in relation to the provider.

(6) In this section:

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

153ZER 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:

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(a) the objects of this Part;
(b) the operational and technical requirements (including those relating to interoperability and financial stability) necessary for the safe and reliable operation of a current or proposed CS facility that is or may be linked to the CS service;
(c) the pricing principles specified in subsection (3);
(d) if an obligation of the provider under an Australian law in relation to the CS service is mentioned in a party's case—that obligation;
(e) if the provider is not the holder of the Australian CS facility licence that authorises the operation of the CS facility, and an obligation of the holder under an Australian law in relation to the CS service is mentioned in a party's case—that obligation;
(f) any advice provided by ASIC or the Reserve Bank of Australia in response to consultations undertaken under paragraph 153ZEP(3)(b);
(g) any advice provided by ASIC or the Reserve Bank of Australia under subsection 153ZEX(3) in relation to the arbitration;
(h) any guidance or policies relating to CS services made by the Commission, ASIC or the Reserve Bank of Australia;
(i) the legitimate business interests of the provider, and the provider's investment in the CS facility;
(j) if the provider is not the holder of the Australian CS facility licence that authorises the operation of the CS facility—the legitimate business interests of the holder, and the holder's investment in the CS facility;
(k) the interests of all persons who have rights to access the CS service;
(l) the public interest, including the public interest in having competition in markets (whether or not in Australia).

(2) The Commission may take any other matters that it thinks are relevant into account in making a final determination.

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(3) For the purposes of paragraph (1)(c), the pricing principles are as follows:

(a) access prices should generate expected revenue for a CS service that reflects the costs of providing access to the CS service;

(b) access prices should include a return on investment commensurate with the regulatory and commercial risks involved;

(c) access price structures should not allow a vertically integrated provider to set terms and conditions that discriminate in favour of its related entities, except to the extent that the cost of providing access to other access seekers is higher;

(d) access pricing should provide incentives to reduce costs or otherwise improve productivity.

Interim determinations

(4) The Commission may take a matter referred to in subsection (1) or (2) into account in making an interim determination.

(5) 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).

153ZES 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 access dispute is notified.

Extending the period

(2) Before the end of the expected period, the Commission may, if satisfied it is appropriate to do so, extend the expected period.

(3) When the Commission extends the expected period, it must:

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(a) notify the parties of the extension before it takes effect; and
(b) give the parties reasons for the extension.

(4) The expected period may be extended one or more times, but must not exceed 365 days.

Deemed final determination

(5) If the Commission does not make 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 153ZET.

153ZET 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 issues on which agreement was reached between the parties to the arbitration and the issues which were in dispute;
(b) the principles the Commission applied in making the determination;
(c) the methodologies the Commission applied in making the determination;

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(d) how the Commission took into account the matters mentioned in subsection 153ZER(1) in making the determination;

(e) any matter the Commission took into account under subsection 153ZER(2) in making the determination and the reasons for doing so;

(f) 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) and (6).

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 (as applied in relation to the arbitration by section 153ZEV).

(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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153ZEU Commission may terminate arbitration in certain cases

(1) The Commission must terminate the arbitration of an access dispute (without making a final determination) if paragraphs (a), (b) and (c) of the definition of declared CS service no longer apply to the CS service.

(2) The Commission may at any time terminate the arbitration of an access dispute (without making a final determination) if it thinks that:

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

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

(c) the party who notified the access dispute has not engaged in negotiations (including negotiations under Division 3) in good faith; or

(d) the negotiation under Division 3 that led to the notification of the access dispute is insufficiently relevant to the matters that a final determination is likely to deal with; or

(e) access to the CS service should continue to be governed by an existing contract between some or all of the parties to the arbitration.

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

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Division 6—Procedure in arbitration

153ZEV Subdivision D of Division 3 of Part IIIA to apply

(1) The following provisions apply in relation to an arbitration of an access dispute under this Part as if they were provisions of this Division:

(a) Subdivision D of Division 3 of Part IIIA;

(b) regulations made for the purposes of provisions in that Subdivision.

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

(a) treat an arbitration of an access dispute under this Part as an arbitration of an access dispute under Part IIIA; and

(b) treat any reference in that Subdivision or in those regulations to:

(i) a provision in that Subdivision or those regulations as a reference to a provision in that Subdivision or those regulations as they apply because of this section; and

(ii) a third party as a reference to an access seeker; and

(b) treat the reference in subsection 44ZG(3) to any other provision of this Part as a reference to any other provision of that Subdivision or Part XICB.

(3) The regulations may modify the provisions mentioned in paragraph (1)(b) in their application under subsection (1) in relation to an arbitration of an access dispute under this Part.

(4) If the Commission holds a joint arbitration hearing in respect of 2 or more access disputes under section 44ZNA (as applied by subsection (1)), the Commission may make a single determination that covers all of the disputes.

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153ZEW Commission's powers if information not provided in negotiations

Use in arbitration of information requested but not provided in negotiations

(1) If:

(a) a party to the arbitration of an access dispute seeks to include certain information in its case; and

(b) in the negotiation under Division 3 that led to the notification of the access dispute, the information was the subject of a request under section 153ZEK; and

(c) the party, or a person related to the party, was the responding party (within the meaning of subsection 153ZEK(1)) to the request; and

(d) the responding party did not ensure that the requirements in subsection 153ZEK(3) were satisfied in respect of the request;

the party must seek the Commission's permission in writing to include the information in its case.

(2) In determining whether to grant permission under subsection (1), the Commission must have regard to:

(a) the desirability of the parties to the negotiation complying with the requirements in section 153ZEK; and

(b) whether the responding party was given a reasonable opportunity to ensure that the requirements in subsection 153ZEK(3) were satisfied in respect of the request before the access dispute was notified.

Commission's powers generally

(3) If the Commission is satisfied that a party to the arbitration of an access dispute has failed to provide information in accordance with section 153ZEK in the negotiation under Division 3 that led to the notification of the access dispute, the Commission may do any of the following in the arbitration:

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(a) direct that the party is not entitled to rely on specified information or materials;
(b) draw such adverse inferences from the failure as the circumstances justify;
(c) for the purposes of making a determination, not have regard to information that the party in the negotiation failed to provide in accordance with section 153ZEK.

153ZEX Sharing information with and requesting advice from ASIC and Reserve Bank

(1) The Commission may do any of the following:
(a) notify ASIC or the Reserve Bank of Australia that an access dispute exists;
(b) request advice from ASIC or the Reserve Bank of Australia relating to the arbitration of an access dispute;
(c) give information relating to an access dispute to ASIC or the Reserve Bank of Australia for the purposes of a notification or request under paragraph (a) or (b).

(2) To avoid doubt, paragraph (1)(c) applies to confidential commercial information that the Commission thinks should not be given to the other parties to the arbitration under section 44ZL (as applied in relation to the arbitration by section 153ZEV).

(3) ASIC and the Reserve Bank of Australia may give advice to the Commission relating to the arbitration of an access dispute.

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Division 7—Effect of determinations

153ZEY Operation of final determinations

(1) Unless otherwise specified, a final determination of an access dispute has effect 21 days after the determination is made.

Backdating

(2) Any or all of the provisions of the 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).

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.

(3) The specified day must not be earlier than the day on which the notification of negotiations under section 153ZEH was given that led to the notification of the access dispute under section 153ZEM.

(4) However, the specified day cannot be a day on which the access seeker did not have access to the CS 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.

Interest

(6) If:

(a) a provision of a final determination is covered by subsection (2); and

(b) the provision requires a party to the determination (the ***first party***) to pay money to another party;

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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 (2); and

(d) ending on the day on which the determination takes effect under subsection (1).

153ZEZ Effect and duration of interim determinations

(1) An interim determination made in the arbitration of an access dispute takes effect on the day specified in the determination.

(2) Unless sooner revoked, such an interim determination continues in effect until the earliest of the following:

(a) the notification of the access dispute is withdrawn under section 153ZEN;

(b) the arbitration is terminated under section 153ZEU;

(c) a final determination relating to the access dispute takes effect.

Note: A backdated final determination may prevail over an interim determination: see subsection 153ZEY(5).

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Division 8—Variation and revocation of determinations

153ZFA Variation and revocation of determinations

(1) The Commission may, if satisfied it is appropriate to do so, by written instrument vary or revoke a determination:
  (a) on its own initiative; or
  (b) on the application of any party to the determination.

(2) Sections 153ZEQ and 153ZER apply to the making of a variation of a final determination 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.

(3) Before making a variation, the Commission may give a draft variation to the parties.

(4) When the Commission varies or revokes a determination, it must give the parties to the determination its reasons for doing so.

(5) A variation or revocation is not a legislative instrument.

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Division 9—Enforcement and remedies

153ZFB Prohibition on hindering access to declared services

(1) The provider or a user of a CS service to which an access seeker has access under a determination, or a body corporate related to the provider or a user of the CS service, must not engage in conduct for the purpose of preventing or hindering the access seeker's access to the CS 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 CS service includes a person who has a right to use the CS service.

153ZFC Division 7 of Part IIIA to apply

(1) Division 7 of Part IIIA applies in relation to a determination under this Part as if they were provisions of this Division.

(2) For the purposes of subsection (1), treat:
  (a) a reference in that Division to:
    (i) a determination as a reference to a determination made under this Part; and
    (ii) section 44ZZ as a reference to section 153ZFB; and
  (b) the reference in subsection 44ZZE(3) to Divisions 2 and 3 as a reference to this Part (other than this section); and
  (c) section 44ZZJ as having been omitted; and
  (d) any reference in Division 7 of Part IIIA to a provision in that Division as a reference to the provision as it applies because of this section.

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Division 10—Miscellaneous

153ZFD Register of determinations

(1) 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 CS service to which the determination relates;
  (c) the date on which the determination was made.

(2) The regulations may make provision about the inspection of the public register (including provision about fees).

153ZFE Provisions of Division 8 of Part IIIA to apply

(1) The following provisions apply in relation to a determination under this Part as if they were provisions of this Division:
  (a) section 44ZZN;
  (b) section 44ZZNA;
  (c) section 44ZZO.

(2) For the purposes of subsection (1), the provisions apply:
  (a) in relation to a determination under this Part in the same way as they apply in relation to a determination made under Part IIIA; and
  (b) in relation to this Part in the same way as they apply in relation to Part IIIA.

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Chapter 8—Miscellaneous

Part XID—Search and seizure

Division 1—Preliminary

154 Simplified outline

The following is a simplified outline of this Part:

- This Part sets out an enforcement regime for the purposes of finding out whether there has been a contravention of this Act, a gas market instrument or the consumer data rules, Part 20 of the *Telecommunications Act 1997* or Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, or Part 5 or 5A of the *Water Act 2007* or the Water Markets Intermediaries Code.
- Division 2 provides for the appointment of inspectors and the issue of identity cards.
- Division 3 deals with entry to premises with the consent of the occupier of the premises.
- Division 4 deals with entry to premises under a search warrant issued by a magistrate. It sets out the powers available under a search warrant, the obligations of persons entering the premises and the rights and responsibilities of the occupier of the premises.
- Division 5 contains some general provisions relating to the operation of electronic equipment at premises.

Note: See also section 155 (which deals with the obtaining of information, documents and evidence).

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154A Definitions

In this Part:

consultant means a person engaged under section 27A.

contravention, in relation to a law, includes an offence against section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an offence against that law.

data includes:

(a) information in any form; or

(b) any program (or part of a program).

data held in a computer includes:

(a) data held in any removable data storage device for the time being held in a computer; or

(b) data held in a data storage device on a computer network of which the computer forms a part.

data storage device means a thing containing, or designed to contain, data for use by a computer.

evidential material means a document or other thing that may afford evidence relating to:

(a) a contravention of this Act, a gas market instrument or the consumer data rules; or

(b) a contravention of Part 20 of the *Telecommunications Act 1997*; or

(c) a contravention of Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

(cb) a contravention of Part 5A of the *Water Act 2007*, other than Division 3 of that Part (water announcements); or

(ca) a contravention of Part 5 of the *Water Act 2007* or of the Water Markets Intermediaries Code within the meaning of that Act; or

(d) a contravention of section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Part.

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executing officer, for a search warrant, means:

(a) the inspector named in the warrant as being responsible for executing the warrant; or

(b) if that inspector does not intend to be present at the execution of the warrant—another inspector whose name has been written in the warrant by the inspector so named; or

(c) another inspector whose name has been written in the warrant by the inspector last named in the warrant.

inspector means a person appointed as an inspector under section 154B.

occupier, in relation to premises, includes a person present at the premises who apparently represents the occupier.

officer assisting, for a search warrant, means:

(a) an inspector who is assisting in executing the warrant; or

(b) a person authorised under section 154K in relation to the warrant.

premises means:

(a) an area of land or any other place (whether or not it is enclosed or built on); or

(b) a building or other structure; or

(c) a vehicle, vessel or aircraft; or

(d) a part of any such premises.

search warrant means a warrant issued by a magistrate under section 154X or signed by a magistrate under section 154Y.

thing includes a thing in electronic or magnetic form.

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Division 2—Appointment of inspectors and identity cards

154B Appointment of inspectors

(1) The Chairperson may, by writing, appoint a member of the staff assisting the Commission to be an inspector.

Staff member to have suitable qualifications and experience

(2) The Chairperson must not do so unless he or she is satisfied that the staff member has suitable qualifications and experience to properly exercise the powers of an inspector.

Inspector to comply with Chairperson's directions

(3) An inspector must comply with any directions of the Chairperson in exercising powers or performing functions as an inspector.

154C Identity cards

(1) The Chairperson must issue an identity card to an inspector.

Form of identity card

(2) The identity card must:
(a) contain the information prescribed by the regulations; and
(b) contain a recent photograph of the inspector.

Offence

(3) A person commits an offence if:
(a) the person has been issued with an identity card; and
(b) the person ceases to be an inspector; and
(c) the person does not return the identity card to the Chairperson as soon as practicable.

Penalty: 1 penalty unit.

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(4) An offence against subsection (3) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Card lost or destroyed

(5) Subsection (3) does not apply if the identity card was lost or destroyed.

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

Inspector must carry card

(6) An inspector must carry his or her identity card at all times when exercising powers or performing functions as an inspector.

Inspector must produce card on request

(7) An inspector is not entitled to exercise any powers under this Part in relation to premises if:

(a) the occupier of the premises has requested the inspector to produce the inspector's identity card for inspection by the occupier; and

(b) the inspector fails to comply with the request.

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Division 3—Entry to premises with consent

154D Entry with consent

Entry

(1) An inspector may enter premises if:
  (a) the Commission, the Chairperson or a Deputy Chairperson has reasonable grounds for suspecting that there may be evidential material on the premises; and
  (b) the inspector obtains the consent of the occupier of the premises to enter the premises.

(2) The inspector may be accompanied by any one or more of the following persons (each of whom is an ***assistant***):
  (a) another member of the staff assisting the Commission;
  (b) a consultant.

Obtaining consent

(3) Before obtaining the consent of a person to enter premises under this Division, the inspector must inform the person that the person may refuse consent.

(4) A consent of a person is not effective for the purposes of this section unless it is voluntary.

154E Powers in relation to premises

(1) The inspector or an assistant may do any of the following after entering premises under this Division:
  (a) search the premises, and any thing on the premises, for the evidential material;
  (b) make copies of the evidential material found on the premises;
  (c) operate electronic equipment at the premises to see whether the evidential material is accessible by doing so;

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Note: See also Division 5 (which contains provisions relating to the operation of electronic equipment at the premises).

(d) remove the evidential material from the premises with the consent of the owner of the material;

Note: See also subsection (2).

(e) secure the evidential material, pending the obtaining of a search warrant to seize it;

(f) take equipment and material onto the premises, and use it, for any of the above purposes.

Obtaining consent to remove evidential material

(2) Before obtaining the consent of a person to remove evidential material from premises under paragraph (1)(d), the inspector or an assistant must inform the person of the purpose for which the material is required and that the person may refuse consent. A consent of a person is not effective for the purposes of that paragraph unless the consent is voluntary.

154F Operation of electronic equipment at premises

(1) If:

(a) an inspector or an assistant enters premises under this Division; and

(b) he or she believes on reasonable grounds that any data accessed by operating electronic equipment at the premises (including data not held at the premises) might constitute evidential material;

he or she may do only 1 of 2 things.

Removal of documents

(2) One thing he or she may do is operate the equipment or other facilities at the premises to put the data in documentary form and remove the documents so produced from the premises.

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Removal of disk, tape or other storage device

(3) The other thing he or she may do is operate the equipment or other facilities at the premises to transfer the data to a disk, tape or other storage device that:

(a) is brought to the premises for the exercise of the power; or

(b) is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;

and remove the disk, tape or other storage device from the premises.

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Division 4—Entry to premises under a search warrant

Subdivision A—Powers available under a search warrant

154G The things that are authorised by a search warrant

(1) A search warrant that is in force in relation to premises authorises the executing officer or an officer assisting to do any of the following:

(a) enter the premises;

(b) search the premises, and any thing on the premises, for the kind of evidential material specified in the warrant, and seize things of that kind found on the premises;

(c) make copies of the kind of evidential material specified in the warrant found on the premises;

(d) operate electronic equipment at the premises to see whether the kind of evidential material specified in the warrant is accessible by doing so (including evidential material not held at the premises);

Note: See also Division 5 (which contains provisions relating to the operation of electronic equipment at the premises).

(e) take equipment and material onto the premises, and use it, for any of the above purposes.

(1A) In executing a search warrant that is in force in relation to premises, the executing officer or an officer assisting may:

(a) for a purpose incidental to the execution of the warrant; or

(b) with the written consent of the occupier of the premises;

take photographs, or make video recordings, of the premises or of anything at the premises.

(1B) If a search warrant in relation to premises is being executed, the executing officer and the officers assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises:

(a) for not more than one hour; or

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(b) for a longer period if the occupier of the premises consents in writing.

Seizing other evidence

(2) If:

(a) the executing officer or an officer assisting, in the course of searching for the kind of evidential material specified in the warrant, finds another thing that he or she believes on reasonable grounds to be evidence of:

(i) an indictable offence against this Act; or

(ii) an indictable offence against Part 20 of the *Telecommunications Act 1997*; or

(iii) an indictable offence against Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

(iv) an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Part; and

(b) he or she believes on reasonable grounds that it is necessary to seize the other thing in order to prevent its concealment, loss or destruction;

then he or she may seize that other thing.

154GA Removing things for examination or processing

(1) A thing found at the premises may be moved to another place for examination or processing in order to determine whether it may be seized under a search warrant if:

(a) both of the following subparagraphs apply:

(i) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance;

(ii) there are reasonable grounds to believe that the thing contains or constitutes evidential material; or

(b) the occupier of the premises consents in writing.

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Notice to occupier

(2) If a thing is moved to another place for the purpose of examination or processing under subsection (1), the executing officer must, if it is practicable to do so:

(a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and

(b) allow the occupier or his or her representative to be present during the examination or processing.

Period of removal

(3) The thing may be moved to another place for examination or processing for no longer than 72 hours.

Extensions

(4) An executing officer may apply to a magistrate for one or more extensions of that time if the executing officer believes on reasonable grounds that the thing cannot be examined or processed within 72 hours or that time as previously extended.

(5) The executing officer must give notice of the application to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.

(6) The magistrate may order an extension for a period specified in the order if the magistrate is satisfied that the extension is necessary.

154H Operation of electronic equipment at premises

(1) If:

(a) a search warrant is in force in relation to premises; and

(b) the executing officer or an officer assisting believes on reasonable grounds that any data accessed by operating electronic equipment at the premises (including data not held

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at the premises) might constitute evidential material of the kind specified in the warrant;

he or she may do only 1 of 3 things.

Seizure

(2) One thing he or she may do is seize the equipment and any disk, tape or other associated device.

Note: Subsection (5) sets out limitations on seizure.

Removal of documents

(3) Another thing he or she may do is operate the equipment or other facilities at the premises to put the data in documentary form and remove the documents so produced from the premises.

Note: An executing officer can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance—see section 154RA.

Removal of disk, tape or other storage device

(4) The final thing he or she may do is operate the equipment or other facilities at the premises to transfer the data to a disk, tape or other storage device that:

(a) is brought to the premises; or

(b) is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;

and remove the disk, tape or other storage device from the premises.

Note: An executing officer can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance—see section 154RA.

Limitation on seizure

(5) A person may seize a thing under subsection (2) only if:

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(a) it is not practicable to put the data in documentary form as mentioned in subsection (3) or to transfer the data as mentioned in subsection (4); or

(b) possession of the thing by the occupier could constitute an offence against a law of the Commonwealth.

154J Securing electronic equipment for use by experts

(1) If a search warrant in relation to premises is being executed and the executing officer or an officer assisting believes on reasonable grounds that:

(a) the kind of evidential material specified in the warrant may be accessible by operating electronic equipment at the premises; and

(b) expert assistance is required to operate the equipment; and

(c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;

he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.

Notice to occupier

(2) The executing officer or officer assisting must give notice to the occupier of the premises of his or her intention to secure the equipment and of the fact that the equipment may be secured for up to 24 hours.

Period equipment may be secured

(3) The equipment may be secured:

(a) for a period not exceeding 24 hours; or

(b) until the equipment has been operated by the expert;

whichever happens first.

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Extensions

(4) If the executing officer or officer assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to a magistrate for an extension of that period.

(5) The executing officer or officer assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.

(6) The magistrate may order an extension for a period specified in the order if the magistrate is satisfied that the extension is necessary.

Subdivision B—Availability of assistance and use of force in executing a search warrant

154K Authorisation of officers assisting

The executing officer for a search warrant may, by writing, authorise a member of the Australian Federal Police, a member of the staff assisting the Commission, or a consultant, to assist in executing the warrant.

154L Availability of assistance and use of force in executing a search warrant

In executing a search warrant:

(a) the executing officer may obtain such assistance as is necessary and reasonable in the circumstances; and

(b) the executing officer, or another inspector who is an officer assisting, may use such force against persons and things as is necessary and reasonable in the circumstances; and

(ba) a member of the Australian Federal Police who is an officer assisting may use such force against persons and things as is necessary and reasonable in the circumstances; and

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(c) a person who is not an inspector, but who is an officer assisting, may use such force against things as is necessary and reasonable in the circumstances.

Subdivision C—Obligations of executing officer and officers assisting

154M Announcement before entry

(1) Before any person enters premises under a search warrant, the executing officer must:

(a) announce that he or she is authorised to enter the premises; and

(b) give any person at the premises an opportunity to allow entry to the premises.

(2) However, the executing officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure that the effective execution of the warrant is not frustrated.

154N Details of warrant to be given to occupier

If a search warrant in relation to premises is being executed and the occupier of the premises is present at the premises, the executing officer or an officer assisting must make available to the occupier a copy of the warrant or a copy of the form of warrant.

Subdivision D—Occupier's rights and responsibilities

154P Occupier entitled to observe search being conducted

(1) If a search warrant in relation to premises is being executed and the occupier of the premises is present at the premises, the occupier is entitled to observe the search being conducted.

(2) The occupier's right to observe the search being conducted ends if the occupier impedes the search.

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(3) This section does not prevent 2 or more areas of the premises being searched at the same time.

154Q Occupier to provide reasonable facilities and assistance

The occupier of premises in relation to which a search warrant is being executed must provide the executing officer and any officer assisting with all reasonable facilities and assistance for the effective exercise of their powers.

Penalty: 30 penalty units.

154R Answering of questions or producing evidential material

(1) If a search warrant in relation to premises is being executed, the executing officer or an officer assisting may:
  (a) require a person at the premises to answer questions or produce evidential material to which the warrant relates; and
  (b) seize that evidential material.

(2) A person commits an offence if the person fails to comply with a requirement under subsection (1).

Penalty: 30 penalty units or imprisonment for 12 months, or both.

Self-incrimination is no excuse

(3) An individual is not excused from answering a question or producing evidential material on the ground that the answer, or the production of the material, might tend to incriminate the individual or make the individual liable to a penalty.

(4) However, the answer is not admissible in evidence against the individual in any criminal proceedings, other than:
  (a) proceedings for an offence against subsection (2); or
  (b) proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Part.

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154RA Person with computer knowledge to assist access etc.

(1) The executing officer for a search warrant may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the officer to do one or more of the following:

(a) access data held in, or accessible from, a computer that is on premises to which the warrant relates;

(b) transfer the data to a disk, tape or other storage device;

(c) convert the data into documentary form.

(2) The magistrate may grant the order if the magistrate is satisfied that:

(a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer; and

(b) the specified person is:

(i) reasonably suspected of having committed the contravention, or one or more of the contraventions, stated in the search warrant; or

(ii) the owner or lessee of the computer; or

(iii) an employee of the owner or lessee of the computer; and

(c) the specified person has relevant knowledge of:

(i) the computer or a computer network of which the computer forms a part; or

(ii) measures applied to protect data held in, or accessible from, the computer.

(3) A person commits an offence if:

(a) the person is subject to an order under this section; and

(b) the person engages in conduct; and

(c) the person's conduct breaches the order.

Penalty for a contravention of this subsection: Imprisonment for 6 months.

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Subdivision E—General provisions relating to seizure

154S Copies of seized things to be provided

(1) If, under a search warrant relating to premises, the executing officer or an officer assisting seizes:

(a) a document, film, computer file or other thing that can be readily copied; or

(b) a storage device the information in which can be readily copied;

then he or she must, if requested to do so by the occupier of the premises, give a copy of the thing or the information to the occupier as soon as practicable after the seizure.

(2) However, subsection (1) does not apply if possession of the document, film, computer file, thing or information by the occupier could constitute an offence against a law of the Commonwealth.

154T Receipts for things seized or moved under warrant

(1) If a thing is seized under a search warrant or moved under subsection 154GA(1), the executing officer or an officer assisting must provide a receipt for the thing.

(2) If 2 or more things are seized or moved, they may be covered in the one receipt.

154U Return of seized things

(1) Subject to any contrary order of a court, if a person (the ***seizer***) seizes a thing under this Division, the person must return it if:

(a) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or

(b) the period of 120 days after its seizure ends;

whichever first occurs, unless the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

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(2) At the end of the 120 days specified in subsection (1), the seizer must take reasonable steps to return the thing to the person from whom it was seized (or to the owner if that person is not entitled to possess it), unless:

(a) proceedings in respect of which the thing may afford evidence were instituted before the end of the 120 days and have not been completed (including an appeal to a court in relation to those proceedings); or

(b) an inspector may retain the thing because of an order under section 154V; or

(c) the seizer is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of a State or Territory) to retain, destroy or dispose of the thing.

154V Magistrate may permit a thing to be retained

Application for extension

(1) An inspector may apply to a magistrate for an order that he or she may retain the thing for a further period if:

(a) before the end of 120 days after the seizure; or

(b) before the end of a period previously specified in an order of a magistrate under this section;

proceedings in respect of which the thing may afford evidence have not commenced.

Grant of extension

(2) If the magistrate is satisfied that it is necessary for the inspector to continue to retain the thing for the purposes of an investigation as to whether there has been:

(a) a contravention of this Act, a gas market instrument or the consumer data rules; or

(b) a contravention of Part 20 of the *Telecommunications Act 1997*; or

(c) a contravention of Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

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(ca) a contravention of Part 5 of the *Water Act 2007* or the Water Markets Intermediaries Code within the meaning of that Act; or

(cb) a contravention of Part 5A of the *Water Act 2007*, other than Division 3 of that Part (water announcements); or

(d) a contravention of section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Part;

the magistrate may order that the inspector may retain the thing for a period (not exceeding 3 years) specified in the order.

Effect on interested parties

(3) Before making the application, the inspector must:

(a) take reasonable steps to discover who has an interest in the retention of the thing; and

(b) if it is practicable to do so, notify each person whom the inspector believes to have such an interest of the proposed application.

154W Disposal of things if there is no owner or owner cannot be located

If:

(a) a thing is seized under this Division; and

(b) a person would otherwise be required to return the thing to its owner; and

(c) there is no owner or the person cannot, despite making reasonable efforts, locate the owner;

the person may dispose of the thing in such manner as he or she thinks appropriate.

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Subdivision F—Search warrants

154X Issue of search warrants

Application for warrant

(1) An inspector may apply to a magistrate for a warrant under this section in relation to premises.

Issue of warrant

(2) The magistrate may issue the warrant if the magistrate is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that:
  (a) there is evidential material on the premises; or
  (b) there may be evidential material on the premises within the next 72 hours.

Note: A magistrate who holds office under a law of a State or Territory may issue a warrant in relation to premises even if those premises are not in that State or Territory.

(3) However, the magistrate must not issue the warrant unless the inspector or some other person has given to the magistrate, either orally or by affidavit, such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought.

Content of warrant

(4) The warrant must state:
  (a) a description of the premises to which the warrant relates; and
  (b) the kind of evidential material that is to be searched for under the warrant (including stating the contraventions to which the warrant relates); and
  (c) the name of the inspector who is to be responsible for executing the warrant; and

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(d) whether the warrant may be executed at any time of the day or night or during specified hours of the day or night; and

(e) the day (not more than one week after the issue of the warrant) on which the warrant ceases to have effect.

154Y Search warrants by telephone, fax etc.

Application for warrant

(1) If, in an urgent case, an inspector considers it necessary to do so, the inspector may apply to a magistrate by telephone, fax or other electronic means for a warrant under section 154X in relation to premises.

Voice communication

(2) The magistrate may require communication by voice to the extent that it is practicable in the circumstances.

Information

(3) Before applying for the warrant, the inspector must prepare an information of the kind mentioned in subsection 154X(2) in relation to the premises that sets out the grounds on which the warrant is sought. If it is necessary to do so, the inspector may apply for the warrant before the information is sworn or affirmed.

Issue of warrant

(4) If the magistrate is satisfied:

(a) after having considered the terms of the information; and

(b) after having received such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought;

that there are reasonable grounds for issuing the warrant, the magistrate may complete and sign the same warrant that the magistrate would issue under section 154X if the application had been made under that section.

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Notification

(5) If the magistrate completes and signs the warrant, the magistrate must inform the applicant, by telephone, fax or other electronic means, of:

(a) the terms of the warrant; and

(b) the day on which and the time at which the warrant was signed; and

(c) the day (not more than one week after the magistrate completes and signs the warrant) on which the warrant ceases to have effect.

Form of warrant

(6) The applicant must then complete a form of warrant in the same terms as the warrant completed and signed by the magistrate, stating on the form the name of the magistrate and the day on which and the time at which the warrant was signed.

Completed form of warrant to be given to magistrate

(7) The applicant must also, not later than the day after the day of expiry or execution of the warrant, whichever is the earlier, send to the magistrate:

(a) the form of warrant completed by the applicant; and

(b) the information referred to in subsection (3), which must have been duly sworn or affirmed.

Attachment

(8) The magistrate is to attach to the documents provided under subsection (7) the warrant completed by the magistrate.

Authority of warrant

(9) A form of warrant duly completed under subsection (6) is authority for the same powers as are authorised by the warrant signed by the magistrate.

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(10) If:

(a) it is material, in any proceedings, for a court to be satisfied that an exercise of a power was authorised by this section; and

(b) the warrant signed by the magistrate authorising the exercise of the power is not produced in evidence;

the court must assume, unless the contrary is proved, that the exercise of the power was not authorised by such a warrant.

154Z Offences relating to warrants

(1) An inspector must not make, in an application for a warrant, a statement that the inspector knows to be false or misleading in a material particular.

Penalty: Imprisonment for 2 years.

(2) An inspector must not:

(a) state in a document that purports to be a form of warrant under section 154Y the name of a magistrate unless that magistrate issued the warrant; or

(b) state on a form of warrant under that section a matter that, to the inspector's knowledge, departs in a material particular from the form authorised by the magistrate; or

(c) purport to execute, or present to another person, a document that purports to be a form of warrant under that section that the inspector knows:

(i) has not been approved by a magistrate under that section; or

(ii) departs in a material particular from the terms authorised by a magistrate under that section; or

(d) give to a magistrate a form of warrant under that section that is not the form of warrant that the inspector purported to execute.

Penalty: Imprisonment for 2 years.

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Subdivision G—Powers of magistrates

154ZA Powers conferred on magistrates

(1) A power conferred on a magistrate by this Division is conferred on the magistrate in a personal capacity and not as a court or a member of a court. The magistrate need not accept the power conferred.

(2) A magistrate exercising such a power has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.

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Division 5—General provisions relating to electronic equipment

154ZB Operation of electronic equipment at premises

A person may operate electronic equipment at premises in order to exercise a power under this Part only if he or she believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

154ZC Compensation for damage to electronic equipment

(1) This section applies if:

(a) as a result of electronic equipment being operated as mentioned in section 154E, 154F, 154G, 154H or 154J:

(i) damage is caused to the equipment; or

(ii) the data recorded on the equipment is damaged; or

(iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and

(b) the damage or corruption occurs because:

(i) insufficient care was exercised in selecting the person who was to operate the equipment; or

(ii) insufficient care was exercised by the person operating the equipment.

(2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.

(3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.

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(4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees and agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.

(5) Compensation is payable out of money appropriated by the Parliament.

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

damage, in relation to data, includes damage by erasure of data or addition of other data.

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Part XIE—Designated complaints

Division 1—Preliminary

154ZD Simplified outline of this Part

This Part sets out a scheme under which designated complainants may make designated complaints to the Commission.

The Commission must respond to a designated complaint within 90 days. If the complaint meets certain criteria, the Commission must give the designated complainant a notice that sets out the actions the Commission proposes to take in response to the complaint.

A designated complainant is an entity that the Minister is satisfied (among other things) represents the interests of consumers or small businesses in Australia in relation to a range of market issues that affect them.

A complaint is treated as a designated complaint if the Commission is satisfied (among other things) that it:

(a) relates to a significant or systemic market issue that affects consumers or small businesses in Australia; and

(b) relates to a potential breach of this Act or to one or more of the Commission's powers or functions under this Act.

154ZE Definitions

In this Part:

approval means an approval as a designated complainant granted under subsection 154ZQ(1).

designated complainant means an entity that has an approval that is in force.

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designated complaints determination means the determination made by the Minister under section 154ZZ.

entity means any of the following:

(a) a corporation;
(b) an individual;
(c) a body corporate;
(d) a corporation sole;
(e) a body politic;
(f) a partnership;
(g) any other unincorporated association or body of entities;
(h) a trust.

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Division 2—Commission handling of designated complaints

154ZF Designated complaints

(1) A designated complainant may make a complaint under this section to the Commission.

(2) The complaint must:
  (a) be in writing; and
  (b) if the Commission has approved a manner for making the complaint—be made in that manner; and
  (c) if the Commission has approved a form for making the complaint:
    (i) be made in the approved form; and
    (ii) include the information required by the form; and
    (iii) be accompanied by any documents required by the form; and
  (d) meet the requirements (if any) prescribed in the designated complaints determination relating to the number and types of designated complaints that a designated complainant may make during a specified period.

(3) The complaint is a ***designated complaint*** starting from the day it meets the requirements mentioned in subsection (2).

154ZG Commission to respond by giving notice

(1) If the Commission receives a designated complaint from a designated complainant, the Commission must, within 90 days, assess the complaint and give the complainant one of the following:
  (a) a notice under subsection 154ZH(1) (no further action on complaint);
  (b) a notice under subsection 154ZK(1) (further action to deal with complaint).

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(2) If, before the Commission gives a notice mentioned in subsection (1) to the complainant, it ceases to be a designated complainant, for the purposes of subsection (1), the complaint is taken never to have been made.

154ZH Notice—no further action on complaint

(1) The Commission:

(a) must give the designated complainant a notice under this subsection if subsection (2) applies in relation to the complaint; and

(b) may give the designated complainant a notice under this subsection if subsection (3), (4) or (5) applies in relation to the complaint.

Complaint does not meet mandatory content requirements

(2) This subsection applies if the Commission is not satisfied that the complaint:

(a) relates to a significant or systemic market issue that affects consumers or small businesses in Australia (or both); and

(b) either:

(i) relates to a potential breach of this Act; or

(ii) relates to one or more of the Commission's powers or functions under this Act.

Complaint does not meet other content requirements

(3) This subsection applies if the Commission is not satisfied that the complaint meets any requirements prescribed in the designated complaints determination.

Subject matter of complaint is subject of other inquiry or action

(4) This subsection applies if the Commission is satisfied that the subject matter of the complaint is, or is part of, a matter:

(a) into which any of the following is inquiring or has within the past 2 years inquired:

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(i) a committee of the Parliament or of either House of the Parliament;
(ii) a Royal Commission;
(iii) a coronial inquiry, coronial investigation or coronial inquest; or

(b) which is the subject of:
(i) legal proceedings; or
(ii) an inquiry, investigation or review conducted by the Commonwealth, a State or Territory, an industry organisation, a consumer organisation or another person;

that is, or is of a kind, prescribed in the designated complaints determination.

Appropriate to take no further action on complaint

(5) This subsection applies if:
(a) the Commission has assessed the complaint; and
(b) the Commission is satisfied that it is appropriate to take no further action in relation to the complaint.

(6) For the purposes of paragraph (5)(b), in considering whether the Commission is satisfied that it is appropriate, the Commission:
(a) must have regard to any matter prescribed for the purposes of this paragraph in the designated complaints determination; and
(b) may have regard to any matter prescribed for the purposes of this paragraph in the designated complaints determination.

154ZJ Notice—no further action on complaint—contents

A notice given under subsection 154ZH(1) must set out the following:
(a) a summary of the complaint;
(b) which of subsections 154ZH(2), (3), (4) and (5) apply in relation to the complaint;
(c) the reasons for the Commission's decision.

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154ZK Notice—further action to deal with complaint

(1) The Commission may give the designated complainant a notice under this subsection if the Commission is satisfied that the complaint:

(a) relates to a significant or systemic market issue that affects consumers or small businesses in Australia (or both); and

(b) either:

(i) relates to a potential breach of this Act; or

(ii) relates to one or more of the Commission's powers or functions under this Act.

(2) The notice must set out:

(a) a summary of the complaint; and

(b) the actions the Commission proposes to take in response to the complaint.

(3) The Commission must:

(a) use its best endeavours to commence the actions set out in the notice as soon as practicable after giving the notice; and

(b) in any case, commence the actions set out in the notice within the period of 6 months after giving the notice; and

(c) when the actions set out in the notice have been completed, use its best endeavours to notify this to the entity that made the complaint (even if the entity has ceased to be a designated complainant).

Circumstances in which Commission not required to take further action

(4) However, subsection (3) does not apply if the Commission is satisfied that circumstances prescribed in the designated complaints determination apply.

(5) If subsection (4) applies, the Commission must use its best endeavours to notify this to the entity that made the complaint (even if the entity has ceased to be a designated complainant).

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154ZL Replacement notices

(1) If the Commission has given the designated complainant a notice under subsection 154ZK(1), the Commission may replace that notice with either of the following:
  (a) if the Commission considers it appropriate—a replacement notice under subsection 154ZK(1);
  (b) if subsection 154ZH(4) (other inquiry or action) or (5) (appropriate to take no further action) applies—a notice under subsection 154ZH(1).

(2) If paragraph (1)(a) applies:
  (a) the Commission must give the designated complainant the replacement notice; and
  (b) the replacement notice must set out the matters specified in subsection 154ZK(2); and
  (c) the replacement notice is taken to be the notice given to the designated complainant under subsection 154ZK(1) from the day the replacement notice is given; and
  (d) treat paragraphs 154ZK(3)(a) and (b) as requiring the Commission to commence the actions set out in the replacement notice as soon as practicable after it is given.

(3) If paragraph (1)(b) applies:
  (a) the Commission must give the designated complainant the notice mentioned in that paragraph; and
  (b) subsection 154ZK(3) ceases to apply in relation to the complaint.

154ZM Withdrawal of complaint

(1) If:
  (a) an entity has made a designated complaint to the Commission; and
  (b) the Commission has not, in relation to the complaint, given the entity either of the following:
    (i) a notice under subsection 154ZH(1) (no further action);

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(ii) a notification under paragraph 154ZK(3)(c) (further action completed);

the entity may, in writing, withdraw the complaint (even if the entity has ceased to be a designated complainant).

(2) The Commission must notify the entity in writing that the complaint has been withdrawn.

(3) From the time the notification in subsection (2) is given:

(a) if the Commission has not yet given the entity a notice under subsection 154ZH(1) or 154ZK(1) in relation to the withdrawn complaint—sections 154ZG and 154ZH cease to apply in relation to the withdrawn complaint; and

(b) if the Commission has given the entity a notice under subsection 154ZK(1) in relation to the withdrawn complaint—subsection 154ZK(3) ceases to apply in relation to the withdrawn complaint.

(4) The withdrawn complaint continues to be a designated complaint for the purposes of this Act (including subsection 154ZF(3) and paragraph 171(3)(dd)).

154ZN Publication requirements

(1) If the Commission gives:

(a) a notice under subsection 154ZH(1) (no further action on complaint); or

(b) a notice under subsection 154ZK(1) (further action to deal with complaint); or

(c) a notification under paragraph 154ZK(3)(c) (actions have been completed); or

(d) a notification under subsection 154ZK(5) (Commission not required to take further action); or

(e) a notice under paragraph 154ZL(2)(a) (replacement notice with further action to deal with complaint); or

(f) a notice under paragraph 154ZL(3)(a) (replacement notice where other inquiry or action, or appropriate to take no further action); or

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(g) if the Commission has given a notice under subsection 154ZK(1) in relation to a designated complaint—a notification under subsection 154ZM(2) that the complaint has been withdrawn;

the Commission must, as soon as practicable, publish the notice, notification or replacement notice on its website.

(2) However, subsection (1) does not require the Commission to publish information if:

(a) the Commission is satisfied that it is appropriate not to publish the information because of its confidential nature; or

(b) the Commission is satisfied that a circumstance prescribed in the designated complaints determination applies to the publication of the information.

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Division 3—Designated complainants

154ZP Application for approval as designated complainant

(1) An entity may apply to the Minister for approval as a designated complainant.

(2) However, a State or Territory may not apply under subsection (1).

(3) The application must:
  (a) be in writing; and
  (b) if the Minister has approved a manner for making the application—be made in that manner; and
  (c) be made during a period prescribed under subsection (4); and
  (d) if the Minister has approved a form:
    (i) be made in the approved form; and
    (ii) include the information required by the form; and
    (iii) be accompanied by any documents required by the form.

(4) For the purposes of paragraph (3)(c), the designated complaints determination may:
  (a) prescribe a period, which may be a single period or a recurring period; and
  (b) provide for the start or end date of the period or each period (as the case may be) to be as is or will be set out on the Department's website.

Withdrawal of application

(5) The applicant may, in writing, withdraw the application before the Minister makes a decision.

(6) If the application is withdrawn, it is taken never to have been made.

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154ZQ Minister may grant approval

(1) The Minister may, in writing, grant the approval if:

(a) where the approval is to be subject to conditions:

(i) the Minister has given the entity a notice under subsection 154ZR(3) setting out those conditions; and

(ii) 14 business days have passed since that notice was given; and

(b) the Minister is satisfied that it is appropriate to grant the approval.

Considerations

(2) For the purposes of being satisfied that it is appropriate to grant the approval, the Minister must have regard to the following matters:

(a) the experience and ability of the applicant in representing the interests of consumers or small businesses (or both) in Australia in relation to a range of market issues that affect them;

(b) the extent to which the Minister is satisfied that the applicant will, if approved as a designated complainant, act with integrity in connection with being a designated complainant;

(c) any other matter prescribed under paragraph (4)(a).

(3) The Minister may also have regard to the following matters:

(a) any matter prescribed under paragraph (4)(b);

(b) any other matter the Minister considers relevant.

(4) For the purposes of paragraphs (2)(c) and (3)(a), the designated complaints determination may prescribe matters to which the Minister:

(a) must have regard; or

(b) may have regard.

Maximum number of designated complainants

(5) However, the Minister must not grant the approval if doing so would result in the number of designated complainants being

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above the limit prescribed in the designated complaints determination.

154ZR Conditions in approval

(1) The approval may specify that it is subject to conditions if the Minister is satisfied that the conditions are appropriate.

Considerations

(2) For the purposes of being satisfied that the conditions are appropriate, the Minister:
  (a) must have regard to the matters mentioned in subsection 154ZQ(2); and
  (b) may have regard to the matters mentioned in subsection 154ZQ(3).

Conditions notices

(3) If the Minister is considering:
  (a) granting the approval; and
  (b) specifying that it is subject to conditions;

the Minister may give the applicant a notice in writing setting out those conditions.

(4) If the Minister gives the applicant a notice under subsection (3), the Minister must give the Commission a copy of the notice as soon as practicable.

154ZS Contents of approval

The approval must set out the following:
  (a) the name of the designated complainant;
  (b) the date (if any) on which the approval ceases to be in force;
  (c) the conditions (if any) to which the approval is subject.

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154ZT Notice of decision on application for approval

(1) If the Minister:

(a) decides to grant the approval; or

(b) decides not to grant the approval;

the Minister must give the applicant, as soon as practicable:

(c) notice of the decision; and

(d) if the decision is to grant the approval—a copy of the approval.

(2) If the Minister decides to grant the approval, as soon as practicable after granting the approval, the Minister:

(a) must give a copy of the notice of the decision to the Commission; and

(b) must publish the name of the entity on the Department's website; and

(c) may publish all or parts of the conditions (if any) to which the approval is subject on the Department's website.

154ZU Variation or revocation of approval

(1) A designated complainant may apply to the Minister for a variation or revocation of its approval.

(2) The application must be:

(a) in writing; and

(b) in the approved form.

Withdrawal of application

(3) The designated complainant may, in writing, withdraw the application if the Minister has not decided it.

(4) If the designated complainant withdraws the application, it is taken never to have been made.

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154ZV Minister may vary or revoke approval

(1) The Minister may, in writing, vary or revoke the approval if:
  (a) the Minister has given the designated complainant a notice under subsection (5) in relation to the variation or revocation; and
  (b) 14 business days have passed since that notice was given; and
  (c) the Minister is satisfied that it is appropriate to make the variation or revocation.

(2) Paragraphs (1)(a) and (b) do not apply if:
  (a) the variation or revocation is in accordance with an application under subsection 154ZU(1); or
  (b) in the case of a variation—the Minister is satisfied that the variation is of a minor or technical nature.

Considerations

(3) For the purposes of being satisfied that it is appropriate to make the variation or revocation, the Minister may have regard to the following matters:
  (a) any matter mentioned in subsection 154ZQ(2) or (3);
  (b) whether the designated complainant has contravened, or is contravening, a condition to which the approval is subject;
  (c) any matter prescribed in the designated complaints determination;
  (d) any other matter the Minister considers relevant.

Notice of proposed variation or revocation

(4) The Minister may give a designated complainant a notice in writing stating that the Minister is proposing to vary or revoke the designated complainant's approval.

(5) The notice must set out the following:
  (a) the proposed variation or revocation;
  (b) the reasons for the proposed variation or revocation;

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(c) the day on which the proposed variation or revocation is to take effect (which must be at least 14 business days after the notice is given).

154ZW Contents of variation or revocation of approval

A variation or revocation made under section 154ZV must specify the details of the variation or revocation, including:

(a) the day on which the decision to make the variation or revocation was made; and

(b) the day on which the variation or revocation takes effect; and

(c) in the case of a variation that changes or removes the date on which the approval ceases to be in force—that change or removal; and

(d) in the case of a variation that changes or removes conditions to which the approval is subject—that change or removal.

154ZX Notice of decision on application for variation or revocation of approval

(1) If the Minister:

(a) decides to vary or revoke a designated complainant's approval; or

(b) in a case where a designated complainant has applied for a variation or revocation of its approval—decides not to vary or revoke the approval;

the Minister must give the designated complainant, as soon as practicable:

(c) notice of the decision; and

(d) if the decision is to vary or revoke the approval—a copy of the variation or revocation.

(2) As soon as practicable after varying or revoking the approval, the Minister:

(a) must give a copy of the notice of the decision to the Commission; and

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(b) in the case of a revocation—must publish that fact on the Department's website; and

(c) in the case of a variation that changes or removes conditions to which the approval is subject—may publish details of that change or removal on the Department's website.

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Division 4—Miscellaneous

154ZY Delegation

(1) The Minister may, in writing, delegate all or any of the Minister's powers or functions under this Part (other than under section 154ZZ) to the Secretary, or a SES employee or acting SES employee in the Department.

(2) In exercising a power under a delegation under this section, the delegate must comply with any written directions of the Minister.

154ZZ Designated complaints determination

The Minister may, by legislative instrument, make a determination (the ***designated complaints determination***) prescribing matters required or permitted by this Part to be prescribed by the designated complaints determination.

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Part XII—Miscellaneous

155 Power to obtain information, documents and evidence

(1) Subject to subsection (2A), if the Commission, the Chairperson or a Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter referred to in subsection (2), a member of the Commission may, by notice in writing served on that person (whether in Australia or outside Australia), require that person:

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

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or

(c) to appear before the Commission, or before a member of the staff assisting the Commission who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) For the purposes of subsection (1), the matter must be a matter that:

(a) constitutes, or may constitute, a contravention of:

(i) this Act; or

(ii) Division 4B of Part 3.3 of the *Radiocommunications Act 1992*; or

(iii) any of the terms of an undertaking under section 87B of this Act or under section 218 of the Australian Consumer Law; or

(iiia) a gas market instrument; or

(iv) the consumer data rules; or

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(v) an SPF code; or

(b) is relevant to:

(i) a designated communications matter (as defined by subsection (9) of this section); or

(iaa) a gas market instrument matter (as defined by subsection (9AAA) of this section); or

(ia) a designated consumer data right matter (as defined by subsection (9AA) of this section); or

(ib) a designated digital platform matter (as defined by subsection (9AB) of this section); or

(ic) a designated scams prevention framework matter (as defined by subsection (9AC) of this section); or

(ii) a designated water matter (as defined by subsection (9A) of this section); or

(iia) the making of an acquisition determination by the Commission; or

(iii) the making of a decision by the Commission under subsection 90(1) in relation to an application for a merger authorisation; or

(iv) the making of a decision by the Commission under subsection 91B(4), 91C(4), 93(3), (3A) or (3B) or 93AC(1), (2) or (2A); or

(v) the Commission investigating or inquiring into the terms of a consumer contract or small business contract for the purposes of determining whether or not to make an application to the court under section 250 of the Australian Consumer Law; or

(vi) a contracting order (within the meaning of Part XICA); or

(vii) a divestiture order (within the meaning of Part XICA).

(2AA) A member of the Commission may vary the time specified in a notice under subsection (1) within which the information must be furnished, or the documents produced, or at which the person is required to appear before the Commission or the member of the staff assisting the Commission who is specified in the notice.

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(2AB) Subsection (2AA) does not affect any operation that subsection 33(3) of the *Acts Interpretation Act 1901* has in relation to a notice under subsection (1).

(2A) A member of the Commission may not give a notice under subsection (1) merely because:

(a) a person has refused or failed to comply with a notice under subsection 95ZK(1) or (2) on the ground that complying with the notice would tend to incriminate the person, or to expose the person to a penalty; or

(b) a person has refused or failed to answer a question that the person was required to answer by the person presiding at an inquiry under Part VIIA, on the ground that the answer would tend to incriminate the person, or to expose the person to a penalty; or

(c) a person has refused or failed to produce a document referred to in a summons under subsection 95S(3), on the ground that production of the document would tend to incriminate the person, or to expose the person to a penalty.

(3) If a notice under subsection (1) requires a person to appear before the Commission to give evidence, the Commission may require the evidence to be given on oath or affirmation. For that purpose, any member of the Commission may administer an oath or affirmation.

(3A) If a notice under subsection (1) requires a person to appear before a member of the staff assisting the Commission to give evidence, the staff member may require the evidence to be given on oath or affirmation and may administer an oath or affirmation.

(4) A member of the Commission may exercise, or continue to exercise, a power under subsection (1) in relation to a matter referred to in that subsection until:

(a) the Commission commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or

(b) the close of pleadings in relation to an application by the Commission for a final injunction in relation to the matter.

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(5) A person shall not:
  (a) refuse or fail to comply with a notice under this section;
  (b) in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading.

Note: Under section 76, the Court may order a person who contravenes paragraph (b) of this subsection to pay a pecuniary penalty.

(5A) Paragraph (5)(a) 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 subsection (5A), see subsection 13.3(3) of the *Criminal Code*.

(5B) Paragraph (5)(a) does not apply to the extent that:
  (a) the notice relates to producing documents; and
  (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 (5B)(b) (see section 13.4 of the *Criminal Code*).

(6) For the purposes of (but without limiting) paragraph (5B)(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.

(6A) A person who contravenes subsection (5) is guilty of an offence punishable on conviction by imprisonment for 2 years or a fine not exceeding 100 penalty units.

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Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

(7) A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person or expose the person to a penalty, but the answer by an individual to any question asked in a notice under this section or the furnishing by an individual of any information in pursuance of such a notice is not admissible in evidence against the individual in any criminal proceedings, other than:

(a) proceedings for an offence against this section; or

(b) proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this section.

(7A) This section does not require a person:

(a) to give information or evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or

(b) to produce a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or

(c) to give information or evidence, or to produce a document, that would disclose the deliberations of the Cabinet of a State or Territory.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7A), see subsection 13.3(3) of the *Criminal Code*.

(7B) This section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.

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

(8) Nothing in this section implies that notices may not be served under this section and section 155A in relation to the same conduct.

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(8A) If a person refuses or fails to comply with a notice under this section, a court may, on application by the Commission, make an order directing the person to comply with the notice.

(9) A reference in this section to a ***designated communications matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) the *Telecommunications Act 1997*; or

(b) the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

(ba) the *National Broadband Network Companies Act 2011*; or

(c) Part XIB or XIC of this Act; or

(d) Division 4B of Part 3.3 of the *Radiocommunications Act 1992*.

(9AAA) A reference in this section to a ***gas market instrument matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) Part IVBB; or

(b) regulations made under this Act for the purposes of that Part (including a gas market code); or

(c) a gas market emergency price order.

(9AA) A reference in this section to a ***designated consumer data right matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) Part IVD (other than Division 5); or

(b) regulations made under this Act for the purposes of that Part; or

(c) the consumer data rules.

(9AB) A reference in this section to a ***designated digital platform matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) Part IVBA; or

(b) regulations made under this Act for the purposes of that Part.

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(9AC) A reference in this section to a ***designated scams prevention framework matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission (as an SPF regulator) by or under:

(a) Part IVF; or

(b) a legislative instrument (such as an SPF code) made under that Part; or

(c) the Regulatory Powers Act to the extent that it applies in relation to a provision of that Part.

(9A) A reference in this section to a ***designated water matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) Part 4 or 4A of the *Water Act 2007*; or

(b) regulations made under that Act for the purposes of Part 4 of that Act; or

(c) water charge rules, or water market rules, made under Part 4 of that Act.

(10) In this section:

legal professional privilege includes privilege under Division 1 of Part 3.10 of the *Evidence Act 1995*.

155AAAA Power to obtain information, documents and evidence—delegation

(1) This section applies in relation to a function or power of any of the following (the ***delegator***) under section 155:

(a) the Commission;

(b) the Chairperson;

(c) a Deputy Chairperson;

(d) a member of the Commission.

(2) The delegator may, in writing, delegate any or all of the delegator's functions or powers under section 155 to a member of the staff of the Commission who is an SES employee or an acting SES employee.

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(3) The delegator may delegate a function or power to a person under subsection (2) only if the delegator 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 delegator.

155AAA Protection of certain information

(1) A Commission official must not disclose any protected information to any person except:

(a) when the Commission official is performing duties or functions as a Commission official; or

(b) when the Commission official or the Commission is required or permitted by:

(i) this Act or any other law of the Commonwealth; or

(ii) a prescribed law of a State or internal Territory;

to disclose the information.

(2) Subsection (1) does not allow a Commission official to disclose protected information when performing a function of the Commission described in section 28.

Disclosure to Ministers

(3) A Commission official may disclose protected information to the designated Minister.

(4) If protected information relates to a matter arising under:

(a) a provision of this Act; or

(b) a provision of another Act;

that is administered by a Minister other than the designated Minister, a Commission official may disclose the protected information to the other Minister.

(5) Subsection (4) does not limit subsection (3).

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Disclosure to Secretaries etc.

(6) A Commission official may disclose protected information to:
  (a) the Secretary of the designated Department; or
  (b) an officer of the designated Department who is authorised by the Secretary of that Department, in writing, for the purposes of this subsection;

for the purpose of advising the designated Minister.

(7) If protected information relates to a matter arising under:
  (a) a provision of this Act; or
  (b) a provision of another Act;

that is administered by a Minister other than the designated Minister, a Commission official may disclose the protected information to:
  (c) the Secretary of the Department that is administered by the other Minister; or
  (d) an officer of that Department who is authorised by the Secretary of that Department, in writing, for the purposes of this subsection;

for the purpose of advising the other Minister.

(8) Subsection (7) does not limit subsection (6).

Disclosure to a Royal Commission

(9) A Commission official may disclose protected information to a Royal Commission.

(10) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (9).

(11) An instrument under subsection (10) is not a legislative instrument.

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Disclosure to certain agencies, bodies and persons

(12) If the Chairperson is satisfied that particular protected information will enable or assist any of the following agencies, bodies or persons:

(a) the Australian Bureau of Statistics;
(b) the ACMA;
(c) the Australian Prudential Regulation Authority;
(d) ASIC;
(e) the National Competition Council;
(f) the Productivity Commission;
(g) any other agency within the meaning of the *Freedom of Information Act 1982*;
(h) the Australian Statistician;
(i) the Commissioner of Taxation;
(j) the Australian Competition Tribunal;
(k) the Director of Public Prosecutions;
(l) the Reserve Bank of Australia;
(la) the Clean Energy Regulator;
(lb) the Climate Change Authority;
(lc) the Australian Energy Regulator;
(m) a State/Territory government body;
(n) a foreign government body;

to perform or exercise any of the functions or powers of the agency, body or person, an authorised Commission official may disclose that protected information to the agency, body or person concerned.

(13) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (12).

(14) An instrument under subsection (13) is not a legislative instrument.

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Disclosure with consent

(15) A Commission official may disclose protected information that relates to the affairs of a person if:

(a) the person has consented to the disclosure; and

(b) the disclosure is in accordance with that consent.

Disclosure of publicly available information

(16) A Commission official may disclose protected information if it is already publicly available.

Disclosure of summaries or statistics

(17) A Commission official may disclose:

(a) summaries of protected information; or

(b) statistics derived from protected information;

if those summaries or statistics, as the case may be, are not likely to enable the identification of a person.

Disclosure authorised by regulations

(18) The regulations may:

(a) authorise a Commission official to disclose protected information in specified circumstances; and

(b) provide that the Chairperson may, by writing, impose conditions to be complied with in relation to the disclosure of protected information in those circumstances.

(19) An instrument under regulations made for the purposes of paragraph (18)(b) is not a legislative instrument.

Delegation

(20) The Chairperson may, by writing, delegate any or all of his or her functions and powers under:

(a) this section; or

(b) regulations made for the purposes of subsection (18);

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to a member of the Commission.

Definitions

(21) In this section:

authorised Commission official means a Commission official authorised by the Chairperson, in writing, for the purposes of this section.

Commission official means:

(a) a member, or associate member, of the Commission; or

(b) a person referred to in subsection 27(1); or

(c) a person engaged under section 27A.

core statutory provision means:

(a) a provision of Part IV, IVA, IVBA, IVBB, IVD (other than Division 5), IVE, V, VII, VIII, XI, XIB, XIC or XICA, of a gas market instrument or of the consumer data rules; or

(b) the remaining provisions of this Act so far as they relate to a provision covered by paragraph (a); or

(c) a provision of the regulations made under section 172 so far as it relates to a provision covered by paragraph (a) or (b); or

(d) a provision of the Australian Consumer Law (other than Part 5-3); or

(e) a provision of the regulations made under section 139G so far as it relates to a provision covered by paragraph (d).

designated Department means the Department that is responsible for the administration of this section (other than subsections (4) and (7)).

designated Minister means the Minister who is responsible for the administration of this section (other than subsections (4) and (7)).

disclose means divulge or communicate.

foreign country includes a region where:

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(a) the region is a colony, territory or protectorate of a foreign country; or
(b) the region is part of a foreign country; or
(c) the region is under the protection of a foreign country; or
(d) a foreign country exercises jurisdiction or control over the region; or
(e) a foreign country is responsible for the region's international relations.

foreign government body means:
(a) the government of a foreign country; or
(b) an agency or authority of a foreign country; or
(c) the government of part of a foreign country; or
(d) an agency or authority of part of a foreign country.

information includes information in a document and information given in evidence.

protected information means:
(a) information that:
(i) was given in confidence to the Commission; and
(ii) relates to a matter arising under a core statutory provision; or
(b) information that:
(i) was obtained by the Commission under Part XID or section 155; and
(ii) relates to a matter arising under a core statutory provision; or
(ba) information that was obtained by the Commission under paragraph 60FD(2)(b) or section 60FA or 60H; or
(c) information that:
(i) was obtained by the Commission under section 151AU, 152AU, 152CBB or 152CBH or rules in force under section 151BU; and
(ii) relates to a matter arising under Part XIB or XIC; or

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(d) information that was obtained by the Commission under section 118NE or 118NI of the *Radiocommunications Act 1992*; or

(e) information that:

(i) was given in confidence to the Commission by a foreign government body; and

(ii) relates to a matter arising under a provision of a law of a foreign country or of a part of a foreign country; or

(f) information that:

(i) was obtained by the Commission under section 155; and

(ii) relates to a designated water matter within the meaning of that section; or

(g) information that was:

(i) obtained by the Commission under section 239AJ, 100ZD or 101D of the *Water Act 2007*; or

(ii) disclosed to the Commission under section 215UB(2A) or 135P of the *Water Act 2007*; or

(iii) obtained under Part XID of this Act and relates to a matter arising under Part 5 or Part 5A of the *Water Act 2007* or the Water Market Intermediaries Code within the meaning of the *Water Act 2007*.

For the purposes of this definition, it is immaterial whether the information was given to or obtained by the Commission before, at or after the commencement of this section.

Royal Commission has the same meaning as in the *Royal Commissions Act 1902*.

State/Territory government body means:

(a) the government of a State or Territory; or

(b) an agency or authority of a State or Territory.

155AA Protection of Part VB information

(1) A Commission official must not disclose any protected Part VB information to any person, except:

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(a) when the Commission official is performing duties or functions as a Commission official; or

(b) when the Commission official or the Commission is required or permitted by law to disclose the information.

(2) Subsection (1) does not allow a Commission official to disclose protected Part VB information when performing a function of the Commission described in section 28.

(3) In this section:

Commission official means:

(a) a member, or associate member, of the Commission;

(b) a person referred to in subsection 27(1);

(c) a person engaged under section 27A.

disclose means divulge or communicate.

information includes information in a document and information given in evidence.

protected Part VB information means:

(a) information that:

(i) was obtained by the Commission under Part XID or section 155; and

(ii) relates to a matter that arose under Part VB before its repeal by item 32 of Schedule 1 to the *Statute Stocktake (Regulatory and Other Laws) Act 2009*; or

(b) information that was obtained by the Commission under section 75AY before its repeal by item 32 of Schedule 1 to the *Statute Stocktake (Regulatory and Other Laws) Act 2009*.

155A Power to obtain information and documents in New Zealand relating to trans-Tasman markets

(1) Where the Commission, the Chairperson or a Deputy Chairperson has reason to believe that a person is capable of furnishing information or producing documents relating to a matter that

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constitutes, or may constitute, a contravention of section 46A, a member of the Commission may, by written notice served on the person in New Zealand, require the person:

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

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

(2) The person may comply with the notice by providing the information or document to the New Zealand Commerce Commission for transmission to the Australian Competition and Consumer Commission.

(3) Nothing in this section implies that notices may not be served under this section and section 155 in relation to the same conduct.

(4) This section binds the Crown in all its capacities.

155B Australian Competition and Consumer Commission may receive information and documents on behalf of New Zealand Commerce Commission

(1) Where, by notice under section 98H of the Commerce Act 1986 of New Zealand, the New Zealand Commerce Commission requires a person to furnish any information or produce any document, the information or document may be provided to the Australian Competition and Consumer Commission for transmission to the New Zealand Commerce Commission.

(2) As soon as practicable after the information or document is provided to the Australian Competition and Consumer Commission, the Australian Competition and Consumer Commission is to transmit it to the New Zealand Commerce Commission.

(3) A person must not:

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(a) contravene a notice under section 98H of the Commerce Act 1986 of New Zealand; or

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

Penalty: 20 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

(3A) Paragraph (3)(a) does not apply if the person has a reasonable excuse.

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

(4) A person is not excused from furnishing information or producing a document under a notice under section 98H of the Commerce Act 1986 of New Zealand on the ground that the information, or the production of the document, may tend to incriminate the person, but:

(a) any information furnished or document produced under such a notice; and

(b) any information, document or thing obtained as a direct or indirect consequence of furnishing the information or producing the document;

is not admissible in evidence against the person in any criminal proceedings, other than proceedings for an offence against subsection (3).

(5) This section binds the Crown in all its capacities, but nothing in this section permits the Crown in any of its capacities to be prosecuted for an offence.

(6) This section applies in and outside Australia.

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156 Inspection of documents by Commission

(1) A member of the Commission, or a person authorised by a member of the Commission, may inspect a document produced in pursuance of a notice under section 155 or 155A and may make copies of, or take extracts from, the document.

(2) The Commission may, for the purposes of this Act, take, and retain for as long as is necessary for those purposes, possession of a document produced in pursuance of a notice under section 155 or 155A but 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 Commission under his or her hand to be a true copy and the certified copy shall be received in all courts as evidence as if it were the original.

(3) Until such a certified copy is supplied, the Commission shall, at such times and places as it 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 or take extracts from the document.

157 Disclosure of documents by Commission

(1) Subject to subsection (1A), if:
  (a) a corporation makes an application to the Commission under section 88, 91A, 91B or 91C; or
  (b) the Commission proposes the revocation of an authorisation under subsection 91B(3) or the revocation of an authorisation and the substitution of another authorisation under subsection 91C(3); or
  (c) a proceeding is instituted against a corporation or other person under section 77, 80, 80AC, 80AD, 81, 81A or 81B; or

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(d) an application is made under subsection 51ADB(1) or 53ZO(1), section 86C or 86D or subsection 87(1A) for an order against a corporation or other person;

the Commission shall, at the request of the corporation or other person and upon payment of the prescribed fee (if any), furnish to the corporation or other person:

(e) a copy of every document that has been furnished to, or obtained by, the Commission in connexion with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person; and

(f) a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connexion with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person;

not being a document obtained from the corporation or other person or prepared by an officer or professional adviser of the Commission.

(1AA) Subject to subsections (1AB) and (1A), if an application for an order against a person is made under:

(a) section 137F; or

(b) subsection 237(1), 243A(1) or 243B(1), or section 246 or 247, of the Australian Consumer Law;

the Commission must, at the request of the person and upon payment of the prescribed fee (if any), give the person:

(c) a copy of every document that has been given to, or obtained by, the Commission in connection with the matter to which the application relates and tends to establish the case of the person; and

(d) a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connection with the matter to which the application relates and tends to establish the case of the person.

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(1AB) Subsection (1AA) does not apply to a document obtained from the person, or prepared by an officer or professional adviser of the Commission.

Protected cartel information—Commission may refuse to comply with request

(1A) If a request under subsection (1) relates to a document containing protected cartel information, the Commission may refuse to comply with the request.

(1B) In exercising its powers under subsection (1A), the Commission must have regard to the following matters:

(a) the fact that the protected cartel information was given to the Commission in confidence;

(b) Australia's relations with other countries;

(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;

(d) in a case where the protected cartel information was given by an informant:

(i) the protection or safety of the informant or of persons associated with the informant; and

(ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;

(e) the legitimate interests of the corporation which, or the person who, made the request under subsection (1);

(f) such other matters (if any) as the Commission considers relevant.

Court order

(2) If the Commission does not comply with a request under subsection (1) otherwise than because of a refusal under subsection (1A), the Court shall, subject to subsection (3), upon application by the corporation which, or other person who, made

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the request, make an order directing the Commission to comply with the request.

(3) The Court may refuse to make an order under subsection (2) in respect of a document or part of a document if the Court considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person, or for any other reason.

(4) Before the Court gives a decision on an application under subsection (2), the Court may require any documents to be produced to it for inspection.

(5) An order under this section may be expressed to be subject to conditions specified in the order.

Definition

(6) In this section:

protected cartel information has the same meaning as in section 157B.

157A Disclosure of energy-related information by Commission

(1) The Commission or a Commission official may disclose to:

(a) the AER; or

(b) the AEMC; or

(c) any staff or consultant assisting the AEMC in performing its functions or exercising its powers; or

(d) a member of the staff of the AER, a person assisting the AER referred to in section 44AACA or a consultant engaged under section 44AACB;

any information that it obtains under this Act or a gas market instrument that is relevant to the functions or powers of the AER or the AEMC.

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

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(2) The AER or a person mentioned in paragraph (1)(d) may use the information for any purpose connected with the performance of the AER's functions or the exercise of its powers.

(3) The AEMC or a person mentioned in paragraph (1)(c) may use the information for any purpose connected with the performance of the AEMC's functions or the exercise of its powers.

(4) The Commission or a Commission official may impose conditions to be complied with in relation to information disclosed.

(5) In this section:

Commission official means:

(a) a member, or associate member, of the Commission; or

(b) a person referred to in subsection 27(1); or

(c) a person engaged under section 27A.

157AA Disclosure of CDR-related information by Commission

Disclosure to the Information Commissioner

(1) The Commission or a Commission official may disclose to:

(a) the Information Commissioner; or

(b) any staff or consultant assisting the Information Commissioner in performing that Commissioner's functions, or exercising that Commissioner's powers, relating to Part IVD or the consumer data rules;

any information that the Commission obtains under this Act, or the consumer data rules, that is relevant or likely to be relevant to the functions or powers referred to in paragraph (b).

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

(2) The Information Commissioner or a person mentioned in paragraph (1)(b) must only use the information:

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(a) for a purpose connected with the performance of the functions, or the exercise of the powers, referred to in paragraph (1)(b); and

(b) in accordance with any conditions imposed under subsection (4).

Disclosure to the Secretary

(2A) The Commission or a Commission official may disclose to:

(a) the Secretary of the Department; or

(b) any employee of the Department or consultant assisting the Secretary in performing the Secretary's functions, or exercising the Secretary's powers, relating to Part IVD;

any information that the Commission obtains under this Act, or the consumer data rules, that is relevant or likely to be relevant to the functions or powers referred to in paragraph (b).

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

(2B) The Secretary or a person mentioned in paragraph (2A)(b) must only use the information:

(a) for a purpose connected with the performance of the functions, or the exercise of the powers, referred to in paragraph (2A)(b); and

(b) in accordance with any conditions imposed under subsection (4).

Disclosure to a foreign agency

(3) The Commission or a Commission official may disclose to:

(a) an agency having the function in a foreign country of supervising or regulating the disclosure of similar information to that covered by an instrument designating a sector under subsection 56AC(2); or

(aa) an agency having the function in a foreign country of supervising or regulating types of actions similar to those declared under section 56ACA; or

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(b) an agency, that is prescribed by the regulations, of a foreign country;

any information that the Commission obtains:

(c) under this Act in relation to Part IVD or the consumer data rules; or

(d) under the consumer data rules.

Conditions

(4) The Commission or a Commission official may impose conditions to be complied with in relation to information disclosed under subsection (1), (2A) or (3).

Definitions

(5) In this section:

Commission official means:

(a) a member, or associate member, of the Commission; or

(b) a person referred to in subsection 27(1); or

(c) a person engaged under section 27A.

foreign country includes a region where:

(a) the region is a colony, territory or protectorate of a foreign country; or

(b) the region is part of a foreign country; or

(c) the region is under the protection of a foreign country; or

(d) a foreign country exercises jurisdiction or control over the region; or

(e) a foreign country is responsible for the region's international relations.

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157B Disclosure of protected cartel information to a court or tribunal

Commission or a Commission official not required to disclose protected cartel information

(1) The Commission or a Commission official is not to be required:

(a) to produce to a court or tribunal a document containing protected cartel information; or

(b) to disclose protected cartel information to a court or tribunal;

except with the leave of the court or tribunal.

(2) In exercising its powers to grant leave under subsection (1), the court or tribunal must have regard to the following matters:

(a) the fact that the protected cartel information was given to the Commission in confidence;

(b) Australia's relations with other countries;

(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;

(d) in a case where the protected cartel information was given by an informant:

(i) the protection or safety of the informant or of persons associated with the informant; and

(ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;

(e) in the case of a court—the interests of the administration of justice;

(f) in the case of a tribunal—the interests of securing the effective performance of the tribunal's functions;

and must not have regard to any other matters.

(3) If:

(a) a document is produced; or

(b) information is disclosed;

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to a court or tribunal in accordance with leave granted under subsection (1) in relation to particular proceedings, the document or information must not be adduced in other proceedings before the court or tribunal except:

(c) in accordance with leave granted under subsection (1) in relation to the other proceedings; or

(d) as a result of an exercise of power under subsection (4) in relation to the other proceedings.

Commission or a Commission official may disclose protected cartel information

(4) The Commission or a Commission official may:

(a) produce to the court or tribunal a document containing protected cartel information; or

(b) disclose protected cartel information to the court or tribunal.

(5) In exercising the powers conferred by subsection (4), the Commission or Commission official must have regard to the following matters:

(a) the fact that the protected cartel information was given to the Commission in confidence;

(b) Australia's relations with other countries;

(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;

(d) in a case where the protected cartel information was given by an informant:

(i) the protection or safety of the informant or of persons associated with the informant; and

(ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;

(e) in the case of production or disclosure to a court—the interests of the administration of justice;

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(f) in the case of production or disclosure to a tribunal—the interests of securing the effective performance of the tribunal's functions;

and must not have regard to any other matters.

(6) If:

(a) a document is produced; or

(b) information is disclosed;

to a court or tribunal as a result of an exercise of power under subsection (4) in relation to particular proceedings, the document or information must not be adduced in other proceedings before the court or tribunal except:

(c) in accordance with leave granted under subsection (1) in relation to the other proceedings; or

(d) as a result of an exercise of power under subsection (4) in relation to the other proceedings.

Definitions

(7) In this section:

Commission official means:

(a) a member, or associate member, of the Commission; or

(b) a person referred to in subsection 27(1); or

(c) a person engaged under section 27A.

disclose means divulge or communicate.

protected cartel information means information that:

(a) was given to the Commission in confidence; and

(b) relates to a breach, or a possible breach, of section 45AF, 45AG, 45AJ or 45AK.

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157C Disclosure of protected cartel information to a party to court proceedings etc.

Commission or Commission official not required to make discovery of documents containing protected cartel information etc.

(1) If:

(a) a person is a party to proceedings before a court; and

(b) the Commission is not a party to the proceedings;

the Commission or a Commission official is not to be required, in connection with the proceedings, to:

(c) make discovery (however described) to the person of a document containing protected cartel information; or

(d) produce to the person a document containing protected cartel information.

(2) If:

(a) a person is considering instituting proceedings before a court; and

(b) the proceedings have not yet been instituted;

the Commission or a Commission official is not to be required, in connection with the prospective proceedings, to:

(c) make discovery (however described) to the person of a document containing protected cartel information; or

(d) produce to the person a document containing protected cartel information.

Commission or Commission official may disclose protected cartel information

(3) If:

(a) a person is a party to proceedings before a court; and

(b) the Commission is not a party to the proceedings;

the Commission or a Commission official may, on application by the person:

(c) make a copy of a document containing protected cartel information; and

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(d) give the copy to the person.

(4) If:

(a) a person is considering instituting proceedings before a court; and

(b) the proceedings have not yet been instituted;

the Commission or a Commission official may, on application by the person:

(c) make a copy of a document containing protected cartel information; and

(d) give the copy to the person.

(5) In exercising the powers conferred by subsection (3) or (4), the Commission or Commission official must have regard to the following matters:

(a) the fact that the protected cartel information was given to the Commission in confidence;

(b) Australia's relations with other countries;

(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;

(d) in a case where the protected cartel information was given by an informant:

(i) the protection or safety of the informant or of persons associated with the informant; and

(ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;

(e) the interests of the administration of justice;

and must not have regard to any other matters.

(6) If a copy of a document is given to a party, or prospective party, to proceedings before a court as a result of an exercise of power under subsection (3) or (4), the copy must not be adduced in other proceedings before:

(a) the court; or

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(b) another court; or
(c) a tribunal;

except:

(d) as a result of an exercise of power under subsection (3) or (4) in relation to the other proceedings; or
(e) in accordance with leave granted under subsection 157B(1) in relation to the other proceedings; or
(f) as a result of an exercise of power under subsection 157B(4) in relation to the other proceedings.

Definitions

(7) In this section:

Commission official means:

(a) a member, or associate member, of the Commission; or
(b) a person referred to in subsection 27(1); or
(c) a person engaged under section 27A.

protected cartel information means information that:

(a) was given to the Commission in confidence; and
(b) relates to a breach, or a possible breach, of section 45AF, 45AG, 45AJ or 45AK.

157D General powers of a court

Power of a court in a criminal or civil proceeding

(1) The power of a court to control the conduct of a criminal or civil proceeding, in particular with respect to abuse of process, is not affected by section 157B or 157C, except so far as that section expressly or impliedly provides otherwise.

Stay order—criminal proceeding

(2) A refusal by a court to grant leave under subsection 157B(1) does not prevent the court from later ordering that a criminal proceeding

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be stayed on the ground that the refusal would have a substantial adverse effect on a defendant's right to receive a fair hearing.

Stay order—civil proceeding

(3) A refusal by a court to grant leave under subsection 157B(1) does not prevent the court from later ordering that a civil proceeding be stayed on the ground that the refusal would have a substantial adverse effect on the hearing in the proceeding.

(4) In deciding whether to order a stay of the civil proceeding, the court must consider:
  (a) the extent of any financial loss that a party would suffer as a result of the proceeding being stayed; and
  (b) whether a party has reasonable prospects of obtaining a remedy in the proceeding; and
  (c) any other matter the court considers relevant.

158 Protection of members of Tribunal, counsel and witnesses

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

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

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

158A Proceedings without initiation notice—use of virtual enquiry technology

(1) This section applies to the following (the ***proceedings***):

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(a) an arbitration of an access dispute under Part IIIA by the Commission as constituted by members of the Commission under section 44Z;
(b) an inquiry under Part VIIA by an inquiry body (within the meaning of that Part) before an inquiry Chair (within the meaning of that Part);
(c) a conference convened under subsection 151AZ(1) by the Commission.

(2) The members of the Commission, the inquiry Chair or the Commission (as applicable) may decide to hold the proceedings:
(a) at one or more physical venues; or
(b) at one or more physical venues and using virtual enquiry technology; or
(c) using virtual enquiry technology only.

(3) Subsections (4) and (5) apply if the proceedings are held:
(a) at one or more physical venues and using virtual enquiry technology; or
(b) using virtual enquiry technology only.

(4) The members of the Commission, the inquiry Chair or the Commission (as applicable) must ensure that the use of the virtual enquiry technology is reasonable.

(5) If the proceedings are held in public, the members of the Commission, the inquiry Chair or the Commission (as applicable) must ensure that:
(a) the virtual enquiry technology provides the public with a reasonable opportunity to observe the proceedings; and
(b) information sufficient to allow the public to observe the proceedings using the virtual enquiry technology is made publicly available in a reasonable way.

(6) If the proceedings are or will be held:
(a) at more than one physical venue; or
(b) at one or more physical venues and using virtual enquiry technology; or

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(c) using virtual enquiry technology only;

the members of the Commission, the inquiry Chair or the Commission (as applicable) may appoint a single place and time at which the proceedings are taken to be or have been held.

(7) This section applies to part of the proceedings in the same way that it applies to all of the proceedings.

158B Proceedings with initiation notice—use of virtual enquiry technology

(1) This section applies to the following (the ***proceedings***):

(a) an appearance to give evidence or produce documents under section 44AAFA before the AER, a member of the staff of the AER or a person assisting the AER;

(b) a conference held under subsection 90A(6) by the Commission as represented by a member or members of the Commission under paragraph 90A(7)(a);

(c) a conference held under subsection 93A(5) by the Commission as represented by a member or members of the Commission under paragraph 93A(6)(a);

(d) a conference held under Subdivision A or B of Division 3 of Part XI by the Commission as represented by a member or members of the Commission under paragraph 132H(1)(a);

(e) an appearance to give evidence or produce documents under section 133D before the Commonwealth Minister or an inspector;

(f) an appearance to give evidence or produce documents under paragraph 155(1)(c) before the Commission or a member of the staff assisting the Commission.

(2) The person who appoints the date or day (if applicable), time and place for the proceedings may decide that the proceedings are to be held:

(a) at one or more physical venues; or

(b) at one or more physical venues and using virtual enquiry technology; or

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(c) using virtual enquiry technology only.

(3) If the proceedings are to be held:

(a) at more than one physical venue; or

(b) at one or more physical venues and using virtual enquiry technology; or

(c) using virtual enquiry technology only;

the single place and time at which the proceedings are taken to be held is that specified in the notice for the proceedings.

(4) Subsections (5) and (6) apply if the proceedings are held:

(a) at one or more physical venues and using virtual enquiry technology; or

(b) using virtual enquiry technology only.

(5) The AER, the person assisting the AER, the member or members of the Commission, the Commission, the Commonwealth Minister, the inspector or the member of the staff assisting the Commission (as applicable) (the ***relevant person***) must ensure that the use of the virtual enquiry technology is reasonable.

(6) If the proceedings are held in public, the relevant person must ensure that:

(a) the virtual enquiry technology provides the public with a reasonable opportunity to observe the proceedings; and

(b) information sufficient to allow the public to observe the proceedings using the virtual enquiry technology is made publicly available in a reasonable way.

(7) This section applies to part of the proceedings in the same way that it applies to all of the proceedings.

159 Incriminating answers

(1) A person appearing before the Commission to give evidence or produce documents is not excused from answering a question, or producing a document, on the ground that the answer to the

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question, or the document, may tend to incriminate the person or expose the person to a penalty.

(2) Evidence given by an individual before the Commission is not admissible against the individual in any criminal proceedings, other than:

(a) proceedings for an offence against this Part; or

(b) proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Part.

160 Failure of witness to attend

(1) A person served, as prescribed, with a summons to appear as a witness before the Tribunal shall not:

(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 Tribunal.

(1A) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

161 Refusal to be sworn or to answer questions

(1) A person appearing as a witness before the Tribunal shall not:

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

(b) refuse or fail to answer a question that he or she is required to answer by the member presiding at the proceedings; or

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

(1A) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

(2) It is a reasonable excuse for an individual to refuse or fail to answer a question that he or she is required to answer under this section that the answer to the question may tend to incriminate him or her.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

(3) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

162 Contempt

(1) A person shall not:

(a) insult a member of the Tribunal, a member of the Commission or an AER member in the exercise of his or her powers or functions as a member;

(b) interrupt the proceedings of the Tribunal or a conference held by the Commission under section 90 or 93A, Division 3 of Part XI or section 151AZ;

(c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the Tribunal is sitting or the Commission is holding such a conference; or

(d) do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court.

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(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

162A Intimidation etc.

A person who:

(a) threatens, intimidates or coerces another person; or

(b) causes or procures damage, loss or disadvantage to another person;

for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission, the Tribunal or the AER, or for or on account of the other person proposing to appear or having appeared as a witness before the Tribunal is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

163 Prosecutions

(1) Prosecutions for offences against this Act may be brought in any court having jurisdiction in the matter.

(2) In so far as this section has effect as a law of the Commonwealth, the Federal Court has jurisdiction in any matter in respect of which a criminal proceeding is instituted for an offence to which subsection (1) applies, and that jurisdiction is exclusive of the jurisdiction of any other court other than:

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(a) the jurisdiction of a Supreme Court of a State or Territory under section 68 of the *Judiciary Act 1903* with respect to any matter in respect of which a criminal proceeding is instituted for an offence against section 45AF or 45AG or subsection 56BN(1) or 56BZI(1); and

(b) the jurisdiction of a court under section 68 of the *Judiciary Act 1903* with respect to the examination and commitment for trial on indictment of a person who is charged with an indictable offence; and

(c) the jurisdiction of the High Court under section 75 of the Constitution.

(4) Proceedings under this section, other than proceedings instituted by:

(aa) the Director of Public Prosecutions; or

(a) the Commission; or

(b) a person authorised in writing by the Commission; or

(c) a person authorised in writing by the Secretary of the Department;

shall not be instituted except with the consent in writing of the Minister or of a person authorised by the Minister in writing to give such consents.

(5) A prosecution for an offence against section 44AAFB, 154Q, 155 or 155B may be commenced at any time after the commission of the offence.

(6) Despite subsection (2), the Federal Court does not have jurisdiction in any matter in respect of which a criminal proceeding is instituted for an offence against section 45AF or 45AG if the proceeding is instituted before the commencement of Schedule 1 to the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009*.

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163A Declarations and orders

Declarations and orders

(1) Subject to this section, a person may, in relation to a matter arising under this Act, a gas market instrument or the consumer data rules, institute a proceeding in a court having jurisdiction to hear and determine proceedings under this section seeking the making of:

(a) a declaration in relation to the operation or effect of any provision of this Act, a gas market instrument or the consumer data rules other than the following provisions:

(i) Part V;

(ii) Part XIB;

(iii) Part XIC; or

(aaa) a declaration in relation to the operation or effect of any provision of the Australian Consumer Law other than Division 1 of Part 3-2 or Part 5-4; or

(aa) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act, a gas market instrument or the consumer data rules; or

(b) an order by way of, or in the nature of, prohibition, certiorari or mandamus;

or both such a declaration and such an order.

(1A) Subsection (1) does not apply in relation to a matter arising under Part IIIAA.

When Minister may institute, or intervene in, proceedings

(2) Subject to subsection (2A), the Minister may institute a proceeding under this section and may intervene in any proceeding instituted under this section or in a proceeding instituted otherwise than under this section in which a party is seeking the making of a declaration of a kind mentioned in paragraph (1)(a) or (aa) or an order of a kind mentioned in paragraph (1)(b).

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(2A) Subsections (1) and (2) do not permit the Minister:

(a) to institute a proceeding seeking a declaration, or an order described in paragraph (1)(b), that relates to Part IV; or

(b) to intervene in a proceeding so far as it relates to a matter that arises under Part IV.

When Commission may institute proceedings

(3) The Commission may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, a gas market instrument or the consumer data rules, the making of a declaration of the kind that may be made under paragraph (1)(a).

Jurisdiction of Federal Court

(3A) Subject to subsections (4B) and (4C), in so far as this section has effect as a law of the Commonwealth, the Federal Court has jurisdiction to hear and determine proceedings under this section.

(4) The jurisdiction of the Federal Court under subsection (3A) to make:

(a) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act, a gas market instrument or the consumer data rules by the Tribunal; or

(b) an order of a kind mentioned in paragraph (1)(b) directed to the Tribunal;

shall be exercised by not less than 3 Judges.

Jurisdiction of State/Territory Supreme Courts etc.

(4A) In so far as this section has effect as a law of the Commonwealth, the Supreme Court of a State or Territory does not have jurisdiction to hear and determine proceedings under this section otherwise than in accordance with subsection (4B) or (4C). This subsection has effect despite any other law, including section 39 of the *Judiciary Act 1903*.

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(4B) If a decision to prosecute a person for an offence against section 45AF or 45AG or subsection 56BN(1) or 56BZI(1) has been made and the prosecution is proposed to be commenced in the Supreme Court of a State or Territory:

(a) the Federal Court does not have jurisdiction with respect to any matter in which a person seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to that decision; and

(b) if the Supreme Court is the Supreme Court of a State—in so far as this section has effect as a law of the Commonwealth, the Supreme Court is invested with federal jurisdiction with respect to any such matter; and

(c) if the Supreme Court is the Supreme Court of a Territory, then:

(i) in so far as this section has effect as a law of the Commonwealth; and

(ii) subject to the Constitution;

the Supreme Court is conferred with jurisdiction with respect to any such matter.

(4C) Subject to subsection (4D), at any time when:

(a) a prosecution for an offence against section 45AF or 45AG or subsection 56BN(1) or 56BZI(1) is before the Supreme Court of a State or Territory; or

(b) an appeal arising out of such a prosecution is before the Supreme Court of a State or Territory;

the following apply:

(c) the Federal Court does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to a related criminal justice process decision;

(d) if the Supreme Court is the Supreme Court of a State—in so far as this section has effect as a law of the Commonwealth, the Supreme Court is invested with federal jurisdiction with respect to any such matter;

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(e) if the Supreme Court is the Supreme Court of a Territory, then:

(i) in so far as this section has effect as a law of the Commonwealth; and

(ii) subject to the Constitution;

the Supreme Court is conferred with jurisdiction with respect to any such matter.

(4D) Subsection (4C) does not apply if, before the commencement of a prosecution for an offence against section 45AF or 45AG or subsection 56BN(1) or 56BZI(1), a person seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to a related criminal justice process decision.

(4E) If subsection (4D) applies, the prosecutor may apply to the Federal Court for a permanent stay of the paragraph (1)(aa) or (b) proceedings referred to in that subsection, and the Federal Court may grant such a stay if the Federal Court determines that:

(a) the matters the subject of the proceedings are more appropriately dealt with in the criminal justice process; and

(b) a stay of proceedings will not substantially prejudice the person.

Definitions

(5) In this section, ***proceeding*** includes a cross-proceeding.

(6) In this section:

related criminal justice process decision has the same meaning as in section 39B of the *Judiciary Act 1903*.

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

(1) A person may, on application in accordance with the regulations and on payment of the prescribed fee (if any):

(a) inspect any document contained in the register kept under subsection 89(3) or 95(1); and

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(b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy under the hand of a person authorised by the Commission to certify such copies).

(2) Subject to subsection (3) and to any direction under subsection 106(2), a person may, on application in accordance with the regulations and on payment of the prescribed fee (if any):

(a) inspect the document recording a declaration under section 50A or a determination of the Tribunal or any document furnished to, or recorded in the records of, the Tribunal in pursuance of this Act or the regulations; and

(b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy under the hand of the Registrar or of a Deputy Registrar).

(3) Unless the Tribunal in a particular case otherwise directs, subsection (2) does not apply in relation to a document furnished to the Tribunal if the person by whom the document was furnished claims, as prescribed, that the document contains matter of a confidential nature.

(4) A copy of a determination of the Commission, certified to be a true copy by a person authorised by the Commission to certify copies of determinations of the Commission, shall be received in all courts as evidence of the determination.

(5) A document purporting to be a copy of a determination of the Commission and to be certified to be a true copy in accordance with subsection (4) shall, unless the contrary is established, be deemed to be such a copy and to be so certified.

(6) A copy of a declaration under section 50A or a determination of, or undertaking given to, the Tribunal, certified to be a true copy under the hand of the Registrar or of a Deputy Registrar, shall be received in all courts as evidence of the declaration, determination or undertaking.

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166 Certificates as to furnishing of particulars to Commission

(1) Where particulars of a provision of a contract, arrangement or understanding, or particulars of a concerted practice, have been furnished to the Commission for the purposes of paragraph 51(2)(g), the Commission shall, on application by a party to the contract, arrangement, understanding or concerted practice, cause to be furnished to the party a certificate signed by a member of the Commission specifying the particulars so furnished and the date on which the particulars were furnished.

(2) A certificate referred to in subsection (1) shall be received in all courts as evidence that the particulars specified in the certificate were furnished to the Commission on the date so specified.

(3) A person is not entitled to inspect any particulars that have been furnished to the Commission for the purposes of paragraph 51(2)(g), but the Commission may make those particulars available to the Minister or to an officer acting on behalf of, and with the authority of, the Minister or to a court.

167 Judicial notice

(1) All courts shall take judicial notice of:

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

(b) the official seal of the Tribunal, of the Commission or of the AER;

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

(1A) All courts must take judicial notice of:

(a) the official signature of a person who holds or has held the office of Chairman, Deputy Chairman, or member (including associate member) of the New Zealand Commerce

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Commission and of the fact that the person holds or has held the office; and

(b) the imprint of the common seal of the New Zealand Commerce Commission;

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

(2) In this section, ***court*** includes a Federal Court or a court of a State or Territory and all persons authorised by law or by consent of parties to receive evidence.

170 Legal and financial assistance

(1) A person:

(a) who has instituted, or proposes to institute, a proceeding before the Commission or the Tribunal, or a proceeding before the Court under Part IVB, Part VI or section 163A, or under Part 3-5 or Chapter 5 of the Australian Consumer Law;

(b) who is entitled to participate, or has been permitted to intervene, in a proceeding before the Commission or the Tribunal; or

(c) against whom a proceeding before the Court has been instituted under Part IVB, Part VI or section 163A, or under Part 3-5 or Chapter 5 of the Australian Consumer Law;

may apply to the Attorney-General for a grant of assistance under this section in respect of the proceeding.

(2) Where an application is made by a person under subsection (1), the Attorney-General, or a person appointed or engaged under the *Public Service Act 1999* (the ***public servant***) authorised in writing by the Attorney-General, may, if he or she is satisfied that it would involve hardship to that person to refuse the application and that, in all the circumstances, it is reasonable that the application should be granted, authorise the grant by the Commonwealth to the person, either unconditionally or subject to such conditions as the Attorney-General or public servant determines, of such legal or financial assistance in relation to the proceeding as the Attorney-General or public servant determines.

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(3) In this section:

(a) a reference to a proceeding before the Commission is a reference to a proceeding in relation to an application for, or in relation to the revocation of, an authorisation under Division 1 of Part VII; and

(b) a reference to a proceeding before the Tribunal is a reference to:

(i) an application to the Tribunal for a declaration under subsection 50A(1); or

(iii) an application for a review of a determination, or of the giving of a notice, by the Commission.

171 Annual report by Commission

(2) An annual report prepared by the Chairperson and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* for a period must include a cumulative list of all Commonwealth, State and Territory laws that the Commission knows about that authorise things for the purposes of subsection 51(1) of this Act or subsection 51(1) of the Competition Code (as defined in section 150A).

(3) The report must also include:

(aa) details of the time taken by the Commission to:

(i) make final determinations under section 44V in relation to access disputes; and

(ii) make decisions on access undertaking applications (within the meaning of section 44B) or access code applications (within the meaning of that section); and

(iii) make decisions on applications under subsection 44PA(1) (about government tendering); and

(ab) the following information relating to the acquisitions provisions:

(i) the number of notification waiver applications made, and a general summary of the kinds of acquisitions to which the applications related;

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(ii) the number of notifications of acquisitions made, and a general description of the kinds of acquisitions notified;

(iii) the number of notifications that the Commission decided were to be subject to phase 2 review, and a general summary of the circumstances in which the Commission made such decisions;

(iv) the number of acquisition determinations the Commission made that included conditions, and a general description of the kinds of conditions included;

(v) a general summary of the kinds of goodwill protection provisions specified in notifications of acquisitions (see subsection 51ABY(6));

(vi) the number of declarations the Commission included in determinations under subsection 51ABZG(1), and a general summary of the circumstances in which the Commission included such declarations; and

(a) the number of:

(i) notices given by the Commission under section 155; and

(iii) notices given by the Commission under section 155A; and

(b) a general description of the nature of the matters in respect of which the notices were given; and

(c) the number of proceedings brought to challenge the validity of the notices; and

(ca) the number of search warrants issued by a judge under section 135Z or signed by a judge under section 136; and

(d) the number of search warrants issued by a magistrate under section 154X or signed by a magistrate under section 154Y; and

(da) a general description of the nature of the matters in respect of which the search warrants referred to in paragraph (ca) or (d) were issued or signed; and

(db) the number of proceedings brought to challenge the validity of the search warrants referred to in paragraph (ca) or (d); and

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(dc) the number of entries onto premises under section 133B or 133C, Division 6 of Part XI or Part XID; and

(dd) the number of designated complaints received by the Commission; and

(de) the number of designated complaints in respect of which the Commission did not comply with each of the following:

(i) section 154ZG;

(ii) paragraph 154ZK(3)(b); and

(e) the number of complaints (other than designated complaints) received by the Commission; and

(f) a general summary of the kinds of complaints (including designated complaints) received by the Commission and how it dealt with them; and

(g) a general description of the major matters investigated by the Commission; and

(h) the number of times the Commission has intervened in proceedings and a general description of the reasons for doing so.

171A Charges by the Commission

(1) The Commission may make a charge of an amount, or at a rate, determined by the Commission for:

(a) supplying a person with material published by the Commission in the course of carrying out its functions or exercising its powers; or

(b) permitting a person to attend or take part in a prescribed activity arranged by or on behalf of the Commission for the purpose of carrying out any of its functions.

(2) Where:

(a) the Commission provides a discretionary service for a person; and

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(b) this Act does not otherwise provide for a charge for the service;

the Commission may make a charge of such amount, or at such a rate, as is agreed between the Commission and the person.

(3) In this section, a reference to the provision by the Commission of a discretionary service for a person is a reference to the doing of an act by the Commission, being a prescribed act that:

(a) the Commission has power to do but is not required to do by or under any law; and

(b) the Commission does at the person's request.

171B Division 3 of Part IIIA does not confer judicial power on the Commission

(1) Division 3 of Part IIIA has no effect to the extent (if any) to which it purports to confer judicial power on the Commission.

(2) In this section:

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

172 Regulations

(1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act (other than Schedule 2) to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act (other than Schedule 2) and, in particular, prescribing:

(a) matters in connexion with the procedure of the Tribunal, the Commission and the AER; and

(b) the fees and expenses of witnesses in proceedings before the Tribunal and the Commission; and

(c) matters for and in relation to the costs, if any, that may be awarded by the Court in proceedings before the Court under this Act; and

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(d) the fees payable to the Commission on making a prescribed application, or giving a prescribed notice, to the Commission under this Act or the regulations.

(1B) Regulations made for the purposes of paragraph (1)(a) or (b) 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.

(2) The regulations may, either unconditionally or subject to such conditions as are specified in the regulations, exempt from the application of this Act (other than Part IV or Schedule 2) or of specified provisions of this Act (other than Part IV or Schedule 2):

(a) conduct engaged in by a specified organization or body that performs functions in relation to the marketing of primary products;

(b) a prescribed contract or proposed contract, contracts included in a prescribed class of contracts, or prescribed conduct, being a contract, proposed contract or class of contracts made, or conduct engaged in, in pursuance of or for the purposes of a specified agreement, arrangement or understanding between the Government of Australia and the Government of a country outside Australia; or

(c) prescribed conduct engaged in in the course of a business carried on by the Commonwealth or by a prescribed authority of the Commonwealth.

(2A) The regulations may prescribe the circumstances in which the Commission may, on behalf of the Commonwealth, wholly or partly waive the fee that would otherwise be payable for an application referred to in subsection 89(1).

(2B) Subsection (2A) does not apply to an application for a merger authorisation, a minor variation of such an authorisation, a revocation of such an authorisation or a revocation of such an authorisation and the substitution of another authorisation.

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(3) Strict compliance with a form of application or notice prescribed or approved for the purposes of this Act is not, and shall be deemed never to have been, required and substantial compliance is, and shall be deemed always to have been, sufficient.

173 Authorisation for the purposes of subsection 51(1)

(1) In deciding whether a person (including a corporation) has contravened section 50 of this Act, the vesting of ownership of primary products in the person by legislation is to be taken, for the purposes of subparagraph 51(1)(a)(i), to be specified in, and specifically authorised by, this section.

(2) In this section:

primary products means:

(a) agricultural or horticultural produce, including produce that has been subjected to a manufacturing process; 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.

Note: An example of agricultural produce that has been subjected to a manufacturing process is sugar cane that has been transformed into raw sugar.

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Part XIII—Application and transitional provisions relating to the competition provisions

Division 1—Cartel conduct

174 Definitions

(1) In this Division:

commencement time means the commencement of Division 1 of Part IV.

(2) A reference in this Division to subsection 88(1A) or paragraph 88(1A)(b) is a reference to that subsection or paragraph as in force before the commencement of Schedule 9 to the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*.

175 Giving effect after the commencement time to a cartel provision in existence before that time

The following provisions of this Act:

(a) paragraph 88(1A)(b);

(b) paragraph 93AB(1A)(c);

(c) paragraph 93AB(1A)(d);

apply in relation to a contract or arrangement made, or an understanding arrived at, before, at or after the commencement time.

176 Proceedings relating to price-fixing contraventions taking place before the commencement time

Despite the repeal of section 76D by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*, that section continues to apply, in relation to proceedings (whether instituted before or after the commencement time) in relation to a

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contravention that took place before the commencement time, as if that repeal had not happened.

177 Authorisations in force before the commencement time

(1) This section applies if:

(a) an authorisation (the ***pre-commencement authorisation***) was granted to a person to give effect to a provision of a contract, arrangement or understanding; and

(b) the provision is a cartel provision; and

(c) the authorisation was in force immediately before the commencement time.

(2) This Act has effect, after the commencement time, as if:

(a) the Commission had, at the commencement time, granted to the person an authorisation under subsection 88(1A) to give effect to the cartel provision; and

(b) the day specified in the subsection 88(1A) authorisation as the day the authorisation comes into force were the day on which Division 1 of Part IV commenced; and

(c) if, immediately before the commencement time, the pre-commencement authorisation was expressed to be in force for a period (the ***initial period***) specified in that authorisation—the subsection 88(1A) authorisation were expressed to be in force for a period specified in the subsection 88(1A) authorisation, and that period were the period:

(i) starting at the commencement time; and

(ii) ending at the end of the initial period; and

(d) any requirements for the granting of the subsection 88(1A) authorisation were satisfied.

(3) Subsection (2) does not prevent the subsection 88(1A) authorisation from being varied, revoked or set aside in accordance with this Act.

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178 Notifications in force before the commencement time

(1) This section applies if:

(a) a person gave the Commission a collective bargaining notice under subsection 93AB(1) in relation to a proposal to give effect to a provision of a contract, arrangement or understanding; and

(b) the provision is a cartel provision of the kind referred to in paragraph 93AB(1A)(c) or (d); and

(c) the subsection 93AB(1) notice is in force immediately before the commencement time.

(2) This Act has effect, after the commencement time, as if:

(a) the person had, at the commencement time, given the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a proposal to give effect to the cartel provision; and

(b) despite subsections 93AD(1) and (2), the subsection 93AB(1A) notice had come into force at the commencement time; and

(c) despite paragraph 93AD(3)(c), the period applicable to the subsection 93AB(1A) notice for the purposes of paragraph 93AD(3)(c) were the period:

(i) starting at the commencement time; and

(ii) ending at the end of the period of 3 years starting on the day the person gave the subsection 93AB(1) notice to the Commission; and

(d) any requirements for the giving of the subsection 93AB(1A) notice were satisfied.

(3) Subsection (2) does not prevent the subsection 93AB(1A) notice from ceasing to be in force in accordance with this Act.

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Division 2—Application of amendments made by the Competition and Consumer Legislation Amendment Act 2011

179 Amendments of section 50

The amendments of section 50 made by Schedule 1 to the *Competition and Consumer Legislation Amendment Act 2011* apply to acquisitions occurring after the commencement of that Schedule.

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Division 3—Application of amendments made by the Competition and Consumer Amendment (Competition Policy Review) Act 2017

180 Definitions

In this Division:

amended Act means this Act as amended by the amending Act.

amending Act means the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*.

commencement time means the commencement of Schedule 1 to the amending Act.

181 Amendment of the definition of *competition*

The repeal and substitution of the definition of ***competition*** in subsection 4(1) made by Schedule 1 to the amending Act applies in relation to conduct engaged in at or after the commencement time.

182 Orders under section 87

If:

(a) before the commencement time, an order was made under section 87 relating to a contravention of section 45B; and

(b) the order was still in force immediately before the commencement time;

the amendments made to section 87 by Schedule 5 to the amending Act do not apply in relation to, and do not affect the validity of, the order.

183 Authorisations under section 88

(1) An authorisation granted under section 88 (other than former subsection 88(5) or (6A)) that was in force immediately before the

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commencement time continues in force (and may be dealt with) at and after the commencement time as if:

(a) it were granted under that section as amended by Schedule 9 to the amending Act; and

(b) it specified the following provision or provisions of Part IV:

(i) if the authorisation was granted under former subsection 88(1A)—sections 45AF, 45AG, 45AJ and 45AK;

(ii) if the authorisation was granted under former subsection 88(1)—section 45;

(iii) if the authorisation was granted under former subsection 88(7)—sections 45D, 45DA and 45DB;

(iv) if the authorisation was granted under former subsection 88(7A)—sections 45E and 45EA;

(v) if the authorisation was granted under former subsection 88(8)—section 47;

(vi) if the authorisation was granted under former subsection 88(8A)—section 48;

(vii) if the authorisation was granted under former subsection 88(8B)—section 49;

(viii) if the authorisation was granted under former subsection 88(9)—section 50A.

(2) If:

(a) a valid application for an authorisation under section 88 (other than former subsection 88(5) or (6A)) is made before the commencement time; and

(b) before the commencement time, the Commission has not made a determination in respect of the application under subsection 90(1);

at and after the commencement time, the application is taken to be (and may be dealt with as) an application made under section 88 of the amended Act.

(3) An authorisation granted before the commencement time under section 88 (other than former subsection 88(5) or (6A)) which had

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not come into force before the commencement time is, after the authorisation comes into force, taken to be (and may be dealt with as) an authorisation:

(a) granted under that section as amended by Schedule 9 to the amending Act; and

(b) that specifies the following provision or provisions of Part IV:

(i) if the authorisation was granted under former subsection 88(1A)—sections 45AF, 45AG, 45AJ and 45AK;

(ii) if the authorisation was granted under former subsection 88(1)—section 45;

(iii) if the authorisation was granted under former subsection 88(7)—sections 45D, 45DA and 45DB;

(iv) if the authorisation was granted under former subsection 88(7A)—sections 45E and 45EA;

(v) if the authorisation was granted under former subsection 88(8)—section 47;

(vi) if the authorisation was granted under former subsection 88(8A)—section 48;

(vii) if the authorisation was granted under former subsection 88(8B)—section 49;

(viii) if the authorisation was granted under former subsection 88(9)—section 50A.

184 Notices under section 93

A notice that was in force under a provision of section 93 immediately before the commencement time continues in force (and may be dealt with) at and after the commencement time as if it had been given under that provision as amended by the amending Act.

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185 Merger clearances and authorisations

Existing old law merger clearances and authorisations to be treated as new law merger authorisations

(1) A clearance or authorisation granted under former Division 3 of Part VII that was in force immediately before the commencement time continues in force (and may be dealt with) at and after the commencement time as if:

(a) it were an authorisation granted under section 88 of the amended Act; and

(b) it specified section 50.

Old law continues to apply to applications for merger clearances and authorisations pending at commencement

(2) Despite the repeal of Subdivisions A and B of Division 3 of Part VII by Schedule 9 to the amending Act, those Subdivisions (other than sections 95AH, 95AI, 95AR and 95AS) continue to apply at and after the commencement time, as if the repeal had not happened, in relation to an application for a clearance made under section 95AD before the commencement time, unless:

(a) a determination was made before the commencement time under section 95AM refusing to grant the clearance; or

(b) the clearance came into force before the commencement time.

Note: If a clearance is granted in relation to the application, it is taken to be an authorisation under section 88 that specifies section 50: see subsections (6) and (7).

(3) Despite the repeal of Subdivisions A and C of Division 3 of Part VII by Schedule 9 to the amending Act, those Subdivisions (other than sections 95AZ, 95AZA, 95AZL and 95AZM) continue to apply at and after the commencement time, as if the repeal had not happened, in relation to an application:

(a) made under section 95AU before the commencement time; and

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(b) in relation to which a determination under section 95AZG had not been made before the commencement time.

Note: If an authorisation is granted in relation to the application, it is taken to be an authorisation under section 88 that specifies section 50: see subsection (6).

New law generally applies for review of merger clearance determinations

(4) At and after the commencement time, Part IX as amended by Schedule 9 to the amending Act applies in relation to a determination (a ***clearance determination***) made by the Commission before, at or after the commencement time under former section 95AM in relation to a clearance, as if the clearance determination related to a merger authorisation that is not an overseas merger authorisation.

Note: Former section 95AM is repealed by Schedule 9 to the amending Act, but has a continued limited application: see subsection (2).

Old law continues to apply to review of merger clearance determinations if proceedings are pending at commencement

(5) However, if:

(a) an application for a review of a clearance determination is made under former Division 3 of Part IX before the commencement time; and

(b) the Tribunal has not made its decision on the review before the commencement time;

then:

(c) subsection (4) does not apply in relation to the clearance determination; and

(d) despite the repeal of that Division by Schedule 9 to the amending Act, that Division continues to apply in relation to the clearance determination at and after the commencement time, as if the repeal had not happened.

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Old law merger clearances and authorisations granted or coming into force after commencement to be treated as new law merger authorisations

(6) A clearance or authorisation granted at or after the commencement time in relation to an application made under former section 95AD or 95AU before the commencement time is, after it is granted, taken to be (and may be dealt with as) an authorisation:
  (a) granted under section 88 of the amended Act; and
  (b) that specifies section 50.

Note: This subsection covers applications processed after the commencement time under the old law as it continues to apply under subsection (2), (3) or (5).

(7) A clearance granted before the commencement time in relation to an application made under former section 95AD which had not come into force before the commencement time is, after the clearance comes into force, taken to be (and may be dealt with as) an authorisation:
  (a) granted under section 88 of the amended Act; and
  (b) that specifies section 50.

Prohibition against providing false or misleading information applies to information given as a result of this section

(8) Section 92 applies to information given to the Commission or Tribunal, at or after the commencement time, under Division 3 of Part VII, or Division 3 of Part IX, as it continues to apply under subsection (2), (3) or (5), in connection with a clearance or authorisation as if the information were information given:
  (a) to the Commission or Tribunal under Division 1 of Part VII, or Part IX, of the amended Act; and
  (b) in connection with a merger authorisation.

Note: Remedies can be obtained after the commencement time in relation to false or misleading information given to the Commission or Tribunal before the commencement time: see former section 95AZN, and subsection 7(2) of the *Acts Interpretation Act 1901*.

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Normal application of provisions unaffected

(9) Nothing in this section limits the application of Part IX, or section 92, of the amended Act.

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Division 4—Application of amendment made by the Treasury Laws Amendment (2018 Measures No. 5) Act 2019

186 Application of repeal of subsection 51(3)

(1) The amendment made by item 1 of Schedule 4 to the *Treasury Laws Amendment (2018 Measures No. 5) Act 2019* applies in relation to a licence granted, an assignment made, or a contract, arrangement or understanding entered into, on or after the commencement of that Schedule.

(2) The amendment also applies to a licence granted, an assignment made, or a contract, arrangement or understanding entered into, before the commencement of that Schedule in relation to:

(a) conditions imposed, or provisions included, on or after that commencement; and

(b) conditions imposed, or provisions included, before that commencement.

(3) Despite subsections (1) and (2), the amendment does not apply to the extent (if any) to which its operation would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph).

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Division 5—Application of amendments made by the Treasury Laws Amendment (More Competition, Better Prices) Act 2022

187 Application of amendments

The amendments made by Part 2 of Schedule 1 to the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* apply in relation to offences committed on or after the commencement of that Schedule.

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Division 6—Application of amendments made by the Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024

188 Notifications may be made on or after 1 July 2025

Division 3 of Part IVA applies in relation to a notification made on or after 1 July 2025.

189 Requirement to notify

(1) Division 2 of Part IVA does not apply in relation to an acquisition to which subsection (2) applies.

(2) This subsection applies to an acquisition if:

(a) between 1 July 2025 and 31 December 2025, the Commission:

(i) grants a merger authorisation for the authorisation; or

(ii) advises a party to the acquisition, in writing, that the Commission does not intend to take action under this Act in relation to a contravention, or possible contravention, of section 50 in relation to the acquisition; and

(b) the acquisition is put into effect during the 12 months starting on the day the Commission grants the merger authorisation or gives the advice.

(3) To avoid doubt, subparagraph (2)(a)(ii) does not:

(a) give the Commission any power, duty or function, including the power, duty or function of giving the advice referred to in that subparagraph or of making a decision in relation to giving such advice; or

(b) limit the ability of the Commission to take any action referred to in that subparagraph; or

(c) affect the operation of any law other than Division 2 of Part IVA.

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Notification waiver applications

(4) An application may be made under subsection 51ABU(1) on or after 1 January 2026.

190 Annual reports by Commission

Paragraph 171(3)(ab) applies in relation to an annual report for a period ending on or after 30 June 2026.

191 Amendments of section 50

The amendments made by Division 1 of Part 3 of Schedule 1 to the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* apply in relation to an acquisition that is put into effect on or after 1 January 2026, other than an acquisition to which subsection 189(2) of this Act applies.

192 Acquisition of property

(1) The amendments made by Schedule 1 to the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* do not apply in relation to an acquisition if:

(a) apart from this section, the operation of the amendments in relation to the acquisition would result in an acquisition of property from a person otherwise than on just terms; and

(b) the acquisition of property would be invalid because of paragraph 51(xxxi) of the Constitution.

(2) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

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Division 7—Application of amendments made by the Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026

193 Application of amendments

The amendments made by item 5 of Schedule 1 to the *Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026* apply in relation to offences committed on or after the commencement of that Schedule.

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