

Trade Practices Act 1974

Act No. 51 of 1974 as amended

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Volume 2 includes: Table of Contents
Sections 10.01 – 178
Schedule

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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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;
 - (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;

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- (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:
 - (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK (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.

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.

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.

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.

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
 - (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.

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, 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
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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
 - (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.
- (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

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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.

- (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.

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.

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:
 - (i) the purpose/effect condition set out in subsection 44ZZRD(2);
 - (ii) the competition condition set out in subsection 44ZZRD(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 44ZZRD(3);
 - (ii) the competition condition set out in subsection 44ZZRD(4); or
- (a) that is an exclusionary provision; 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), (a) 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
 - (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).

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.

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 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

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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 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45

- (1) Sections 44ZZRF, 44ZZRJ 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 44ZZRG, 44ZZRK 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 relation to an outwards liner cargo shipping service or an inwards liner cargo shipping service.

10.17A Exemptions from sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45 for freight rate agreements

- (1) Sections 44ZZRF, 44ZZRJ 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 44ZZRF, 44ZZRJ 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 44ZZRG, 44ZZRK 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 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.

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- (4) Sections 44ZZRG, 44ZZRK 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:
 - (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 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45

- (1) Sections 44ZZRF, 44ZZRJ 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 44ZZRG, 44ZZRK and 45 do not apply in relation to conduct engaged in by a party to a loyalty 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.

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.

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- (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 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45 and 47 in relation to certain negotiations

- (1) Sections 44ZZRF, 44ZZRJ, 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 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 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 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 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45 and 47 in relation to stevedoring contracts

- (1) Sections 44ZZRF, 44ZZRJ and 45 do not apply in relation to the making of a stevedoring contract.

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

- (2) Sections 44ZZRG, 44ZZRK, 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 44ZZRF, 44ZZRJ, 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:

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.

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:
 - (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:
- (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.

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- (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
 - (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).

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;

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- (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 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.

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).
- (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;
 - (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.

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- (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
 - (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.

- (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
 - (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

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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:
- (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:

(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

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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.

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.

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
 - (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
 - (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).

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- (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.

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.
- (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

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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);
 - (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 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;

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- (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;
 - (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;
 - (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

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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.
- (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 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;

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- (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.

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.
- (2) Part VI applies in relation to subsection (1) as if that subsection were a provision of Part IV.

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.
- (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:
- 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 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.

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 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 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.

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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.
- (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;
 - (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.

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- (2) Part VI applies in relation to subsection (1) as if that subsection were a provision of Part IV.

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

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- (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 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.

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 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
 - (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.

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) is guilty of an offence punishable, on conviction, by a fine not exceeding:
 - (a) in the case of a natural person—\$2,000; and
 - (b) in the case of a body corporate—\$10,000.

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
 - (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.

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- (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.

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.

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 *Legislative Instruments 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).

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.

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.

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).

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.

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.
- (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.

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.
- (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;
- 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

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- (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.

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 Appeals Tribunal for review of a reviewable decision.
- (2) In subsection (1):

decision has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

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 Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975* 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 Appeals Tribunal for review of a decision may, under section 28 of that Act, request a statement that includes reasons for the decision.
- (2) Paragraph (1)(b) does not apply in relation to a case to which subsection 28(4) of the *Administrative Appeals Tribunal Act 1975* applies.

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- (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.

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
 - (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.

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- (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;
- (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
 - (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

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- (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 XIX and section 155 to investigations under Part

- (1) Part XIX 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.

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;
 - (iii) an appointment made by the Governor-General or a Minister but not under an Act;

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- (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 the Schedule 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;
 - (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, references to corporations are to include references to persons who are not corporations.

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:
- (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).

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.

- (6) Subsections (1) to (5) do not limit section 150F.

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.

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.

Section 150J

**150J Authorisations etc. under this Act may relate also to
Competition Code**

The validity of an authorisation, notification, clearance 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.

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).

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 competition notice that was in force at the time when the alleged conduct occurred.

Part XIB The Telecommunications Industry: Anti-competitive conduct and record-keeping rules

Division 1 Introduction

Section 151AB

- 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***.
- Carriers and carriage service providers may be directed to file tariff information with the Commission. The direction is called a ***tariff filing direction***.
- 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:

ACMA means the Australian Communications and Media Authority.

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*.

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.

Part A competition notice means a notice issued under subsection 151AKA(1) or (2).

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.

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service provider rule has the same meaning as in the *Telecommunications Act 1997*.

tariff filing direction means a direction under section 151BK.

telecommunications market has the meaning given by section 151AF.

151AC Extension to external Territories

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*).

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
 - (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.

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;
- 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

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- (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
- (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
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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 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 or VII not affected by this Part

In determining the meaning of a provision of Part IV or VII, the provisions of this Part are to be ignored.

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.

- (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 44ZZRJ, 44ZZRK, 45, 45B, 46, 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 44ZZRJ, 44ZZRK, 45, 45B, 46, 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 44ZZRL and 44ZZRM;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 44ZZRN 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, 45B, 46, 47 or 48, the following assumptions are to be made:
- (a) the assumption that the expression “or any body corporate related to such a corporation” were omitted from subsection 45(3);
 - (b) the assumption that the expression “or a body corporate related to the corporation” were omitted from paragraph 45(4)(b);
 - (c) the assumption that the expression “or of a body corporate that is related to the corporation” were omitted from paragraphs 46(1)(a) and (1AA)(a);
 - (d) the assumption that subsection 46(2) had not been enacted;
 - (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 subsection (2) or (3), a carrier or carriage service provider does not engage in anti-competitive conduct if that conduct does not constitute a contravention of section 44ZZRJ, 44ZZRK, 45, 45B, 46, 47 or 48:
- (a) because an authorisation is in force; or
 - (b) because of the operation of subsection 44ZZRL(1) or 45(8A) or section 93; or
 - (c) because of the operation of subsection 45(9); or
 - (d) because of the operation of subsection 45B(8); or
 - (e) because of the operation of section 44ZZRM.
- (8) A carrier or carriage service provider does not engage in anti-competitive conduct if that conduct occurred before 1 July 1997.

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.

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 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.

Consultation

- (9) The Commission must not issue a Part A competition notice under subsection (1) in relation to a carrier or carriage service provider unless the Commission has first:
 - (a) given the carrier or provider a written notice:
 - (i) stating that the Commission proposes to issue a Part A competition notice under subsection (1) in relation to the carrier or provider; and
 - (ii) describing, in summary form, the instance of anti-competitive conduct that is proposed to be specified in the Part A competition notice; and
 - (iii) inviting the carrier or provider to make a submission to the Commission on the proposal by a specified time limit; and
 - (b) considered any submission that was received within that time limit.
 - (10) The Commission must not issue a Part A competition notice under subsection (2) in relation to a carrier or carriage service provider unless the Commission has first:
 - (a) given the carrier or provider a written notice:
 - (i) stating that the Commission proposes to issue a Part A competition notice under subsection (2) in relation to the carrier or provider; and
 - (ii) describing, in summary form, the kind of anti-competitive conduct that is proposed to be specified in the Part A competition notice; and
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- (iii) inviting the carrier or provider to make a submission to the Commission on the proposal by a specified time limit; and
- (b) considered any submission that was received within that time limit.

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**.

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:
 - (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.

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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
 - (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:
- (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 Magistrates Court 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 Magistrates Court or a Federal Magistrate may, by order, on such conditions as the Court or the Federal Magistrate 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

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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:
- (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).
- (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:
 - (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.

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
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- (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:
 - (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 non-profit community organisation or a non-profit charitable organisation; 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.
- (3) Subsection (2) does not, by implication, limit the matters to which the Commission may have regard.
- (4) The Commission must not make an exemption order in relation to particular conduct of a person if:
- (a) the conduct is in contravention of section 46; and
 - (b) subsection 46(6) does not apply to the conduct.
- (5) Subsections 151AJ(4) and (5) apply for the purposes of subsection (4) of this section in a corresponding way to the way in which they apply for the purposes of subsection 151AJ(3).
- (6) In this section:
- environment*** includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings.

Section 151BD

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
 - (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);
 - (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.

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- (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.

Division 4—Tariff filing

151BK Tariff filing directions

- (1) This section applies to a person who is a carrier or carriage service provider if the Commission is satisfied that the person has a substantial degree of power in a telecommunications market.
- (2) The Commission may give the person a written direction that:
 - (a) contains a statement to the effect that any or all of the following are within the scope of the direction:
 - (i) specified carriage services;
 - (ii) specified ancillary goods;
 - (iii) specified ancillary services; and
 - (b) complies with subsection (3), (4) or (5).

The direction is called a *tariff filing direction*.

Note: For enforcement of tariff filing directions, see Division 7.

- (3) A direction complies with this subsection if it contains a requirement that if, at the time the direction is given, the person has charges for goods or services within the scope of the direction, the person must give the Commission, within the period and in the form specified in the direction, a written statement setting out such information about those charges as is specified in the direction.
- (4) A direction complies with this subsection if it contains a requirement that the person must, at least 7 days before:
 - (a) imposing a new charge for goods or services within the scope of the direction at any time when the direction is in force; or
 - (b) varying a charge for goods or services within the scope of the direction at any time when the direction is in force; or
 - (c) ceasing to impose a charge for goods or services within the scope of the direction at any time when the direction is in force;

give the Commission, in the form specified in the direction, a written statement setting out such information about the person's intentions as is specified in the direction.

Note: See subsection (6) for a special rule relating to this subsection.

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- (5) A direction complies with this subsection if it contains a requirement that, in the event that the person:
- (a) imposes a new charge for goods or services within the scope of the direction at any time when the direction is in force; or
 - (b) varies a charge for goods or services within the scope of the direction at any time when the direction is in force; or
 - (c) ceases to impose a charge for goods or services within the scope of the direction at any time when the direction is in force;
- the person must give the Commission:
- (d) within such period after the imposition, variation or cessation, as the case may be, as is specified in the direction; and
 - (e) in the form specified in the direction;
- a written statement setting out such information about the imposition, variation or cessation, as the case may be, as is specified in the direction.
- (6) The Commission may, on the application of the person, make a written determination that subsection (4) has effect, in relation to a specified matter, as if the reference in that subsection to 7 days were a reference to such shorter period as is specified in the determination. The determination has effect accordingly.
- (7) This section does not, by implication, limit section 87B or 155.
- (8) This section does not prevent 2 or more tariff filing directions being given to the same person at the same time.
- (9) For the purposes of this section, information relating to the terms and conditions on which goods or services have been, are being or are proposed to be supplied is taken to be information relating to charges that have been imposed, are being imposed or are proposed to be imposed for those goods or services.
- (10) A tariff filing direction given before 1 July 1997 comes into force on 1 July 1997.
- (11) In this section:
- ancillary goods*** means goods for use in connection with a carriage service.

ancillary service means a service for use in connection with a carriage service.

variation, in relation to a charge, means a variation of the nature of the charge or the amount of the charge, or both.

151BL Specification of goods and services

- (1) Goods or services may be specified in a tariff filing direction by reference to any or all of the following:
 - (a) the nature of the goods or services;
 - (b) the customers to whom the goods or services are, or are proposed to be, supplied (whether those customers are identified by name, by inclusion in a specified class or in any other way);
 - (c) the kinds of terms and conditions on which the goods or services are, or are proposed to be, supplied.
- (2) Subsection (1) does not, by implication, limit the ways in which goods and services may be specified in a tariff filing direction.

151BM Notification of reasons

If the Commission gives a tariff filing direction to a person, the Commission must give the person a written notice setting out the reasons for the direction.

151BN Duration of direction may be limited

A tariff filing direction may be expressed to cease to be in force at a time ascertained in accordance with the direction.

Note: A time specified in accordance with the direction may be the time of occurrence of a specified event or the time when a specified condition is satisfied.

151BO Revocation of direction

- (1) If a tariff filing direction relating to a person is in force, the Commission may revoke the direction.
- (2) The Commission must give the person a written notice stating that the direction has been revoked.

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- (3) A revocation of a tariff filing direction takes effect:
 - (a) at the time when the notice of revocation is given; or
 - (b) if a later time is specified in the notice of revocation—at that later time.

151BP Variation of direction

- (1) If a tariff filing direction relating to a person is in force, the Commission may vary the direction.
- (2) The Commission must give the person a written notice setting out:
 - (a) the terms of the variation; and
 - (b) the reasons for the variation.
- (3) A variation of a tariff filing direction takes effect:
 - (a) at the time when the notice of variation is given; or
 - (b) if a later time is specified in the notice of variation—at that later time.

151BQ Public access to tariff information

- (1) This section applies to a particular item of information given to the Commission by a person (the *first person*) in accordance with a tariff filing direction.
- (2) If the Commission is satisfied that:
 - (a) the disclosure of the information would result, or be likely to result, in a benefit to the public; and
 - (b) that benefit would outweigh both:
 - (i) the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the information were disclosed; and
 - (ii) any substantial prejudice to the commercial interests of a person that would result, or be likely to result, if the information were disclosed;the Commission must give the first person a written notice stating that the Commission intends to make copies of the information, together with copies of the direction, available for inspection and purchase by the public.

- (3) If the Commission gives the first person a notice under subsection (2), the Commission must make copies of the information, together with copies of the direction, available for inspection and purchase by the public:
 - (a) as soon as practicable after the end of the 7-day period that began when the notice was given to the first person; or
 - (b) if the Commission decides that the information and direction should not be made available during a further period of up to 14 days—after the end of that further period.

151BR Register of tariff filing directions

- (1) The Commission must keep a Register in relation to tariff filing directions.
- (2) The Register must include the following:
 - (a) particulars of all tariff filing directions (including directions that have expired);
 - (b) particulars of all revocations of tariff filing directions;
 - (c) particulars of all variations of tariff filing directions.
- (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.

151BT *Meaning of terms and conditions*

In this Division:

terms and conditions, in relation to the supply of goods or services, includes:

- (a) charges for the supply of the goods or services; and
- (b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of the goods or services; and
- (c) any commissions or similar benefits (whether monetary or otherwise) payable or given in relation to the supply of the goods or services; and
- (d) the supply of other goods or services, where the other goods or services are supplied in connection with the first-mentioned goods or services; and
- (e) the making of payments for such other goods or services.

Division 5—Tariff filing by Telstra

151BTA Tariff filing by Telstra

- (1) This section applies to a charge for a basic carriage service.
- (2) At least 7 days before:
 - (a) imposing a new charge; or
 - (b) varying a charge; or
 - (c) ceasing to impose a charge;Telstra must give the Commission, in a form approved in writing by the Commission, a written statement setting out such information about Telstra's intentions as the Commission requires.
- (3) The Commission may, on the application of Telstra, make a written determination that subsection (2) has effect, in relation to a specified matter, as if the reference in that subsection to 7 days were a reference to such shorter period as specified in the determination.
- (4) A determination under subsection (3) has effect accordingly.
- (5) Divisions 6 and 7 apply to a contravention of subsection (2) in a corresponding way to the way in which they apply to a contravention of a tariff filing direction.
- (6) This section does not, by implication, limit the application of Division 4 to Telstra.
- (7) The Commission may, by written notice given to Telstra, exempt a charge for a specified basic carriage service from the scope of subsection (2).
- (8) A basic carriage service may be specified for the purposes of subsection (7) by reference to any or all of the following:
 - (a) the customers to whom the services are, or are proposed to be, supplied;
 - (b) the kinds of terms and conditions on which the services are, or are proposed to be, supplied.
- (9) Subsection (8) does not, by implication, limit subsection (7).

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- (10) An exemption under subsection (7) may be unconditional or subject to such conditions (if any) as are specified in the exemption.
- (11) Section 151BQ applies to information given to the Commission under this section in a corresponding way to the way in which it applies to information given to the Commission in accordance with a tariff filing direction.
- (13) In this section:

basic carriage service has the meaning given by section 174 of the *Telecommunications Act 1991*, as in force before 1 July 1997, but does not include a service supplied to an existing carrier.

existing carrier means a person who held a general telecommunications licence, or a public mobile licence, that was in force under the *Telecommunications Act 1991* immediately before 1 July 1997.

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

terms and conditions has the same meaning as in section 151BT.

variation, in relation to a charge, means a variation of the nature of the charge or the amount of the charge, or both.

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).
- (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.

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- (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
 - (b) ascertaining whether tariff filing directions have been, or are 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
 - (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 regulation of Telstra's charges).
- (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 give written directions 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 give a written 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 46(2) of the *Acts Interpretation Act 1901*.

- (1C) The Minister may give a written 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***.
- (4) A direction under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

151BUAAA Minister to give direction to Commission about Telstra's wholesale operations and retail operations

- (1) The Minister must take all reasonable steps to ensure that a special Telstra direction is given within 6 months after the commencement of this section.
- (2) For the purposes of this section, a ***special Telstra direction*** is a direction under section 151BUAA that:
 - (a) relates to Telstra's wholesale operations and retail operations; and
 - (b) requires the Commission to exercise its powers under section 151BU to make rules requiring Telstra to:
 - (i) keep and retain particular records; and

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- (ii) prepare reports consisting of information contained in those records; and
 - (iii) give those reports to the Commission; and
 - (c) requires the Commission to exercise its powers under at least one of sections 151BUDA, 151BUDB and 151BUDC in relation to those reports.
- (3) Before giving a special Telstra direction in compliance with subsection (1), the Minister must:
- (a) publish a draft of the direction and invite people to make submissions to the Minister on the draft direction; and
 - (b) consider any submissions that are received within the time limit specified by the Minister when he or she published the draft direction.
- (4) This section does not, by implication, limit the Minister's powers to give subsequent directions to the Commission in relation to Telstra's wholesale operations and retail operations.
- (5) In this section:

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

wholesale operations includes operations in relation to services that Telstra supplies:

- (a) to itself; or
- (b) to other persons, in order that the other persons can provide carriage services and/or content services.

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.

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
 - (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 regulation of Telstra's charges);

the Commission may give the carrier or carriage service provider concerned:

- (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

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(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 46(2) 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:
 - (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 46(2) 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
 - (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) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units.
- (11) A person who contravenes subsection (9) is guilty of 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.

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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
 - (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 regulation of Telstra's charges);

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 46(2) 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 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 paragraph (2)(d) direction that the report is, or the extracts are, available for inspection and purchase.

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- (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) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units.
- (13) A person who contravenes subsection (11) is guilty of 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.

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
 - (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 regulation of Telstra's charges);

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
- (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 46(2) 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

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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 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 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) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units.
- (13) A person who contravenes subsection (11) is guilty of 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 make a written 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 46(2) of the *Acts Interpretation Act 1901*.

- (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 make a written 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 46(2) of the *Acts Interpretation Act 1901*.

- (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.

Disallowable instrument

- (6) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

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;

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 46(2) 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 is guilty of 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.

- (7) A person is guilty of 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

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(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 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 46(2) 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 with the terms and conditions (if any) that are specified in the direction.

Offences

- (7) A person is guilty of 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.

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- (8) A person is guilty of 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 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 46(2) 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 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

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with the terms and conditions (if any) that are specified in the direction.

Offences

- (7) A person is guilty of 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 is guilty of 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 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.
- (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) is guilty of 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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Section 151BW

Division 7—Enforcement of the competition rule, tariff filing directions, record-keeping rules and disclosure directions

151BW Person involved in a contravention of the competition rule, a tariff filing direction, 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 tariff filing direction, 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 tariff filing direction, 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 tariff filing direction, a record-keeping rule or a disclosure direction; or
 - (b) has attempted to contravene the competition rule, a tariff filing direction, a record-keeping rule or a disclosure direction; or
 - (c) has been involved in a contravention of the competition rule, a tariff filing direction, 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
 - (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:
 - (i) if the contravention continued for more than 21 days—the sum of \$31 million and \$3 million for each day in excess of 21 that the contravention continued; or
 - (ii) otherwise—the sum of \$10 million and \$1 million for each day that the contravention continued; or
 - (b) in the case of a contravention of a tariff filing direction—\$10 million for each 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 any other case—\$500,000 for each contravention.
- (5) If conduct constitutes a contravention of:
- (a) 2 or more tariff filing directions; or
 - (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 tariff filing directions, record-keeping rules or disclosure directions. However,
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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.

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
 - (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, tariff filing directions, 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 tariff filing direction, a record-keeping rule or a disclosure direction; or
 - (b) has attempted to contravene the competition rule, a tariff filing direction, a record-keeping rule or a disclosure direction; or
 - (c) has been involved in a contravention of the competition rule, a tariff filing direction, a record-keeping rule or a disclosure direction.
- (2) To avoid doubt, this section does not affect the operation of Division 137 of the *Criminal Code* in respect of tariff information.
- (3) To avoid doubt, subsection (1) does not apply in relation to proceedings for an offence against section 44ZZRF or 44ZZRG.

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 tariff filing direction, a record-keeping rule or a disclosure direction; or
 - (b) attempting to contravene the competition rule, a tariff filing direction, a record-keeping rule or a disclosure direction; or
 - (c) aiding, abetting, counselling or procuring a person to contravene the competition rule, a tariff filing direction, 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

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competition rule, a tariff filing direction, 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 tariff filing direction, a record-keeping rule or a disclosure direction; or

(f) conspiring with others to contravene the competition rule, a tariff filing direction, 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).

(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.

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

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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.
- (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 or a tariff filing direction.
- (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:
 - (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;

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- (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;
 - (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).

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 of the document would prejudice any person, or for any other reason.

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Division 8 Disclosure of documents by Commission

Section 151CG

- (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.

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).

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.
- (3) If the Commission makes a decision under section 151BQ to make information obtained from a person available for inspection and purchase, 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.

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 151BQ, 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.
- (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.

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Division 10 Review of decisions

Section 151CK

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.

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 to the Minister 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 give a report under subsection (1) to the Minister as soon as practicable 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 this section to be laid before each House of the Parliament within 15 sitting days of that House after receiving the report.
- (6) This section applies to a financial year ending on or after 30 June 1998.
- (7) In this section:
telecommunications industry has the same meaning as in the *Telecommunications Act 1997*.

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 to the Minister on:
 - (a) charges paid by consumers for the following goods and services:
 - (i) listed carriage services;
 - (ii) goods for use in connection with a listed carriage service;
 - (iii) services for use in connection with a listed carriage service; and
 - (b) the adequacy of Telstra's compliance with Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with price control arrangements for Telstra); and
 - (c) the adequacy of each universal service provider's compliance with Division 11 of Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with regulation of universal service charges).
- (2) The Commission must give a report under subsection (1) to the Minister as soon as practicable after the end of the financial year concerned.
- (3) 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.
- (4) This section applies to a financial year ending on or after 30 June 1998.
- (5) In this section:

listed carriage service has the same meaning as in the *Telecommunications Act 1997*.

universal service provider has the same meaning as in the
Telecommunications (Consumer Protection and Service Standards)
Act 1999.

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 written 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 written 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 written 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) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.
- (7) In this section:

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 written 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 written 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) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.
- (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 under subsection 151CMA(1) or 151CMB(1):

- (a) charges for:
- (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;
- (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;

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Division 12A Reports about competition in the telecommunications industry

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- (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.

Division 13—Review of operation of this Part

151CN Review of operation of this Part

- (1) Before 1 July 2000, the Minister must cause to be conducted a review of the operation of this Part.
- (2) In conducting the review, consideration must be given to the question whether any or all of the provisions of this Part should be repealed or amended.
- (3) The Minister must cause to be prepared a report of the review.
- (4) The Minister must cause copies of the report to be laid before each House of the Parliament within 15 sitting days of that House after the completion of the preparation of the report.

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Division 14 Operational separation for Telstra

Section 151CP

Division 14—Operational separation for Telstra

151CP Operational separation for Telstra

- (1) This section applies if Telstra has engaged in conduct in order to comply with a final operational separation plan in force under Part 8 of Schedule 1 to the *Telecommunications Act 1997*.
- (2) 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.

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.
- The Commission may declare carriage services and related services to be *declared services*.
- 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, but no access undertaking is in operation, the terms and conditions are to be determined by the Commission acting as an arbitrator.
- An access undertaking (other than a special access undertaking) may adopt the terms and conditions set out in a *telecommunications access code*.

- The Commission may conduct an arbitration of a dispute about access to declared services. The Commission's determination on the arbitration must not be inconsistent with the standard access obligations or an access undertaking.
- The Commission may register agreements about access to declared services.
- A carrier, carriage service provider or related body must not prevent or hinder the fulfilment of a standard access obligation.

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 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

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- (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.

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 seeker has the meaning given by section 152AG.

access undertaking means an ordinary access undertaking or a special access undertaking.

ACMA means the Australian Communications and Media Authority.

carriage service has the same meaning as in the *Telecommunications Act 1997*, and includes a proposed carriage service.

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*.

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.

facility has the same meaning as in the *Telecommunications Act 1997*.

Federal Court means the Federal Court of Australia.

Ministerial pricing determination means a determination under section 152CH.

modifications includes additions, omissions and substitutions.

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nominated carrier has the same meaning as in the *Telecommunications Act 1997*.

ordinary access undertaking means an undertaking under Subdivision A of Division 5.

person includes a partnership.

Note: Section 152EN sets out additional rules about partnerships.

Procedural Rules means Procedural Rules made under section 152ELA.

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 has the meaning given by section 152AR.

telecommunications access code means a code made under section 152BJ.

telecommunications network has the same meaning as in the *Telecommunications Act 1997*.

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

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*).

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.

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 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
 - (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:
-

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- (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.

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 and VII not affected by this Part

This Part does not affect the operation of Parts IV and VII.

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

- (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.

Declaration has effect

- (4) A declaration under this section has effect accordingly.

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Gazettal of declaration

- (5) A copy of a declaration under this section 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

- (7) If:
- (a) a person 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 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 is not a legislative instrument

- (9) A declaration under this section is not, and is taken never to have been, a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (10) A variation of a declaration made under this section is not, and is taken never to have been, a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (11) A revocation of a declaration made under this section is not, and is taken never to have been, a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

- (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 for the purposes of the *Legislative Instruments Act 2003*; 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 for the purposes of the *Legislative Instruments Act 2003*.
- (13) For the purposes of paragraph (12)(b), assume that the *Legislative Instruments Act 2003* had never been enacted.
- (14) Subsections (9) to (12) are enacted for the avoidance of doubt.

152ALA Duration of declaration

Expiry date

- (1) A declaration under section 152AL must specify an expiry date for the declaration.
- (2) An expiry date must occur in the 5-year period beginning when the declaration was made.
- (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.

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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.

Public inquiry during 12-month period ending on the expiry date of a declaration

- (7) The Commission must:
- (a) during the 12-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
 - (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;
- the Commission is taken to have complied with paragraphs 152AL(3)(a), (b) and (c) 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) 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 for the purposes of the *Legislative Instruments Act 2003*.
- (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 for the purposes of the *Legislative Instruments Act 2003*.
- (12) For the purposes of paragraph (11)(c), assume that the *Legislative Instruments Act 2003* had never been enacted.
- (13) Subsections (10) and (11) are enacted for the avoidance of doubt.

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 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) If the Commission decides not to hold a public inquiry that a person has requested under paragraph (2)(b), the Commission must notify the person in writing of the decision and of the reasons for the decision.

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- (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 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
 - (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) 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 152ALA(7)(a) of this Act.
- (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.

152AQA Pricing principles

Determination

- (1) The Commission must, by writing, determine principles relating to the price of access to a declared service.

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Note: See subsection (6) for the effect of the determination.

- (2) The determination may also contain price-related terms and conditions relating to access to the declared service.

Timing

- (3) The Commission must make such a determination at the same time as, or as soon as practicable after:
- (a) the Commission declares a service to be a declared service; and
 - (b) if the Commission varies a declared service—that variation.

Consultation

- (4) Before making such a determination, the Commission must:
- (a) publish a draft of the determination and invite people to make submissions to the Commission on the draft determination; and
 - (b) consider any submissions that are received within the time limit specified by the Commission when it published the draft determination.

Publication

- (5) The Commission must publish the determination in such manner as it considers appropriate (including in electronic form).

Arbitration

- (6) The Commission must have regard to the determination if it is required to arbitrate an access dispute under Division 8 in relation to the declared service.

Ministerial pricing determinations prevail

- (7) A determination under this section has no effect to the extent that it is inconsistent with any Ministerial pricing determination.

Other powers not limited

- (7A) To avoid doubt, neither:
- (a) this section; nor
 - (b) a determination under this section;

limits the Commission's powers under the following provisions:

- (c) Division 4 (which deals with the telecommunications access code);
- (d) Division 5 (which deals with access undertakings).

Definition

- (8) In this section:

price-related terms and conditions means terms and conditions relating to price or a method of ascertaining price.

152AQB Model terms and conditions relating to access to core services

Core services

- (1) For the purposes of this section, each of the following declared services is a *core service*:
- (a) the Domestic PSTN Originating Access Service (as described in the relevant declaration);
 - (b) the Domestic PSTN Terminating Access Service (as described in the relevant declaration);
 - (c) the Unconditioned Local Loop Service (as described in the relevant declaration);
 - (d) the Local Carriage Service (as described in the relevant declaration);
 - (e) a declared service specified in the regulations.

Determination setting out model terms and conditions

- (2) The Commission must make a written determination setting out model terms and conditions relating to access to each core service.

Timing

- (3) The Commission must take all reasonable steps to ensure that a determination relating to a core service referred to in paragraph (1)(a), (b), (c) or (d) is made within 6 months after the commencement of this section.

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- (4) The Commission must take all reasonable steps to ensure that a determination relating to a core service specified in the regulations is made within 6 months after the relevant regulation takes effect.

Public consultation

- (5) Before making a determination under this section, the Commission must:
- (a) publish a draft of the determination and invite people to make submissions to the Commission on the draft determination; and
 - (b) consider any submissions that are received within the time limit specified by the Commission when it published the draft determination.

Consultation with ACMA

- (6) Before making a determination under this section, the Commission must consult the ACMA.

Publication

- (7) The Commission must publish a determination under this section in such manner as it considers appropriate (including in electronic form).

Duration of determination

- (8) Unless sooner revoked, a determination under this section relating to a particular core service ceases to be in force at the end of:
- (a) the period of 5 years beginning on the day on which the determination was made; or
 - (b) if a longer period is specified in the regulations in relation to the determination—that longer period.

Arbitration

- (9) The Commission must have regard to a determination under this section if it is required to arbitrate an access dispute under Division 8 in relation to a core service covered by the determination.

Ministerial pricing determinations prevail etc.

- (10) A determination under this section has no effect to the extent that it is inconsistent with:
- (a) any Ministerial pricing determination; or
 - (b) any determination under section 152AQA.

Other powers not limited

- (11) To avoid doubt, neither:
- (a) this section; nor
 - (b) a determination under this section;
- limits the Commission's powers under the following provisions:
- (c) Division 4 (which deals with the telecommunications access code);
 - (d) Division 5 (which deals with access undertakings).

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.

Division 3—Standard access obligations

152AR Standard access obligations

- (1) This section sets out the *standard access obligations*.

Access provider and active declared services

- (2) For the purposes of this section, if a carrier or a carriage service provider 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.

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.

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 46(2) of the *Acts Interpretation Act 1901*.

- (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 46(2) of the *Acts Interpretation Act 1901*.

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 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.

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, or under a determination (within the meaning of Division 8), 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.

152AS Ordinary class exemptions from standard access obligations

- (1) The Commission may, by written instrument, determine that 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.
- (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.

- (3) A determination under this section has effect accordingly.
- (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.
- (5) 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.
- (6) An instrument under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Note: For variation and revocation of instruments under subsection (1), see subsection 33(3) of the *Acts Interpretation Act 1901*.

152ASA Anticipatory class exemptions from 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.
- (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.

- (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) a fresh determination under this section in the same terms as the expired determination; or
 - (b) if the service or proposed service has become an active declared service—a determination under section 152AS in relation to the service.
- (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.

Disallowable instrument

- (12) An instrument under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Definition

- (13) In this section:

active declared service has the same meaning as in section 152AR.

Note: For variation and revocation of instruments under subsection (1), see subsection 33(3) of the *Acts Interpretation Act 1901*.

152AT Ordinary individual exemptions from standard access obligations

Application for exemption order

- (1) A carrier or a carriage service provider may apply to the Commission for a written order exempting the carrier or provider from all or any of the obligations referred to in section 152AR.
- (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 exempting the applicant from one or more of the obligations referred to in section 152AR; or
 - (b) refuse the application.

Criteria for making exemption order

- (4) 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.

Exemption orders

- (5) 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.

- (6) An order under paragraph (3)(a) has effect accordingly.
- (7) An order under paragraph (3)(a) may be expressed to come into effect:
- (a) immediately after it is made; or
 - (b) on a later date specified in the order.

Expiry date for exemption order

- (8) An order under paragraph (3)(a) may specify an expiry date 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.

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Consultation

- (9) 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

- (10) If the Commission does not make a decision on an application under subsection (1) 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.
- (11) In calculating the 6-month period referred to in subsection (10), disregard:
- (a) if the Commission has published the application under subsection (9)—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

- (12) The Commission may, by written notice given to the applicant, extend or further extend the 6-month period referred to in subsection (10), 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.

- (13) As soon as practicable after the Commission gives a notice under subsection (12), the Commission must cause a copy of the notice to be made available on the internet.

Notification of refusal of application

- (14) 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.

Note: For variation and revocation of orders, see subsection 33(3) of the *Acts Interpretation Act 1901*.

152ATA Anticipatory individual exemptions from 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:

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- (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.
- (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.

- (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.

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) a fresh order under paragraph (3)(a) in the same terms as the expired order; or
 - (b) if the service or proposed service has become an active declared service—an order under section 152AT in relation to the service.

- (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.
- (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.

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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.

Definition

- (18) In this section:

active declared service has the same meaning as in section 152AR.

Note: For variation and revocation of orders, see subsection 33(3) of the *Acts Interpretation Act 1901*.

152AU Individual exemptions—request for further information

- (1) This section applies to an application under subsection 152AT(1) or 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.

152AV Review by Tribunal of exemption order decision

- (1) A person whose interests are affected by a decision of the Commission under section 152AT or 152ATA may apply in writing to the Tribunal for a review of the decision.
- (2) The application must be made within 21 days after the Commission made the decision.
- (3) The Tribunal must review the decision.

152AW Functions and powers of Tribunal

Decision on review

- (1) On a review of a decision of the Commission under section 152AT or 152ATA, 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 to make an order under paragraph 152AT(3)(a) or paragraph 152ATA(3)(a)—setting aside or varying the Commission’s decision; or
 - (c) in the case of a review of a decision of the Commission under section 152AT refusing an application for an order—both:
 - (i) setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, making an order under paragraph 152AT(3)(a); or
 - (d) in the case of a review of a decision of the Commission under section 152ATA refusing an application for an order—both:
 - (i) setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, making an order under paragraph 152ATA(3)(a); or
 - (e) in the case of a review of a decision of the Commission under section 152AT or 152ATA varying an order—setting aside or varying the Commission’s decision; or
 - (f) in the case of a review of a decision of the Commission under section 152AT or 152ATA refusing to vary an order—both:
 - (i) setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, varying the order; or

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- (g) in the case of a review of a decision of the Commission under section 152AT or 152ATA revoking an order—a decision setting aside the Commission’s decision; or
- (h) in the case of a review of a decision of the Commission under section 152AT or 152ATA refusing to revoke an order—both:
 - (i) setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, revoking the order;

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) varying a decision of the Commission; or
 - (c) setting aside a decision of the Commission; or
 - (d) made in substitution for a decision of the Commission;is taken, for the purposes of this Act (other than section 152AV or this section), 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.
- (4) For the purposes of a review, the Tribunal may have regard only to:
 - (a) any information given, documents produced or evidence given to the Commission in connection with the making of the decision to which the review relates; and
 - (b) any other information that was referred to in the Commission’s reasons for making the decision to which the review relates.

Tribunal to make decision within 6 months

- (5) If:
 - (a) a person applies to the Tribunal for a review of a decision of the Commission under section 152AT or 152ATA; and

- (b) the Tribunal does not make a decision under subsection (1) of this section on the review within 6 months after receiving the application for review;

the Tribunal is taken to have made, at the end of that 6-month period, whichever of the following decisions is applicable:

- (c) in the case of a review of a decision of the Commission to make an order under paragraph 152AT(3)(a) or paragraph 152ATA(3)(a), where the applicant for review is seeking to have the Tribunal set aside the Commission's decision—a decision setting aside the Commission's decision;
- (d) in the case of a review of a decision of the Commission to make an order under paragraph 152AT(3)(a) or paragraph 152ATA(3)(a), where the applicant for review is seeking to have the Tribunal vary the Commission's decision—a decision varying the Commission's decision in accordance with the terms of the application for review;
- (e) in the case of a review of a decision of the Commission under section 152AT refusing an application for an order—both:
 - (i) a decision setting aside the Commission's decision; and
 - (ii) in substitution for the decision so set aside, a decision to make an order under paragraph 152AT(3)(a) in accordance with the terms of the application;
- (f) in the case of a review of a decision of the Commission under section 152ATA refusing an application for an order—both:
 - (i) a decision setting aside the Commission's decision; and
 - (ii) in substitution for the decision so set aside, a decision to make an order under paragraph 152ATA(3)(a) in accordance with the terms of the application;
- (g) in the case of a review of a decision of the Commission under section 152AT or 152ATA varying an order, where the applicant for review is seeking to have the Tribunal set aside the Commission's decision—a decision setting aside the Commission's decision;
- (h) in the case of a review of a decision of the Commission under section 152AT or 152ATA varying an order, where the applicant for review is seeking to have the Tribunal vary the Commission's decision—a decision varying the Commission's decision in the manner sought by the applicant for review;

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- (i) in the case of a review of a decision of the Commission under section 152AT or 152ATA refusing to vary an order—both:
 - (i) a decision setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, a decision to vary the order in accordance with the terms of the application for variation;
- (j) in the case of a review of a decision of the Commission under section 152AT or 152ATA revoking an order—a decision setting aside the Commission’s decision;
- (k) in the case of a review of a decision of the Commission under section 152AT or 152ATA refusing to revoke an order—both:
 - (i) a decision setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, a decision to revoke the order.

Extension of decision-making period

- (6) The Tribunal may, by written notice given to the applicant for review, 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 Tribunal has been unable to make a decision on the review within that 6-month period or that 6-month period as previously extended, as the case may be.
- (7) As soon as practicable after the Tribunal gives a notice under subsection (6), the Tribunal must cause a copy of the notice to be made available on the internet.

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

152AX 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 made by the Commission under section 152AT or 152ATA.

152AXA Statement of reasons for reviewable decision—specification of documents

- (1) If the Commission:
 - (a) makes a decision under section 152AT or 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.
- (2) If a document is specified under subsection (1), information in the document is taken, for the purposes of paragraph 152AW(4)(b), to be referred to in the Commission's reasons for making the decision.

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) on such terms and conditions as are agreed between the following parties:
 - (i) the carrier or carriage service provider, as the case requires;
 - (ii) the access seeker; or
 - (b) failing agreement:
 - (i) if an access undertaking given by the carrier or carriage service provider 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 undertaking; or
 - (ii) if an access undertaking given by the carrier or carriage service provider is in operation, but the undertaking does not specify terms and conditions about a particular matter—on such terms and conditions relating to that matter as are determined by the Commission under Division 8 (which deals with arbitration of disputes about access); or

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- (iii) if there is no such undertaking—on such terms and conditions as are determined by the Commission under Division 8 (which deals with arbitration of disputes about access).

Note: An agreement mentioned in paragraph (a) may be registered under Division 9.

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;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

- (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
 - (b) any obligations under section 152AYA that are applicable to the provider.

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.
- (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:
 - (c) an order directing the carrier or carriage service provider to comply with the obligation;

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- (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 152AS or 152ASA; or
 - (b) an order under section 152AT or 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.

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;
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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 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
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- (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.

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.
- (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.
- (5) A member of the Commission is not disqualified from constituting the Commission (with other members) for the purposes of an arbitration under Division 8 of a dispute about a particular matter, merely because the member or another person attended, or

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mediated at, negotiations in relation to the matter in accordance with a request under this section.

152BBD Reaching agreement on terms and conditions of access

The Commission must, in exercising its powers under sections 152BBA and 152BBC, 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.

Division 4—Telecommunications access code

152BJ Telecommunications access code

Commission may make code

- (1) The Commission may, by writing, make a telecommunications access code.

Disallowable instrument

- (2) A telecommunications access code is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Only one code

- (3) The Commission must ensure that not more than one code is in force at a particular time.

152BK Content of telecommunications access code

- (1) A telecommunications access code must set out model terms and conditions:
 - (a) relating to compliance with the standard access obligations; and
 - (b) that are capable of being adopted by ordinary access undertakings.
- (2) Different sets of model terms and conditions may be set out for:
 - (a) different kinds of obligations; or
 - (b) the same kind of obligation in so far as it applies to different kinds of declared services.
- (3) The Commission must not make a telecommunications access code unless the Commission is satisfied that:
 - (a) the code is consistent with the standard access obligations; and
 - (b) if any part of the code deals with price or a method of ascertaining price—the code is consistent with any Ministerial pricing determination; and

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- (c) each set of model terms and conditions set out in the code is reasonable.

Note: Section 152AH contains a list of matters to be taken into account in determining whether terms and conditions are reasonable.

152BL Commission must invite public submissions on telecommunications access code

The Commission must not make a telecommunications access code unless the Commission has first:

- (a) published the code and invited people to make submissions to the Commission on the code; and
- (b) considered any submissions that were received within the time limit specified by the Commission when it published the code.

152BM Commission must consult the ACMA about code

Before making a telecommunications access code, the Commission must consult the ACMA.

152BN Copy of code to be given to the ACMA

If the Commission makes a telecommunications access code, the Commission must give the ACMA a copy of the code.

152BR Register of telecommunications access codes

- (1) The Commission must maintain a Register that includes:
 - (a) all telecommunications access codes (including those that are no longer in force); and
 - (b) all variations of telecommunications access codes.
- (2) The Register may be maintained by electronic means.
- (3) 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.

- (4) 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.
- (5) 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.

Division 5—Access undertakings

Subdivision A—Ordinary access undertakings

152BS What is an *ordinary access undertaking*?

- (1) For the purposes of this Part, an *ordinary access undertaking* is a written undertaking given by a carrier or a carriage service provider to the Commission under which the carrier or provider undertakes to comply with the terms and conditions specified in the undertaking in relation to the applicable standard access obligations.

Note: The undertaking need not specify all terms and conditions—see subparagraph 152AY(2)(b)(ii).

- (2) For the purposes of subsection (1), the *applicable standard access obligations* are the standard access obligations that are applicable to the carrier or provider.
 - (3) The text of the terms and conditions may be specified in the undertaking.
 - (4) Alternatively, the terms and conditions may be specified by adopting a set of model terms and conditions set out in the telecommunications access code, as in force from time to time.
 - (5) The terms and conditions must not be specified by a combination of the methods described in subsections (3) and (4). However, this rule does not prevent the carrier or provider from giving 2 separate undertakings in relation to the same declared service, where one undertaking specifies some of the terms and conditions using the method described in subsection (3) and the other undertaking specifies other terms and conditions using the method described in subsection (4).
 - (6) The undertaking must be in a form approved in writing by the Commission.
- (6A) The undertaking may be without limitations or may be subject to such limitations as are specified in the undertaking.

- (7) If the undertaking specifies terms and conditions using the method described in subsection (3), the undertaking must specify the expiry time of the undertaking.
- (8) The expiry time of the undertaking may be described by reference to the end of a period beginning when the undertaking comes into operation.
- (9) Subsection (8) does not, by implication, limit subsection (7).
- (9A) If an undertaking expires, this Part does not prevent the carrier or provider from giving a fresh undertaking in the same terms as the expired undertaking.
- (10) The terms and conditions specified in an undertaking may be expressed to come into effect:
 - (a) immediately after the undertaking is accepted by the Commission; or
 - (b) at a later time ascertained in accordance with the undertaking.

152BT Further information about undertaking

- (1) This section applies if an ordinary access undertaking is given to the Commission by a carrier or a carriage service provider.
- (2) The Commission may request the carrier or provider 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 carrier or provider does not give the Commission the information within that time limit;the Commission may, by written notice given to the carrier or provider, reject the undertaking.
- (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 152BU(5) has effect as if the decision had been made under subsection 152BU(2).

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- (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 carrier or provider gives the Commission the information.
- (4) The Commission may withdraw its request for further information, in whole or in part.

152BU Commission to accept or reject access undertaking

- (1) This section applies if an ordinary access undertaking is given to the Commission by a carrier or carriage service provider.
- (1A) Before the Commission makes a decision under subsection (2) in relation to the undertaking, the carrier or provider 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 carrier or provider a written notice stating that the undertaking has been accepted.
- (4) If the Commission rejects the undertaking, the Commission must give the carrier or provider a written notice:
 - (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:
- (a) if the Commission has published the undertaking under paragraph 152BV(2)(a)—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 152BT 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 carrier or provider, 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.

152BV Acceptance of access undertaking—model terms and conditions in access code not adopted

- (1) This section applies if:
- (a) an ordinary access undertaking is given to the Commission by a carrier or a carriage service provider; and
 - (b) the undertaking does not adopt a set of model terms and conditions set out in the telecommunications access code.

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- (2) The Commission must not accept the undertaking unless:
- (a) 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; and
 - (b) the Commission is satisfied that the undertaking is consistent with the standard access obligations that are applicable to the carrier or provider; and
 - (c) if the undertaking deals with price or a method of ascertaining price—the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; and
 - (d) the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable; and
 - (e) the expiry time of the undertaking occurs within 3 years after the date on which the undertaking comes into operation.

Note: Section 152AH contains a list of matters to be taken into account in determining whether terms and conditions are reasonable.

152BW Acceptance of access undertaking—model terms and conditions in access code adopted

- (1) This section applies if:
- (a) an ordinary access undertaking is given to the Commission by a carrier or a carriage service provider; and
 - (b) the undertaking adopts a set of model terms and conditions set out in the telecommunications access code.
- (2) The Commission must accept the undertaking.

152BX Duration of access undertaking

- (1) This section applies if an ordinary access undertaking is given to the Commission.
- (2) If the Commission accepts the undertaking:
- (a) the undertaking comes into operation:
 - (i) if the terms and conditions specified in the undertaking are expressed to come into effect immediately after the

- undertaking is accepted by the Commission—at the time of acceptance; or
- (ii) if the terms and conditions specified in the undertaking are expressed to come into effect at a later time ascertained in accordance with the undertaking—at that later time; and
- (b) the undertaking continues in operation until:
- (i) in the case of an undertaking that specifies an expiry time—the expiry time; or
 - (ii) in the case of an undertaking that adopts a set of model terms and conditions set out in the telecommunications access code—the code is revoked or is varied so as to omit that set of terms and conditions; or
 - (iii) in any case—the undertaking is withdrawn as mentioned in section 152CA or 152CB.

152BY Variation of access undertakings

- (1) This section applies if an ordinary access undertaking given by a carrier or a carriage service provider is in operation.
- (2) The carrier or provider 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 carrier or provider 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
 - (b) reject the variation.
- (4) Sections 152BV and 152BW apply to the variation in a corresponding way to the way in which they apply 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

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Commission is not required to comply with paragraph 152BV(2)(a) in relation to the variation.

Notice of decision

- (5) If the Commission accepts the variation, the Commission must give the carrier or provider 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 carrier or provider 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 152BV(2)(a)—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 152BZ in relation to the variation—a day during 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.

152BZ Further information about variation of access undertaking

- (1) This section applies if the carrier or carriage service provider gives the Commission a variation of an ordinary access undertaking.
 - (2) The Commission may request the carrier or provider 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 carrier or provider 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 carrier or provider, reject the variation.
- (2B) Subsection (2A) has effect despite anything in this Division.
- (2C) If the Commission makes a decision under subsection (2A) to reject the variation, subsection 152BY(7) has effect as if the decision had been made under subsection 152BY(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 carrier or provider gives the Commission the information.
 - (4) The Commission may withdraw its request for further information, in whole or in part.

152CA Voluntary withdrawal of undertaking

- (1) This section applies if an ordinary access undertaking given by a carrier or a carriage service provider is in operation.
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- (2) The carrier or provider may, by written notice given to the Commission, withdraw the undertaking.

152CB Replacement of access undertaking

- (1) This section applies if an ordinary access undertaking (the *current undertaking*) given by a carrier or a carriage service provider is in operation.
- (2) The carrier or provider may give to the Commission an ordinary access undertaking that is expressed to replace the current undertaking.
- (3) If the Commission accepts the replacement undertaking under section 152BU, the current undertaking is taken to have been withdrawn immediately before the time when the replacement undertaking comes into operation.

Subdivision B—Special access undertakings

152CBA What is a *special access undertaking*?

Scope

- (1) This section applies to a person who is, or expects to be, a carrier or a carriage service provider supplying:
 - (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);whether to itself or to other persons, so long as the service is not an active declared 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.
- (3) 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).

- (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).
- (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) a fresh special access undertaking in the same terms as the expired undertaking; or
 - (b) an ordinary access undertaking that deals with the same service as the expired undertaking.

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Related services

- (11) 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.

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.

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.
- (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:
 - (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:
 - (a) if the Commission has published the undertaking under paragraph 152CBD(2)(d)—a day in the period:
 - (i) beginning on the date of publication; and

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- (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.

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) the Commission is satisfied that 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
 - (b) the Commission is satisfied that those terms and conditions are reasonable; and
 - (c) the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; 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.

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
 - (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

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- (b) setting out the reasons for the refusal.
- (8) In this section, a reference to an *extension* includes a reference to a further extension.

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 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
 - (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.

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 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:

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- (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.
- (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 subsection 152AL(7).

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.
- (2) The Register may be maintained by electronic means.
- (3) 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.

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- (4) 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.
- (5) 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.

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
 - (b) a variation of an access undertaking.
-

- (2) Subsection (1) has effect despite anything in this Division.

152CE Review by Tribunal

- (1) A person whose interests are affected by a decision of the Commission under subsection 152BU(2), 152BY(3), 152CBC(2) or 152CBG(3) may apply in writing to the Tribunal for a review of the decision.
- (2) The application must be made within 21 days after the Commission made the decision.
- (3) The Tribunal must review the decision.

152CF Functions and powers of Tribunal

Decision on review

- (1) On a review of a decision of the Commission under subsection 152BU(2), 152BY(3), 152CBC(2) or 152CBG(3), 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 subsection 152BU(2) or 152CBC(2) to accept an undertaking—setting aside the Commission’s decision; or
 - (c) in the case of a review of a decision of the Commission under subsection 152BU(2) or 152CBC(2) to reject an undertaking—both:
 - (i) setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, to accept the undertaking; or
 - (d) in the case of a review of a decision of the Commission under subsection 152BY(3) or 152CBG(3) to accept a variation of an undertaking—setting aside the Commission’s decision; or
 - (e) in the case of a review of a decision of the Commission under subsection 152BY(3) or 152CBG(3) to reject a variation of an undertaking—both:
 - (i) setting aside the Commission’s decision; and
 - (ii) in substitution for the decision so set aside, to accept the variation;

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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;
- is taken, for the purposes of this Act (other than section 152CE or this section), 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.
- (4) For the purposes of a review, the Tribunal may have regard only to:
- (a) any information given, documents produced or evidence given to the Commission in connection with the making of the decision to which the review relates; and
 - (b) any other information that was referred to in the Commission's reasons for making the decision to which the review relates.

Tribunal to make decision within 6 months

- (5) If:
- (a) a person applies to the Tribunal for a review of a decision of the Commission under subsection 152BU(2), 152BY(3), 152CBC(2) or 152CBG(3); and
 - (b) the Tribunal does not make a decision under subsection (1) of this section on the review within 6 months after receiving the application for review;
- the Tribunal is taken to have made, at the end of that 6-month period, whichever of the following decisions is applicable:
- (c) in the case of a review of a decision of the Commission to accept an access undertaking—a decision setting aside the Commission's decision;

- (d) in the case of a review of a decision of the Commission to reject an access undertaking:
 - (i) a decision setting aside the Commission's decision; and
 - (ii) in substitution for the decision so set aside, a decision to accept the undertaking;
- (e) in the case of a review of a decision of the Commission to accept a variation of an access undertaking—a decision setting aside the Commission's decision;
- (f) in the case of a review of a decision of the Commission to reject a variation of an access undertaking:
 - (i) a decision setting aside the Commission's decision; and
 - (ii) in substitution for the decision so set aside, a decision to accept the variation.

Extension of decision-making period

- (6) The Tribunal may, by written notice given to the applicant for review, 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 Tribunal has been unable to make a decision on the review within that 6-month period or that 6-month period as previously extended, as the case may be.
- (7) As soon as practicable after the Tribunal gives a notice under subsection (6), the Tribunal must cause a copy of the notice to be made available on the internet.

Time of acceptance of undertaking

- (8) To avoid doubt, if the Tribunal makes a decision to accept an undertaking, the time of acceptance of the undertaking is the time when the Tribunal made its decision.

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

152CG 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 made by the Commission under subsection 152BU(2), 152BY(3), 152CBC(2) or 152CBG(3).

152CGA Statement of reasons for reviewable decision—specification of documents

- (1) If the Commission:
 - (a) makes a decision referred to in section 152CE; 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.
- (2) If a document is specified under subsection (1), information in the document is taken, for the purposes of paragraph 152CF(4)(b), to be referred to in the Commission's reasons for making the decision.

152CGB Access undertakings prevail over inconsistent arbitral determinations

A determination made by the Commission under Division 8 has no effect to the extent to which it is inconsistent with an access undertaking that is in operation.

Division 6—Ministerial pricing determinations

152CH Ministerial pricing determinations

- (1) The Minister may make a written 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 1A: Subsection 152AQA(7) provides that a determination under section 152AQA has no effect to the extent that the determination is inconsistent with any Ministerial pricing determination.

Note 1B: Subsection 152AQB(9) provides that a determination under section 152AQB has no effect to the extent that the determination is inconsistent with any Ministerial pricing determination.

Note 2: Subsection 152BK(3) provides that the Commission must not make a telecommunications access code unless the code is consistent with any Ministerial pricing determination.

Note 3: Subsection 152BV(2) provides that the Commission must not accept an ordinary access undertaking dealing with price or a method of ascertaining price unless the undertaking is consistent with any 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 the telecommunications access code has no effect to the extent that the provision is inconsistent with any Ministerial pricing determination.

Note 6: Subsection 152CQ(6) provides that the Commission must not make a determination under Division 8 that is inconsistent with any Ministerial pricing determination.

- (2) A determination under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

- (3) In this section:

price-related terms and conditions means terms and conditions relating to price or a method of ascertaining price.

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152CI Undertakings and codes 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 the telecommunications access code 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 may be maintained by electronic means.
- (3) 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.
- (4) 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.
- (5) 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.

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 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.

Division 8—Resolution of disputes about access

Subdivision A—Introduction

152CL Definitions

In this Division, unless the contrary intention appears:

determination means a determination made by the Commission under this Division.

final determination means a determination other than an interim determination.

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

party means:

- (a) in relation to an arbitration of an access dispute—a party to the arbitration, as mentioned in section 152CO; or
- (b) in relation to a determination—a party to the arbitration in which the Commission made the determination.

152CLA Resolution of access disputes

- (1) The Commission must, in exercising its powers under this Division, have regard to the desirability of access disputes being resolved in a timely manner (including through the use of alternative dispute resolution methods such as mediation and conciliation).

Note: The Commission must also have regard to the the matters set out in section 152CR, to any relevant pricing determination under section 152AQA and, in the case of core services, to any relevant determination under section 152AQB.

Deferral of consideration of access dispute

- (2) If:
 - (a) the Commission receives an access undertaking that relates, in whole or in part, to a matter; and
 - (b) the matter is the subject of an access dispute that has been notified to the Commission;

the Commission may defer consideration of the access dispute, in whole or in part, while the Commission considers the access undertaking.

- (3) Subsection (2) has effect despite anything in this Division (other than subsection (4)).

Guidelines about deferral

- (4) In exercising the power conferred by subsection (2), the Commission must have regard to:
- (a) the fact that the access undertaking will, if accepted, apply generally to access seekers whereas a determination relating to the access dispute will only apply to the parties to the determination; and
 - (b) any guidelines in force under subsection (5); and
 - (c) such other matters as the Commission considers relevant.
- (5) The Commission must, by writing, formulate guidelines for the purposes of subsection (4).
- (6) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (5) is made within 6 months after the commencement of this subsection.
- (7) Guidelines under subsection (5) are to be made available on the internet.

Procedural Rules

- (8) Subsections (2) to (7) may be displaced or modified by the Procedural Rules.
- (9) The Procedural Rules may authorise the Commission to defer consideration of an access dispute, in whole or in part.
- (10) Subsection (9) has effect despite anything in this Division.

Subdivision B—Notification of access disputes

152CM Notification of access disputes

(1) If:

- (a) a declared service is supplied, or proposed to be supplied, by a carrier or a carriage service provider; and
- (b) one or more standard access obligations apply, or will apply, to the carrier or provider in relation to the declared service; and
- (c) an access seeker is unable to agree with the carrier or provider about the terms and conditions on which the carrier or provider is to comply with those obligations;

then:

- (d) the access seeker; or
- (e) the carrier or provider;

may notify the Commission in writing that an access dispute exists.

(2) If:

- (a) a declared service is supplied, or proposed to be supplied, by a carrier or a carriage service provider; and
- (b) one or more standard access obligations apply, or will apply, to the carrier or provider in relation to the declared service; and
- (c) an access seeker is unable to agree with the carrier or provider about one or more aspects of access to the declared service;

then:

- (d) the access seeker; or
- (e) the carrier or provider;

may notify the Commission in writing that an access dispute exists.

(3) For the purposes of paragraph (2)(b), it is to be assumed that subsection 152AR(4) had not been enacted.

(4) Subsection (2) only authorises the notification of a dispute to the extent that the dispute cannot be notified under subsection (1).

(5) The following are examples of things on which an access seeker and a carrier or provider might disagree:

- (a) the price, or the method of ascertaining the price, at which access is to be provided;
 - (b) whether a previous determination ought to be varied.
- (6) On receiving the notification, the Commission must give written notice of the access dispute to:
- (a) the carrier or provider, if the access seeker notified the access dispute; and
 - (b) the access seeker, if the carrier or provider notified the access dispute; and
 - (c) if the Commission is of the opinion that the resolution of the access dispute may involve requiring another person to do something—that other person; and
 - (d) any other person who the Commission thinks might want to become a party to the arbitration.
- (7) Unless the contrary intention appears, for the purposes of the application of this Division to a particular access dispute, a reference in this Division to the carrier or to the provider is a reference to the carrier or to the provider, as the case may be, referred to in whichever of subsections (1) and (2) is applicable.

152CN Withdrawal of notifications

Withdrawal by carrier or provider

- (1) If the carrier or provider notified the access dispute, the carrier or provider may withdraw the notification at any time before the Commission makes its final determination, but only with the consent of:
- (a) the access seeker; or
 - (b) if the carrier or provider is unable to obtain the consent of the access seeker—the Commission.

Withdrawal by access seeker

- (2) If the access seeker notified the access dispute, the access seeker may withdraw the notification at any time before the Commission makes its final determination, but only with the consent of:
- (a) the carrier or provider (as the case may be); or
 - (b) if the access seeker is unable to obtain the consent of the carrier or provider—the Commission.

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No other withdrawal

- (2A) A notification may not be withdrawn in any other circumstances.

Consequences of withdrawal

- (3) If the notification is withdrawn:
- (a) the Commission must not make a final determination in relation to the access dispute; and
 - (b) if the Commission has not already made an interim determination in relation to the access dispute—the Commission must not make an interim determination in relation to the access dispute.

Subdivision C—Arbitration of access disputes

152CO Parties to the arbitration

The parties to the arbitration of an access dispute are as follows:

- (a) the carrier or provider;
- (b) the access seeker;
- (c) if the Commission is of the opinion that the resolution of the access dispute may involve requiring another person to do something—that other person;
- (d) any other person who applies in writing to be made a party and is accepted by the Commission as having a sufficient interest.

152CP Determination by Commission

- (1) Unless the Commission terminates the arbitration under section 152CS, the Commission must make a written determination on access by the access seeker to the declared service.
- (2) The determination may deal with any matter relating to access by the access seeker to the declared service including matters that were not the basis for notification of the dispute. For example, the determination may:
 - (a) require the carrier or provider to provide access to the declared service by the access seeker; or
 - (b) require the access seeker to accept, and pay for, access to the declared service; or

- (c) specify the terms and conditions on which the carrier or provider is to comply with any or all of the standard access obligations applicable to the carrier or provider; or
 - (d) specify any other terms and conditions of the access seeker's access to the declared service; or
 - (e) require a party to extend or enhance the capability of a facility by means of which the declared service is supplied; or
 - (f) specify the extent to which the determination overrides an earlier determination relating to access to the declared service by the access seeker.
- (3) The determination must not require the carrier or provider to provide access to the declared service by the access seeker if the requirement is already imposed by:
- (a) Division 3 (which deals with the standard access obligations); or
 - (b) any other law of the Commonwealth.
- (4) Before making a determination, the Commission must give a draft determination to the parties.
- (5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.
- (6) A determination does not take effect before 1 July 1997.

152CPA Interim determination by Commission

- (1) A determination may be expressed to be an interim determination.
- (2) The making of an interim determination does not terminate an arbitration or relieve the Commission from its duty to make a final determination.

Procedural fairness

- (3) The Commission is not required to observe any requirements of procedural fairness in relation to the making of an interim determination if:
 - (a) both:
 - (i) the declared service is covered by a determination in force under section 152AQA; and

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- (ii) the price-related terms and conditions in the interim determination are consistent with the price-related terms and conditions in the section 152AQA determination; or
- (b) both:
 - (i) the declared service is covered by a determination in force under section 152AQB; and
 - (ii) the price-related terms and conditions in the interim determination are consistent with the price-related terms and conditions in the section 152AQB determination.

For this purpose, *price-related terms and conditions* means terms and conditions relating to price or a method of ascertaining price.

Duration

- (4) An interim determination has effect on the date specified in the determination.
- (5) Unless sooner revoked, an interim determination remains in force until the end of the period specified in the determination. The period must not be longer than 12 months.
- (5A) The Commission may extend the period specified in an interim determination, so long as:
 - (a) the extension is for a period of not more than 12 months; and
 - (b) there has been no previous extension.
- (5B) The Commission is not required to observe any requirements of procedural fairness in relation to granting, or refusing to grant, an extension under subsection (5A).

Revocation

- (6) The Commission may revoke an interim determination.
- (7) The Commission must revoke an interim determination if requested to do so by the parties to the determination.
- (8) If:
 - (a) an interim determination relating to an access dispute is in force; and
 - (b) the notification of the dispute is withdrawn under section 152CN;

the interim determination is taken to have been revoked when the withdrawal occurs.

- (9) If:
- (a) an interim determination relating to an access dispute is in force; and
 - (b) a final determination relating to the access dispute takes effect;
- the interim determination is taken to have been revoked when the final determination takes effect.

Variation

- (10) The Commission may vary an interim determination.
- (11) Sections 152CQ and 152CR apply to a variation under subsection (10) as if:
- (a) in a case where the interim determination was made in arbitration of an access dispute relating to an earlier final determination of an access dispute (the *eligible access dispute*) between the access seeker and the carrier or provider:
 - (i) an access dispute (the *notional access dispute*) arising out of the interim determination had been notified at the time when the eligible access dispute was notified; and
 - (ii) the notional access dispute were an access dispute relating to the earlier final determination; and
 - (iii) the variation were the making of an interim determination in the terms of the varied interim determination; or
 - (b) in any other case:
 - (i) an access dispute arising out of the interim determination had been notified at the time when the original access dispute was notified; and
 - (ii) the variation were the making of an interim determination in the terms of the varied interim determination.
- (12) The Commission is not required to observe any requirements of procedural fairness in relation to the variation under subsection (10) of an interim determination if:
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- (a) both:
 - (i) the declared service is covered by a determination in force under section 152AQA; and
 - (ii) the price-related terms and conditions in the varied interim determination are consistent with the price-related terms and conditions in the section 152AQA determination; or
- (b) both:
 - (i) the declared service is covered by a determination in force under section 152AQB; and
 - (ii) the price-related terms and conditions in the varied interim determination are consistent with the price-related terms and conditions in the section 152AQB determination.

For this purpose, *price-related terms and conditions* means terms and conditions relating to price or a method of ascertaining price.

152CQ Restrictions on access determinations

- (1) The Commission must not make a 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;
 - (b) preventing the carrier or 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;
 - (c) preventing a person from obtaining, by the exercise of a pre-notification 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 the 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 party (other than the 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 the carrier or provider to provide the 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) Paragraphs (1)(a), (b), (c) and (d) do not apply in relation to the requirements and rights of the access seeker and the carrier or 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 carrier or provider.
- (3) 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 provider).
- (4) The Commission must not make a determination that is inconsistent with any of the standard access obligations that are, or will be, applicable to the carrier or provider.
- (5) If an access undertaking given by the carrier or provider is in operation, the Commission must not make a determination that is inconsistent with the undertaking.
- (6) The Commission must not make a determination that is inconsistent with a Ministerial pricing determination.
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Section 152CR

- (7) A determination is of no effect if it is made in contravention of subsection (1), (4), (5) or (6).
- (8) 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 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.
- (9) In this section:

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

protected contractual right means a right under a contract that was in force at the beginning of 13 September 1996.

152CR Matters that the Commission must take into account

- (1) The Commission must take the following matters into account in making a final 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 the carrier or provider, 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 party 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) The Commission may take into account any other matters that it thinks are relevant.
 - (3) The Commission may take the following matters into account in making an interim determination:
 - (a) a matter referred to in a paragraph of subsection (1);
 - (b) any other matters that it thinks are relevant.
 - (4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in a paragraph of subsection (1).

152CRA Publication of determinations

Publication

- (1) The Commission may publish, in whole or in part, a determination and the reasons for making the determination. It may do so in such manner as it considers appropriate (including in electronic form).

Consultation

- (2) Before doing so, the Commission must give each party to the determination 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:
 - (i) identifying any part of what the Commission is proposing to publish that the party considers should not be published; and
 - (ii) setting out the party's reasons for that view.
- (3) In deciding whether to do so, the Commission must have regard to the following matters:
 - (a) any such submission received within that 14 day period;

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- (b) whether publication would be likely to promote competition in markets for listed carriage services (within the meaning of the *Telecommunications Act 1997*);
- (c) whether publication would be likely to facilitate the operation of this Part;
- (d) such other matters as the Commission considers relevant.

152CS Commission may terminate arbitration in certain cases

- (1) The Commission may at any time terminate an arbitration (without making a determination) if it thinks that:
 - (a) the notification of the dispute was vexatious; or
 - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (c) a party to the arbitration of the dispute has not engaged in negotiations in good faith; or
 - (d) access to the declared service should continue to be governed by an existing contract between the carrier or provider and the access seeker; or
 - (e) in the case of a dispute notified under subsection 152CM(2)—the arbitration should be terminated on the grounds that:
 - (i) the arbitration is not likely to make a significant contribution to competition in a market (whether or not in Australia); or
 - (ii) the access seeker's carriage service or content service is not of significant social and/or economic importance.
- (2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the existing determination should not continue to have effect in its present form.

152CT Commission may give directions in relation to negotiations

- (1) If the Commission considers that it would be likely to facilitate negotiations relating to an access dispute if a person who is or was a party to the arbitration of the access dispute were to be given a direction under this subsection, the Commission may, for the purposes of facilitating those negotiations, give the person a written procedural direction requiring the person to do, or refrain

from doing, a specified act or thing relating to the conduct of those negotiations.

- (2) The following are examples of the kinds of procedural directions that may be given under subsection (1):
- (a) a direction requiring a party to give relevant information to one or more other parties;
 - (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 another 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.

If the arbitration has been terminated, a reference in this subsection to a *party* is a reference to a former party.

- (2A) For the purposes of paragraph (2)(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 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.

- (3) A person must not contravene a direction under subsection (1).
- (4) A person must not:
- (a) aid, abet, counsel or procure a contravention of subsection (3); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (3); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (3); or
 - (d) conspire with others to effect a contravention of subsection (3).

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- (5) In deciding whether to give a direction under subsection (1), the Commission must have regard to:
 - (a) any guidelines in force under subsection (6); and
 - (b) such other matters as the Commission considers relevant.
- (6) The Commission may, by written instrument, formulate guidelines for the purposes of subsection (5).
- (7) In addition to its effect apart from this subsection, subsection (1) also has the effect it would have if each reference to a person were, by express provision, confined to a person who is a constitutional corporation.

152CU Enforcement of directions

- (1) If the Federal Court is satisfied that a person has contravened subsection 152CT(3) or (4), 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 152CT(3) or (4).

Subdivision D—Procedure in arbitrations

152CV Constitution of Commission for conduct of arbitration

- (1) For the purposes of a particular arbitration, the Commission is to be constituted by 1 or more members of the Commission nominated in writing by the Chairperson.
- (2) To avoid doubt, a member of the Commission is not disqualified from constituting the Commission (with other members) for the purposes of an arbitration of a dispute about a particular matter merely because the member has performed functions, or exercised powers, in relation to the matter or a related matter.
- (3) Subsection (2) has effect in addition to subsection 152BBC(5).
- (4) In determining the operation of a provision of this Act other than this Division or section 152BBC, subsection (2) of this section and subsection 152BBC(5) are to be disregarded.

152CW Member of the Commission presiding at an arbitration

2 or more members—Chairperson part of arbitration

- (1) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is one of those members;
- then the Chairperson is to preside at the arbitration.

2 or more members—Chairperson not part of arbitration

- (2) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is not one of those members;
- then the Chairperson must nominate one of those members to preside at the arbitration.

152CWA Exercise of procedural powers by Commission members

2 or more members—Chairperson part of arbitration

- (1) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is one of those members;
- then the procedural powers of the Commission in relation to the arbitration may be exercised by either or both of the following:
- (c) the Chairperson;
 - (d) any other of those members nominated in writing by the Chairperson for the purposes of this paragraph.

2 or more members—Chairperson not part of arbitration

- (2) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is not one of those members;
- then the procedural powers of the Commission in relation to the arbitration may be exercised by either or both of the following:
- (c) the member nominated under subsection 152CW(2) to preside at the arbitration;
 - (d) any other of those members nominated in writing by the Chairperson for the purposes of this paragraph.

Procedural powers

- (3) For the purposes of this section, a **procedural power** of the Commission in relation to an arbitration is a power of the Commission in relation to the arbitration other than:
- (a) a power conferred by this Division to make, vary or revoke a determination; or
 - (b) a power conferred by this Division to give a draft determination to the parties.

152CX Reconstitution of Commission

Single member

- (1) If:
- (a) the Commission is constituted under section 152CV by one member of the Commission; and
 - (b) that member stops being a member of the Commission or for any reason is not available for the purposes of the arbitration;
- then the Chairperson must direct that the Commission is to be constituted for the purposes of finishing the arbitration by one or more members nominated by the Chairperson.

2 or more members

- (2) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) one of those members stops being a member of the Commission or for any reason is not available for the purposes of the arbitration;
- then the Chairperson must either:
- (c) direct that the Commission is to be constituted for the purposes of finishing the arbitration by the remaining member or members; or
 - (d) direct that the Commission is to be constituted for that purpose by the remaining member or members together with one or more other members nominated by the Chairperson.

Previous record of proceedings

- (3) If a direction under subsection (1) or (2) is given, the Commission as constituted in accordance with the direction must continue and finish the arbitration and may, for that purpose, have regard to any record of the proceedings of the arbitration made by the Commission as previously constituted.

152CY Determination of questions

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

Section 152CZ

- (a) unless paragraph (b) applies—according to the opinion of the majority of those members; or
- (b) if the members are evenly divided on the question—according to the opinion of the member who is presiding.

152CZ Hearing to be in private

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

Note 1: The Commission may publish a determination made in relation to the arbitration: see section 152CRA.

Note 2: Information or documents given to the Commission in the course of the arbitration hearing may be given to a person for the purposes of another arbitration: see section 152DBA.

- (2) If the parties agree, an arbitration hearing or part of an arbitration hearing may be conducted in public.
- (3) The member of the Commission who is presiding at an arbitration hearing that is conducted in private may give written directions as to the persons who may be present.
- (4) In giving directions under subsection (3), the member presiding must have regard to the wishes of the parties and the need for commercial confidentiality.

152DA Right to representation

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

152DB Procedure of Commission

- (1) In an arbitration hearing about an access dispute, the Commission:
 - (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and
 - (c) may inform itself of any matter relevant to the dispute in any way it thinks appropriate.

Note: The Commission may conduct a joint arbitration hearing in relation to more than 1 access dispute: see section 152DMA.

- (2) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods.
- (3) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.
- (4) The Commission may determine that an arbitration hearing is to be conducted by:
 - (a) telephone; or
 - (b) closed circuit television; or
 - (c) any other means of communication.
- (5) Paragraph (1)(c) and subsections (2), (3) and (4) may be displaced or modified by the Procedural Rules.

152DBA Using information from one arbitration in another arbitration

- (1) For the purposes of an arbitration (the *current arbitration*) of an access dispute, the Commission may give any of the following:
 - (a) a party to the current arbitration;
 - (b) a representative of a party to the current arbitration;
 - (c) any other person who provides advice or assistance to a party to the current arbitration or to the Commission;any information, or any document or part of a document, given to the Commission by a person (the *contributor*) in the course of any other arbitration under this Division.
- (2) The Commission may do so only if it considers this would be likely to result in the current arbitration being conducted in a more efficient and timely manner.

Consultation

- (3) Before making a decision under subsection (1) to give information or a document or part of a document to a person (the *recipient*), the Commission must give the contributor a notice in writing:

Section 152DC

- (a) specifying what the Commission is proposing to give the recipient; and
 - (b) inviting the contributor to make a written submission to the Commission within 14 days after the notice is given:
 - (i) identifying any part of what the Commission is proposing to give the recipient that the contributor considers should not be given; and
 - (ii) setting out the contributor's reasons for that view.
- (4) In making a decision under subsection (1), the Commission must have regard to the following matters:
- (a) any such submission received within that 14 day period;
 - (b) any order or direction of the Commission under section 152DC in relation to particular information or a particular document;
 - (c) any decision of the Commission under section 152DK not to give a party to another arbitration under this Division a part of a document;
 - (d) such other matters as the Commission considers relevant.

152DC Particular powers of Commission

- (1) The Commission may do any of the following things for the purpose of arbitrating an access dispute:
- (a) give a direction in the course of, or for the purposes of, an arbitration hearing;
 - (b) hear and determine the arbitration in the absence of a person who has been summoned or served with a notice to appear;
 - (c) sit at any place;
 - (d) adjourn to any time and place;
 - (e) refer any matter to an expert and accept the expert's report as evidence;
 - (f) generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the access dispute.
- (2) Subsection (1) has effect subject to any other provision of this Part and subject to the regulations.
- (3) The Commission may give an oral or written order to a person not to divulge or communicate to anyone else specified information

that was given to the person in the course of an arbitration unless the person has the Commission's permission.

- (4) A person who contravenes:
- (a) a direction under paragraph (1)(a) or (f); or
 - (b) an order under subsection (3);
- is guilty of 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*.

152DD Power to take evidence on oath or affirmation

- (1) The Commission may take evidence on oath or affirmation and for that purpose a member of the Commission may administer an oath or affirmation.
- (2) The member of the Commission who is presiding may summon a person to appear before the Commission to give evidence and to produce such documents (if any) as are referred to in the summons.
- (3) The powers in this section may be exercised only for the purposes of arbitrating an access dispute.

152DE Failing to attend as a witness

- (1) A person who is served, as prescribed, with a summons to appear as a witness before the Commission must 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 Commission.

Penalty: Imprisonment for 6 months.

Note: See also sections 4AA and 4B of the *Crimes Act 1914*.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Section 152DF

152DF Failing to answer questions etc.

- (1) A person appearing as a witness before the Commission must not:
 - (a) refuse or fail to be sworn or to make an affirmation; or
 - (b) refuse or fail to answer a question that the person is required to answer by the Commission; or
 - (c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part served on him or her as prescribed.

Penalty: Imprisonment for 6 months.

Note: See also sections 4AA and 4B of the *Crimes Act 1914*.

- (1A) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A) (see subsection 13.3(3) of the *Criminal Code*).

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

152DG Giving false or misleading evidence

A person appearing before the Commission to give evidence under section 152DD must not give evidence that is false or misleading in a material particular.

Penalty: Imprisonment for 12 months.

Note: See also sections 4AA and 4B of the *Crimes Act 1914*.

152DH Provision of false or misleading document

- (1) A person must not, in complying with a summons under section 152DD, produce a document that, to the knowledge of the person, is false or misleading in a material particular.
- (2) Subsection (1) does not apply to a person who produces a document that, to the knowledge of the person, is false or

misleading in a material particular if the document is accompanied by a written statement signed by the person:

- (a) stating that the document is, to the knowledge of the person, false or misleading in a material particular; and
- (b) setting out, or referring to, the material particular in which the document is false or misleading.

Penalty: Imprisonment for 12 months.

Note: See also sections 4AA and 4B of the *Crimes Act 1914*.

152DI Intimidation etc.

A person must not:

- (a) threaten, intimidate or coerce another person; or
- (b) cause or procure damage, loss or disadvantage to another person;

because that other person:

- (c) proposes to produce, or has produced, documents to the Commission; or
- (d) proposes to appear or has appeared as a witness before the Commission.

Penalty: Imprisonment for 12 months.

Note: See also sections 4AA and 4B of the *Crimes Act 1914*.

152DJ Disturbing an arbitration hearing etc.

(1) A person must not, in relation to the arbitration of an access dispute:

- (a) insult or disturb a member of the Commission in the exercise of the member's powers or the performance of the member's functions or duties as a member of the Commission; or
- (b) interrupt an arbitration hearing; or
- (c) use insulting language towards a member of the Commission exercising powers, or performing functions, as such a member; or
- (d) create a disturbance, or take part in creating or continuing a disturbance, in a place where the Commission is holding an arbitration hearing.

Section 152DK

- (2) A person who intentionally contravenes subsection (1) is guilty of 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*.

152DK Party may request Commission to treat material as confidential

- (1) A party to an arbitration hearing may:
- (a) inform the Commission that, in the party's opinion, a specified part of a document contains confidential commercial information; and
 - (b) request the Commission not to give a copy of that part to another party.
- (2) On receiving a request, the Commission must:
- (a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and
 - (b) ask the other party or parties whether there is any objection to the Commission complying with the request.
- (3) If there is an objection to the Commission complying with a request, the party objecting may inform the Commission of its objection and of the reasons for it.
- (4) After considering:
- (a) a request; and
 - (b) any objection; and
 - (c) any further submissions that any party has made in relation to the request;
- the Commission may decide not to give to the other party or parties a copy of so much of the document as contains confidential commercial information that the Commission thinks should not be so given.
- (5) Subsections (1), (2), (3) and (4) may be displaced or modified by the Procedural Rules.

152DL Sections 18 and 19 do not apply to the Commission in an arbitration

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

152DM Parties to pay costs of an arbitration

The regulations may provide for the Commission to:

- (a) charge the parties to an arbitration for its costs in conducting the arbitration; and
- (b) apportion the charge between the parties.

152DMA Joint arbitration hearings

Joint hearing

- (1) If:
 - (a) the Commission is arbitrating 2 or more access disputes at a particular time; and
 - (b) one or more matters are common to those disputes;the Chairperson may, by writing, determine that the Commission is to hold a joint arbitration hearing in respect of such of those disputes (the *nominated disputes*) as are specified in the determination.
- (2) The Chairperson may do so only if he or she considers this would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.
- (3) The Chairperson may, for the purposes of the conduct of the joint arbitration hearing, give written directions to the member of the Commission presiding at that hearing.

Constitution of Commission

- (4) Sections 152CV to 152CY apply in relation to the joint arbitration hearing in a corresponding way to the way in which they apply to a particular arbitration.

Note: For example, the Chairperson would be required to nominate in writing 1 or more members of the Commission to constitute the Commission for the purposes of the joint arbitration hearing.

Section 152DN

Procedure of Commission

- (5) Sections 152CZ to 152DM apply in relation to the joint arbitration hearing in a corresponding way to the way in which they apply to an arbitration hearing of a particular access dispute.

Record of proceedings etc.

- (6) The Commission as constituted for the purposes of the joint arbitration hearing may, for the purposes of that hearing, have regard to any record of the proceedings of the arbitration of any nominated dispute.
- (7) The Commission as constituted for the purposes of the arbitration of each nominated dispute may, for the purposes of making a determination in relation to that arbitration:
- (a) have regard to any record of the proceedings of the joint arbitration hearing; and
 - (b) adopt any findings of fact made by the Commission as constituted for the purposes of the joint arbitration hearing.

Procedural Rules

- (8) Subsections (1) to (7) may be displaced or modified by the Procedural Rules.

Subdivision E—Effect of determinations

152DN Operation of determinations

- (1) A final determination has effect 21 days after the determination is made.

152DNA Backdating of final determinations

- (1) Any or all of the provisions of a final determination may be expressed to have taken effect on a specified date that is earlier than the date on which the determination took effect.
- (2) The specified date must not be earlier than the date on which the parties to the determination commenced negotiations with a view to agreeing on the terms and conditions as mentioned in paragraph 152AY(2)(a).

Note: See subsection 152CP(3) for the limits on a final determination.

- (3) For the purposes of subsection 152CPA(9), in determining the time when a final determination takes effect, a provision covered by subsection (1) of this section is to be disregarded.
- (4) A provision of a final determination may be expressed to cease to have effect on a specified date.
- (5) This section has effect despite anything in section 152DN.

Interest

- (6) If:
 - (a) a provision of a determination is covered by subsection (1); and
 - (b) the provision requires a party to the determination (the *first party*) to pay money to another party;the determination may require the first party to pay interest to the other party, at the rate specified in the determination, on the whole or a part of the money, for the whole or a part of the period:
 - (c) beginning on the date on which the parties began negotiations with a view to agreeing on the terms and conditions as mentioned in paragraph 152AY(2)(a); and
 - (d) ending on the date on which the determination would have taken effect if no provision of the determination had been covered by subsection (1) of this section.

Guidelines

- (7) In exercising the powers conferred by subsection (1) or (6), 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 must, by writing, formulate guidelines for the purposes of subsection (7).
- (9) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (8) is made within 6 months after the commencement of this subsection.

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- (10) Guidelines under subsection (8) are to be made available on the internet.

152DNB Stay of 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 a 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 a 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.

152DNC Continuity of final determination not affected by expiry of declaration relating to declared service

- (1) This section applies if:
- (a) a declaration under section 152AL expires; and
 - (b) immediately before the expiry of the declaration, a final determination was in force in relation to the declared service concerned; and
 - (c) the determination does not have an indefinite duration.
- (2) Despite the expiry of the declaration, the declaration continues in force for the purposes of:
- (a) ascertaining whether the determination remains in force; and
 - (b) ascertaining whether a party to the determination has any obligations under section 152AR to any other party to the determination while the determination remains in force; and
 - (c) exercising the Commission's power to vary the determination under section 152DT.
- (3) A party to the determination is not entitled to notify an access dispute in relation to the declared service.

Subdivision G—Variation of determinations

152DT Variation of determinations

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

Note: If the parties cannot agree on a variation, a new access dispute can be notified under section 152CM.

- (2) Sections 152CQ and 152CR apply to a variation under this section as if:
- (a) an access dispute arising out of the final determination had been notified when the application was made to the Commission for the variation of the final determination; and
 - (b) the variation were the making of a final determination in the terms of the varied final determination.

Subdivision H—Enforcement of determinations

152DU Enforcement of determinations

- (1) If the Federal Court is satisfied, on the application of a party to a determination, that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination, the Court may make all or any of the following orders:
- (a) an order granting an injunction on such terms as the Court thinks appropriate:
 - (i) restraining the other party from engaging in the conduct; or
 - (ii) if the conduct involves refusing or failing to do something—requiring the other party to do that thing;
 - (b) an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;
 - (c) any other order that the Court thinks appropriate.
- (1A) The revocation of a determination does not affect any remedy under subsection (1) in respect of a contravention of the determination that occurred when the determination was in force.

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- (2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.
- (3) A reference in this section to a person involved in the contravention is a reference to a person who has:
 - (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention, whether through threats or promises or otherwise; or
 - (c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or
 - (d) conspired with others to effect the contravention.

152DV Consent injunctions

On an application for an injunction under section 152DU, 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.

152DW Interim injunctions

The Federal Court may grant an interim injunction pending determination of an application under section 152DU.

152DX Factors relevant to granting a restraining injunction

The power of the Federal Court to grant an injunction under section 152DU 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.

152DY Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 152DU 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.

152DZ Discharge or variation of injunction or other order

The Federal Court may discharge or vary an injunction or order granted under this Subdivision.

Subdivision I—Miscellaneous

152EA Register of determinations

- (1) The Commission must maintain a Register that specifies the following information for each determination:
 - (a) the names of the parties to the determination;
 - (b) the declared service to which the determination relates;
 - (c) the date on which the determination was made.
- (2) The Register may be maintained by electronic means.
- (3) 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.
- (4) 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.
- (5) 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.

152EAA Commission's powers under Division 6 of Part XIB not limited

Nothing in this Division limits the Commission's powers under Division 6 of Part XIB (about record-keeping rules and disclosure directions).

152EB Compensation for acquisition of property

- (1) If:
- (a) a determination would result in an acquisition of property; and
 - (b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated;
- the Commonwealth must pay that person:
- (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
 - (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.
- (2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:
- (a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;
 - (b) compensation awarded under a determination.
- (3) In this section:
- acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.

Division 9—Registered agreements for access to declared services

152EC Agreements to which this Division applies

This Division applies to an agreement if:

- (a) the agreement embodies any or all of the terms or 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) all of the following conditions are satisfied in relation to the agreement:
 - (i) the agreement provides for access to a declared service;
 - (ii) the agreement was made after the service was declared;
 - (iii) the parties to the agreement are an access seeker and the carrier or carriage service provider who supplies, or proposes to supply, the service.

152ED Registration of agreement

- (1) On application by all the parties to an agreement, the Commission must:
 - (a) register the agreement by entering the following details on a Register:
 - (i) the names of the parties to the agreement;
 - (ii) the declared service to which the agreement relates;
 - (iii) the date on which the agreement was made; or
 - (b) decide not to register the agreement.
- (2) In deciding whether to register an agreement, the Commission must take into account:
 - (a) the public interest, including the public interest in having competition in markets (whether or not in Australia); and
 - (b) the interests of all persons who have rights to use the declared service to which the agreement relates.
- (3) The Commission must publish a decision not to register an agreement.

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- (4) If the Commission publishes a decision not to register an agreement, it must give the parties to the agreement reasons for the decision when it publishes the decision.
- (5) If:
 - (a) an agreement is registered; and
 - (b) all the parties to the agreement apply in writing to the Commission for the deregistration of the agreement;the Commission must deregister the agreement by removing details of the agreement from the Register.
- (6) The Register may be maintained by electronic means.
- (7) 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.
- (8) 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.
- (9) 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.

152EE Effect of registration of agreement

- (1) The parties to an agreement that is registered:
 - (a) may enforce the agreement under Subdivision H of Division 8 as if the agreement were a determination of the Commission under section 152CP and they were parties to the determination; and
 - (b) cannot enforce the agreement by any other means.
- (2) Subsection (1) does not have effect before 1 July 1997.

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) an obligation imposed by a determination made by the Commission under Division 8;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 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:

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- (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.

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.

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 152AT(1) or 152ATA(1); or
 - (ii) a person who gave the Commission an access undertaking or a variation of an access undertaking; or
 - (iii) a party to the arbitration of an access dispute under Division 8;
 - (b) matters to which the Commission must have regard in deciding whether to make an interim determination under Division 8;
 - (c) the form and content of applications, undertakings, variations or other documents given to the Commission under this Part;
 - (d) dispensing with the need for an oral hearing in relation to the arbitration of an access dispute under Division 8.
- (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) The Procedural Rules may require a power conferred on the Commission by the Procedural Rules in relation to an arbitration under Division 8 to be exercised by the Commission as constituted under section 152CV for the purposes of that arbitration.
- (7) Subsections (5) and (6) do not limit subsection (1).
- (8) An instrument under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Note: For variation and revocation of instruments under subsection (1), see subsection 33(3) of the *Acts Interpretation Act 1901*.

152ELB Public consultation

- (1) Before making any Procedural Rules, the Commission must:
 - (a) publish a draft of the Procedural Rules on the Commission's website and invite people to make submissions to the Commission on the draft Procedural Rules; and
 - (b) consider any submissions that are received within the time limit specified by the Commission when it published the draft Procedural Rules.
- (2) The time limit specified by the Commission must be at least 30 days after the day of publication of the draft Procedural Rules.

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 for the purposes of the *Legislative Instruments Act 2003*.

Division 11—Miscellaneous**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:

- (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,

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consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent; is taken for the purposes of this Part to have been engaged in also by the body corporate, unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

- (3) 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 Operational separation for Telstra

- (1) This section applies if Telstra has engaged in conduct in order to comply with a final operational separation plan in force under Part 8 of Schedule 1 to the *Telecommunications Act 1997*.
- (2) 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.

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, Part 20 of the *Telecommunications Act 1997* or Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.
- 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).

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.

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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; 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
- (d) a contravention of section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Part.

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.

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) be in the form 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.

- (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.

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;

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.

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.

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;

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
 - (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.

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:

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- (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 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:
- (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

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(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.

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
- (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

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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.
- (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.

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.

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Penalty for a contravention of this subsection: Imprisonment for 6 months.

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.
- (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; 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
 - (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.

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Affect 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.

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
 - (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.

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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.

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.
- (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

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- (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.

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.

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.
 - (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.
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(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.

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 that constitutes, or may constitute, a contravention of this Act or Division 4A or 4B of Part 3.3 of the *Radiocommunications Act 1992*, or is relevant to a designated communications matter (as defined by subsection (9)) or a designated water matter (as defined by subsection (9A)) or is relevant to the making of a decision by the Commission under subsection 91B(4), 91C(4), 93(3) or (3A) or 93AC(1) or (2) or 95AS(7) or the making of an application under subsection 95AZM(6), a member of the Commission may, by notice in writing served on that person, 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.
- (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

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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.
- (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.
- (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*.
- (6A) A person who contravenes subsection (5) 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.

- (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.
- (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

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- (c) Part XIB or XIC of this Act; or
 - (d) Division 4A or 4B of Part 3.3 of the *Radiocommunications Act 1992*.
- (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*.

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).

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 Australian Communications and Media Authority;
- (c) the Australian Prudential Regulation Authority;
- (d) the Australian Securities and Investments Commission;
- (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;
- (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.

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);
- 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, V, VA, VII, VIII, XIB or XIC (other than a provision of Division 1AA of Part V); 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 so far as it relates to a provision covered by paragraph (a) or (b).

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:

- (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
- (c) information that:
 - (i) was obtained by the Commission under section 151AU, 152AU, 152BT, 152BZ, 152CBB or 152CBH or rules in force under section 151BU; and
 - (ii) relates to a matter arising under Part XIB or XIC; or
- (d) information that was obtained by the Commission under section 118C, 118G, 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.

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:
 - (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

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:
 - (a) contravene a notice under section 98H of the Commerce Act 1986 of New Zealand; or

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- (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.

156 Inspection of documents by Commission

- (1) A member of the Commission, or a person authorized 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 authorized 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 Subdivision B of Division 3 of Part VII; or
 - (b) the Commission proposes the revocation of an authorization under subsection 91B(3) or the revocation of an authorization and the substitution of another authorization under subsection 91C(3); or
 - (ba) the Commission proposes to revoke, or to revoke and substitute, a clearance under section 95AS; or
 - (c) a proceeding is instituted against a corporation or other person under section 77, 80, 80AC, 81 or 81A; or
 - (d) an application is made under section 86C or 86D or subsection 87(1A), 87AAA(1) or 87A(1) 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

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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.

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

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.

157AA Disclosure of documents by Tribunal in relation to merger authorisations

- (1) If:
 - (a) a corporation makes an application to the Tribunal in relation to an authorisation under Subdivision C of Division 3 of Part VII; or
 - (b) the Tribunal proposes to revoke, or to revoke and substitute, an authorisation granted to the corporation under section 95AZM;the Tribunal must, at the request of the corporation and upon payment of the prescribed fee (if any), give to the corporation:
 - (c) a copy of every document that has been given to, or obtained by, the Tribunal in relation to the application or revocation that tends to establish the corporation's case; and
 - (d) a copy of any other document in the Tribunal's possession that comes to the Tribunal's attention in relation to the application or revocation that tends to establish the corporation's case.

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- (2) However, subsection (1) does not require the Tribunal to give to the corporation a document that was:
 - (a) obtained from the corporation; or
 - (b) prepared by an officer or professional adviser of the Tribunal.
- (3) If the Tribunal does not comply with a requirement under subsection (1), then, subject to subsection (4), the Court must, upon application by the corporation, make an order directing the Tribunal to comply with the requirement.
- (4) The Court may refuse to make an order under subsection (3) 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.
- (5) Before the Court gives a decision on an application under subsection (3), the 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 conditions specified in the order.

157A Disclosure of 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 AER or the AEMC in performing its functions or exercising its powers;any information that it obtains under this Act 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.
- (2) The AER or a person mentioned in paragraph (1)(c) 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.

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;

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(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;

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;
 - (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 44ZZRF, 44ZZRG, 44ZZRJ or 44ZZRK.

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
 - (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
 - (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
-

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- (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 44ZZRF, 44ZZRG, 44ZZRJ or 44ZZRK.

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 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.

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 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
 - (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 65J, 65M, 90A, 93A or 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.
- (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

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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:
 - (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 44ZZRF or 44ZZRG; 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 to 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 118, 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 44ZZRF or 44ZZRG if the proceeding is instituted before the commencement of Schedule 1 to the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009*.

163A Declarations and orders

Declarations and orders

- (1) Subject to this section, a person may, in relation to a matter arising under this Act, 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 other than the following provisions:
 - (i) Division 2, 2A or 3 of Part V;
 - (ii) Part XIB;
 - (iii) Part XIC; 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; 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.

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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).
- (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, 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 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*.

- (4B) If a decision to prosecute a person for an offence against section 44ZZRF or 44ZZRG 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 44ZZRF or 44ZZRG 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;
 - (e) if the Supreme Court is the Supreme Court of a Territory, then:
-

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- (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 44ZZRF or 44ZZRG, 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) or section 95AH; 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 a person authorized 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.
- (3A) Subject 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 any document contained in the register kept under section 95AZ; and
 - (b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy by the Registrar or a Deputy Registrar).
- (4) A copy of a determination of the Commission, certified to be a true copy by a person authorized 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.

166 Certificates as to furnishing of particulars to Commission

- (1) Where particulars of, or of a provision of, a contract, arrangement or understanding 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 or to the arrangement or understanding, 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 of, or of a provision of, a contract, arrangement or understanding 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 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 authorized 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 VA, Part VI or section 163A;
 - (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 VA, Part VI or section 163A;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*) authorized 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, authorize 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.
- (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 or a clearance under Division 3 of Part VII; and

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- (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
 - (ii) a proceeding in relation to an application for, or the revocation of, an authorisation under Division 3 of Part VII; 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

- (1) The Commission shall, within 60 days after each year ending on 30 June, furnish to the Minister, for presentation to the Parliament, a report with respect to its operations in that year.
- (2) The report 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
 - (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

- (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 were issued or signed; and
- (db) the number of proceedings brought to challenge the validity of the search warrants; and
- (dc) the number of entries onto premises under Part XIX; and
- (e) the number of complaints received by the Commission; and
- (f) a general summary of the kinds of 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
 - (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

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- (b) the Commission does at the person's request.

171B Division 3 of Part IIIA and Division 8 of Part XIC do not confer judicial power on the Commission

- (1) Division 3 of Part IIIA and Division 8 of Part XIC have no effect to the extent (if any) to which they purport 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 to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act 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
 - (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.
- (1A) Without limiting subsection (1), that subsection includes the power to make regulations enabling a person who is alleged to have contravened section 65R to pay to the Commonwealth, as an alternative to prosecution, a specified penalty, not exceeding one-fifth of the maximum penalty that could be imposed on the person under that section.
- (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 of specified provisions of this Act (other than Part IV):
 - (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 an authorisation under subsection 88(9), 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.
- (3) Strict compliance with a form of application or notice prescribed 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.

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(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.

Part XIII—Application and transitional provisions relating to the competition provisions

Division 1—Cartel conduct

174 Definitions

In this Division:

commencement time means the commencement of Division 1 of Part IV.

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 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

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- (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.

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.

Schedule The Schedule version of Part IV

Part 1 Schedule version of Part IV

Division 1 Cartel conduct

Section 44ZZRA

Schedule—The Schedule version of Part IV

Part 1—Schedule version of Part IV

Note: See section 150A.

Division 1—Cartel conduct

Subdivision A—Introduction

44ZZRA Simplified outline

The following is a simplified outline of this Division:

- This Division sets out parallel offences and civil penalty provisions relating to cartel conduct.
- A person must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
- A cartel provision is a provision relating to:
 - (a) price-fixing; or
 - (b) restricting outputs in the production and supply chain; or
 - (c) allocating customers, suppliers or territories; or
 - (d) bid-rigging;by parties that are, or would otherwise be, in competition with each other.

44ZZRB Definitions

In this Division:

annual turnover, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate,

have made, or are likely to make, during the 12-month period, other than:

- (a) supplies made from any of those bodies corporate to any other of those bodies corporate; or
- (b) supplies that are input taxed; or
- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on; or
- (e) supplies that are not connected with Australia.

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

benefit includes any advantage and is not limited to property.

bid includes:

- (a) tender; and
- (b) the taking, by a potential bidder or tenderer, of a preliminary step in a bidding or tendering process.

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

knowledge has the same meaning as in the *Criminal Code*.

likely, in relation to any of the following:

- (a) a supply of goods or services;
- (b) an acquisition of goods or services;
- (c) the production of goods;
- (d) the capacity to supply services;

includes a possibility that is not remote.

obtaining includes:

- (a) obtaining for another person; and
- (b) inducing a third person to do something that results in another person obtaining.

party has a meaning affected by section 44ZZRC.

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production includes manufacture, processing, treatment, assembly, disassembly, renovation, restoration, growing, raising, mining, extraction, harvesting, fishing, capturing and gathering.

44ZZRC Extended meaning of party

For the purposes of this Division, if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a **party** to that contract, arrangement or understanding.

44ZZRD Cartel provisions

- (1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a **cartel provision** if:
 - (a) either of the following conditions is satisfied in relation to the provision:
 - (i) the purpose/effect condition set out in subsection (2);
 - (ii) the purpose condition set out in subsection (3); and
 - (b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

Purpose/effect condition

- (2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:
 - (a) fixing, controlling or maintaining; or
 - (b) providing for the fixing, controlling or maintaining of; the price for, or a discount, allowance, rebate or credit in relation to:
 - (c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
 - (d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
 - (e) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or

- (f) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions—see subsection (8).

Note 2: **Party** has an extended meaning—see section 44ZZRC.

Purpose condition

- (3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
- (a) preventing, restricting or limiting:
 - (i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
 - (ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or
 - (iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or
 - (b) allocating between any or all of the parties to the contract, arrangement or understanding:
 - (i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or
 - (ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or
 - (iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
 - (iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

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- (c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:
 - (i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or
 - (ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or
 - (iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or
 - (iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or
 - (v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered with related provisions—see subsection (9).

Note 3: **Party** has an extended meaning—see section 44ZZRC.

Competition condition

- (4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:
 - (a) are or are likely to be; or
 - (b) but for any contract, arrangement or understanding, would be or would be likely to be;in competition with each other in relation to:
 - (c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services—the supply of those goods or services; or

- (d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services; or
- (e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or likely re-supply, of goods or services—the supply of those goods or services to that re-supplier; or
- (f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods; or
- (g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services; or
- (h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services; or
- (i) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services; or
- (j) if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services.

Note: **Party** has an extended meaning—see section 44ZZRC.

Immaterial whether identities of persons can be ascertained

- (5) It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (f) or subparagraph (3)(a)(iii), (b)(i) or (ii) can be ascertained.

Recommending prices etc.

- (6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:
 - (a) to have the purpose mentioned in subsection (2); or
 - (b) to have, or be likely to have, the effect mentioned in subsection (2);by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

Immaterial whether particular circumstances or particular conditions

- (7) It is immaterial whether:
- (a) for the purposes of subsection (2), subparagraph (3)(a)(iii) and paragraphs (3)(b) and (c)—a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and
 - (b) for the purposes of subparagraph (3)(a)(i)—the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and
 - (c) for the purposes of subparagraph (3)(a)(ii)—the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

Considering related provisions—purpose/effect condition

- (8) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:
- (a) the other provisions of the contract, arrangement or understanding;
 - (b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;
- has that purpose, or has or is likely to have that effect.

Considering related provisions—purpose condition

- (9) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:
- (a) the other provisions of the contract, arrangement or understanding;
 - (b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least

one of the parties to the first-mentioned contract,
arrangement or understanding;
has that purpose.

Purpose/effect of a provision

- (10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:
- (a) the form of the provision; or
 - (b) the form of the contract, arrangement or understanding; or
 - (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

Purpose of a provision

- (11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:
- (a) the form of the provision; or
 - (b) the form of the contract, arrangement or understanding; or
 - (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

44ZZRE Meaning of expressions in other provisions of this Act

In determining the meaning of an expression used in a provision of this Act (other than this Division, subsection 6(2C), paragraph 76(1A)(aa) or subsection 93AB(1A)), this Division is to be disregarded.

Subdivision B—Offences etc.

44ZZRF Making a contract etc. containing a cartel provision

Offence

- (1) A person commits an offence if:
- (a) the person makes a contract or arrangement, or arrives at an understanding; and

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- (b) the contract, arrangement or understanding contains a cartel provision.
- (2) The fault element for paragraph (1)(b) is knowledge or belief.

Penalty

- (3) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not exceeding the greater of the following:
 - (a) \$10,000,000;
 - (b) if the court can determine the total value of the benefits that:
 - (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;3 times that total value;
 - (c) if the court cannot determine the total value of those benefits—10% of the body corporate's annual turnover during the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the offence.
- (4) An offence against subsection (1) committed by a person other than a body corporate is punishable on conviction by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both.

Indictable offence

- (5) An offence against subsection (1) is an indictable offence.

44ZZRG Giving effect to a cartel provision

Offence

- (1) A person commits an offence if:
 - (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the person gives effect to the cartel provision.
- (2) The fault element for paragraph (1)(a) is knowledge or belief.

Penalty

- (3) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not exceeding the greater of the following:
- (a) \$10,000,000;
 - (b) if the court can determine the total value of the benefits that:
 - (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;3 times that total value;
 - (c) if the court cannot determine the total value of those benefits—10% of the body corporate's annual turnover during the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the offence.
- (4) An offence against subsection (1) committed by a person other than a body corporate is punishable on conviction by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both.

Pre-commencement contracts etc.

- (5) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section.

Indictable offence

- (6) An offence against subsection (1) is an indictable offence.

44ZZRH Determining guilt

- (1) A person may be found guilty of an offence against section 44ZZRF or 44ZZRG even if:
- (a) each other party to the contract, arrangement or understanding is a person who is not criminally responsible; or
 - (b) subject to subsection (2), all other parties to the contract, arrangement or understanding have been acquitted of the offence.

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Note: *Party* has an extended meaning—see section 44ZZRC.

- (2) A person cannot be found guilty of an offence against section 44ZZRF or 44ZZRG if:
- (a) all other parties to the contract, arrangement or understanding have been acquitted of such an offence; and
 - (b) a finding of guilt would be inconsistent with their acquittal.

44ZZRI Court may make related civil orders

If a prosecution against a person for an offence against section 44ZZRF or 44ZZRG is being, or has been, heard by a court, the court may:

- (a) grant an injunction under section 80 against the person in relation to:
 - (i) the conduct that constitutes, or is alleged to constitute, the offence; or
 - (ii) other conduct of that kind; or
- (b) make an order under section 86C, 86D, 86E or 87 in relation to the offence.

Subdivision C—Civil penalty provisions

44ZZRJ Making a contract etc. containing a cartel provision

A person contravenes this section if:

- (a) the person makes a contract or arrangement, or arrives at an understanding; and
- (b) the contract, arrangement or understanding contains a cartel provision.

Note: For enforcement, see Part VI.

44ZZRK Giving effect to a cartel provision

- (1) A person contravenes this section if:
- (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the person gives effect to the cartel provision.

Note: For enforcement, see Part VI.

- (2) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section.

Subdivision D—Exceptions

44ZZRL Conduct notified

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply to a person in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
- (a) the cartel provision:
 - (i) has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); or
 - (ii) has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); and
 - (b) the person has given the Commission a collective bargaining notice under subsection 93AB(1A) setting out particulars of the contract, arrangement or understanding; and
 - (c) the notice is in force under section 93AD.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

44ZZRM Cartel provision subject to grant of authorisation

- (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the making of a contract that contains a cartel provision if:
- (a) the contract is subject to a condition that the provision will not come into force unless and until the person is granted an authorisation to give effect to the provision; and
 - (b) the person applies for the grant of such an authorisation within 14 days after the contract is made.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

44ZZRN Contracts, arrangements or understandings between related bodies corporate

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding if the only
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parties to the contract, arrangement or understanding are bodies corporate that are related to each other.

- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

44ZZRO Joint ventures—prosecution

- (1) Sections 44ZZRF and 44ZZRG do not apply in relation to a contract containing a cartel provision if:
- (a) the cartel provision is for the purposes of a joint venture; and
 - (b) the joint venture is for the production and/or supply of goods or services; and
 - (c) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract; and
 - (d) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital;of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (1A) Section 44ZZRF does not apply in relation to an arrangement or understanding containing a cartel provision if:
- (a) the arrangement or understanding is not a contract; and
 - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
 - (i) intended the arrangement or understanding to be a contract; and
 - (ii) reasonably believed that the arrangement or understanding was a contract; and
 - (c) the cartel provision is for the purposes of a joint venture; and
 - (d) the joint venture is for the production and/or supply of goods or services; and

- (e) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
- (f) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (d) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (1B) Section 44ZZRG does not apply in relation to giving effect to a cartel provision contained in an arrangement or understanding if:
 - (a) the arrangement or understanding is not a contract; and
 - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
 - (i) intended the arrangement or understanding to be a contract; and
 - (ii) reasonably believed that the arrangement or understanding was a contract; and
 - (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
 - (d) the cartel provision is for the purposes of a joint venture; and
 - (e) the joint venture is for the production and/or supply of goods or services; and
 - (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
 - (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (e) jointly by means of:
 - (i) their joint control; or

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(ii) their ownership of shares in the capital;
of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

(2) A person who wishes to rely on subsection (1), (1A) or (1B) bears an evidential burden in relation to that matter.

Notice to prosecutor

(3) A person is not entitled to rely on subsection (1), (1A) or (1B) in a trial for an offence unless, within 28 days after the day on which the person is committed for trial, the person gives the prosecutor:

(a) a written notice setting out:

(i) the facts on which the person proposes to rely for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1), (1A) or (1B), as the case may be; and

(ii) the names and address of any witnesses whom the person proposes to call for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1), (1A) or (1B), as the case may be; and

(b) certified copies of any documents which the person proposes to adduce or point to for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1), (1A) or (1B), as the case may be.

(4) If the trial of a person for an offence is being, or is to be, held in a court, the court may, by order:

(a) exempt the person from compliance with subsection (3); or

(b) extend the time within which the person is required to comply with subsection (3).

(5) For the purposes of paragraph (3)(b), a *certified copy* of a document is a copy of the document certified to be a true copy by:

(a) a Justice of the Peace; or

(b) a commissioner for taking affidavits.

44ZZRP Joint ventures—civil penalty proceedings

- (1) Sections 44ZZRJ and 44ZZRK do not apply in relation to a contract containing a cartel provision if:
- (a) the cartel provision is for the purposes of a joint venture; and
 - (b) the joint venture is for the production and/or supply of goods or services; and
 - (c) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract; and
 - (d) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital;of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (1A) Section 44ZZRJ does not apply in relation to an arrangement or understanding containing a cartel provision if:
- (a) the arrangement or understanding is not a contract; and
 - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
 - (i) intended the arrangement or understanding to be a contract; and
 - (ii) reasonably believed that the arrangement or understanding was a contract; and
 - (c) the cartel provision is for the purposes of a joint venture; and
 - (d) the joint venture is for the production and/or supply of goods or services; and
 - (e) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
 - (f) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate

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formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (d) jointly by means of:

- (i) their joint control; or
- (ii) their ownership of shares in the capital; of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (1B) Section 44ZZRK does not apply in relation to giving effect to a cartel provision contained in an arrangement or understanding if:
- (a) the arrangement or understanding is not a contract; and
 - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
 - (i) intended the arrangement or understanding to be a contract; and
 - (ii) reasonably believed that the arrangement or understanding was a contract; and
 - (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
 - (d) the cartel provision is for the purposes of a joint venture; and
 - (e) the joint venture is for the production and/or supply of goods or services; and
 - (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
 - (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (e) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (2) A person who wishes to rely on subsection (1), (1A) or (1B) bears an evidential burden in relation to that matter.

44ZZRQ Covenants affecting competition

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract containing a cartel provision, in so far as the cartel provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

44ZZRR Resale price maintenance

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:
- (a) conduct that contravenes section 48; or
 - (b) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
 - (c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

44ZZRS Exclusive dealing

- (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as giving effect to the cartel provision would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47.
- (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the giving effect to a cartel provision by way of:

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- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or
- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an authorisation under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7), conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (3) A person who wishes to rely on subsection (1) or (2) bears an evidential burden in relation to that matter.

44ZZRT Dual listed company arrangement

- (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as:
 - (a) the contract, arrangement or understanding is a dual listed company arrangement; and
 - (b) the making of the contract, arrangement or understanding would, or would apart from subsection 88(8B), contravene section 49.
- (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the giving effect to a cartel provision, in so far as:
 - (a) the cartel provision is a provision of a dual listed company arrangement; and
 - (b) the giving effect to the cartel provision would, or would apart from subsection 88(8B), contravene section 49.
- (3) A person who wishes to rely on subsection (1) or (2) bears an evidential burden in relation to that matter.

44ZZRU Acquisition of shares or assets

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of:
 - (a) any shares in the capital of a body corporate; or
 - (b) any assets of a person.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

44ZZRV Collective acquisition of goods or services by the parties to a contract, arrangement or understanding

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
 - (a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); and
 - (b) either:
 - (i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or
 - (ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

Division 2—Other provisions

45 Contracts, arrangements or understandings that restrict dealings or affect competition

- (1) If a provision of a contract made before the commencement of this section:
 - (a) is an exclusionary provision; or
 - (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a person.
- (2) A person shall not:
 - (a) make a contract or arrangement, or arrive at an understanding, if:
 - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
 - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
 - (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
 - (i) is an exclusionary provision; or
 - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- (3) For the purposes of this section, *competition*, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a person who is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a person, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the

provision, supply or acquire, or be likely to supply or acquire, goods or services.

- (4) For the purposes of the application of this section in relation to a particular person, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:
- (a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
 - (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the person or a body corporate related to the person is or would be a party;
- together have or are likely to have that effect.
- (5) This section does not apply to or in relation to:
- (a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;
 - (b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or
 - (c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:
 - (i) conduct that contravenes section 48; or
 - (ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
 - (iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.
- (6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of

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subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or
 - (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (6A) The following conduct:
- (a) the making of a dual listed company arrangement;
 - (b) the giving effect to a provision of a dual listed company arrangement;
- does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.
- (7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.
- (8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.
- (8A) Subsection (2) does not apply to a person engaging in conduct described in that subsection if:

- (a) the person has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and
 - (b) the notice is in force under section 93AD.
- (9) The making by a person of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:
- (a) the contract is subject to a condition that the provision will not come into force unless and until the person is granted an authorization to give effect to the provision; and
 - (b) the person applies for the grant of such an authorization within 14 days after the contract is made;
- but nothing in this subsection prevents the giving effect by a person to such a provision from constituting a contravention of subsection (2).

45B Covenants affecting competition

- (1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a first person or on a person associated with a first person if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the first person or any person associated with the first person supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.
- (2) A first person or a person associated with a first person shall not:
- (a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:
 - (i) the first person, or any person associated with the first person by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or
 - (ii) any person associated with the first person by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the

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covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the first person;

- (b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or
 - (c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.
- (3) Where a person:
- (a) issues an invitation to another person to enter into a contract containing a covenant;
 - (b) makes an offer to another person to enter into a contract containing a covenant; or
 - (c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms;
- the first-mentioned person shall, by issuing that invitation, making that offer or making that fact known, be deemed to require the giving of the covenant.
- (4) For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which:
- (a) a person who is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or
 - (b) a person associated with the person referred to in paragraph (a);
- is or would be, or but for subsection (1) would be, entitled.
- (5) The requiring of the giving of, or the giving of, a covenant does not constitute a contravention of this section by reason that giving

effect to the covenant would, or would but for the operation of subsection 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to engaging in conduct in relation to a covenant by way of:

- (a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or
 - (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.
- (7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), the first person and another person (the **second person**) shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:
- (a) the first person is a body corporate and the second person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the first person in relation to the covenant or proposed covenant; or
 - (b) the second person is a body corporate in relation to which the first person is in the position mentioned in subparagraph 4A(1)(a)(ii).
- (8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:
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- (a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and
 - (b) the person applies for the grant of such an authorization within 14 days after the covenant is given;
- but nothing in this subsection affects the application of paragraph (2)(b) or (c) in relation to the covenant.
- (9) This section does not apply to or in relation to a covenant or proposed covenant if:
- (a) the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;
 - (b) the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution; or
 - (c) the covenant was or is required to be given in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

45C Covenants in relation to prices

- (1) In the application of subsection 45B(1) in relation to a covenant that has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who are, or but for that subsection would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them, in competition with each other, that subsection has effect as if the words “if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the first person or any person associated with the first person supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services” were omitted.

- (2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words “require the giving of a covenant, or give a covenant” were omitted.
- (3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:
- (a) the form of the covenant or proposed covenant; or
 - (b) any description given to the covenant by any of the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant or any description given to the proposed covenant by any of the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant.
- (4) For the purposes of the preceding provisions of this section, but without limiting the generality of those provisions:
- (a) a covenant shall be deemed to have, or to be likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the covenant has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the

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covenant, or by any of them, or by any persons associated with any of them; and

- (b) a proposed covenant shall be deemed to have the purpose, or to have, or to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (2) if the proposed covenant has the purpose, or would have or be likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them.

- (5) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

45D Secondary boycotts for the purpose of causing substantial loss or damage

- (1) A person must not, in concert with a second person, engage in conduct:
 - (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

- (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

45DA Secondary boycotts for the purpose of causing substantial lessening of competition

- (1) A person must not, in concert with a second person, engage in conduct:
- (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
 - (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

Note: This version of Part IV does not contain an equivalent of section 45DB of the *Trade Practices Act 1974*.

45DC Involvement and liability of employee organisations

Certain organisations taken to be acting in concert

- (1) If 2 or more persons (the *participants*), each of whom is a member or officer of the same organisation of employees, engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with another person, then, unless the organisation proves otherwise, the organisation is taken for the purposes of sections 45D and 45DA:
 - (a) to engage in that conduct in concert with the participants; and
 - (b) to have engaged in that conduct for the purposes for which the participants engaged in it.

Consequences of organisation contravening subsection 45D(1) or 45DA(1)

- (2) The consequences of an organisation of employees engaging, or being taken by subsection (1) to engage, in conduct in concert with any of its members or officers in contravention of subsection 45D(1) or 45DA(1) are as set out in subsections (3), (4) and (5).

Loss or damage taken to have been caused by organisation's conduct

- (3) Any loss or damage suffered by a person as a result of the conduct is taken, for the purposes of this Act, to have been caused by the conduct of the organisation.

Taking proceedings if organisation is a body corporate

- (4) If the organisation is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organisation in respect of the conduct.

Taking proceedings if organisation is not a body corporate

- (5) If the organisation is not a body corporate:
 - (a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all the persons

who were members of the organisation at the time when the conduct was engaged in; and

- (b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and
- (c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and
- (d) except as provided by paragraph (a), a proceeding in respect of the conduct must not be brought under section 77 or 82 against any of the members or officers of the organisation; and
- (e) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in paragraph (a) that was brought under section 77 or 82, process may be issued and executed against the following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:
 - (i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or however otherwise held;
 - (ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or however otherwise held;
 - (iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity as members, whether vested in trustees or however otherwise held; and
- (f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

45DD Situations in which boycotts permitted

Dominant purpose of conduct relates to employment matters—conduct by a person

- (1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1) or 45DA(1) by engaging in

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conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

Dominant purpose of conduct relates to employment matters—conduct by employee organisation and employees

(2) If:

- (a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:
 - (i) an organisation of employees; or
 - (ii) an officer of an organisation of employees; and
- (b) the conduct is only engaged in by the persons covered by paragraph (a); and
- (c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a);

the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1) or 45DA(1) by engaging in the conduct.

Dominant purpose of conduct relates to environmental protection or consumer protection

- (3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1) or 45DA(1) by engaging in conduct if:
 - (a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and
 - (b) engaging in the conduct is not industrial action.

Note 1: If an environmental organisation or a consumer organisation is a body corporate:

- (a) it is a “person” who may be subject to the prohibitions in subsections 45D(1) and 45DA(1) and who may also be covered by this exemption; and

- (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1) and 45DA(1) and who may also be covered by this exemption.

Note 2: If an environmental organisation or a consumer organisation is not a body corporate:

- (a) it is not a “person” and is therefore not subject to the prohibitions in subsections 45D(1) and 45DA(1) (consequently, this exemption does not cover the organisation as such); but
- (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1) and 45DA(1) and who may also be covered by this exemption.

Meaning of industrial action—basic definition

(4) In subsection (3), **industrial action** means:

- (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
 - (i) the terms and conditions of the work are prescribed, wholly or partly, by a workplace instrument or an order of an industrial body; or
 - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or
- (b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by a workplace instrument or by an order of an industrial body; or
- (c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or
- (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

For this purpose, **industrial body** and **workplace instrument** have the same meanings as in the *Fair Work Act 2009*.

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Meaning of industrial action—further clarification

- (5) For the purposes of subsection (3):
- (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and
 - (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Subsections (1), (2) and (3) do not protect people not covered by them

- (6) In applying subsection 45D(1) or 45DA(1) to a person who is not covered by subsection (1), (2) or (3) in respect of certain conduct, disregard the fact that other persons may be covered by one of those subsections in respect of the same conduct.

Note: Section 415 of the *Fair Work Act 2009* limits the right to bring actions under the Competition Code in respect of industrial action that is protected action for the purposes of that section.

45E Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services

Situations to which section applies

- (1) This section applies in the following situations:
- (a) a **supply situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to supply goods or services to another person (the **second person**); or
 - (b) an **acquisition situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to acquire goods or services from another person (the **second person**).

Note: For the meanings of **accustomed to supply** and **accustomed to acquire**, see subsections (5) and (7).

Prohibition in a supply situation

- (2) In a supply situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for

and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

- (a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or
- (b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:
 - (i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and
 - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

Prohibition in an acquisition situation

- (3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:
 - (a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or
 - (b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:
 - (i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and
 - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

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No contravention if second person gives written consent to written contract etc.

- (4) Subsections (2) and (3) do not apply to a contract, arrangement or understanding if it is in writing and was made or arrived at with the written consent of the second person.

Meaning of accustomed to supply

- (5) In this section, a reference to a person who has been **accustomed to supply** goods or services to a second person includes (subject to subsection (6)):
- (a) a regular supplier of such goods or services to the second person; or
 - (b) the latest supplier of such goods or services to the second person; or
 - (c) a person who, at any time during the immediately preceding 3 months, supplied such goods or services to the second person.

Exception to subsection (5)

- (6) If:
- (a) goods or services have been supplied by a person to a second person under a contract between them that required the first person to supply such goods or services over a period; and
 - (b) the period has ended; and
 - (c) after the end of the period, the second person has been supplied with such goods or services by another person and has not also been supplied with such goods or services by the first person;
- then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to supply such goods or services to the second person.

Meaning of accustomed to acquire

- (7) In this section, a reference to a person who has been **accustomed to acquire** goods or services from a second person includes (subject to subsection (8)):

- (a) a regular acquirer of such goods or services from the second person; or
- (b) a person who, when last acquiring such goods or services, acquired them from the second person; or
- (c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

Exception to subsection (7)

- (8) If:
- (a) goods or services have been acquired by a person from a second person under a contract between them that required the first person to acquire such goods or services over a period; and
 - (b) the period has ended; and
 - (c) after the end of the period, the second person has refused to supply such goods or services to the first person;

then, for the purposes of the application of this section in relation to anything done after the second person has refused to supply goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to acquire such goods or services from the second person.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

45EA Provisions contravening section 45E not to be given effect

A person must not give effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person:

- (a) contravened subsection 45E(2) or (3); or
- (b) would have contravened subsection 45E(2) or (3) if:
 - (i) section 45E had been in force when the contract or arrangement was made, or the understanding was arrived at; and
 - (ii) the words “is in writing and” and “written” were not included in subsection 45E(4).

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

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45EB Sections 45D to 45EA do not affect operation of other provisions of Part

Nothing in section 45D, 45DA, 45DC, 45DD, 45E or 45EA affects the operation of any other provision of this Part.

46 Misuse of market power

- (1) A person (the *first person*) who has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
- (a) eliminating or substantially damaging a competitor of the first person or of a body corporate that is related to the first person in that or any other market;
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
- (1AAA) If a person supplies goods or services for a sustained period at a price that is less than the relevant cost to the person of supplying the goods or services, the person may contravene subsection (1) even if the person cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.
- (1AA) A person that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the person of supplying such goods or services, for the purpose of:
- (a) eliminating or substantially damaging a competitor of the person or of a body corporate that is related to the person in that or any other market; or
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
- (1AB) For the purposes of subsection (1AA), without limiting the matters to which the Court may have regard for the purpose of determining whether a person has a substantial share of a market, the Court may have regard to the number and size of the competitors of the person in the market.

- (1A) For the purposes of subsections (1) and (1AA):
- (a) the reference in paragraphs (1)(a) and (1AA)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
 - (b) the reference in paragraphs (1)(b) and (c) and (1AA)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.
- (2) If:
- (a) a body corporate that is related to a person (the *first person*) has, or 2 or more bodies corporate each of which is related to the one person (the *first person*) together have, a substantial degree of power in a market; or
 - (b) a person (the *first person*) and a body corporate that is, or a person (the *first person*) and 2 or more bodies corporate each of which is, related to the first person, together have a substantial degree of power in a market;
- the first person shall be taken for the purposes of this section to have a substantial degree of power in that market.
- (3) In determining for the purposes of this section the degree of power that a person (the *first person*) or bodies corporate has or have in a market, the court shall have regard to the extent to which the conduct of the first person or of any of those bodies corporate in that market is constrained by the conduct of:
- (a) competitors, or potential competitors, of the first person or of any of those bodies corporate in that market; or
 - (b) persons to whom or from whom the first person or any of those bodies corporate supplies or acquires goods or services in that market.
- (3A) In determining for the purposes of this section the degree of power that a person (the *first person*) or bodies corporate has or have in a market, the court may have regard to the power the first person or bodies corporate has or have in that market that results from:
- (a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the first person or bodies corporate has or have, or may have, with another party or other parties; and

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- (b) any covenants, or proposed covenants, that the first person or bodies corporate is or are, or would be, bound by or entitled to the benefit of.
- (3B) Subsections (3) and (3A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a person or bodies corporate has or have in a market.
- (3C) For the purposes of this section, 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 market, a person may have a substantial degree of power in a 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.
- (3D) To avoid doubt, for the purposes of this section, more than 1 person may have a substantial degree of power in a market.
- (4) In this section:
 - (a) a reference to power is a reference to market power;
 - (b) a reference to a market is a reference to a market for goods or services; and
 - (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.
- (4A) Without limiting the matters to which the court may have regard for the purpose of determining whether a person has contravened subsection (1), the court may have regard to:
 - (a) any conduct of the person that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the person of supplying such goods or services; and
 - (b) the reasons for that conduct.

- (5) Without extending by implication the meaning of subsection (1), a person shall not be taken to contravene that subsection by reason only that the person acquires plant or equipment.
- (6) This section does not prevent a person from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 49 and 50, by reason that an authorization or clearance is in force or by reason of the operation of subsection 45(8A) or section 93.
- (6A) In determining for the purposes of this section whether, by engaging in conduct, a person has taken advantage of the person's substantial degree of power in a market, the court may have regard to any or all of the following:
- (a) whether the conduct was materially facilitated by the person's substantial degree of power in the market;
 - (b) whether the person engaged in the conduct in reliance on the person's substantial degree of power in the market;
 - (c) whether it is likely that the person would have engaged in the conduct if the person did not have a substantial degree of power in the market;
 - (d) whether the conduct is otherwise related to the person's substantial degree of power in the market.
- This subsection does not limit the matters to which the court may have regard.
- (7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a person may be taken to have taken advantage of the person's power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or of any other person or from other relevant circumstances.

47 Exclusive dealing

- (1) Subject to this section, a person shall not, in trade or commerce, engage in the practice of exclusive dealing.
- (2) A person (the *first person*) engages in the practice of exclusive dealing if the first person:

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- (a) supplies, or offers to supply, goods or services;
 - (b) supplies, or offers to supply, goods or services at a particular price; or
 - (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the first person; on the condition that the person (the *second person*) to whom the first person supplies, or offers or proposes to supply, the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate:
 - (d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
 - (e) will not, or will not except to a limited extent, re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; or
 - (f) in the case where the first person supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.
- (3) A person (the *first person*) also engages in the practice of exclusive dealing if the first person refuses:
- (a) to supply goods or services to a second person;
 - (b) to supply goods or services to a second person at a particular price; or
 - (c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a second person;
- for the reason that the second person or, if the second person is a body corporate, a body corporate related to that body corporate:

- (d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
 - (e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; or
 - (f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the first person to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the first person:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.
- (4) A person (the **first person**) also engages in the practice of exclusive dealing if the first person:
- (a) acquires, or offers to acquire, goods or services; or
 - (b) acquires, or offers to acquire, goods or services at a particular price;
- on the condition that the person (the **second person**) from whom the first person acquires or offers to acquire the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
- (c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (d) in particular places or classes of places or in places other than particular places or classes of places.
- (5) A person (the **first person**) also engages in the practice of exclusive dealing if the first person refuses:
- (a) to acquire goods or services from a second person; or
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- (b) to acquire goods or services at a particular price from a second person;
for the reason that the second person or, if the second person is a body corporate, a body corporate related to that body corporate has supplied, or has not agreed not to supply, goods or services, or goods or services of a particular kind or description:
 - (c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (d) in particular places or classes of places or in places other than particular places or classes of places.
- (6) A person (the *first person*) also engages in the practice of exclusive dealing if the first person:
- (a) supplies, or offers to supply, goods or services;
 - (b) supplies, or offers to supply, goods or services at a particular price; or
 - (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the first person;
- on the condition that the person (the *second person*) to whom the first person supplies or offers or proposes to supply the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.
- (7) A person (the *first person*) also engages in the practice of exclusive dealing if the first person refuses:
- (a) to supply goods or services to a second person;
 - (b) to supply goods or services at a particular price to a second person; or
 - (c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a second person;
- for the reason that the second person or, if the second person is a body corporate, a body corporate related to that body corporate has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.

- (8) A person (the *first person*) also engages in the practice of exclusive dealing if the first person grants or renews, or makes it known that the first person will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:
- (a) will not, or will not except to a limited extent:
 - (i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; or
 - (ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
 - (b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places; or
 - (c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.
- (9) A person (the *first person*) also engages in the practice of exclusive dealing if the first person refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:
- (a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;

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- (b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
 - (c) has supplied goods or services, or goods or services of a particular kind or description:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places; or
 - (d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.
- (10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a person engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:
- (a) the engaging by the person in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
 - (b) the engaging by the person in that conduct, and the engaging by the person, or by a body corporate related to the person, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.
- (10A) Subsection (1) does not apply to a person engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:
- (a) the person has given the Commission a notice under subsection 93(1) describing the conduct; and
 - (b) the notice is in force under section 93.
- (11) Subsections (8) and (9) do not apply with respect to:
- (a) conduct engaged in by, or by a trustee for, a religious, charitable or public benevolent institution, being conduct engaged in for or in accordance with the purposes or objects of that institution; or

- (b) conduct engaged in in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.
- (12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.
- (13) In this section:
- (a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;
 - (b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:
 - (i) the person engaging in the conduct or any body corporate related to that person; or
 - (ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;
supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and
 - (c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the person engaging in the conduct or any other person whose business dealings are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those persons, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

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48 Resale price maintenance

A person shall not engage in the practice of resale price maintenance.

49 Dual listed company arrangements that affect competition

- (1) A person must not:
- (a) make a dual listed company arrangement if a provision of the proposed arrangement has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
 - (b) give effect to a provision of a dual listed company arrangement if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(8B).

Exception

- (2) The making by a person of a dual listed company arrangement that contains a provision that has the purpose, or would have or be likely to have the effect, of substantially lessening competition does not contravene this section if:
- (a) the arrangement is subject to a condition that the provision will not come into force unless and until the person is granted an authorisation to give effect to the provision; and
 - (b) the person applies for the grant of such an authorisation within 14 days after the arrangement is made.

However, this subsection does not permit the person to give effect to such a provision.

Meaning of competition

- (3) For the purposes of this section, **competition**, in relation to a provision of a dual listed company arrangement or of a proposed dual listed company arrangement, means competition in any market in which:
- (a) a person that is a party to the arrangement or would be a party to the proposed arrangement; or
 - (b) any body corporate related to such a person;

supplies or acquires, or is likely to supply or acquire, goods or services or would, apart from the provision, supply or acquire, or be likely to supply or acquire, goods or services.

- (4) For the purposes of the application of this section in relation to a particular person, a provision of a dual listed company arrangement or of a proposed dual listed company arrangement is taken to have, or to be likely to have, the effect of substantially lessening competition if that provision and any one or more of the following provisions:
- (a) the other provisions of that arrangement or proposed arrangement;
 - (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the person or a body corporate related to the person is or would be a party;
- together have or are likely to have that effect.

50 Prohibition of acquisitions that would result in a substantial lessening of competition

- (1) A person must not directly or indirectly:
- (a) acquire shares in the capital of a body corporate; or
 - (b) acquire any assets of a person;
- if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Note: The person will not be prevented from making the acquisition if the corporation is granted a clearance or an authorisation for the acquisition under Division 3 of Part VII: see subsections 95AC(2) and 95AT(2).

- (3) Without limiting the matters that may be taken into account for the purposes of subsection (1) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:
- (a) the actual and potential level of import competition in the market;
 - (b) the height of barriers to entry to the market;
 - (c) the level of concentration in the market;
 - (d) the degree of countervailing power in the market;

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- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
 - (f) the extent to which substitutes are available in the market or are likely to be available in the market;
 - (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
 - (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
 - (i) the nature and extent of vertical integration in the market.
- (4) Where:
- (a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;
 - (b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted a clearance or an authorization to acquire the shares or assets; and
 - (c) the person applied for the grant of such a clearance or an authorization before the expiration of 14 days after the contract was entered into;
- the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:
- (d) the application for the clearance or authorization is disposed of; or
 - (e) the contract ceases to be subject to the condition;
- whichever first happens.
- (5) For the purposes of subsection (4), an application for a clearance shall be taken to be disposed of:
- (a) in a case to which paragraph (b) of this subsection does not apply—at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the clearance; or
 - (b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the clearance—at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.

(5A) For the purposes of subsection (4), an application for an authorisation is taken to be disposed of 14 days after the day the Tribunal makes a determination on the application.

(6) In this section:

market means a substantial market for goods or services in:

- (a) Australia; or
- (b) a State; or
- (c) a Territory; or
- (d) a region of Australia.

51 Exceptions

(1) In deciding whether a person has contravened this Part, the following must be disregarded:

- (a) anything that is disregarded for the purposes of Part IV of the *Trade Practices Act 1974* because of subsection 51(1) of that Act;
- (b) anything done in a State, if the thing is specified in, and specifically authorised by:
 - (i) an Act passed by the Parliament of that State; or
 - (ii) regulations made under such an Act;
- (c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:
 - (i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988*; or
 - (ii) regulations made under such an enactment;
- (d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:
 - (i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or
 - (ii) regulations made under such an enactment;
- (e) anything done in another Territory, if the thing is specified in, and specifically authorised by:
 - (i) an Ordinance of that Territory; or
 - (ii) regulations made under such an Ordinance.

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- (1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:
- (a) a licence or other instrument issued or made under the law specifies one or both of the following:
 - (i) the person authorised to engage in the conduct;
 - (ii) the place where the conduct is to occur; and
 - (b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).

For this purpose, *law* means a State Act, enactment or Ordinance.

- (1B) Subsections (1) and (1A) apply regardless of when the State Acts, enactments, Ordinances, regulations or instruments referred to in those subsections were passed, made or issued.

- (1C) The operation of subsection (1) (other than paragraph (1)(a)) is subject to the following limitations:
- (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to the Competition Code;
 - (b) paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50;
 - (c) regulations referred to in subparagraph (1)(b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;
 - (d) regulations referred to in subparagraph (1)(b)(ii), (c)(ii) or (d)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations that:
 - (i) were made for the purposes of the subparagraph concerned; and
 - (ii) came into operation more than 2 years before the particular thing happened.

- (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45E, 45EA or 48 has been committed, regard shall not be had:
- (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or

the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

- (b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract;
 - (c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia International Limited or by a prescribed association or body;
 - (d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he or she is, or after he or she ceases to be, a partner;
 - (e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business—to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or
 - (g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.
- (2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or

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commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(3) A contravention of a provision of this Part other than section 46 or 48 shall not be taken to have been committed by reason of:

(a) the imposing of, or giving effect to, a condition of:

(i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or

(ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design;

to the extent that the condition relates to:

(iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;

(iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;

(v) the work or other subject matter in which the copyright subsists; or

(vi) the eligible layout in which the EL rights subsist;

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between:

(i) the registered proprietor of a trade mark other than a certification trade mark; and

(ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be

produced or supplied, or the giving effect to the provision to that extent.

- (4) This section applies in determining whether a provision of a contract is unenforceable by reason of subsection 45(1), or whether a covenant is unenforceable by reason of subsection 45B(1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.