



Competition and Consumer Act 2010

Act No. 51 of 1974 as amended

This compilation was prepared on 1 January 2011
taking into account amendments up to Act No. 148 of 2010

Volume 1 includes: Table of Contents
Sections 1 – 119

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

Volume 2 includes: Table of Contents
Sections 10.01 – 178

Volume 3 includes: Table of Contents
Schedules 1 and 2
Note 1
Table of Acts
Act Notes
Table of Amendments
Notes 2 and 3
Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Contents

Part I—Preliminary	1
1 Short title [see Note 1].....	1
2 Object of this Act.....	1
2A Application of Act to Commonwealth and Commonwealth authorities	1
2B Application of Act to States and Territories	2
2BA Application of Part IV to local government bodies	2
2C Activities that are not business	2
3 Repeal.....	4
4 Interpretation	4
4A Subsidiary, holding and related bodies corporate	14
4B Consumers	16
4C Acquisition, supply and re-supply	18
4D Exclusionary provisions	19
4E Market	20
4F References to purpose or reason	20
4G Lessening of competition to include preventing or hindering competition.....	21
4H Application of Act in relation to leases and licences of land and buildings	21
4J Joint ventures.....	21
4K Loss or damage to include injury.....	22
4KA Definitions etc. that do not apply in Part XI or Schedule 2	22
4L Severability.....	22
4M Saving of law relating to restraint of trade and breaches of confidence	23
4N Extended application of Part IIIA.....	23
5 Extended application of this Act to conduct outside Australia	23
6 Extended application of this Act to persons who are not corporations [see Note 2].....	25
6AA Application of the <i>Criminal Code</i>	31
Part II—The Australian Competition and Consumer Commission	32
6A Establishment of Commission	32
7 Constitution of Commission.....	32
8 Terms and conditions of appointment	33
8A Associate members.....	33
8AB State/Territory AER members taken to be associate members	34
9 Remuneration	35
10 Deputy Chairpersons	35
11 Acting Chairperson.....	36

12	Leave of absence	36
13	Termination of appointment of members of the Commission	37
14	Termination of appointment of associate members of the Commission.....	37
15	Resignation.....	37
16	Arrangement of business	38
17	Disclosure of interests by members.....	38
18	Meetings of Commission.....	39
19	Chairperson may direct Commission to sit in Divisions.....	40
25	Delegation by Commission	41
26	Delegation by Commission of certain functions and powers.....	41
27	Staff of Commission.....	42
27A	Consultants	42
28	Functions of Commission in relation to dissemination of information, law reform and research.....	42
29	Commission to comply with directions of Minister and requirements of the Parliament.....	43
Part IIA—The National Competition Council		45
29A	Establishment of Council.....	45
29B	Functions and powers of Council	45
29BA	Commonwealth consent to conferral of functions etc. on Council	46
29BB	How duty is imposed	46
29BC	When a State/Territory energy law imposes a duty	47
29C	Membership of Council	47
29D	Terms and conditions of office	48
29E	Acting Council President.....	48
29F	Remuneration of Councillors.....	48
29G	Leave of absence	49
29H	Termination of appointment of Councillors	49
29I	Resignation of Councillors	49
29J	Arrangement of Council business.....	49
29K	Disclosure of interests by Councillors	50
29L	Council meetings.....	51
29LA	Resolutions without meetings.....	51
29M	Staff to help Council.....	52
29N	Consultants	52
29O	Annual report.....	52
Part III—The Australian Competition Tribunal		54
29P	Definition	54
30	Constitution of Tribunal	54
31	Qualifications of members of Tribunal.....	54

31A	Appointment of Judge as presidential member of Tribunal not to affect tenure etc.	55
32	Terms and conditions of appointment	55
33	Remuneration and allowances of members of Tribunal.....	55
34	Acting appointments.....	55
35	Suspension and removal of members of Tribunal.....	56
36	Resignation.....	57
37	Constitution of Tribunal for particular matters	57
38	Validity of determinations	58
39	President may give directions	58
40	Disclosure of interests by members of Tribunal	58
41	Presidential member to preside.....	59
42	Decision of questions	59
43	Member of Tribunal ceasing to be available.....	59
43A	Counsel assisting Tribunal.....	60
43B	Consultants	60
44	Staff of Tribunal	60
44A	Acting appointments.....	61
Part IIIAA—The Australian Energy Regulator (AER)		62
Division 1—Preliminary		62
44AB	Definitions.....	62
44AC	This Part binds the Crown	62
44AD	Extra-territorial operation.....	62
Division 2—Establishment of the AER		64
44AE	Establishment of the AER	64
44AF	AER to hold money and property on behalf of the Commonwealth	64
44AG	Constitution of the AER	64
Division 3—Functions and powers of the AER		65
44AH	Commonwealth functions.....	65
44AI	Commonwealth consent to conferral of functions etc. on AER.....	65
44AJ	How duty is imposed	65
44AK	When a State/Territory energy law imposes a duty	66
44AL	Powers of the AER.....	67
Division 4—Administrative provisions relating to the AER		68
Subdivision A—Appointment etc. of members		68
44AM	Appointment of Commonwealth AER member.....	68
44AN	Membership of AER and Commission	68
44AO	Acting appointment of Commonwealth AER member	69
44AP	Appointment of State/Territory AER members	69

44AQ	Acting appointment of State/Territory AER member	70
44AR	AER Chair	70
44AS	Acting AER Chair	71
44AT	Remuneration of AER members.....	71
44AU	Additional remuneration of AER Chair.....	72
44AV	Leave of absence	72
44AW	Other terms and conditions.....	72
44AX	Outside employment.....	72
44AY	Disclosure of interests	73
44AZ	Resignation.....	73
44AAB	Termination of appointment	73
Subdivision B—Staff etc. to assist the AER		74
44AAC	Staff etc. to assist the AER	74
Subdivision C—Meetings of the AER etc.		74
44AAD	Meetings.....	74
44AAE	Resolutions without meetings.....	75
44AAEA	Arbitration	75
Subdivision D—Miscellaneous		76
44AAF	Confidentiality.....	76
44AAG	Federal Court may make certain orders.....	77
44AAGA	Federal Court may order disconnection if an event specified in the National Electricity Rules occurs.....	78
44AAH	Delegation by the AER.....	79
44AAI	Fees	80
44AAJ	Annual report.....	80
44AAK	Regulations may deal with transitional matters	80
Part IIIA—Access to services		82
Division 1—Preliminary		82
44AA	Objects of Part	82
44B	Definitions.....	82
44C	How this Part applies to partnerships and joint ventures	86
44D	Meaning of <i>designated Minister</i>	87
44DA	The principles in the Competition Principles Agreement have status as guidelines.....	87
44E	This Part binds the Crown	88
Division 2—Declared services		89
Subdivision A—Recommendation by the Council		89
44F	Person may request recommendation	89
44FA	Council may request information	90
44G	Limits on the Council recommending declaration of a service.....	91
44GA	Time limit for Council recommendations.....	92

44GB	Council may invite public submissions on the application	94
44GC	Council must publish its recommendation.....	95
Subdivision B—Declaration by the designated Minister		96
44H	Designated Minister may declare a service	96
44HA	Designated Minister must publish his or her decision	98
44I	Duration and effect of declaration	99
44J	Revocation of declaration.....	100
44K	Review of declaration.....	100
44KA	Tribunal may stay operation of declaration	102
44KB	Tribunal may order costs be awarded	103
44L	Review of decision not to revoke a declaration	104
Division 2AA—Services that are ineligible to be declared		106
Subdivision A—Scope of Division		106
44LA	Constitutional limits on operation of this Division	106
Subdivision B—Ineligibility recommendation by Council		106
44LB	Ineligibility recommendation.....	106
44LC	Council may request information	108
44LD	Time limit for Council recommendations.....	108
44LE	Council may invite public submissions on the application	110
44LF	Council must publish its recommendation.....	111
Subdivision C—Designated Minister’s decision on ineligibility		112
44LG	Designated Minister’s decision on ineligibility	112
44LH	Designated Minister must publish his or her decision	114
Subdivision D—Revocation of ineligibility decision		114
44LI	Revocation of ineligibility decision	114
Subdivision E—Review of decisions		116
44LJ	Review of ineligibility decisions	116
44LK	Review of decision to revoke or not revoke an ineligibility decision.....	118
Subdivision F—Other matters		119
44LL	Ineligibility decisions subject to alteration, cancellation etc.....	119
Division 2A—Effective access regimes		121
Subdivision A—Recommendation by Council		121
44M	Recommendation for a Ministerial decision on effectiveness of access regime	121
44MA	Council may request information	122
Subdivision B—Decision by Commonwealth Minister		122
44N	Ministerial decision on effectiveness of access regime	122
Subdivision C—Extensions of Commonwealth Minister’s decision		123
44NA	Recommendation by Council	123

44NAA	Council may request information	124
44NB	Decision by the Commonwealth Minister	125
Subdivision D—Procedural provisions		126
44NC	Time limit for Council recommendations.....	126
44NE	Council may invite public submissions	128
44NF	Publication—Council	130
44NG	Publication—Commonwealth Minister	130
Subdivision E—Review of decisions		131
44O	Review of Ministerial decision on effectiveness of access regime.....	131
Subdivision F—State or Territory ceasing to be a party to Competition Principles Agreement		132
44P	State or Territory ceasing to be a party to Competition Principles Agreement	132
Division 2B—Competitive tender processes for government owned facilities		134
44PA	Approval of competitive tender process	134
44PAA	Commission may request information	135
44PB	Report on conduct of tender process.....	136
44PC	Revocation of approval decision	136
44PD	Time limit for Commission decisions.....	138
44PE	Commission may invite public submissions	139
44PF	Commission must publish its decisions	141
44PG	Review of Commission’s initial decision	141
44PH	Review of decision to revoke an approval.....	143
Division 2C—Register of decisions and declarations		145
44Q	Register of decisions, declarations and ineligibility decisions.....	145
Division 3—Access to declared services		146
Subdivision A—Scope of Division		146
44R	Constitutional limits on operation of this Division	146
Subdivision B—Notification of access disputes		146
44S	Notification of access disputes	146
44T	Withdrawal of notifications	146
Subdivision C—Arbitration of access disputes		147
44U	Parties to the arbitration.....	147
44V	Determination by Commission.....	147
44W	Restrictions on access determinations	148
44X	Matters that the Commission must take into account	150
44XA	Time limit for Commission’s final determination	151
44Y	Commission may terminate arbitration in certain cases.....	153

44YA	Commission must terminate arbitration if declaration varied or set aside by Tribunal	153
Subdivision D—Procedure in arbitrations		153
44Z	Constitution of Commission for conduct of arbitration	153
44ZA	Member of the Commission presiding at an arbitration.....	154
44ZB	Reconstitution of Commission	154
44ZC	Determination of questions.....	154
44ZD	Hearing to be in private	155
44ZE	Right to representation	155
44ZF	Procedure of Commission	155
44ZG	Particular powers of Commission.....	156
44ZH	Power to take evidence on oath or affirmation	157
44ZI	Failing to attend as a witness	157
44ZJ	Failing to answer questions etc.....	157
44ZK	Intimidation etc.....	158
44ZL	Party may request Commission to treat material as confidential.....	158
44ZM	Sections 18 and 19 do not apply to the Commission in an arbitration	159
44ZN	Parties to pay costs of an arbitration.....	159
44ZNA	Joint arbitration hearings	159
Subdivision DA—Arbitration reports		161
44ZNB	Arbitration reports	161
Subdivision E—Effect of determinations		162
44ZO	Operation of final determinations	162
44ZOA	Effect and duration of interim determinations	164
Subdivision F—Review of final determinations		164
44ZP	Review by Tribunal	164
44ZQ	Provisions that do not apply in relation to a Tribunal review	165
44ZR	Appeals to Federal Court from determinations of the Tribunal	166
44ZS	Operation and implementation of a determination that is subject to appeal	166
44ZT	Transmission of documents	167
Subdivision G—Variation and revocation of determinations		167
44ZU	Variation of final determinations.....	167
44ZUA	Variation and revocation of interim determinations	168
Division 4—Registered contracts for access to declared services		169
44ZV	Constitutional limits on operation of this Division.....	169
44ZW	Registration of contract	169
44ZX	Review of decision not to register contract.....	170
44ZY	Effect of registration of contract.....	171

Division 5—Hindering access to declared services	172
44ZZ Prohibition on hindering access to declared services.....	172
Division 6—Access undertakings and access codes for services	173
Subdivision A—Giving of access undertakings and access codes	173
44ZZA Access undertakings by providers	173
44ZZAAA Proposed amendments to access undertakings	175
44ZZAAB Access undertakings containing fixed principles.....	177
44ZZAA Access codes prepared by industry bodies	179
44ZZAB Commission may rely on industry body consultations	180
Subdivision B—Effect of access undertakings and access codes	181
44ZZBA When access undertakings and access codes come into operation.....	181
Subdivision C—Extensions of access undertakings and access codes	182
44ZZBB Extensions of access undertakings and access codes	182
Subdivision D—Procedural provisions	184
44ZZBC Time limit for Commission decisions.....	184
44ZZBCA Commission may request information.....	186
44ZZBD Commission may invite public submissions	186
44ZZBE Commission must publish its decisions	188
Subdivision E—Review of decisions	189
44ZZBF Review of decisions.....	189
Subdivision F—Register of access undertakings and access codes	191
44ZZC Register of access undertakings and access codes	191
Division 6A—Pricing principles for access disputes and access undertakings or codes	192
44ZZCA Pricing principles for access disputes and access undertakings or codes	192
Division 6B—Overlap among determinations, registered contracts, access undertakings and Tribunal review	193
44ZZCB Deferring access disputes or access undertakings.....	193
44ZZCBA Deferral of arbitration if review is underway.....	194
44ZZCC Overlap between determinations and access undertakings	196
44ZZCD Overlap between registered contracts and access undertakings	196
Division 7—Enforcement and remedies	197
44ZZD Enforcement of determinations.....	197
44ZZE Enforcement of prohibition on hindering access	197
44ZZF Consent injunctions	198
44ZZG Interim injunctions.....	199
44ZZH Factors relevant to granting a restraining injunction.....	199

44ZZI	Factors relevant to granting a mandatory injunction.....	199
44ZZJ	Enforcement of access undertakings.....	199
44ZZK	Discharge or variation of injunction or other order	200
Division 8—Miscellaneous		201
44ZZL	Register of determinations.....	201
44ZZM	Commonwealth consent to conferral of functions etc. on the Commission or Tribunal by State or Territory laws	201
44ZZMA	How duty is imposed.....	201
44ZZMB	When a law of a State or Territory imposes a duty.....	202
44ZZN	Compensation for acquisition of property	203
44ZZNA	Operation of Parts IV and VII not affected by this Part	203
44ZZO	Conduct by directors, servants or agents	203
44ZZOAA	Information to be given to Tribunal	205
44ZZOAA	Tribunal only to consider particular material	207
44ZZOAT	Time limit for Tribunal decisions	207
44ZZP	Regulations about review by the Tribunal	210
44ZZQ	Regulations about fees for inspection etc. of registers.....	211
44ZZR	Procedure of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law	211
Part IV—Restrictive trade practices		213
Division 1—Cartel conduct		213
Subdivision A—Introduction		213
44ZZRA	Simplified outline	213
44ZZRB	Definitions	213
44ZZRC	Extended meaning of <i>party</i>	215
44ZZRD	Cartel provisions.....	215
44ZZRE	Meaning of expressions in other provisions of this Act.....	220
Subdivision B—Offences etc.		220
44ZZRF	Making a contract etc. containing a cartel provision	220
44ZZRG	Giving effect to a cartel provision	221
44ZZRH	Determining guilt.....	222
44ZZRI	Court may make related civil orders.....	222
Subdivision C—Civil penalty provisions		223
44ZZRJ	Making a contract etc. containing a cartel provision	223
44ZZRK	Giving effect to a cartel provision	223
Subdivision D—Exceptions		223
44ZZRL	Conduct notified	223
44ZZRM	Cartel provision subject to grant of authorisation	224
44ZZRN	Contracts, arrangements or understandings between related bodies corporate	224

44ZZRO	Joint ventures—prosecution	225
44ZZRP	Joint ventures—civil penalty proceedings	228
44ZZRQ	Covenants affecting competition	230
44ZZRR	Resale price maintenance	230
44ZZRS	Exclusive dealing.....	230
44ZZRT	Dual listed company arrangement	231
44ZZRU	Acquisition of shares or assets.....	232
44ZZRV	Collective acquisition of goods or services by the parties to a contract, arrangement or understanding.....	232
Division 2—Other provisions		234
45	Contracts, arrangements or understandings that restrict dealings or affect competition	234
45B	Covenants affecting competition	237
45C	Covenants in relation to prices	240
45D	Secondary boycotts for the purpose of causing substantial loss or damage	242
45DA	Secondary boycotts for the purpose of causing substantial lessening of competition	243
45DB	Boycotts affecting trade or commerce	244
45DC	Involvement and liability of employee organisations	244
45DD	Situations in which boycotts permitted.....	246
45E	Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services	249
45EA	Provisions contravening section 45E not to be given effect	253
45EB	Sections 45D to 45EA do not affect operation of other provisions of Part.....	253
46	Misuse of market power	253
46A	Misuse of market power—corporation with substantial degree of power in trans-Tasman market.....	257
46B	No immunity from jurisdiction in relation to certain New Zealand laws.....	259
47	Exclusive dealing.....	259
48	Resale price maintenance	265
49	Dual listed company arrangements that affect competition	265
50	Prohibition of acquisitions that would result in a substantial lessening of competition.....	267
50A	Acquisitions that occur outside Australia	269
51	Exceptions	271
51AAA	Concurrent operation of State and Territory laws.....	276
Part IVB—Industry codes		277
Division 1—Preliminary		277
51ACA	Definitions.....	277

Division 2—Contravention of industry codes	279
51AD Contravention of industry codes	279
Division 3—Public warning notices	280
51ADA Commission may issue a public warning notice	280
Division 4—Orders to redress loss or damage suffered by non-parties etc.	281
51ADB Orders to redress loss or damage suffered by non-parties etc.	281
51ADC Kinds of orders that may be made to redress loss or damage suffered by non-parties etc.	283
Division 5—Investigation power	285
51ADD Commission may require corporation to provide information	285
51ADE Extending periods for complying with notices	285
51ADF Compliance with notices	285
51ADG False or misleading information etc.....	286
Division 6—Miscellaneous	287
51AE Regulations relating to industry codes.....	287
51AEA Concurrent operation of State and Territory laws.....	287
Part VI—Enforcement and remedies	288
75B Interpretation [<i>see</i> Note 2]	288
76 Pecuniary penalties.....	288
76A Defence to proceedings under section 76 relating to a contravention of section 95AZN	291
76B What happens if substantially the same conduct is a contravention of Part IV or section 95AZN and an offence?.....	292
76C Defence to proceedings relating to exclusionary provisions.....	293
77 Civil action for recovery of pecuniary penalties	294
77A Indemnification of officers	294
77B Certain indemnities not authorised and certain documents void.....	295
77C Application of section 77A to a person other than a body corporate.....	295
78 Criminal proceedings not to be brought for contraventions of Part IV or V [<i>see</i> Note 2].....	295
79 Offences against section 44ZZRF or 44ZZRG	296
79A Enforcement and recovery of certain fines	297
79B Preference must be given to compensation for victims.....	299
80 Injunctions.....	299
80AB Stay of injunctions	302
80AC Injunctions to prevent mergers if clearance or authorisation granted on the basis of false or misleading information	303
81 Divestiture where merger contravenes section 50 or 50A	304

81A	Divestiture where merger done under clearance or authorisation granted on false etc. information.....	306
82	Actions for damages [<i>see</i> Note 2].....	308
83	Finding in proceedings to be evidence [<i>see</i> Note 2]	308
84	Conduct by directors, employees or agents	309
85	Defences.....	310
86	Jurisdiction of courts [<i>see</i> Note 2]	311
86AA	Limit on jurisdiction of Federal Magistrates Court.....	312
86A	Transfer of matters	312
86C	Non-punitive orders.....	313
86D	Punitive orders—adverse publicity.....	315
86E	Order disqualifying a person from managing corporations	316
86F	Privilege against exposure to penalty—disqualification from managing corporations	317
87	Other orders [<i>see</i> Note 2].....	318
87AA	Special provision relating to Court’s exercise of powers under this Part in relation to boycott conduct	322
87B	Enforcement of undertakings.....	323
87C	Enforcement of undertakings—Secretary to the Department	323
87CA	Intervention by Commission.....	324

**Part VIA—Proportionate liability for misleading and deceptive
conduct**

		325
87CB	Application of Part	325
87CC	Certain concurrent wrongdoers not to have benefit of apportionment.....	325
87CD	Proportionate liability for apportionable claims	326
87CE	Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware	327
87CF	Contribution not recoverable from defendant.....	327
87CG	Subsequent actions	328
87CH	Joining non-party concurrent wrongdoer in the action	328
87CI	Application of Part	328

**Part VIB—Claims for damages or compensation for death or
personal injury**

		329
Division 1—Introduction		329
87D	Definitions.....	329
87E	Proceedings to which this Part applies	330
Division 2—Limitation periods		332
87F	Basic rule.....	332
87G	Date of discoverability.....	333
87H	Long-stop period	334
87J	The effect of minority or incapacity	335

87K	The effect of close relationships	335
Division 3—Limits on personal injury damages for non-economic loss		
87L	Limits on damages for non-economic loss	336
87M	Maximum amount of damages for non-economic loss	336
87N	Index numbers	337
87P	Most extreme cases.....	337
87Q	Cases of 33% or more (but not 100%) of a most extreme case.....	337
87R	Cases of 15% or more (but less than 33%) of a most extreme case.....	338
87S	Cases of less than 15% of a most extreme case	339
87T	Referring to earlier decisions on non-economic loss	339
Division 4—Limits on personal injury damages for loss of earning capacity		
87U	Personal injury damages for loss of earning capacity	340
87V	Average weekly earnings.....	340
Division 5—Limits on personal injury damages for gratuitous attendant care services		
87W	Personal injury damages for gratuitous attendant care services for plaintiff.....	342
87X	Personal injury damages for loss of plaintiff's capacity to provide gratuitous attendant care services	343
Division 6—Other limits on personal injury damages		
87Y	Damages for future economic loss—discount rate	345
87Z	Damages for loss of superannuation entitlements.....	345
87ZA	Interest on damages	346
87ZB	Exemplary and aggravated damages.....	347
Division 7—Structured settlements		
87ZC	Court may make orders under section 87 for structured settlements.....	348
Part VII—Authorisations, notifications and clearances in respect of restrictive trade practices		
Division 1—Authorisations (other than section 50 merger authorisations)		
87ZP	Definitions.....	349
88	Power of Commission to grant authorisations	349
89	Procedure for applications and the keeping of a register	356
90	Determination of applications for authorisations.....	359
90A	Commission to afford opportunity for conference before determining application for authorisation.....	364

90B	Commission may rely on consultations undertaken by the AEMC	368
91	Grant and variation of authorisations.....	369
91A	Minor variations of authorizations.....	371
91B	Revocation of an authorization.....	373
91C	Revocation of an authorization and substitution of a replacement	374
Division 2—Notifications		377
Subdivision A—Exclusive dealing		377
93	Notification of exclusive dealing	377
Subdivision B—Collective bargaining		382
93AA	Definitions.....	382
93AB	Notification of collective bargaining	382
93AC	Commission’s objection notice.....	387
93AD	When collective bargaining notice comes into force and ceases to be in force.....	388
93AE	Withdrawal of collective bargaining notice	390
93AEA	Only 1 collective bargaining notice under subsection 93AB(1A) may be given.....	391
93AF	Only 1 collective bargaining notice under subsection 93AB(1) may be given	391
Subdivision C—Conferences		392
93A	Commission to afford opportunity for conference before giving notice	392
Subdivision D—Register of notifications		394
95	Register of notifications.....	394
Division 3—Merger clearances and authorisations		398
Subdivision A—Preliminary		398
95AA	Simplified outline of this Division.....	398
95AB	Definitions.....	399
Subdivision B—Merger clearances		400
95AC	Commission may grant clearance for a merger	400
95AD	Application for clearance.....	400
95AE	Requirements for valid clearance application.....	400
95AF	Commission to notify if clearance application is invalid.....	401
95AG	Application to be published on the internet	401
95AH	Merger clearance register	401
95AI	Confidentiality claims etc.	402
95AJ	Commission may seek additional information from applicant	403
95AK	Commission may seek further information and consult others.....	403
95AL	Applicant may withdraw application.....	404
95AM	Commission to make determination on application.....	404

95AN	When clearance must not be granted	405
95AO	Time limits for determining application	405
95AP	Clearance subject to conditions	405
95AQ	When clearance is in force.....	406
95AR	Minor variations of clearances.....	407
95AS	Revocation of clearance or revocation of clearance and substitution of a new clearance.....	410
Subdivision C—Merger authorisations		414
95AT	Tribunal may grant authorisation for a merger	414
95AU	Application for authorisation.....	415
95AV	Requirements for valid authorisation application	415
95AW	Tribunal to notify if authorisation application is invalid.....	415
95AX	Tribunal to notify Commission of authorisation application	416
95AY	Application to be published on the internet	416
95AZ	Merger authorisation register.....	416
95AZA	Confidentiality claims etc.....	417
95AZC	Tribunal may seek additional information from applicant.....	418
95AZD	Tribunal may seek further information and consult others etc.	418
95AZE	Applicant may withdraw application	419
95AZEATribunal	must require Commission to give report	419
95AZF	Commission to assist Tribunal.....	419
95AZFACommission	may make enquiries.....	420
95AZG	Tribunal to make determination on application	420
95AZH	When authorisation must not be granted	421
95AZI	Time limits for determining application	421
95AZJ	Authorisation subject to conditions	422
95AZK	When authorisation is in force.....	422
95AZL	Minor variations of authorisations.....	422
95AZM	Revocation of authorisation or revocation of authorisation and substitution of a new authorisation	426
Subdivision D—Miscellaneous		431
95AZN	Providing false or misleading information	431
Part VIIA—Prices surveillance		432
Division 1—Preliminary		432
95A	Interpretation	432
95B	Exempt supplies	435
95C	Application of Part	436
95D	Crown to be bound	437
95E	Object of this Part.....	437
95F	Simplified overview of this Part	437

Division 2—Commission’s functions under this Part	439
95G Commission’s functions under this Part	439
Division 3—Price inquiries	441
Subdivision A—Holding of inquiries	441
95H Price inquiries.....	441
95J Content of inquiry notices	442
95K Period for completing inquiry.....	443
95L Notice of holding of inquiry	443
95M Notice of extension of period for completing inquiry.....	444
95N Price restrictions	444
Subdivision B—Reports on inquiries	447
95P Copies of report to be made available	447
95Q Notification of proposed prices after receipt of report.....	447
Subdivision C—Procedure at inquiries	448
95R Public inquiries etc.	448
95S Taking of evidence on oath or affirmation	449
95T Failure of witness to attend.....	450
95U Refusal to be sworn or to answer question	450
95V Protection of witnesses	451
95W Allowances to witnesses.....	451
Division 4—Price notifications	452
95X Declarations by Minister or Commission	452
95Y Declarations in relation to State or Territory authorities.....	452
95Z Price restrictions	454
95ZA Later notices modifying a locality notice.....	456
95ZB Applicable period in relation to a locality notice	457
95ZC Register of price notifications.....	458
95ZD Delegation by Commission	459
Division 5—Price monitoring	460
95ZE Directions to monitor prices, costs and profits of an industry.....	460
95ZF Directions to monitor prices, costs and profits of a business	460
95ZG Exceptions to price monitoring.....	461
Division 6—Other provisions	462
95ZH Ministerial directions.....	462
95ZI Inquiries by an unincorporated body or a group of 2 or more individuals	462
95ZJ Withdrawal of notices.....	463
95ZK Power to obtain information or documents.....	463
95ZL Inspection of documents etc.	466
95ZM Retention of documents	466
95ZN Confidential information	467

95ZO	Immunity	468
95ZP	Secrecy: members or staff members of the Commission etc.	468
95ZQ	Secrecy: persons involved in inquiries by bodies other than the Commission	470
Part VIII—Resale price maintenance		472
96	Acts constituting engaging in resale price maintenance	472
96A	Resale price maintenance in relation to services.....	474
97	Recommended prices.....	474
98	Withholding the supply of goods.....	475
99	Statements as to the minimum price of goods	476
100	Evidentiary provisions.....	476
Part IX—Review by Tribunal of Determinations of Commission		478
Division 1—Applications for review (other than for merger clearances)		478
101	Applications for review	478
101A	Application for review of notice under subsection 93(3) or (3A) or 93AC(1) or (2)	479
102	Functions and powers of Tribunal	479
Division 2—Procedure and Evidence		484
102A	Definition	484
103	Procedure generally	484
104	Regulations as to certain matters	484
105	Power to take evidence on oath	485
106	Hearings to be in public except in special circumstances	485
107	Evidence in form of written statement.....	486
108	Taking of evidence by single member	486
109	Participants in proceedings before Tribunal	486
110	Representation	486
Division 3—Review of Commission’s determinations on merger clearances		488
111	Applications for review	488
112	Tribunal to notify Commission.....	489
113	Commission to give material to Tribunal	489
114	Tribunal may consult etc. to clarify information	489
115	Commission to assist Tribunal.....	490
116	Tribunal only to consider material before the Commission	490
117	Tribunal to make decision on review	490
118	Time limits for making review decision	490
119	Tribunal’s decision taken to be Commission’s	491

An Act relating to competition, fair trading and consumer protection, and for other purposes

Part I—Preliminary

1 Short title *[see Note 1]*

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

2 Object of this Act

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

2A Application of Act to Commonwealth and Commonwealth authorities

- (1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.
- (2) Subject to the succeeding provisions of this section, this Act applies as if:
 - (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
 - (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business;were a corporation.
- (3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.
- (3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.

Section 2B

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

2B Application of Act to States and Territories

- (1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:
 - (a) Part IV;
 - (b) Part XIB;
 - (c) the other provisions of this Act so far as they relate to the above provisions.
- (2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.
- (3) The protection in subsection (2) does not apply to an authority of a State or Territory.

2BA Application of Part IV to local government bodies

- (1) Part IV applies in relation to a local government body only to the extent that it carries on a business, either directly or by an incorporated company in which it has a controlling interest.
- (2) In this section:

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

2C Activities that are not business

- (1) For the purposes of sections 2A, 2B and 2BA, the following do not amount to carrying on a business:
 - (a) imposing or collecting:
 - (i) taxes; or

- (ii) levies; or
 - (iii) fees for licences;
 - (b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions);
 - (c) a transaction involving:
 - (i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of the Commonwealth or an authority of a State or Territory); or
 - (ii) only persons who are all acting for the same authority of the Commonwealth; or
 - (iii) only persons who are all acting for the same authority of a State or Territory; or
 - (iv) only the Crown in right of the Commonwealth and one or more non-commercial authorities of the Commonwealth; or
 - (v) only the Crown in right of a State or Territory and one or more non-commercial authorities of that State or Territory; or
 - (vi) only non-commercial authorities of the Commonwealth; or
 - (vii) only non-commercial authorities of the same State or Territory; or
 - (viii) only persons who are all acting for the same local government body (within the meaning of section 2BA) or for the same incorporated company in which such a body has a controlling interest;
 - (d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:
 - (i) the body chooses to acquire the products; or
 - (ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.
- (2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of sections 2A, 2B and 2BA.
- (3) In this section:
-

Section 3

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

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

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

primary products means:

- (a) agricultural or horticultural produce; or
 - (b) crops, whether on or attached to the land or not; or
 - (c) animals (whether dead or alive); or
 - (d) the bodily produce (including natural increase) of animals.
- (4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is **non-commercial** if:
- (a) it is constituted by only one person; and
 - (b) it is neither a trading corporation nor a financial corporation.

3 Repeal

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

4 Interpretation

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

acquire includes:

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

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

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

AER Chair means the Chair of the AER.

AER member means a member of the AER.

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

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

authorisation means:

- (a) an authorisation under Division 1 of Part VII granted by the Commission or by the Tribunal on a review of a determination of the Commission; or
- (b) an authorisation under Division 3 of Part VII granted by the Tribunal.

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

- (a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory; or
- (b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest.

authority of the Commonwealth means:

- (a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or
- (b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest.

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

business includes a business not carried on for profit.

cartel provision has the meaning given by section 44ZZRD.

Chairperson means the Chairperson of the Commission.

Section 4

clearance means a clearance under Division 3 of Part VII granted by the Commission or by the Tribunal on a review of a determination of the Commission.

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

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

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

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

corporation means a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

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

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

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

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

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

Deputy Chairperson means a Deputy Chairperson of the Commission.

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

Deputy Registrar means a Deputy Registrar of the Tribunal.

designated Commonwealth energy law means:

- (a) the National Electricity (Commonwealth) Law and Regulations (as defined by the *Australian Energy Market Act 2004*); or
- (b) the National Gas (Commonwealth) Law and Regulations (as defined by the *Australian Energy Market Act 2004*); or
- (c) the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations (as defined by the *Australian Energy Market Act 2004*).

document includes:

- (a) a book, plan, paper, parchment or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them; and
- (b) a disc, tape, paper or other device from which sounds or messages are capable of being reproduced.

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

financial corporation means a financial corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that carries on as its sole or principal business the

Section 4

business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned).

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

fully-participating jurisdiction means a State or Territory that:

- (a) is a participating jurisdiction as defined in section 150A; and
- (b) is not named in a notice in operation under section 150K.

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

goods includes:

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity.

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

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

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

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

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

personal injury includes:

- (a) pre-natal injury; or
- (b) impairment of a person's physical or mental condition; or
- (c) disease;

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

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

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

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

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

price includes a charge of any description.

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

Registrar means the Registrar of the Tribunal.

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

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

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

- (a) a contract for or in relation to:

Section 4

- (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
 - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
- (b) a contract of insurance;
 - (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
 - (d) any contract for or in relation to the lending of moneys;
- but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

share includes stock.

South Australian Electricity Legislation means:

- (a) the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; and
- (b) any regulations, as in force from time to time, made under Part 4 of that Act.

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

South Australian Gas Legislation means:

- (a) the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time; and
- (b) any regulations, as in force from time to time, made under Part 3 of that Act.

The reference in paragraph (a) to the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time includes a reference

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

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

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

- (a) a uniform energy law that applies as a law of a State or Territory;
- (b) a law of a State or Territory that applies a law mentioned in paragraph (a) as a law of its own jurisdiction;
- (c) any other provisions of a law of a State or Territory that:
 - (i) relate to energy; and
 - (ii) are prescribed by the regulations for the purposes of this paragraph;being those provisions as in force from time to time.

supply, when used as a verb, includes:

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
 - (b) in relation to services—provide, grant or confer;
- and, when used as a noun, has a corresponding meaning, and **supplied** and **supplier** have corresponding meanings.

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

Territory means:

- (a) an internal Territory; or
- (b) the Territory of Christmas Island; or
- (c) the Territory of Cocos (Keeling) Islands.

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

the Family Court means the Family Court of Australia.

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

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

Section 4

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

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

uniform energy law means:

- (a) the South Australian Electricity Legislation; or
- (b) the South Australian Gas Legislation; or
- (c) the Western Australian Gas Legislation; or
- (d) provisions of a law of a State or Territory that:
 - (i) relate to energy; and
 - (ii) are prescribed by the regulations for the purposes of this subparagraph;being those provisions as in force from time to time.

Western Australian Gas Legislation means:

- (a) the National Gas Access (Western Australia) Law (within the meaning of the *National Gas Access (WA) Act 2009* of Western Australia) as in force from time to time; and
- (b) any regulations, as in force from time to time, made under Part 3 of that Act.

The reference in paragraph (a) to the National Gas Access (Western Australia) Law (within the meaning of the *National Gas Access (WA) Act 2009* of Western Australia) as in force from time to time includes a reference to any Rules or other instruments, as in force from time to time, made or having effect under that Law.

(2) In this Act:

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

- giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;
- (c) a reference to refusing to do an act includes a reference to:
 - (i) refraining (otherwise than inadvertently) from doing that act; or
 - (ii) making it known that that act will not be done; and
 - (d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.
- (3) Where a provision of this Act is expressed to render a provision of a contract, or to render a covenant, unenforceable if the provision of the contract or the covenant has or is likely to have a particular effect, that provision of this Act applies in relation to the provision of the contract or the covenant at any time when the provision of the contract or the covenant has or is likely to have that effect notwithstanding that:
- (a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or
 - (b) the provision of the contract or the covenant will not or may not have that effect at a later time.
- (4) In this Act:
- (a) a reference to the acquisition of shares in the capital of a body corporate shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares; and
 - (b) a reference to the acquisition of assets of a person shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such assets but does not include a reference to an acquisition by way of charge only or an acquisition in the ordinary course of business.

Section 4A

4A Subsidiary, holding and related bodies corporate

- (1) For the purposes of this Act, a body corporate shall, subject to subsection (3), be deemed to be a subsidiary of another body corporate if:
 - (a) that other body corporate:
 - (i) controls the composition of the board of directors of the first-mentioned body corporate;
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first-mentioned body corporate; or
 - (iii) holds more than one-half of the allotted share capital of the first-mentioned body corporate (excluding any part of that allotted share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
 - (b) the first-mentioned body corporate is a subsidiary of any body corporate that is that other body corporate's subsidiary (including any body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).
- (2) For the purposes of subsection (1), the composition of a body corporate's board of directors shall be deemed to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if:
 - (a) a person cannot be appointed as a director without the exercise in his or her favour by that other body corporate of such a power; or
 - (b) a person's appointment as a director follows necessarily from his or her being a director or other officer of that other body corporate.
- (3) In determining whether a body corporate is a subsidiary of another body corporate:

- (a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;
 - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:
 - (i) by any person as a nominee for that other body corporate (except where that other body corporate is concerned only in a fiduciary capacity); or
 - (ii) by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity;shall be treated as held or exercisable by that other body corporate;
 - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any allotment of such debentures, shall be disregarded; and
 - (d) any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.
- (4) A reference in this Act to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.
- (5) Where a body corporate:
- (a) is the holding company of another body corporate;
 - (b) is a subsidiary of another body corporate; or
 - (c) is a subsidiary of the holding company of another body corporate;
- that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

Section 4B

- (5A) For the purposes of Parts IV, VI and VII:
- (a) a body corporate that is a party to a dual listed company arrangement is taken to be related to the other body corporate that is a party to the arrangement; and
 - (b) a body corporate that is related to one of the parties to the arrangement is taken to be related to the other party to the arrangement; and
 - (c) a body corporate that is related to one of the parties to the arrangement is taken to be related to each body corporate that is related to the other party to the arrangement.
- (6) In proceedings under this Act, whether in the Court or before the Tribunal or the Commission, it shall be presumed, unless the contrary is established, that bodies corporate are not, or were not at a particular time, related to each other.

4B Consumers

- (1) For the purposes of this Act, unless the contrary intention appears:
- (a) a person shall be taken to have acquired particular goods as a consumer if, and only if:
 - (i) the price of the goods did not exceed the prescribed amount; or
 - (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and
 - (b) a person shall be taken to have acquired particular services as a consumer if, and only if:
 - (i) the price of the services did not exceed the prescribed amount; or
 - (ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

- (2) For the purposes of subsection (1):
- (a) the prescribed amount is \$40,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;
 - (b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;
 - (c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been:
 - (i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;
 - (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
 - (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time;
 - (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been:
 - (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;
 - (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at

Section 4C

- that time, reasonably have purchased goods or services of that kind from another supplier; or
- (iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and
- (e) without limiting by implication the meaning of the expression *services* in subsection 4(1), the obtaining of credit by a person in connection with the acquisition of goods or services by him or her shall be deemed to be the acquisition by him or her of a service and any amount by which the amount paid or payable by him or her for the goods or services is increased by reason of his or her so obtaining credit shall be deemed to be paid or payable by him or her for that service.
- (3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.
- (4) In this section, *commercial road vehicle* means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

4C Acquisition, supply and re-supply

In this Act, unless the contrary intention appears:

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;
- (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;
- (c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both;
- (d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both;

- (e) a reference to the re-supply of goods acquired from a person includes a reference to:
 - (i) a supply of the goods to another person in an altered form or condition; and
 - (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated;
- (f) a reference to the re-supply of services (the *original services*) acquired from a person (the *original supplier*) includes a reference to:
 - (i) a supply of the original services to another person in an altered form or condition; and
 - (ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.

4D Exclusionary provisions

- (1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
 - (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
 - (b) the provision has the purpose of preventing, restricting or limiting:
 - (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
 - (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;
- by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or

Section 4E

proposed party is a body corporate, by a body corporate that is related to the body corporate.

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

4E Market

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

4F References to purpose or reason

- (1) For the purposes of this Act:
- (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:
 - (i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and
 - (ii) that purpose was or is a substantial purpose; and
 - (b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

- (i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and
 - (ii) that purpose or reason was or is a substantial purpose or reason.
- (2) This section does not apply for the purposes of subsections 45D(1), 45DA(1), 45DB(1), 45E(2) and 45E(3).

4G Lessening of competition to include preventing or hindering competition

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

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

In this Act:

- (a) a reference to a contract shall be construed as including a reference to a lease of, or a licence in respect of, land or a building or part of a building and shall be so construed notwithstanding the express references in this Act to such leases or licences;
- (b) a reference to making or entering into a contract, in relation to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and
- (c) a reference to a party to a contract, in relation to such a lease or licence, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

4J Joint ventures

In this Act:

- (a) a reference to a joint venture is a reference to an activity in trade or commerce:
 - (i) carried on jointly by two or more persons, whether or not in partnership; or

Section 4K

- (ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate; and
- (b) a reference to a contract or arrangement made or understanding arrived at, or to a proposed contract or arrangement to be made or proposed understanding to be arrived at, for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate as mentioned in subparagraph (a)(ii), be read as including a reference to the memorandum and articles of association, rules or other document that constitute or constitutes, or are or is to constitute, that body corporate.

4K Loss or damage to include injury

In this Act:

- (a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and
- (b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.

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

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

4L Severability

If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 51ADB or 87, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.

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

This Act does not affect the operation of:

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

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

4N Extended application of Part IIIA

- (1) Part IIIA, and the other provisions of this Act so far as they relate to Part IIIA, extend to services provided by means of facilities that are, or will be, wholly or partly within:
 - (a) an external Territory; or
 - (b) the offshore area in respect of a State, of the Northern Territory, or of an external Territory, as specified in section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.
- (3) Nothing in subsection (1) affects the operation of section 15B of the *Acts Interpretation Act 1901* in respect of the application of Part IIIA, and of the other provisions of this Act so far as they relate to Part IIIA, in any part of:
 - (a) the coastal sea of Australia; or
 - (b) the coastal sea of an external Territory;that is on the landward side of each of the offshore areas referred to in that subsection.
- (4) For the purposes of this section:

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

5 Extended application of this Act to conduct outside Australia

- (1) Each of the following provisions:
 - (a) Part IV;
 - (b) Part XI;
 - (c) the Australian Consumer Law (other than Part 5-3);

Section 5

- (f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b) or (c));
- extends to the engaging in conduct outside Australia by:
 - (g) bodies corporate incorporated or carrying on business within Australia; or
 - (h) Australian citizens; or
 - (i) persons ordinarily resident within Australia.
- (1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:
 - (a) New Zealand and New Zealand Crown corporations; or
 - (b) bodies corporate carrying on business within New Zealand; or
 - (c) persons ordinarily resident within New Zealand.
- (2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.
- (3) Where a claim under section 82, or under section 236 of the Australian Consumer Law, is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.
- (4) A person other than the Minister, the Commission or the Director of Public Prosecutions is not entitled to make an application to the Court for an order under subsection 87(1) or (1A), or under subsection 237(1) or 238(1) of the Australian Consumer Law, in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.
- (5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:
 - (a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

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

6 Extended application of this Act to persons who are not corporations [see Note 2]

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

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

- (a) any references in this Act other than in section 45DB, or section 33 or 155 of the Australian Consumer Law, to trade or commerce were, by express provision, confined to trade or commerce:

- (i) between Australia and places outside Australia; or
- (ii) among the States; or
- (iii) within a Territory, between a State and a Territory or between two Territories; or
- (iv) by way of the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth; and

- (b) the following provisions:

- (i) sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45, 45B, 45D to 45EB (other than section 45DB), 46 and 46A;
- (ii) Part VIII;
- (iii) sections 31 and 43, Division 3 of Part 3-1, and sections 50, 153, 163, 164 and 168, of the Australian Consumer Law;

were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:

- (iv) trade or commerce between Australia and places outside Australia; or
- (v) trade or commerce among the States; or
- (vi) trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
- (vii) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth; and

Section 6

- (c) any reference in Division 1 of Part 3-2 of the Australian Consumer Law to a contract for the supply of goods or services and any reference in Part 3-5 or 5-4 of the Australian Consumer Law to the supply of goods or services, were, by express provision, confined to a contract made, or the supply of goods or services, as the case may be:
 - (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia; or
 - (ii) in the course of, or in relation to, trade or commerce among the States; or
 - (iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between two Territories; and
- (ca) any reference in Part 2-3 of the Australian Consumer Law to a contract were, by express provision, confined to a contract made:
 - (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia; or
 - (ii) in the course of, or in relation to, trade or commerce among the States; or
 - (iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between two Territories; and
- (d) in subsection 45(1) and subparagraph 87(3)(a)(i) the words “in so far as it confers rights or benefits or imposes duties or obligations on a corporation” were omitted; and
- (e) in subsection 45B(1) and subparagraph 87(3)(a)(ii) the words “in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation” were omitted; and
- (ea) subsections 45D(3), 45D(4) and 45DA(3) were repealed, the words “In the circumstances specified in subsections (3) and (4)” were omitted from subsection 45D(1) and the words “In the circumstances specified in subsection (3)” were omitted from subsection 45DA(1); and
- (eb) the second sentence in subsection 45E(1) were omitted; and
- (g) subsection 96(2) were omitted; and
- (h) subject to paragraphs (d), (e), (ea), (eb) and (g), a reference in this Act to a corporation, except a reference in section 4, 48, 49, 50, 50A, 77A, 81, 151AE or 151AJ or in section 229 of

the Australian Consumer Law, included a reference to a person not being a corporation.

- (2A) So far as subsection (2) relates to Part IV, that subsection has effect in relation to a participating Territory as if the words “within a Territory,” were omitted from subparagraphs (2)(a)(iii) and (2)(b)(iii). For this purpose, ***participating Territory*** means a Territory that is a participating Territory within the meaning of Part XIA but is not named in a notice in operation under section 150K.
- (2C) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:
- (a) the reference in paragraph 44ZZRD(2)(c) to goods or services supplied, or likely to be supplied, were, by express provision, confined to goods or services supplied, or likely to be supplied, to corporations or classes of corporations; and
 - (b) the reference in paragraph 44ZZRD(2)(d) to goods or services acquired, or likely to be acquired, were, by express provision, confined to goods or services acquired, or likely to be acquired, from corporations or classes of corporations; and
 - (c) the reference in paragraph 44ZZRD(2)(e) to goods or services re-supplied, or likely to be re-supplied, were, by express provision, confined to goods or services re-supplied, or likely to be re-supplied, to corporations or classes of corporations; and
 - (d) the reference in paragraph 44ZZRD(2)(f) to goods or services likely to be re-supplied were, by express provision, confined to goods or services likely to be re-supplied to corporations or classes of corporations; and
 - (e) the following paragraphs were added at the end of subsection 44ZZRD(2):
 - “; or (g) goods or services re-supplied, or likely to be re-supplied, by corporations or classes of corporations to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
 - (h) goods or services likely to be re-supplied by corporations or classes of corporations to whom those goods or services are

Section 6

likely to be supplied by any or all of the parties to the contract, arrangement or understanding.”; and

- (f) the reference in subparagraph 44ZZRD(3)(a)(i) to the production, or likely production, of goods were, by express provision, confined to the production, or likely production, of goods for supply to corporations or classes of corporations; and
- (g) the reference in subparagraph 44ZZRD(3)(a)(ii) to the supply of services were, by express provision, confined to the supply of services to corporations or classes of corporations; and
- (h) each reference in subparagraphs 44ZZRD(3)(a)(iii), (b)(i) and (ii) to persons or classes of persons were, by express provision, confined to corporations or classes of corporations; and
- (i) the reference in subparagraph 44ZZRD(3)(b)(iii) to the geographical areas in which goods or services are supplied, or likely to be supplied, were, by express provision, confined to the geographical areas in which goods or services are supplied, or likely to be supplied, to corporations or classes of corporations; and
- (j) the reference in subparagraph 44ZZRD(3)(b)(iv) to the geographical areas in which goods or services are acquired, or likely to be acquired, were, by express provision, confined to the geographical areas in which goods or services are acquired, or likely to be acquired, from corporations or classes of corporations; and
- (k) the reference in paragraph 44ZZRD(3)(c) to the supply or acquisition of goods or services were, by express provision, confined to supply of goods or services to, or the acquisition of goods or services from, corporations or classes of corporations; and
- (l) the reference in paragraph 44ZZRD(4)(e) to paragraph (2)(e) or (f) included a reference to paragraph (2)(g) or (h); and
- (m) section 44ZZRD also provided that it is immaterial whether the identities of the corporations referred to in subsection (2) or (3) of that section can be ascertained; and
- (n) each reference in the following provisions of this Act:
 - (i) Division 1 of Part IV (other than section 44ZZRD);

- (ii) any other provision (other than section 4, 44ZZRD, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV; to a corporation included a reference to a person not being a corporation.

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

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

- (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of, or relates to, a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; and
- (b) each reference in the following provisions of this Act:
 - (i) Division 1 of Part IV;
 - (ii) any other provision (other than section 4, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV; to a corporation included a reference to a person not being a corporation.

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

- (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in, or relates to:
 - (i) a Territory; or
 - (ii) a Commonwealth place (within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*); and
- (b) each reference in the following provisions of this Act:
 - (i) Division 1 of Part IV;

Section 6

- (ii) any other provision (other than section 4, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV; to a corporation included a reference to a person not being a corporation.
- (3) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by another subsection of this section, the provisions of Part IVA, of Divisions 1, 1AAA, 1AA and 1A of Part V and of Divisions 2 and 3 of Part VC have, by force of this subsection, the effect they would have if:
 - (a) those provisions (other than sections 33 and 155 of the Australian Consumer Law) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and
 - (b) a reference in the provisions of Part XI to a corporation included a reference to a person not being a corporation.
- (3A) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by subsection (2), the provisions of Part 2-3 of the Australian Consumer Law have, by force of this subsection, the effect they would have if:
 - (a) those provisions were, by express provision, confined in their operation to contracts for or relating to:
 - (i) the use of postal, telegraphic or telephonic services; or
 - (ii) radio or television broadcasts; and
 - (b) a reference in the provisions of Part XI to a corporation included a reference to a person not being a corporation.
- (4) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by another subsection of this section, the provisions of Parts 2-2, 3-1 (other than sections 30 and 33), Part 4-1 (other than sections 152, 155 and 164) and 5-3 of the Australian Consumer Law also have, by force of this subsection, the effect they would have if:
 - (a) those provisions were, by express provision, confined in their operation to engaging in conduct in a Territory; and
 - (b) a reference in those provisions to a thing done by a corporation in trade or commerce included a reference to a

thing done in the course of the promotional activities of a professional person.

- (5) In the application of sections 279, 282 and 283 of the Australian Consumer Law in relation to a supplier who is a natural person, those sections have effect as if there were substituted for paragraphs 279(3)(a), 282(2)(a) and 283(5)(a) of the Australian Consumer Law the following paragraph:

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

- (5A) Despite anything in section 44ZZRF or 44ZZRG, if a body corporate other than a corporation is convicted of an offence against that section (as that section applies because of this section), the offence is taken to be punishable on conviction as if the body corporate were a corporation.
- (5B) Despite anything in section 44ZZRF or 44ZZRG, if a person other than a body corporate is convicted of an offence against that section (as that section applies because of this section), the offence is taken to be punishable on conviction by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both.

6AA Application of the *Criminal Code*

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

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

- (2) Despite subsection (1), Part 2.5 of the *Criminal Code* does not apply to an offence against Part IIIA or XIC, Division 7 of Part XIB, or section 44ZZRF or 44ZZRG.

Part II—The Australian Competition and Consumer Commission

6A Establishment of Commission

- (1) The Australian Competition and Consumer Commission is established by this section.
- (2) The Commission:
 - (a) is a body corporate, with perpetual succession;
 - (b) shall have an official seal;
 - (c) may acquire, hold and dispose of real and personal property; and
 - (d) may sue or be sued in its corporate name.
- (3) Any real or personal property held by the Commission is held for and on behalf of the Commonwealth.
- (4) Any money received by the Commission is received for and on behalf of the Commonwealth.
- (5) To avoid doubt, a right to sue is taken not to be personal property for the purposes of subsection (3).

7 Constitution of Commission

- (1) The Commission shall consist of a Chairperson and such number of other members as are from time to time appointed in accordance with this Act.
- (2) The members of the Commission shall be appointed by the Governor-General and shall be so appointed as full-time members.

Note: A member of the Commission who is also appointed as an AER member remains a full-time member of the Commission: see section 44AN.
- (3) Before the Governor-General appoints a person as a member of the Commission or as Chairperson, the Minister must:
 - (a) be satisfied that the person qualifies for the appointment because of the person's knowledge of, or experience in,

- industry, commerce, economics, law, public administration or consumer protection; and
 - (b) consider whether the person has knowledge of, or experience in, small business matters; and
 - (c) if there is at least one fully-participating jurisdiction—be satisfied that a majority of such jurisdictions support the appointment.
- (4) At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection.

8 Terms and conditions of appointment

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

8A Associate members

- (1) The Minister may appoint persons to be associate members of the Commission.
- (1A) If there is at least one fully-participating jurisdiction, the Minister must not appoint a person as an associate member unless the Minister is satisfied that a majority of such jurisdictions support the appointment.
- (2) An associate member of the Commission shall be appointed for such period not exceeding 5 years as is specified in the instrument of his or her appointment, but is eligible for re-appointment.
- (3) Subject to this Part, an associate member of the Commission holds office on such terms and conditions as the Minister determines.
- (4) The Chairperson may, by writing signed by him or her, direct that, for the purposes of the exercise of the powers of the Commission under this Act in relation to a specified matter, not being an exercise of those powers by a Division of the Commission, a specified associate member of the Commission or specified associate members of the Commission shall be deemed to be a member or members of the Commission and, in that case, unless the contrary intention appears, a reference in this Act to a member

Section 8AB

of the Commission shall, for the purposes only of the exercise of the powers of the Commission in relation to that matter, be construed as including a reference to that associate member of the Commission or each of those associate members of the Commission, as the case may be.

- (5) Associate members of the Commission shall be deemed to be members of the Commission for the purposes of section 19.
- (6) For the purpose of the determination by the Commission of an application for an authorization or a clearance, or the making by the Commission of any decision for the purposes of subsection 93(3) or (3A) or 93AC(1) or (2), the Chairperson shall consider:
 - (a) whether he or she should give a direction under subsection (4) of this section; or
 - (b) in the case of a matter in relation to which the Chairperson proposes to give a direction under subsection 19(1), whether he or she should direct that the Division concerned is to include an associate member of the Commission or associate members of the Commission.
- (7) Nothing in subsection (4) or (5) deems an associate member of the Commission to be a member of the Commission for any purpose related to the preparation of a report by the Commission under section 171.

8AB State/Territory AER members taken to be associate members

- (1) A State/Territory AER member is taken to be an associate member of the Commission during the period for which he or she is an AER member.

Note: A State/Territory AER member who is taken to be an associate member of the Commission can still be appointed as an associate member under section 8A.

- (2) However, a State/Territory AER member who is taken to be an associate member under subsection (1), is not taken to be an associate member for the purposes of sections 8A, 9, 14, 15 and 17.
- (3) As an associate member, the State/Territory AER member holds office on such terms and conditions as are specified in the instrument of his or her appointment under section 44AP.

9 Remuneration

- (1) A member of the Commission shall be paid such remuneration as is determined by the Remuneration Tribunal, but, until that remuneration is so determined, he or she shall be paid such remuneration as is prescribed.
- (2) Subject to the *Remuneration Tribunal Act 1973*, a member of the Commission shall be paid such allowances as are prescribed.
- (3) In this section, ***member of the Commission*** includes an associate member of the Commission.

10 Deputy Chairpersons

- (1) The Governor-General may appoint a person who is, or is to be, a member of the Commission to be a Deputy Chairperson of the Commission.
- (1A) If there is at least one fully-participating jurisdiction, the Governor-General must not appoint a person as a Deputy Chairperson unless the Governor-General is satisfied that a majority of such jurisdictions support the appointment.
- (1B) Before the Governor-General appoints a person as a Deputy Chairperson, the Minister must be satisfied that, immediately after the appointment, there will be at least one Deputy Chairperson who has knowledge of, or experience in, small business matters.
- (2) A person appointed under this section holds office as Deputy Chairperson until the expiration of his or her period of appointment as a member of the Commission or until he or she sooner ceases to be a member of the Commission.
- (3) Where a member of the Commission appointed as Deputy Chairperson is, upon ceasing to be a Deputy Chairperson by virtue of the expiration of the period of his or her appointment as a member, re-appointed as a member, he or she is eligible for re-appointment as Deputy Chairperson.
- (4) A Deputy Chairperson may resign his or her office of Deputy Chairperson by writing signed by him or her and delivered to the Governor-General.

Section 11

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

11 Acting Chairperson

- (1) Where there is, or is expected to be, a vacancy in the office of Chairperson, the Governor-General may appoint a person to act as Chairperson until the filling of the vacancy.
- (1A) A person appointed under subsection (1) to act during a vacancy shall not continue so to act for more than 12 months.
- (2) Where the Chairperson is absent from duty or from Australia:
- (a) if there are 2 Deputy Chairpersons available to act as Chairperson, the Minister may appoint 1 of them to act as Chairperson during the absence of the Chairperson; or
 - (b) if there is only 1 Deputy Chairperson available to act as Chairperson, that Deputy Chairperson is to act as Chairperson during the absence of the Chairperson; or
 - (c) if there are no Deputy Chairpersons or none of the Deputy Chairpersons are available to act as Chairperson, the Minister may appoint a member of the Commission to act as Chairperson during the absence of the Chairperson, but any such appointment ceases to have effect if a person is appointed as a Deputy Chairperson or a Deputy Chairperson becomes available to act as Chairperson.
- (3) A person acting as Chairperson shall act in that capacity on such terms and conditions as the Governor-General determines and has all the powers and duties, and shall perform all the functions, conferred on the Chairperson by this Act.

12 Leave of absence

- (1) A member of the Commission has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Minister may grant a member of the Commission leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

13 Termination of appointment of members of the Commission

- (1) The Governor-General may terminate the appointment of a member of the Commission for misbehaviour or physical or mental incapacity.
- (2) If a member of the Commission:
 - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;
 - (b) fails to comply with his or her obligations under section 17;
 - (c) without the consent of the Minister engages in any paid employment outside the duties of his or her office; or
 - (d) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;the Governor-General shall terminate the appointment of that member of the Commission.

14 Termination of appointment of associate members of the Commission

- (1) The Minister may terminate the appointment of an associate member of the Commission for misbehaviour or physical or mental incapacity.
- (2) If an associate member of the Commission:
 - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit; or
 - (b) fails to comply with his or her obligations under section 17;the Minister shall terminate the appointment of that associate member of the Commission.

15 Resignation

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

Section 16

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

16 Arrangement of business

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

17 Disclosure of interests by members

- (1) Where a member of the Commission other than the Chairperson is taking part, or is to take part, in the determination of a matter before the Commission and the member has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions in relation to the determination of the matter:
 - (a) the member shall disclose the interest to the Chairperson; and
 - (b) the member shall not take part, or continue to take part, in the determination of the matter if:
 - (i) the Chairperson gives a direction under paragraph (2)(a) in relation to the matter; or
 - (ii) all of the persons concerned in the matter do not consent to the member taking part in the determination of the matter.
- (2) Where the Chairperson becomes aware that a member of the Commission is taking part, or is to take part, in the determination of a matter and that the member has in relation to the determination of the matter such an interest:
 - (a) if the Chairperson considers that the member should not take part, or should not continue to take part, in the determination of the matter—the Chairperson shall give a direction to the member accordingly; or
 - (b) in any other case—the Chairperson shall cause the interest of the member to be disclosed to the persons concerned in the matter.
- (3) The Chairperson shall give written notice to the Minister of all pecuniary interests that the Chairperson has or acquires in any business carried on in Australia or in any body corporate carrying on any such business.

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

18 Meetings of Commission

- (1) Subject to this section, the Chairperson shall convene such meetings of the Commission as he or she thinks necessary for the efficient performance of the functions of the Commission.
- (2) Meetings of the Commission shall be held at such places as the Chairperson determines.
- (3) The Chairperson shall preside at all meetings of the Commission at which he or she is present.
- (4) In the absence of the Chairperson from a meeting of the Commission:
 - (a) if there are 2 Deputy Chairpersons available to preside at the meeting—the Chairperson may nominate 1 of them to preside at the meeting; or
 - (b) if there is only 1 Deputy Chairperson available to preside at the meeting—that Deputy Chairperson is to preside at the meeting.
- (5) Subject to this Act and the regulations, the member presiding at a meeting of the Commission may give directions regarding the procedure to be followed at or in connexion with the meeting.
- (6) At a meeting of the Commission:
 - (a) three members (including the Chairperson or a Deputy Chairperson) form a quorum;
 - (b) all questions shall be decided by a majority of votes of the members present and voting; and
 - (c) the member presiding has a deliberative vote and, in the event of an equality of votes, also has a casting vote.
- (7) If the Commission so determines, a member or members may participate in, and form part of a quorum at, a meeting of the Commission or a Division of the Commission by means of any of the following methods of communication:
 - (a) telephone;
 - (b) closed circuit television;

Section 19

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

19 Chairperson may direct Commission to sit in Divisions

- (1) The Chairperson may, by writing signed by him or her, direct that the powers of the Commission under this Act in relation to a matter shall be exercised by a Division of the Commission constituted by the Chairperson and such other members (not being less than two in number) as are specified in the direction.
- (2) Where the Chairperson has given a direction under subsection (1), he or she may, by writing signed by him or her, at any time before the Division of the Commission specified in the direction has made a determination in relation to the matter, revoke the direction or amend the direction in relation to the membership of the Division or in any other respect, and where the membership of a Division of the Commission is changed, the Division as constituted after the change may complete the determination of the matter.
- (3) For the purposes of the determination of a matter specified in a direction given under subsection (1), the Commission shall be deemed to consist of the Division of the Commission specified in the direction.
- (4) The Chairperson is not required to attend a meeting of a Division of the Commission if he or she does not think fit to do so.
- (5) At a meeting of a Division of the Commission at which neither the Chairperson nor a Deputy Chairperson is presiding, a member of the Commission nominated for the purpose by the Chairperson shall preside.
- (6) Notwithstanding section 18, at a meeting of a Division of the Commission, two members form a quorum.
- (7) A Division of the Commission may exercise powers of the Commission under this Act notwithstanding that another Division

of the Commission is exercising powers of the Commission at the same time.

25 Delegation by Commission

- (1) The Commission may, by resolution, delegate to a member of the Commission, either generally or otherwise as provided by the instrument of delegation, any of its powers under this Act (other than Part VIIA or section 152ELA), Procedural Rules under Part XIC, the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the *Water Act 2007*, Rules of Conduct under Part 20 of the *Telecommunications Act 1997* or the *Australian Postal Corporation Act 1989*, other than this power of delegation and its powers to grant, revoke or vary an authorization or a clearance.

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

- (2) A power so delegated may be exercised or performed by the delegate in accordance with the instrument of delegation.
- (3) A delegation under this section is revocable at will and does not prevent the exercise of a power by the Commission.

26 Delegation by Commission of certain functions and powers

- (1) The Commission may, by resolution, delegate:
- (a) any of its functions and powers under or in relation to Parts VI and XI and the Australian Consumer Law; and
 - (b) any of its powers under Part XII that relate to those Parts or the Australian Consumer Law;
- to a staff member of the Australian Securities and Investments Commission within the meaning of section 5 of the *Australian Securities and Investments Commission Act 2001*.
- (2) The Commission must not delegate a function or power under subsection (1) unless the Chairperson of the Australian Securities and Investments Commission has agreed to the delegation in writing.

Section 27

27 Staff of Commission

- (1) The staff necessary to assist the Commission shall be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the Chairperson of the Commission and the APS employees assisting the Chairperson together constitute a Statutory Agency; and
 - (b) the Chairperson is the Head of that Statutory Agency.

27A Consultants

- (1) On behalf of the Commonwealth, the Commission may engage persons to give advice to, and perform services for, the Commission.
- (2) The terms and conditions of engagement are as determined by the Commission.

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

- (1) In addition to any other functions conferred on the Commission, the Commission has the following functions:
 - (a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under this Act;
 - (b) to examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in respect of matters referred to the Commission by the Minister, being matters with respect to which the Parliament has power to make laws;
 - (c) to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;
 - (ca) to conduct research and undertake studies on matters that are referred to the Commission by the Council and that relate to the Commission's other functions;

- (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;
 - (e) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.
- (2) Where a matter of a kind mentioned in paragraph (1)(b) is referred by the Minister to the Commission for examination and report:
 - (a) the Commission shall cause to be published in the *Gazette* and in such newspapers and other journals as the Commission considers appropriate a notice:
 - (i) stating that the reference has been made and specifying the matter to which the reference relates; and
 - (ii) inviting interested persons to furnish to the Commission their views on that matter and specifying the time and manner within which those views are to be furnished;
 - (b) the Commission shall not furnish its report to the Minister until a reasonable opportunity has been given to interested persons to furnish to the Commission their views on the matter to which the reference relates; and
 - (c) the Commission shall include in its report to the Minister any recommendations that it considers desirable with respect to the reform of the law relating to the matter to which the reference relates, whether those recommendations relate to the amendment of existing laws or the making of new laws.
- (3) The Minister shall cause a copy of each report furnished to him or her by the Commission in relation to a matter referred to the Commission under paragraph (1)(b) to be laid before each House of the Parliament as soon as practicable after the report is received by him or her.

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

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

Section 29

- (1A) The Minister must not give directions under subsection (1) relating to:
 - (a) Part IIIA, IV, VII, VIIA, X, XIB or XIC; or
 - (b) Division 3 of Part XI in relation to individual cases.
- (1B) The Commission must comply with a direction.
- (2) Any direction given to the Commission under subsection (1) shall be in writing and the Minister shall cause a copy of the direction to be published in the *Gazette* as soon as practicable after the direction is given.
- (3) If either House of the Parliament or a Committee of either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the functions of the Commission under this Act, the Commission shall comply with the requirement.

Part IIA—The National Competition Council

29A Establishment of Council

The National Competition Council is established by this section.

29B Functions and powers of Council

- (1) The Council's functions include:
 - (a) carrying out research into matters referred to the Council by the Minister; and
 - (b) providing advice on matters referred to the Council by the Minister.
- (2) The Council may:
 - (a) perform any function conferred on it by a law of the Commonwealth, or of a State or Territory; and
 - (b) exercise any power:
 - (i) conferred by that law to facilitate the performance of that function; or
 - (ii) necessary or convenient to permit the performance of that function.
- (2A) The Council must not, under subsection (2):
 - (a) perform a function conferred on it by a law of a State or Territory; or
 - (b) exercise a power that is so conferred;unless the conferral of the function or power is in accordance with the Competition Principles Agreement.
- (2B) Subsection (2) does not apply to a State/Territory energy law.

Note: Section 29BA provides that a State/Territory energy law may confer functions or powers, or impose duties, on the Council.
- (3) In performing its functions, the Council may co-operate with a department, body or authority of the Commonwealth, of a State or of a Territory.

Section 29BA

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

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

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

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a State/Territory energy law to the extent to which:
- (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the Council; or
 - (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.
- (3) The Council cannot perform a duty or function, or exercise a power, under a State/Territory energy law unless the conferral of the function or power, or the imposition of the duty, is in accordance with an agreement between the Commonwealth and the State or Territory concerned.

29BB How duty is imposed

Application

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

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

State or Territory legislative power sufficient to support duty

- (2) The duty is taken not to be imposed by this Part (or any other law of the Commonwealth) to the extent to which:
- (a) imposing the duty is within the legislative powers of the State or Territory concerned; and
 - (b) imposing the duty by the law of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the Council.

Section 29BC

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

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

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Part to the extent necessary to ensure that validity.
- (4) If, because of subsection (3), this Part is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Part.
- (5) The duty is taken to be imposed by this Part in accordance with subsection (3) only to the extent to which imposing the duty:
 - (a) is within the legislative powers of the Commonwealth; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the Council.
- (6) Subsections (1) to (5) do not limit section 29BA.

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

For the purposes of sections 29BA and 29BB, a State/Territory energy law ***imposes a duty*** on the Council if:

- (a) the law confers a function or power on the Council; and
- (b) the circumstances in which the function or power is conferred give rise to an obligation on the Council to perform the function or to exercise the power.

29C Membership of Council

- (1) The Council consists of the Council President and up to 4 other Councillors.
- (2) Each Councillor is to be appointed by the Governor-General, for a term of up to 5 years.

Section 29D

- (3) The Governor-General must not appoint a person as a Councillor or Council President unless the Governor-General is satisfied that:
 - (a) the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration; and
 - (b) a majority of the States and Territories that are parties to the Competition Principles Agreement support the appointment.

29D Terms and conditions of office

- (1) A Councillor may be appointed to hold office on either a full-time or a part-time basis.
- (2) A Councillor holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as the Governor-General determines.

29E Acting Council President

- (1) The Minister may appoint a Councillor to act as the Council President:
 - (a) if there is a vacancy in the office of Council President, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Council President is absent from duty or absent from Australia or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:
 - (a) the occasion for appointment had not arisen;
 - (b) there was a defect or irregularity in the appointment;
 - (c) the appointment had ceased to have effect;
 - (d) the occasion to act had not arisen or had ceased.

29F Remuneration of Councillors

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

- (2) A Councillor is to be paid such allowances as are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

29G Leave of absence

- (1) A full-time Councillor has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Minister may grant a full-time Councillor leave of absence, other than recreation leave, on such terms and conditions as the Minister determines. The terms and conditions may include terms and conditions relating to remuneration.

29H Termination of appointment of Councillors

- (1) The Governor-General may terminate the appointment of a Councillor for misbehaviour or for physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of a Councillor who:
 - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;
 - (b) fails to comply with his or her obligations under section 29K;
 - (c) in the case of a full-time Councillor—engages in any paid employment outside the duties of the Councillor's office without the consent of the Minister;
 - (d) in the case of a full-time Councillor—is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.

29I Resignation of Councillors

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

29J Arrangement of Council business

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

Section 29K

- (2) The Council must not carry out any work (other than work relating to a function under Part IIIA or VIIA) except in accordance with a program agreed to by:
 - (a) a majority of the parties to the Competition Principles Agreement; or
 - (b) if the parties to the Agreement are evenly divided on the question of agreeing to a program—the Commonwealth.

29K Disclosure of interests by Councillors

- (1) If a Councillor (except the Council President) is taking part, or is to take part, in the Council's consideration of a matter and the Councillor has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions relating to the matter:
 - (a) the Councillor must disclose the interest to the Council President; and
 - (b) the Councillor must not take part, or continue to take part, in the consideration of the matter if:
 - (i) all of the persons concerned in the matter do not consent to the Councillor taking part in the consideration of the matter; or
 - (ii) the Council President gives a direction to the member under paragraph (2)(b).
- (2) If the Council President becomes aware that a Councillor is taking part, or is to take part, in the Council's consideration of a matter and that the Councillor has such an interest relating to the matter:
 - (a) the Council President must cause the Councillor's interest to be disclosed to the persons concerned in the matter; or
 - (b) if the Council President considers that the Councillor should not take part or continue to take part in the consideration of the matter—the Council President must direct the Councillor accordingly.
- (3) The Council President must give the Minister written notice of all pecuniary interests that the Council President has or acquires in any business carried on in Australia or in any body corporate carrying on such business.

29L Council meetings

- (1) The Council President must convene the meetings that the Council President thinks are necessary to perform the Council's functions efficiently.
- (2) The meetings must be held in places determined by the Council President.
- (3) The Council President must preside at any meeting that he or she attends.
- (4) If the Council President is absent from a meeting, a Councillor chosen by the Councillors at the meeting must preside.
- (5) The Councillor presiding at a meeting may give directions on the procedure to be followed in relation to the meeting.
- (6) The quorum for a meeting is 3 Councillors (including the Council President).
- (7) At a meeting, a question must be decided by a majority of votes of the Councillors present and voting. The Councillor presiding has a deliberative vote, and a casting vote if the deliberative votes are equally divided.

29LA Resolutions without meetings

- (1) If all Councillors (other than those that must not sign a document because of subsection (3)) sign a document containing a statement that they are in favour of a resolution in terms set out in the document, then a resolution in those terms is taken to have been passed at a duly constituted meeting of the Council held on the day the document was signed, or, if the members sign the document on different days, on the last of those days.
- (2) For the purposes of subsection (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more Councillors are together taken to constitute one document containing a statement in those terms signed by those Councillors on the respective days on which they signed the separate documents.
- (3) A Councillor must not sign a document containing a statement in favour of a resolution if the resolution concerns a matter in which

Section 29M

the Councillor has any pecuniary interest, being an interest that could conflict with the proper performance of the Councillor's functions in relation to any matter.

29M Staff to help Council

- (1) The staff needed to help the Council are to be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the Council President and the APS employees assisting the Council President together constitute a Statutory Agency; and
 - (b) the Council President is the Head of that Statutory Agency.

29N Consultants

- (1) On behalf of the Commonwealth, the Council may engage persons to give advice to, and perform services for, the Council.
- (2) The terms and conditions of engagement are as determined by the Council.

29O Annual report

- (1) Within 60 days after the end of each financial year, the Councillors must give a report on the Council's operations during that year to the Minister for presentation to the Parliament.
- (2) The report must also include details of the following:
 - (a) the time taken by the Council to make a recommendation on any application under section 44F, 44M or 44NA (about access regime applications under Part IIIA);
 - (b) any court or Tribunal decision interpreting:
 - (i) paragraph (f) of the definition of *service* in section 44B (which is an exclusion to do with production processes); or
 - (ii) any of the matters mentioned in subsection 44H(4) (about matters relevant to declaring services under Part IIIA);
 - (c) any matter the Council considers has impeded the operation of Part IIIA from delivering efficient access outcomes;

- (d) any evidence of the benefits arising from determinations of the Commission under section 44V (about arbitration determinations under Part IIIA);
- (e) any evidence of the costs of, or the disincentives for, investment in the infrastructure by which declared services (within the meaning of Part IIIA) are provided;
- (f) any implications for the operation of Part IIIA in the future.

Part III—The Australian Competition Tribunal

29P Definition

In this Part, unless the contrary intention appears:

proceedings includes:

- (a) applications made to the Tribunal under Subdivision C of Division 3 of Part VII; and
- (b) applications made to the Tribunal under section 111 (about review of the Commission's decisions on merger clearances).

30 Constitution of Tribunal

- (1) The Trade Practices Tribunal that existed immediately before this subsection commenced continues to exist as the Australian Competition Tribunal.
- (2) The Tribunal so continued in existence shall consist of a President and such number of Deputy Presidents and other members as are appointed in accordance with this section.
- (3) A member of the Tribunal shall be appointed by the Governor-General.

31 Qualifications of members of Tribunal

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

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

The appointment of a Judge of a Federal Court as a presidential member of the Tribunal, or service by a Judge of a Federal Court as a presidential member of the Tribunal, whether the appointment was or is made or the service occurred or occurs before or after the commencement of this section, does not affect, and shall be deemed never to have affected, his or her tenure of office as a Judge of a Federal Court or his or her rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of his or her office as a Judge of a Federal Court and, for all purposes, his or her service, whether before or after the commencement of this section, as a presidential member of the Tribunal shall be taken to have been, or to be, service as the holder of his or her office as a Judge of a Federal Court.

32 Terms and conditions of appointment

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

33 Remuneration and allowances of members of Tribunal

- (4) A member of the Tribunal other than a presidential member shall be paid such remuneration as is determined by the Remuneration Tribunal.
- (5) A member of the Tribunal other than a presidential member shall be paid such allowances as are prescribed.
- (6) Subsections (4) and (5) have effect subject to the *Remuneration Tribunal Act 1973*.

34 Acting appointments

- (1) Where:
 - (a) the President is, or is expected to be, absent from duty; or

Section 35

- (b) there is, or is expected to be, a vacancy in the office of President;
the Minister may appoint a Deputy President or an acting Deputy President to act as President during the absence, or while there is a vacancy in the office of President, as the case may be.
- (2) Where a presidential member (including the President) of the Tribunal is, or is expected to be, absent from duty, the Governor-General may appoint a person qualified to be appointed as a presidential member to act as a Deputy President during the absence from duty of the member.
- (3) Where a member of the Tribunal other than a presidential member is, or is expected to be, absent from duty, the Governor-General may appoint a person qualified to be appointed as a member of the Tribunal other than a presidential member to act as such a member during the absence from duty of the member.
- (4) Where a person has been appointed under subsection (2) or (3), the Governor-General may, by reason of pending proceedings or other special circumstances, direct, before the absent member of the Tribunal resumes duty, that the person so appointed shall continue to act under the appointment after the resumption of duty by the absent member until the Governor-General terminates the appointment, but a person shall not continue to act as a member of the Tribunal by virtue of this subsection for more than 12 months after the resumption of duty by the absent member.
- (5) Where a person has been appointed under this section to act as a member of the Tribunal during the absence from duty of a member of the Tribunal, and that member ceases to hold office without having resumed duty, the period of appointment of the person so appointed shall be deemed to continue until it is terminated by the Governor-General, or until the expiration of 12 months from the date on which the absent member ceases to hold office, whichever first happens.

35 Suspension and removal of members of Tribunal

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

- (2) The Minister shall cause a statement of the ground of the suspension to be laid before each House of the Parliament within 7 sitting days of the House after the suspension.
- (3) Where such a statement has been laid before a House of the Parliament, that House may, within 15 sitting days of that House after the day on which the statement has been laid before it, by resolution, declare that the member of the Tribunal should be restored to office and, if each House so passes a resolution, the Governor-General shall terminate the suspension.
- (4) If, at the expiration of 15 sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General may remove the member of the Tribunal from office.
- (5) If a member of the Tribunal becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, the Governor-General shall remove him or her from office.
- (6) A member of the Tribunal shall not be removed from office except as provided by this section.
- (7) A presidential member of the Tribunal ceases to hold office if he or she no longer holds office as a Judge of a Federal Court, not being the High Court or a court of an external Territory.

36 Resignation

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

37 Constitution of Tribunal for particular matters

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

Section 38

38 Validity of determinations

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

39 President may give directions

- (1) The President may give directions as to the arrangement of the business of the Tribunal and the constitution of Divisions of the Tribunal.
- (2) The President may give directions to the Deputy Presidents in relation to the exercise by the Deputy Presidents of powers with respect to matters of procedure in proceedings before the Tribunal.

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

40 Disclosure of interests by members of Tribunal

- (1) Where a member of the Tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and the member has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions in relation to the proceedings:
 - (a) the member shall disclose the interest to the President; and
 - (b) the member shall not take part, or continue to take part, in the proceedings if:
 - (i) the President gives a direction under paragraph (2)(a) in relation to the proceedings; or
 - (ii) all of the persons concerned in the proceedings do not consent to the member taking part in the proceedings.
- (2) Where the President becomes aware that a member of the Tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and that the member has in relation to the proceedings such an interest:
 - (a) if the President considers that the member should not take part, or should not continue to take part, in the proceedings—the President shall give a direction to the member accordingly; or

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

41 Presidential member to preside

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

42 Decision of questions

- (1) A question of law arising in a matter before a Division of the Tribunal (including the question whether a particular question is one of law) shall be determined in accordance with the opinion of the presidential member presiding.
- (2) Subject to subsection (1), a question arising in proceedings before a Division of the Tribunal shall be determined in accordance with the opinion of a majority of the members constituting the Division.

43 Member of Tribunal ceasing to be available

- (1) This section applies where the hearing of any proceedings has been commenced or completed by the Tribunal but, before the matter to which the proceedings relate has been determined, one of the members constituting the Tribunal for the purposes of the proceedings has ceased to be a member of the Tribunal or has ceased to be available for the purposes of the proceedings.
- (2) Where the President is satisfied that this section applies in relation to proceedings, the President may direct that a specified member of the Tribunal shall take the place of the member referred to in subsection (1) for the purposes of the proceedings.
- (3) Where this section applies in relation to proceedings that were being dealt with before the Tribunal, the President may, instead of giving a direction under subsection (2), direct that the hearing and determination, or the determination, of the proceedings be completed by the Tribunal constituted by the members other than the member referred to in subsection (1).

Section 43A

- (4) Where the President has given a direction under subsection (3), he or she may, at any time before the determination of the proceedings, direct that a third member be added to the Tribunal as constituted in accordance with subsection (3).
- (5) The Tribunal as constituted in accordance with any of the provisions of this section for the purposes of any proceedings may have regard to any record of the proceedings before the Tribunal as previously constituted.

43A Counsel assisting Tribunal

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

- (2) In this section:

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

43B Consultants

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

44 Staff of Tribunal

- (1) There shall be a Registrar of the Tribunal and such Deputy Registrars of the Tribunal as are appointed in accordance with this section.
- (2) The Registrar and the Deputy Registrars shall be appointed by the Minister and shall have such duties and functions as are provided by this Act and the regulations and such other duties and functions as the President directs.
- (3) The Registrar and the Deputy Registrars, and the staff necessary to assist them, shall be persons engaged under the *Public Service Act 1999*.

44A Acting appointments

- (1) The Minister may appoint a person who is engaged under the *Public Service Act 1999* to act as the Registrar or as a Deputy Registrar during any period, or during all periods, when:
 - (a) the Registrar or that Deputy Registrar, as the case may be, is absent from duty or from Australia or is, for any other reason, unable to perform the duties and functions of his or her office; or
 - (b) there is a vacancy in the office of Registrar or in that office of Deputy Registrar, as the case may be.
- (2) A person acting as the Registrar or as a Deputy Registrar by reason of a vacancy in the office of Registrar or of that Deputy Registrar shall not continue so to act after the expiration of 12 months after the occurrence of the vacancy.
- (3) A person appointed to act as the Registrar or as a Deputy Registrar has, while acting as the Registrar or as that Deputy Registrar, as the case may be, all the duties and functions of the Registrar or of that Deputy Registrar, and references in this Act to the Registrar or to a Deputy Registrar shall:
 - (a) if a person is acting as the Registrar—be read as a reference to the person so acting; or
 - (b) if a person is acting as a Deputy Registrar—be read as including a reference to the person so acting.
- (4) The Minister may at any time terminate an appointment of a person to act as the Registrar or as a Deputy Registrar.
- (5) A person who holds an appointment to act as the Registrar or as a Deputy Registrar may resign his or her appointment by writing under his or her hand delivered to the Minister.
- (6) The validity of an act done by a person appointed to act as the Registrar or as a Deputy Registrar shall not be questioned in any proceeding on a ground arising from the fact that the occasion for the appointment, or for him or her to act under the appointment, had not arisen or that the appointment had ceased to have effect or the occasion for him or her to act under the appointment had passed.

Part IIIA—The Australian Energy Regulator (AER)

Division 1—Preliminary

44AB Definitions

In this Part, unless the contrary intention appears:

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

- (a) that relates to energy; and
- (b) that is between the Commonwealth, all of the States, the Australian Capital Territory and the Northern Territory; and
- (c) that is first made in 2004; and
- (d) that agrees to the establishment of the AER and the AEMC.

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

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

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

44AC This Part binds the Crown

This Part binds the Crown in each of its capacities.

44AD Extra-territorial operation

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

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

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

Division 2—Establishment of the AER

44AE Establishment of the AER

- (1) The Australian Energy Regulator (the **AER**) is established by this section.
- (2) The AER:
 - (a) is a body corporate with perpetual succession; and
 - (b) must have a common seal; and
 - (c) may acquire, hold and dispose of real and personal property; and
 - (d) may sue and be sued in its corporate name.

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

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

44AG Constitution of the AER

The AER consists of:

- (a) a Commonwealth AER member, appointed in accordance with section 44AM; and
- (b) 2 State/Territory AER members, appointed in accordance with section 44AP.

Division 3—Functions and powers of the AER

44AH Commonwealth functions

The AER has any functions:

- (a) conferred under a law of the Commonwealth; or
- (b) prescribed by regulations made under this Act.

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

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

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

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

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a State/Territory energy law to the extent to which:
 - (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the AER; or
 - (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.
- (3) The AER cannot perform a duty or function, or exercise a power, under a State/Territory energy law unless the conferral of the function or power, or the imposition of the duty, is in accordance with the Australian Energy Market Agreement, or any other relevant agreement between the Commonwealth and the State or Territory concerned.

44AJ How duty is imposed

Application

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

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

Section 44AK

State or Territory legislative power sufficient to support duty

- (2) The duty is taken not to be imposed by this Part (or any other law of the Commonwealth) to the extent to which:
- (a) imposing the duty is within the legislative powers of the State or Territory concerned; and
 - (b) imposing the duty by the law of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the AER.

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 44AI to the imposition of the duty by that law).

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

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Part to the extent necessary to ensure that validity.
- (4) If, because of subsection (3), this Part is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Part.
- (5) The duty is taken to be imposed by this Part in accordance with subsection (3) only to the extent to which imposing the duty:
- (a) is within the legislative powers of the Commonwealth; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the AER.
- (6) Subsections (1) to (5) do not limit section 44AI.

44AK When a State/Territory energy law imposes a duty

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

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

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

44AL Powers of the AER

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

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

Division 4—Administrative provisions relating to the AER

Subdivision A—Appointment etc. of members

44AM Appointment of Commonwealth AER member

- (1) A Commonwealth AER member is to be appointed by the Governor-General by written instrument.
- (2) The Commonwealth AER member holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (3) A person is not eligible for appointment as the Commonwealth AER member unless the person is a member of the Commission. If the person ceases to be a member of the Commission, then the person also ceases to be an AER member.
- (4) A person is not eligible for appointment as the Commonwealth AER member unless the person has been chosen for appointment in accordance with the Australian Energy Market Agreement.

44AN Membership of AER and Commission

Member taken to be full-time member of both AER and Commission

- (1) For the purposes of this Part, the Commonwealth AER member is taken to be a full-time member of the AER.
- (2) However, the Commonwealth AER member remains a full-time member of the Commission.

Paid employment

- (3) Paragraph 13(2)(c) does not apply to a member of the Commission in respect of any paid employment of that member as an AER member.
- (4) Sections 44AX and 44AAB do not apply to an AER member in respect of the paid employment of that member as a member of the Commission.

44AO Acting appointment of Commonwealth AER member

- (1) The Chairperson may appoint a member of the Commission to act as the Commonwealth AER member:
 - (a) during a vacancy in the office of Commonwealth AER member, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Commonwealth AER member is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) If a person acting as the Commonwealth AER member ceases to be a member of the Commission, then the appointment to act as the Commonwealth AER member also ceases.
- (3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

44AP Appointment of State/Territory AER members

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

Note: A State/Territory AER member is also taken to be an associate member of the Commission: see section 8AB.

- (2) A State/Territory AER member holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (3) A person is not eligible for appointment as a State/Territory AER member unless the person, being a person who has knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration, has been nominated for

Section 44AQ

appointment in accordance with the Australian Energy Market Agreement.

44AQ Acting appointment of State/Territory AER member

- (1) The Minister may appoint a person to act as a State/Territory AER member:
 - (a) during a vacancy in the office of State/Territory AER member, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the State/Territory AER member is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) A person is not eligible for appointment to act as a State/Territory AER member unless the person, being a person who has knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration, has been nominated for appointment in accordance with the Australian Energy Market Agreement.

44AR AER Chair

- (1) One of the AER members is to be appointed by the Governor-General as the AER Chair, by written instrument. The appointment as AER Chair may be made at the same time as the appointment as AER member, or at a later time.
- (2) A member is not eligible for appointment as AER Chair unless the person has been nominated for appointment as the Chair in accordance with the Australian Energy Market Agreement.
- (3) The AER Chair holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (4) If the AER Chair ceases to be an AER member, then he or she also ceases to be the AER Chair.

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

44AS Acting AER Chair

- (1) The Minister may appoint an AER member to act as the AER Chair:
 - (a) during a vacancy in the office of the AER Chair, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the AER Chair is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) If a person acting as the AER Chair ceases to be an AER member, then the appointment to act as the AER Chair also ceases.
- (3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

44AT Remuneration of AER members

- (1) An AER member (other than the Commonwealth AER member) is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed.
- (2) An AER member (other than the Commonwealth AER member) is to be paid the allowances that are prescribed.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.
- (4) The Commonwealth AER member is not entitled to be paid remuneration or allowances.

Note: The Commonwealth AER member is paid as a member of the Commission.

Section 44AU

44AU Additional remuneration of AER Chair

- (1) The AER Chair (whether or not the Commonwealth AER member) is to be paid additional remuneration (if any) determined by the Remuneration Tribunal.
- (2) The AER Chair (whether or not the Commonwealth AER member) is to be paid additional allowances (if any) that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973* other than subsection 7(11) of that Act.

44AV Leave of absence

- (1) A full-time AER member has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant a full-time AER member leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.
- (3) The AER Chair may grant leave of absence to any part-time AER member on the terms and conditions that the AER Chair determines.

44AW Other terms and conditions

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

44AX Outside employment

- (1) A full-time AER member must not engage in paid employment outside the duties of the member's office without the Minister's consent.
- (2) A part-time AER member must not engage in any paid employment that conflicts or could conflict with the proper performance of the member's duties.

44AY Disclosure of interests

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

44AZ Resignation

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

44AAB Termination of appointment

All AER members

- (1) The Governor-General may terminate the appointment of an AER member:
 - (a) for misbehaviour or physical or mental incapacity; or
 - (b) if the member:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (c) if the member fails, without reasonable excuse, to comply with section 44AY.

Section 44AAC

Additional grounds: full-time AER members

- (2) The Governor-General may terminate the appointment of a full-time AER member if:
- (a) the member is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (b) the member engages, except with the Minister's consent, in paid employment outside the duties of his or her office.

Additional grounds: part-time AER members

- (3) The Governor-General may terminate the appointment of a part-time AER member if:
- (a) the member is absent, except on leave of absence, from 3 consecutive meetings of the AER; or
 - (b) the member engages in paid employment that conflicts or could conflict with the proper performance of the duties of his or her office.

Subdivision B—Staff etc. to assist the AER

44AAC Staff etc. to assist the AER

The Chairperson must make available:

- (a) persons engaged under section 27; and
 - (b) consultants engaged under section 27A;
- to assist the AER to perform its functions.

Subdivision C—Meetings of the AER etc.

44AAD Meetings

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

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

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

- (3) At a meeting of the AER, 2 members constitute a quorum. The quorum must include the AER Chair and must also include the Commonwealth AER member (if the Commonwealth AER member is not also the AER Chair).
- (4) Questions arising at a meeting must be determined by unanimous vote of the members present and voting.
- (5) The AER Chair must preside at all meetings of the AER.
- (6) The AER Chair may give directions regarding the procedure to be followed at or in connection with a meeting.

44AAE Resolutions without meetings

- (1) If all 3 AER members sign a document containing a statement that they are in favour of a resolution in terms set out in the document, then a resolution in those terms is taken to have been passed at a duly constituted meeting of the AER held on the day the document was signed, or, if the members sign the document on different days, on the last of those days.
- (2) For the purposes of subsection (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more members are together taken to constitute one document containing a statement in those terms signed by those members on the respective days on which they signed the separate documents.
- (3) A member must not sign a document containing a statement in favour of a resolution if the resolution concerns a matter in which the member has any direct or indirect interest, being an interest that could conflict with the proper performance of the member's functions in relation to any matter.

44AAEA Arbitration

- (1) Sections 44AAD and 44AAE do not apply to the AER as constituted for an arbitration under:
 - (a) the National Electricity (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*); or
 - (b) the National Gas (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*); or

Section 44AAF

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

Subdivision D—Miscellaneous

44AAF Confidentiality

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

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

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

Authorised use

- (3) Disclosing information to one of the following is authorised use and disclosure of the information:
 - (a) the Commission;
 - (b) the AEMC;
 - (c) Australian Energy Market Operator Limited (ACN 072 010 327);
 - (d) any staff or consultant assisting a body mentioned in paragraph (a), (b) or (c) in performing its functions or exercising its powers;
 - (e) any other person or body prescribed by the regulations for the purpose of this paragraph.

- (4) A person or body to whom information is disclosed under subsection (3) may use the information for any purpose connected with the performance of the functions, or the exercise of the powers, of the person or body.
- (5) The AER may impose conditions to be complied with in relation to information disclosed under subsection (3).
- (6) For the purposes of subsection (1), the use or disclosure of information by a person for the purposes of:
 - (a) performing the person's functions, or exercising the person's powers, as:
 - (i) an AER member, a person referred to in section 44AAC or a delegate of the AER; or
 - (ii) a person who is authorised to perform or exercise a function or power of, or on behalf of, the AER; or
 - (b) the performance of functions, or the exercise of powers, by the person by way of assisting a delegate of the AER;is taken to be authorised use and disclosure of the information.
- (7) Regulations made for the purposes of this section may specify uses of information and disclosures of information that are authorised uses and authorised disclosures for the purposes of this section.
- (8) Nothing in any of the above subsections limits:
 - (a) anything else in any of those subsections; or
 - (b) what may otherwise constitute, for the purposes of subsection (1), authorised use or disclosure of information.

44AAG Federal Court may make certain orders

- (1) The Federal Court may make an order, on application by the AER on behalf of the Commonwealth, declaring that a person is in breach of:
 - (a) a uniform energy law that is applied as a law of the Commonwealth; or
 - (b) a State/Territory energy law.
- (2) If the order declares the person to be in breach of such a law, the order may include one or more of the following:
 - (a) an order that the person pay a civil penalty determined in accordance with the law;

Section 44AAGA

- (b) an order that the person cease, within a specified period, the act, activity or practice constituting the breach;
 - (c) an order that the person take such action, or adopt such practice, as the Court requires for remedying the breach or preventing a recurrence of the breach;
 - (d) an order that the person implement a specified program for compliance with the law;
 - (e) an order of a kind prescribed by regulations made under this Act.
- (3) If a person has engaged, is engaging or is proposing to engage in any conduct in breach of:
 - (a) a uniform energy law that is applied as a law of the Commonwealth; or
 - (b) a State/Territory energy law;the Federal Court may, on application by the AER on behalf of the Commonwealth, grant an injunction:
 - (c) restraining the person from engaging in the conduct; and
 - (d) if, in the court's opinion, it is desirable to do so—requiring the person to do something.
- (4) The power of the Federal Court under subsection (3) to grant an injunction restraining a person from engaging in conduct of a particular kind may be exercised:
 - (a) if the court is satisfied that the person has engaged in conduct of that kind—whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
 - (b) if it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the person engages in conduct of that kind.

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

- (1) If a relevant disconnection event occurs, the Federal Court may make an order, on application by the AER on behalf of the

Commonwealth, directing that a Registered participant's loads be disconnected.

(2) In this section:

National Electricity Law means:

- (a) the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; or
- (b) that Law as it applies as a law of another State; or
- (c) that Law as it applies as a law of a Territory; or
- (d) that Law as it applies as a law of the Commonwealth.

National Electricity Rules means:

- (a) the National Electricity Rules, as in force from time to time, made under the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia; or
- (b) those Rules as they apply as a law of another State; or
- (c) those Rules as they apply as a law of a Territory; or
- (d) those Rules as they apply as a law of the Commonwealth.

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

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

44AAH Delegation by the AER

The AER may, by resolution, delegate:

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

to an AER member or to an SES employee, or acting SES employee, assisting the AER as mentioned in section 44AAC.

Note 1: Section 17AA of the *Acts Interpretation Act 1901* contains the definitions of ***SES employee*** and ***acting SES employee***.

Section 44AAI

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

44AAI Fees

- (1) The AER may charge a fee specified in the regulations for services provided by it in performing any of its functions, or exercising any of its powers, under this Part or under regulations made under this Act, or under another law of the Commonwealth or a State/Territory energy law.
- (2) The fee must not be such as to amount to taxation.

44AAJ Annual report

- (1) The AER must, within 60 days after the end of each year ending on 30 June, give the Minister a report on its operations during that year, for presentation to the Parliament.

Note: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.
- (2) The Minister must give a copy of the report to the relevant Minister of each of the States, the Australian Capital Territory and the Northern Territory.

44AAK Regulations may deal with transitional matters

- (1) The Governor-General may make regulations dealing with matters of a transitional nature relating to the transfer of functions and powers from a body to the AER.
- (2) Without limiting subsection (1), the regulations may deal with:
 - (a) the transfer of any relevant investigations being conducted by the body at the time of the transfer of functions and powers to the AER; or
 - (b) the transfer of any decisions or determinations being made by the body at the time of the transfer of functions and powers to the AER; or
 - (c) the substitution of the AER as a party to any relevant proceedings that are pending in any court or tribunal at the time of the transfer of functions and powers to the AER; or
 - (d) the transfer of any relevant information from the body to the AER.

(3) In this section:

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

Part IIIA—Access to services

Division 1—Preliminary

44AA Objects of Part

The objects of this Part are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

44B Definitions

In this Part, unless the contrary intention appears:

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

access code application means:

- (a) an access code given to the Commission; or
- (b) a request made to the Commission for the withdrawal or variation of an access code; or
- (c) an application under subsection 44ZZBB(4) for an extension of the period for which an access code is in operation.

access code decision means:

- (a) a decision under section 44ZZAA to accept or reject an access code; or
- (b) a decision under section 44ZZAA to consent or refuse to consent to the withdrawal or variation of an access code; or
- (c) a decision under section 44ZZBB to extend or refuse to extend the period for which an access code is in operation.

access undertaking means an undertaking under section 44ZZA.

access undertaking application means:

- (a) an access undertaking given to the Commission; or
- (b) a request made to the Commission for the withdrawal or variation of an access undertaking; or
- (ba) a request made to the Commission under subsection 44ZZAAB(7) to consent to the revocation or variation of a fixed principle included as a term of an access undertaking; or
- (c) an application under subsection 44ZZBB(1) for an extension of the period for which an access undertaking is in operation.

access undertaking decision means:

- (a) a decision under section 44ZZA to accept or reject an access undertaking; or
- (b) a decision under section 44ZZA to consent or refuse to consent to the withdrawal or variation of an access undertaking; or
- (ba) a decision under subsection 44ZZAAB(7) to consent or refuse to consent to the revocation or variation of a fixed principle included as a term of an access undertaking; or
- (c) a decision under section 44ZZBB to extend or refuse to extend the period for which an access undertaking is in operation.

Commonwealth Minister means the Minister.

constitutional trade or commerce means any of the following:

- (a) trade or commerce among the States;
- (b) trade or commerce between Australia and places outside Australia;
- (c) trade or commerce between a State and a Territory, or between 2 Territories.

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

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

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

Section 44B

designated Minister has the meaning given by section 44D.

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

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

entity means a person, partnership or joint venture.

final determination means a determination other than an interim determination.

fixed principle has the meaning given by section 44ZZAAB.

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

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

modifications includes additions, omissions and substitutions.

National Gas Law means:

- (a) the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia as in force from time to time, as that Law applies as a law of South Australia; or
- (b) if an Act of another State or of the Australian Capital Territory or the Northern Territory applies the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia, as in force from time to time, as a law of that other State or of that Territory—the National Gas Law as so applied; or
- (c) the Western Australian Gas Legislation; or
- (d) the National Gas (Commonwealth) Law (within the meaning of the *Australian Energy Market Act 2004*); or
- (e) the Offshore Western Australian Pipelines (Commonwealth) Law (within the meaning of the *Australian Energy Market Act 2004*).

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

party means:

- (a) in relation to an arbitration of an access dispute—a party to the arbitration, as mentioned in section 44U;
- (b) in relation to a determination—a party to the arbitration in which the Commission made the determination.

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

- (a) structurally separate from any existing facility; or
- (b) a major extension of an existing facility.

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

responsible Minister means:

- (a) the Premier, in the case of a State;
- (b) the Chief Minister, in the case of a Territory.

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

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

- (a) the use of an infrastructure facility such as a road or railway line;
- (b) handling or transporting things such as goods or people;
- (c) a communications service or similar service;

but does not include:

- (d) the supply of goods; or
- (e) the use of intellectual property; or
- (f) the use of a production process;

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

State or Territory access regime law means:

- (a) a law of a State or Territory that establishes or regulates an access regime; or
- (b) a law of a State or Territory that regulates an industry that is subject to an access regime; or
- (c) a State/Territory energy law.

Section 44C

State or Territory body means:

- (a) a State or Territory;
- (b) an authority of a State or Territory.

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

44C How this Part applies to partnerships and joint ventures

- (1) This section applies if the provider of a service is a partnership or joint venture that consists of 2 or more corporations. Those corporations are referred to in this section as the ***participants***.
- (2) If this Part requires or permits something to be done by the provider, the thing may be done by one or more of the participants on behalf of the provider.
- (3) If a provision of this Part refers to the provider bearing any costs, the provision applies as if the provision referred to any of the participants bearing any costs.
- (4) If a provision of this Part refers to the provider doing something, the provision applies as if the provision referred to one or more of the participants doing that thing on behalf of the provider.
- (5) If:
 - (a) a provision of this Part requires the provider to do something, or prohibits the provider from doing something; and
 - (b) a contravention of the provision is an offence;the provision applies as if a reference to the provider were a reference to any person responsible for the day-to-day management and control of the provider.
- (6) If:
 - (a) a provision of this Part requires a provider to do something, or prohibits a provider doing something; and
 - (b) a contravention of the provision is not an offence;the provision applies as if the reference to provider were a reference to each participant and to any other person responsible for the day-to-day management and control of the provider.

44D Meaning of *designated Minister*

- (1) The Commonwealth Minister is the designated Minister unless subsection (2), (3), (4) or (5) applies.
- (2) In relation to declaring a service in a case where:
 - (a) the provider is a State or Territory body; and
 - (b) the State or Territory concerned is a party to the Competition Principles Agreement;the responsible Minister of the State or Territory is the designated Minister.
- (3) In relation to revoking a declaration that was made by the responsible Minister of a State or Territory, the responsible Minister of that State or Territory is the designated Minister.
- (4) In relation to deciding whether a service is ineligible to be a declared service in a case where:
 - (a) a person who is, or expects to be, the provider of the service is a State or Territory body; and
 - (b) the State or Territory concerned is a party to the Competition Principles Agreement;the responsible Minister of the State or Territory is the designated Minister.
- (5) In relation to revoking a decision:
 - (a) that a service is ineligible to be a declared service; and
 - (b) that was made by the responsible Minister of a State or Territory;the responsible Minister of that State or Territory is the designated Minister.

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

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

Section 44E

- (d) the requirement, under subsection 44N(2), that the Commonwealth Minister, in making a decision on a recommendation received from the Council, apply the relevant principles set out in the Agreement;
are obligations that the Council and the relevant Ministers must treat each individual relevant principle as having the status of a guideline rather than a binding rule.
- (2) An effective access regime may contain additional matters that are not inconsistent with Competition Principles Agreement principles.

44E This Part binds the Crown

- (1) This Part binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.
- (2) Nothing in this Part makes the Crown liable to be prosecuted for an offence.
- (3) The protection in subsection (2) does not apply to an authority of the Commonwealth or an authority of a State or Territory.

Division 2—Declared services

Subdivision A—Recommendation by the Council

44F Person may request recommendation

- (1) The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend that a particular service be declared.
- (2) After receiving the application, the Council:
 - (a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and
 - (b) must, after having regard to the objects of this Part, recommend to the designated Minister:
 - (i) that the service be declared, with the expiry date specified in the recommendation; or
 - (ii) that the service not be declared.

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

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

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

- (3) If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.
- (4) In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.
- (5) The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

Section 44FA

- (6) The applicant may request, in writing, the Council to vary the application at any time before the Council makes a recommendation relating to it.
- (7) If a request is made under subsection (6), the Council must decide to:
 - (a) make the variation; or
 - (b) reject the variation.
- (8) An instrument making a decision under subsection (7) is not a legislative instrument.
- (9) The Council may reject the variation if it is satisfied that the requested variation is of a kind, or the request for the variation is made at a time or in a manner, that:
 - (a) would unduly prejudice the provider (if the provider is not the applicant) or anyone else the Council considers has a material interest in the application; or
 - (b) would unduly delay the process for considering the application.

44FA Council may request information

- (1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44F.
- (2) The Council must:
 - (a) give a copy of the notice to:
 - (i) if the person is not the applicant—the applicant; and
 - (ii) if the person is not the provider of the service—the provider; and
 - (b) publish, by electronic or other means, the notice.
- (3) In deciding what recommendation to make on the application, the Council:
 - (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

- (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44G Limits on the Council recommending declaration of a service

- (1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under Division 6.
- (1A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the Council cannot recommend declaration of any service provided by means of the facility that was specified under paragraph 44PA(2)(a).
- (2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:
 - (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
 - (b) that it would be uneconomical for anyone to develop another facility to provide the service;
 - (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
 - (e) that access to the service:
 - (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or
 - (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;

Section 44GA

- (f) that access (or increased access) to the service would not be contrary to the public interest.
- (6) The Council cannot recommend declaration of a service provided by means of a pipeline (within the meaning of a National Gas Law) if:
 - (a) a 15-year no-coverage determination is in force under the National Gas Law in respect of the pipeline; or
 - (b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.
- (7) The Council cannot recommend that a service be declared if there is in force a decision of the designated Minister under section 44LG that the service is ineligible to be a declared service.

44GA Time limit for Council recommendations

Council to make recommendation within the consideration period

- (1) The Council must make a recommendation on an application under section 44F within the consideration period.
- (2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

Stopping the clock

- (3) In working out the expected period in relation to a recommendation on an application under section 44F, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
 - (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Section 44GA

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44FA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

(4) Despite subsection (3):

- (a) do not disregard any day more than once; and
- (b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

- (5) The Council, the applicant and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.
- (6) The Council must publish, by electronic or other means, the agreement.

Council may extend time for making recommendation

- (7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.
- (8) The notice must:
 - (a) specify when the Council must now make a recommendation on the application; and

Section 44GB

- (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.
- (9) The Council must give a copy of the notice to:
 - (a) the applicant; and
 - (b) if the applicant is not the provider of the service—the provider.

Publication

- (10) If the Council extends the consideration period under subsection (7), it must publish a notice in a national newspaper:
 - (a) stating that it has done so; and
 - (b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

- (11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

44GB Council may invite public submissions on the application

Invitation

- (1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44F if it considers that it is appropriate and practicable to do so.
- (2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

- (3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:
 - (a) must have regard to any submission made on or before the day specified in the notice; and
 - (b) may disregard any submission made after the day specified in the notice.

Council may make submissions publicly available

- (4) The Council may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

- (5) A person may, at the time of making a submission, request that the Council:

- (a) not make the whole or a part of the submission available under subsection (4); and
- (b) not publish or make available the whole or a part of the submission under section 44GC;

because of the confidential commercial information contained in the submission.

- (6) If the Council refuses such a request:

- (a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and
- (b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and
- (c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:
 - (i) make the whole or the part of the submission available under subsection (4); and
 - (ii) publish or make available the whole or the part of the submission under section 44GC; and
 - (iii) have regard to the whole or the part of the submission in making its recommendation on the application.

44GC Council must publish its recommendation

- (1) The Council must publish, by electronic or other means, a recommendation under section 44F and its reasons for the recommendation.
 - (2) The Council must give a copy of the publication to:
 - (a) the applicant under section 44F; and
-

Section 44H

- (b) if the applicant is not the provider of the service—the provider.

Timing

- (3) The Council must do the things under subsections (1) and (2) on the day the designated Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

Consultation

- (4) Before publishing under subsection (1), the Council may give any one or more of the following persons:
 - (a) the applicant under section 44F;
 - (b) if the applicant is not the provider of the service—the provider;
 - (c) any other person the Council considers appropriate;a notice in writing:
 - (d) specifying what the Council is proposing to publish; and
 - (e) inviting the person to make a written submission to the Council within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (5) The Council must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Subdivision B—Declaration by the designated Minister

44H Designated Minister may declare a service

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

Note: The designated Minister must publish his or her decision: see section 44HA.

- (1A) The designated Minister must have regard to the objects of this Part in making his or her decision.
- (2) In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service.

This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not.

- (3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under Division 6.
- (3A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph 44PA(2)(a).
- (4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:
 - (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
 - (b) that it would be uneconomical for anyone to develop another facility to provide the service;
 - (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
 - (e) that access to the service:
 - (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or
 - (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;

Section 44HA

- (f) that access (or increased access) to the service would not be contrary to the public interest.
- (6B) The designated Minister cannot declare a service provided by means of a pipeline (within the meaning of a National Gas Law) if:
 - (a) a 15-year no-coverage determination is in force under the National Gas Law in respect of the pipeline; or
 - (b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.
- (6C) The designated Minister cannot declare a service if there is in force a decision of the designated Minister under section 44LG that the service is ineligible to be a declared service.
- (8) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.
- (9) If the designated Minister does not publish under section 44HA his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period, to have decided not to declare the service and to have published that decision not to declare the service.

44HA Designated Minister must publish his or her decision

- (1) The designated Minister must publish, by electronic or other means, his or her decision on a declaration recommendation and his or her reasons for the decision.
- (2) The designated Minister must give a copy of the publication to:
 - (a) the applicant under section 44F; and
 - (b) if the applicant is not the provider of the service—the provider.

Consultation

- (3) Before publishing under subsection (1), the designated Minister may give any one or more of the following persons:
 - (a) the applicant under section 44F;
 - (b) if the applicant is not the provider of the service—the provider;

- (c) any other person the designated Minister considers appropriate;
- a notice in writing:
 - (d) specifying what the designated Minister is proposing to publish; and
 - (e) inviting the person to make a written submission to the designated Minister within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (4) The designated Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

44I Duration and effect of declaration

- (1) Subject to this section, a declaration begins to operate at a time specified in the declaration. The time cannot be earlier than 21 days after the declaration is published.
- (2) If:
 - (a) an application for review of a declaration is made within 21 days after the day the declaration is published; and
 - (b) the Tribunal makes an order under section 44KA staying the operation of the declaration;the declaration does not begin to operate until the order is no longer of effect under subsection 44KA(6) or the Tribunal makes a decision on the review to affirm the declaration, whichever is the earlier.
- (3) A declaration continues in operation until its expiry date, unless it is earlier revoked.
- (4) The expiry or revocation of a declaration does not affect:
 - (a) the arbitration of an access dispute that was notified before the expiry or revocation; or
 - (b) the operation or enforcement of any determination made in the arbitration of an access dispute that was notified before the expiry or revocation.

44J Revocation of declaration

- (1) The Council may recommend to the designated Minister that a declaration be revoked. The Council must have regard to the objects of this Part in making its decision.
- (2) The Council cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation, subsection 44H(4) would prevent the designated Minister from declaring the service concerned.
- (3) On receiving a revocation recommendation, the designated Minister must either revoke the declaration or decide not to revoke the declaration.
- (3A) The designated Minister must have regard to the objects of this Part in making his or her decision.
- (4) The designated Minister must publish the decision to revoke or not to revoke.
- (5) If the designated Minister decides not to revoke, the designated Minister must give reasons for the decision to the provider of the declared service when the designated Minister publishes the decision.
- (6) The designated Minister cannot revoke a declaration without receiving a revocation recommendation.
- (7) If the designated Minister does not publish under subsection (4) his or her decision on the revocation recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:
 - (a) to have made a decision that the declaration be revoked; and
 - (b) to have published that decision in accordance with this section.

44K Review of declaration

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

- (2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister's decision may be made by the person who applied for the declaration recommendation.
- (3) An application for review must be made within 21 days after publication of the designated Minister's decision.
- (4) The review by the Tribunal is a re-consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

- (5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.
- (6) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review (including for the purposes of deciding whether to make an order under section 44KA).
- (6A) Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (6B) The Tribunal must:
 - (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the provider of the service; and
 - (iii) the person who applied for the declaration recommendation; and
 - (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.
- (8) If the designated Minister decided not to declare the service, the Tribunal may either:

Section 44KA

- (a) affirm the designated Minister's decision; or
 - (b) set aside the designated Minister's decision and declare the service in question.
- (9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).

44KA Tribunal may stay operation of declaration

- (1) Subject to this section, an application for review of a declaration under subsection 44K(1) does not:
 - (a) affect the operation of the declaration; or
 - (b) prevent the taking of steps in reliance on the declaration.
- (2) On application by a person who has been made a party to the proceedings for review of a declaration, the Tribunal may:
 - (a) make an order staying, or otherwise affecting the operation or the taking of steps in reliance on, the declaration if the Tribunal considers that:
 - (i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and
 - (ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or
 - (b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).
- (3) Subject to subsection (4), the Tribunal must not:
 - (a) make an order under subsection (2) unless the Council has been given a reasonable opportunity to make a submission to the Tribunal in relation to the matter; or
 - (b) make an order varying or revoking an order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)) unless:
 - (i) the Council; and
 - (ii) the person who requested the making of the order under paragraph (2)(a); and

- (iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who requested the making of the last-mentioned order or orders;
have been given a reasonable opportunity to make submissions to the Tribunal in relation to the matter.
- (4) Subsection (3) does not prohibit the Tribunal from making an order without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Tribunal in relation to a matter if the Tribunal is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity.
- (5) If an order is made under subsection (3) without giving the Council a reasonable opportunity to make a submission to the Tribunal in relation to a matter, the order does not come into operation until a notice setting out the terms of the order is given to the Council.
- (6) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):
 - (a) is subject to such conditions as are specified in the order; and
 - (b) has effect until:
 - (i) if a period for the operation of the order is specified in the order—the expiration of that period or, if the application for review is decided by the Tribunal before the expiration of that period, the decision of the Tribunal on the application for review comes into operation; or
 - (ii) if no period is so specified—the decision of the Tribunal on the application for review comes into operation.

44KB Tribunal may order costs be awarded

- (1) If the Tribunal is satisfied that it is appropriate to do so, the Tribunal may order that a person who has been made a party to proceedings for a review of a declaration under section 44K pay all or a specified part of the costs of another person who has been made a party to the proceedings.

Section 44L

- (2) However, the Tribunal must not make an order requiring the designated Minister to pay some or all of the costs of another party to proceedings unless the Tribunal considers that the designated Minister's conduct in the proceedings was engaged in without due regard to:
 - (a) the costs that would be incurred by the other party to the proceedings as a result of that conduct; or
 - (b) the time required by the Tribunal to make a decision on the review as a result of that conduct; or
 - (c) the time required by the other party to prepare their case for the purposes of the review as a result of that conduct; or
 - (d) the submissions or arguments made during the proceedings to the Tribunal by the other party or parties to the proceedings or by the Council.
- (3) If the Tribunal makes an order under subsection (1), it may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.
- (4) The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.
- (5) If a party (the *first party*) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.

44L Review of decision not to revoke a declaration

- (1) If the designated Minister decides not to revoke a declaration, the provider may apply in writing to the Tribunal for review of the decision.
- (2) An application for review must be made within 21 days after publication of the designated Minister's decision.
- (3) The review by the Tribunal is a re-consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

- (4) For the purposes of the review, the Tribunal has the same powers as the designated Minister.
- (5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
 - (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (6) The Tribunal may either:
 - (a) affirm the designated Minister's decision; or
 - (b) set aside the designated Minister's decision and revoke the declaration.

Division 2AA—Services that are ineligible to be declared

Subdivision A—Scope of Division

44LA Constitutional limits on operation of this Division

This Division does not apply in relation to a service unless:

- (a) the person who is, or expects to be, the provider of the service is a corporation (or a partnership or joint venture consisting wholly of corporations); or
- (b) access to the service is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

Subdivision B—Ineligibility recommendation by Council

44LB Ineligibility recommendation

Person may request recommendation

- (1) A person with a material interest in a particular service proposed to be provided by means of a proposed facility may make a written application to the Council asking the Council to recommend that the designated Minister decide that the service is ineligible to be a declared service.

Note: The application must be made before construction of the facility commences: see the definition of *proposed facility* in section 44B.

Council must make recommendation

- (2) After receiving the application, the Council must, after having regard to the objects of this Part:
 - (a) recommend to the designated Minister:
 - (i) that he or she decide that the service is ineligible to be a declared service; and
 - (ii) the period for which the decision should be in force (which must be at least 20 years); or
 - (b) recommend to the designated Minister that he or she decide that the service is not ineligible to be a declared service.

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

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

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

Limits on recommendation

- (3) The Council cannot recommend that the designated Minister decide that the service is ineligible to be a declared service unless it is satisfied of both of the following matters:
 - (a) that the service will be provided by means of the proposed facility when constructed;
 - (b) that it is not satisfied of at least one of the matters referred to in subsection 44G(2) in relation to the service to be provided by means of the proposed facility.
- (4) If the applicant is a person other than the designated Minister, the Council may recommend that the designated Minister decide that the service is not ineligible to be a declared service if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the designated Minister decide that the service is not ineligible to be a declared service.

Relationship between ineligibility recommendations, access undertakings and competitive tender processes

- (5) The Council may recommend that the designated Minister decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.
- (6) The Council may recommend that the designated Minister decide that the service is ineligible to be a declared service even if:
 - (a) the service is proposed to be provided by means of a facility specified under paragraph 44PA(2)(a); and
 - (b) a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of the facility, as a competitive tender process.

Applicant may withdraw application

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

Section 44LC

44LC Council may request information

- (1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of a kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44LB.
- (2) The Council must:
 - (a) give a copy of the notice to:
 - (i) if the person is not the applicant—the applicant; and
 - (ii) if the person is not the provider, or the person who expects to be the provider—that person; and
 - (b) publish, by electronic or other means, the notice.
- (3) In deciding what recommendation to make on the application, the Council:
 - (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44LD Time limit for Council recommendations

Council to make recommendation within the consideration period

- (1) The Council must make a recommendation on an application under section 44LB within the consideration period.
- (2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

Stopping the clock

- (3) In working out the expected period in relation to a recommendation on an application under section 44LB, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
 - (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44LC(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

- (4) Despite subsection (3):
- (a) do not disregard any day more than once; and
 - (b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

- (5) The Council and the applicant may agree in writing that a specified period is to be disregarded in working out the expected period.
- (6) The Council must publish, by electronic or other means, the agreement.

Extension of time for making decision

- (7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or it has been previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.
- (8) The notice must:
- (a) specify when the Council must now make a recommendation on the application; and

Section 44LE

- (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.
- (9) The Council must give a copy of the notice to:
 - (a) the applicant; and
 - (b) if the applicant is not the person who is, or expects to be, the provider—that person.

Publication

- (10) If the Council extends the consideration period under subsection (7), it must publish a notice in a national newspaper:
 - (a) stating that it has done so; and
 - (b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

- (11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

44LE Council may invite public submissions on the application

Invitation

- (1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44LB if it considers that it is appropriate and practicable to do so.
- (2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

- (3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:
 - (a) must have regard to any submission made on or before the day specified in the notice; and
 - (b) may disregard any submission made after the day specified in the notice.

Council may make submissions publicly available

- (4) The Council may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

- (5) A person may, at the time of making a submission, request that the Council:

- (a) not make the whole or a part of the submission available under subsection (4); and
- (b) not publish or make available the whole or a part of the submission under section 44LF;

because of the confidential commercial information contained in the submission.

- (6) If the Council refuses such a request:

- (a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and
- (b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and
- (c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:
 - (i) make the whole or the part of the submission available under subsection (4); and
 - (ii) publish or make available the whole or the part of the submission under section 44LF; and
 - (iii) have regard to the whole or the part of the submission in making its recommendation on the application.

44LF Council must publish its recommendation

Council must publish its recommendation

- (1) The Council must publish, by electronic or other means, a recommendation under section 44LB and its reasons for the recommendation.

Section 44LG

- (2) The Council must give a copy of the publication to:
- (a) the person who made the application under section 44LB; and
 - (b) if the applicant is not the person who is, or expects to be, the provider—that person.

Timing

- (3) The Council must do the things under subsections (1) and (2) on the day the designated Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

Consultation

- (4) Before publishing under subsection (1), the Council may give any one or more of the following persons:
- (a) the person who made the application under section 44LB;
 - (b) any other person the Council considers appropriate;
- a notice in writing:
- (c) specifying what the Council is proposing to publish; and
 - (d) inviting the person to make a written submission to the Council within 14 days after the day the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (5) The Council must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Subdivision C—Designated Minister’s decision on ineligibility

44LG Designated Minister’s decision on ineligibility

- (1) On receiving an ineligibility recommendation, the designated Minister must:
- (a) decide:
 - (i) that the service is ineligible to be a declared service; and
 - (ii) the period for which the decision is in force (which must be at least 20 years); or
 - (b) decide that the service is not ineligible to be a declared service.

Note: The designated Minister must publish his or her decision: see section 44LH.

- (2) The designated Minister must have regard to the objects of this Part in making his or her decision.
- (3) The designated Minister may decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.
- (4) The designated Minister may decide that the service is ineligible to be a declared service even if:
 - (a) the service is proposed to be provided by means of a facility specified under paragraph 44PA(2)(a); and
 - (b) a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of the facility, as a competitive tender process.
- (5) The designated Minister must not decide that the service is ineligible to be a declared service unless he or she is satisfied of both of the following matters:
 - (a) that the service is to be provided by means of the proposed facility when constructed;
 - (b) that he or she is not satisfied of at least one of the matters referred to in subsection 44H(4) in relation to the service to be provided by means of the proposed facility.
- (6) If the designated Minister does not publish under section 44LH his or her decision on the ineligibility recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:
 - (a) the designated Minister is taken, immediately after the end of that 60-day period, to have made a decision under subsection (1) in accordance with the ineligibility recommendation and to have published that decision under section 44LH; and
 - (b) if the Council recommended that the designated Minister decide that the service be ineligible to be a declared service—the period for which the decision is in force is taken to be the period recommended by the Council.
- (7) A decision of the designated Minister under subsection (1) is not a legislative instrument.

Section 44LH

44LH Designated Minister must publish his or her decision

- (1) The designated Minister must publish, by electronic or other means, his or her decision on an ineligibility recommendation and his or her reasons for the decision.
- (2) The designated Minister must give a copy of the publication to the person who made the application under section 44LB.

Consultation

- (3) Before publishing under subsection (1), the designated Minister may give any one or more of the following persons:
 - (a) the person who made the application under section 44LB;
 - (b) any other person the designated Minister considers appropriate;a notice in writing:
 - (c) specifying what the designated Minister is proposing to publish; and
 - (d) inviting the person to make a written submission to the designated Minister within 14 days after the day the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (4) The designated Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

Subdivision D—Revocation of ineligibility decision

44LI Revocation of ineligibility decision

Council may recommend revocation if facility materially different or upon request

- (1) The Council may recommend to the designated Minister that the designated Minister revoke his or her decision (the ***ineligibility decision***) that a service is ineligible to be a declared service. The Council must have regard to the objects of this Part in making its recommendation.

- (2) The Council cannot recommend that a decision be revoked unless:
- (a) it is satisfied that, at the time of the recommendation, the facility that is (or will be) used to provide the service concerned is so materially different from the proposed facility described in the application made under section 44LB that the Council is satisfied of all of the matters mentioned in subsection 44G(2) in relation to the service; or
 - (b) the person who is, or expects to be, the provider of the service that is provided, or that is proposed to be provided, by means of the facility requests that it be revoked.

Minister must decide whether to revoke

- (3) On receiving a recommendation that the designated Minister revoke the ineligibility decision, the designated Minister must either revoke the ineligibility decision or decide not to revoke the ineligibility decision.
- (4) The designated Minister must have regard to the objects of this Part in making his or her decision.

Minister must publish decision

- (5) The designated Minister must publish, by electronic or other means, the decision to revoke or not to revoke the ineligibility decision.
- (6) If the designated Minister decides not to revoke the ineligibility decision, the designated Minister must give reasons for the decision to the person who is, or expects to be, the provider of the service concerned when the designated Minister publishes the decision.

Deemed decision of Minister

- (7) If the designated Minister does not publish his or her decision to revoke or not to revoke the ineligibility decision within the period starting at the start of the day the recommendation to revoke the ineligibility decision is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:
- (a) to have made a decision (the ***deemed decision***) under subsection (3) that the ineligibility decision be revoked; and

Section 44LJ

- (b) to have published the deemed decision under subsection (5).

Limits on when a revocation can be made

- (8) The designated Minister cannot revoke the ineligibility decision without receiving a recommendation from the Council that the ineligibility decision be revoked.

When a revocation comes into operation

- (9) If the designated Minister revokes the ineligibility decision, the revocation comes into operation at:
- (a) if, within 21 days after the designated Minister publishes his or her decision, no person has applied to the Tribunal for review of the decision—the end of that period; or
 - (b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

Decision is not a legislative instrument

- (10) A decision of the designated Minister under subsection (3) is not a legislative instrument.

Subdivision E—Review of decisions

44LJ Review of ineligibility decisions

Application for review

- (1) A person whose interests are affected by a decision of the designated Minister under subsection 44LG(1) may apply in writing to the Tribunal for a review of the decision.
- (2) An application for review must be made within 21 days after publication of the designated Minister's decision.
- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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

Council to provide assistance

- (5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.
- (6) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (7) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the person who is, or expects to be, the provider of the service; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.

Tribunal's decision

- (8) If the designated Minister decided that a service is ineligible to be a declared service, the Tribunal may affirm, vary or set aside the decision.

Note: If the Tribunal sets aside a decision of the designated Minister that a service is ineligible to be a declared service, the designated Minister's decision is no longer in force. This means the designated Minister is no longer prevented by subsection 44H(6C) from declaring the service.

- (9) If the designated Minister decided that a service is not ineligible to be a declared service, the Tribunal may either:
- (a) affirm the designated Minister's decision; or
 - (b) set aside the designated Minister's decision and decide that the service is ineligible to be a declared service for a specified period (which must be at least 20 years).

Section 44LK

Effect of Tribunal's decision

- (10) The Tribunal's decision is taken to be a decision by the designated Minister for all purposes of this Part (except this section).

44LK Review of decision to revoke or not revoke an ineligibility decision

Application for review

- (1) A person whose interests are affected by a decision of the designated Minister under subsection 44LI(3) may apply in writing to the Tribunal for a review of the decision.
- (2) An application for review must be made within 21 days after publication of the designated Minister's decision.
- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

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

Council to give assistance

- (5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.
- (6) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (7) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the person who is, or expects to be, the provider of the service; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

- (b) publish, by electronic or other means, the notice.

Tribunal's decision

- (8) If the designated Minister decided to revoke his or her decision (the ***ineligibility decision***) that the service is ineligible to be a declared service, the Tribunal may either:
 - (a) affirm the designated Minister's decision; or
 - (b) set aside the designated Minister's decision to revoke the ineligibility decision.
- (9) If the designated Minister decided not to revoke his or her ineligibility decision, the Tribunal may either:
 - (a) affirm the designated Minister's decision; or
 - (b) set aside the designated Minister's decision and revoke the ineligibility decision.

Effect of Tribunal's decision

- (10) If the Tribunal sets aside the designated Minister's decision to revoke his or her ineligibility decision, the ineligibility decision is taken never to have been revoked.
- (11) If the Tribunal sets aside the designated Minister's decision and revokes the ineligibility decision, the Tribunal's decision is, for the purposes of this Part other than this section, taken to be a decision by the Minister to revoke his or her decision that the service is ineligible to be a declared service.

Subdivision F—Other matters

44LL Ineligibility decisions subject to alteration, cancellation etc.

- (1) A decision of the designated Minister under section 44LG that a service is ineligible to be a declared service is made on the basis that:
 - (a) the decision may be revoked under section 44LI; and
 - (b) the decision may be cancelled, revoked, terminated or varied by or under later legislation; and
 - (c) no compensation is payable if the decision is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

Part IIIA Access to services

Division 2AA Services that are ineligible to be declared

Section 44LL

- (2) Subsection (1) does not, by implication, affect the interpretation of any other provision of this Act.

Division 2A—Effective access regimes

Subdivision A—Recommendation by Council

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

- (1) This section applies if a State or Territory that is a party to the Competition Principles Agreement has established at any time a regime for access to a service or a proposed service.
- (2) The responsible Minister for the State or Territory may make a written application to the Council asking the Council to recommend that the Commonwealth Minister decide that the regime for access to the service or proposed service is an effective access regime.
- (3) The Council must recommend to the Commonwealth Minister:
 - (a) that he or she decide that the access regime is an effective access regime for the service, or proposed service; or
 - (b) that he or she decide that the access regime is not an effective access regime for the service, or proposed service.

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

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

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

- (4) In deciding what recommendation it should make, the Council:
 - (a) must, subject to subsection (4A), assess whether the access regime is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement; and
 - (aa) must have regard to the objects of this Part; and
 - (b) must, subject to section 44DA, not consider any other matters.
- (4A) In deciding what recommendation it should make, the Council must disregard Chapter 5 of a National Gas Law.

Section 44MA

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

44MA Council may request information

- (1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44M.
- (2) The Council must:
- (a) give a copy of the notice to:
 - (i) if the person is not the applicant—the applicant; and
 - (ii) if the person is not the provider of the service—the provider; and
 - (b) publish, by electronic or other means, the notice.
- (3) In deciding what recommendation to make on the application, the Council:
- (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

Subdivision B—Decision by Commonwealth Minister

44N Ministerial decision on effectiveness of access regime

- (1) On receiving a recommendation under section 44M, the Commonwealth Minister must:
- (a) decide that the access regime is an effective access regime for the service or proposed service; or
 - (b) decide that the access regime is not an effective access regime for the service or proposed service.

Note: The Commonwealth Minister must publish his or her decision: see section 44NG.

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

Section 44NA

- (a) must, subject to subsection (2A), apply the relevant principles set out in the Competition Principles Agreement; and
 - (aa) must have regard to the objects of this Part; and
 - (b) must, subject to section 44DA, not consider any other matters.
- (2A) In making a decision, the Commonwealth Minister must disregard Chapter 5 of a National Gas Law.
- (3) The decision must specify the period for which it is in force.

Note: The period for which the decision is in force may be extended: see section 44NB.
- (4) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44M within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:
 - (a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:
 - (i) to have made a decision under subsection (1) in accordance with the recommendation made by the Council under section 44M; and
 - (ii) to have published that decision under section 44NG; and
 - (b) if the Council recommended that the Commonwealth Minister decide that the access regime is an effective access regime for the service, or proposed service—the decision is taken to be in force for the period recommended by the Council under subsection 44M(5).

Subdivision C—Extensions of Commonwealth Minister’s decision

44NA Recommendation by Council

- (1) This section applies if a decision of the Commonwealth Minister is in force under section 44N (including as a result of an extension under section 44NB) that a regime established by a State or Territory for access to a service is an effective access regime.

Section 44NAA

Application to Council

- (2) The responsible Minister for the State or Territory may make a written application to the Council asking it to recommend that the Commonwealth Minister decide to extend the period for which the decision is in force.

Note: The Commonwealth Minister may extend the period for which the decision is in force more than once: see section 44NB. This means there may be multiple applications under this subsection.

- (3) The responsible Minister for the State or Territory may specify in the application proposed variations to the access regime.

Assessment by Council

- (4) The Council must assess whether the access regime (including any proposed variations) is an effective access regime. It must do this in accordance with subsection 44M(4).
- (5) If the Council is satisfied that it is an effective access regime, the Council must, in writing, recommend to the Commonwealth Minister that he or she extend the period for which the decision under section 44N is in force. The Council must also recommend an extension period.
- (6) If the Council is satisfied that it is not an effective access regime, the Council must, in writing, recommend to the Commonwealth Minister that he or she not extend the period for which the decision under section 44N is in force.

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

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

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

44NAA Council may request information

- (1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44NA.
- (2) The Council must:

- (a) give a copy of the notice to:
 - (i) if the person is not the applicant—the applicant; and
 - (ii) if the person is not the provider of the service—the provider; and
 - (b) publish, by electronic or other means, the notice.
- (3) In deciding what recommendation to make on the application, the Council:
 - (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44NB Decision by the Commonwealth Minister

- (1) On receiving a recommendation under section 44NA, the Commonwealth Minister must assess whether the access regime (including any proposed variations) is an effective access regime. He or she must do this in accordance with subsection 44N(2).

Note: The Commonwealth Minister must publish his or her decision: see section 44NG.
- (2) If the Commonwealth Minister is satisfied that it is, he or she must, by notice in writing, decide to extend the period for which the decision under section 44N is in force. The notice must specify the extension period.
- (3) If the Commonwealth Minister is satisfied that it is not, he or she must, by notice in writing, decide not to extend the period for which the decision under section 44N is in force.
- (3A) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44NA within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:
 - (a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:
 - (i) to have made a decision under this section in accordance with the recommendation made by the Council under section 44NA; and

Section 44NC

- (ii) to have published that decision under section 44NG; and
- (b) if the Council recommended that the Commonwealth Minister extend the period for which the decision under section 44N is in force—the extension period is taken to be the extension period recommended by the Council under subsection 44NA(5).

Multiple extensions

- (4) The Commonwealth Minister may extend the period for which a decision is in force under section 44N more than once.

Subdivision D—Procedural provisions

44NC Time limit for Council recommendations

Council to make recommendation within the consideration period

- (1) The Council must make a recommendation on an application under section 44M or 44NA within the consideration period.
- (2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

Stopping the clock

- (3) In working out the expected period in relation to a recommendation on an application under section 44M or 44NA, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
 - (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44MA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is given under subsection 44NAA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

- (4) Despite subsection (3):
- (a) do not disregard any day more than once; and
 - (b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

- (5) The Council, the applicant and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.
- (6) The Council must publish, by electronic or other means, the agreement.

Council may extend time for making recommendation

- (7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the
-

Section 44NE

consideration period as previously extended under this subsection), it must, by notice in writing to the Commonwealth Minister, extend the consideration period by a specified period.

- (8) The notice must:
 - (a) specify when the Council must now make its recommendation on the application; and
 - (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.
- (9) The Council must give a copy of the notice to:
 - (a) the applicant; and
 - (b) if the applicant is not the provider of the service—the provider.

Publication

- (10) If the Council extends the consideration period under subsection (7), it must publish a notice in a national newspaper:
 - (a) stating that it has done so; and
 - (b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

- (11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

44NE Council may invite public submissions

Invitation

- (1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44M or 44NA if it considers that it is appropriate and practicable to do so.
- (2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

- (3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:
- (a) must have regard to any submission made on or before the day specified in the notice; and
 - (b) may disregard any submission made after the day specified in the notice.

Council may make submissions publicly available

- (4) The Council may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

- (5) A person may, at the time of making a submission, request that the Council:
- (a) not make the whole or a part of the submission available under subsection (4); and
 - (b) not publish or make available the whole or a part of the submission under section 44NF;
- because of the confidential commercial information contained in the submission.
- (6) If the Council refuses such a request:
- (a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and
 - (b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and
 - (c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:
 - (i) make the whole or the part of the submission available under subsection (4); and
 - (ii) publish or make available the whole or the part of the submission under section 44NF; and

Section 44NF

- (iii) have regard to the whole or the part of the submission in making its recommendation on the application.

44NF Publication—Council

- (1) The Council must publish, by electronic or other means, a recommendation under section 44M or 44NA and its reasons for the recommendation.
- (2) The Council must give a copy of the publication to:
 - (a) the applicant under section 44M or 44NA; and
 - (b) the provider of the service.

Timing

- (3) The Council must do the things under subsections (1) and (2) on the day the Commonwealth Minister publishes his or her decision on the recommendation or as soon as practicable after that day.

Consultation

- (4) Before publishing under subsection (1), the Council may give any one or more of the following persons:
 - (a) the applicant under section 44M or 44NA;
 - (b) the provider of the service;
 - (c) any other person the Council considers appropriate;a notice in writing:
 - (d) specifying what the Council is proposing to publish; and
 - (e) inviting the person to make a written submission to the Council within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (5) The Council must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

44NG Publication—Commonwealth Minister

- (1) The Commonwealth Minister must publish, by electronic or other means, his or her decision on a recommendation under section 44M or 44NA and his or her reasons for the decision.

- (2) The Commonwealth Minister must give a copy of the publication to:
 - (a) the applicant under section 44M or 44NA; and
 - (b) the provider of the service.

Consultation

- (3) Before publishing under subsection (1), the Commonwealth Minister may give any one or more of the following persons:
 - (a) the applicant under section 44M or 44NA;
 - (b) the provider of the service;
 - (c) any other person the Minister considers appropriate;a notice in writing:
 - (d) specifying what the Minister is proposing to publish; and
 - (e) inviting the person to make a written submission to the Minister within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (4) The Commonwealth Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

Subdivision E—Review of decisions

44O Review of Ministerial decision on effectiveness of access regime

- (1) The responsible Minister of the State or Territory:
 - (a) who applied for a recommendation under section 44M that the Commonwealth Minister decide that the access regime is an effective access regime; or
 - (b) who applied for a recommendation under section 44NA that the Commonwealth Minister decide to extend the period for which the decision under section 44N is in force;may apply to the Tribunal for review of the Commonwealth Minister's decision.
- (2) An application for review must be made within 21 days after publication of the Commonwealth Minister's decision.

Section 44P

- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

- (4) For the purposes of the review, the Tribunal has the same powers as the Commonwealth Minister.
- (5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for the review; and
 - (ii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (6) The Tribunal may affirm, vary or reverse the Commonwealth Minister's decision.
- (7) A decision made by the Tribunal is to be taken to be a decision of the Commonwealth Minister for all purposes of this Part (except this section).

**Subdivision F—State or Territory ceasing to be a party to
Competition Principles Agreement**

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

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

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

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

Division 2B—Competitive tender processes for government owned facilities

44PA Approval of competitive tender process

Application to Commission

- (1) The Commonwealth Minister, or the responsible Minister of a State or Territory, may make a written application to the Commission asking it to approve a tender process, for the construction and operation of a facility that is to be owned by the Commonwealth, State or Territory, as a competitive tender process.
- (2) The application must:
 - (a) specify the service or services proposed to be provided by means of the facility; and
 - (b) be in accordance with the regulations.

Decision of Commission

- (3) The Commission must, by notice in writing, approve or refuse to approve the tender process as a competitive tender process.
 - Note 1: While a decision is in force approving a tender process as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph (2)(a): see subsection 44H(3A).
 - Note 2: There are time limits that apply to the Commission's decision: see section 44PD.
 - Note 3: The Commission may request information and invite public submissions on the application: see sections 44PAA and 44PE.
 - Note 4: The Commission must publish its decision: see section 44PF.
- (4) The Commission must not approve a tender process as a competitive tender process unless:
 - (a) it is satisfied that reasonable terms and conditions of access to any service specified under paragraph (2)(a) will be the result of the process; and
 - (b) it is satisfied that the tender process meets the requirements prescribed by the regulations.

- (4A) The Commission may approve the tender process as a competitive tender process even if the service proposed to be provided by means of the facility is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be a declared service.

Period for which decision in force

- (5) If the Commission approves the tender process as a competitive tender process, it may specify in the notice the period for which the decision is in force.

Note: Section 44PC provides for revocation of the decision.

- (6) The Commission may, by writing, extend that period by a specified period. The Commission may do so more than once.

Legislative Instruments Act

- (7) A notice under subsection (3) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

44PAA Commission may request information

- (1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of the kind specified in the notice that the Commission considers may be relevant to deciding whether to approve or refuse to approve a tender process under section 44PA.
- (2) The Commission must:
- (a) if the person is not the applicant—give a copy of the notice to the applicant; and
 - (b) publish, by electronic or other means, the notice.
- (3) In deciding whether to approve or refuse to approve the tender process, the Commission:
- (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44PB Report on conduct of tender process

Report

- (1) If the Commission approves a tender process as a competitive tender process, it must, after a tenderer is chosen, ask the applicant under subsection 44PA(1), by notice in writing, to give the Commission a written report on the conduct of the tender process.
- (2) The report must be in accordance with the regulations.

Commission may ask for further information

- (3) After the Commission receives the report, it may ask the applicant under subsection 44PA(1), by notice in writing, to give the Commission further information in relation to the conduct of the tender process.

Legislative Instruments Act

- (4) A report under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

44PC Revocation of approval decision

Discretionary revocation

- (1) The Commission may, by writing, revoke a decision to approve a tender process as a competitive tender process if it is satisfied that the assessment of the tenders was not in accordance with that process.

Note 1: The Commission may invite public submissions on any proposed revocation decision: see section 44PE.

Note 2: The Commission must publish its decision: see section 44PF.

- (2) The Commission may, by writing, revoke a decision to approve a tender process as a competitive tender process if it is satisfied that the provider of a service:
 - (a) specified under paragraph 44PA(2)(a); and
 - (b) being provided by means of the facility concerned;is not complying with the terms and conditions of access to the service.

Note 1: The Commission may invite public submissions on any proposed revocation decision: see section 44PE.

Note 2: The Commission must publish its decision: see section 44PF.

- (3) Before making a decision under subsection (2), the Commission must give the applicant under subsection 44PA(1), and the provider of the service, a written notice:
- (a) stating that the Commission is proposing to make such a decision and the reasons for it; and
 - (b) inviting the person to make a written submission to the Commission on the proposal; and
 - (c) stating that any submission must be made within the period of 40 business days after the notice is given.
- (4) The Commission must consider any written submission received within that period.

Mandatory revocation

- (5) If:
- (a) the Commission approves a tender process as a competitive tender process; and
 - (b) the Commission gives the applicant a notice under subsection 44PB(1) or (3); and
 - (c) the applicant does not comply with the notice within the period of 40 business days beginning on the day on which the notice is given;
- the Commission must, by writing, revoke the approval decision at the end of that period. The Commission must give notice of the revocation to the applicant.

Definition

- (6) In this section:

business day means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

Section 44PD

44PD Time limit for Commission decisions

Commission to make decision within 90 days

- (1) The Commission must make a decision on an application under subsection 44PA(1) within the period of 90 days (the ***expected period***) starting at the start of the day the application is received.

Stopping the clock

- (2) In working out the expected period in relation to a decision on an application under subsection 44PA(1), in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
- (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Stopping the clock			
Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44PAA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is published under subsection 44PE(1) inviting public submissions in relation to the application	The day on which the notice is published	The day specified in the notice as the day by which submissions may be made

- (3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

- (4) The Commission and the applicant may agree in writing that a specified period is to be disregarded in working out the expected period.
- (5) The Commission must publish, by electronic or other means, the agreement.

Deemed approval as a competitive tender process

- (6) If the Commission does not publish under subsection 44PF(1) its decision on the application within the expected period, it is taken, immediately after the end of the expected period, to have:
- (a) approved the tender process as a competitive tender process; and
 - (b) published the decision to approve the process and its reasons for that decision; and
 - (c) specified that the decision is in force for a period of 20 years, starting 21 days after the start of the day the decision is taken to have been published.

44PE Commission may invite public submissions

Invitation

- (1) The Commission may publish, by electronic or other means, a notice inviting public submissions:
- (a) on an application under subsection 44PA(1); or
 - (b) on any proposed decision under subsection 44PC(1) or (2) to revoke a decision under subsection 44PA(3) to approve a tender process as a competitive tender process;
- if it considers that it is appropriate and practicable to do so.
- (2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

- (3) Subject to subsection (6), in making its decision, the Commission:

Section 44PE

- (a) must have regard to any submission made on or before the day specified in the notice; and
- (b) may disregard any submission made after the day specified in the notice.

Commission may make submissions publicly available

- (4) The Commission may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

- (5) A person may, at the time of making a submission, request that the Commission:

- (a) not make the whole or a part of the submission available under subsection (4); and
- (b) not publish or make available the whole or a part of the submission under section 44PF;

because of the confidential commercial information contained in the submission.

- (6) If the Commission refuses such a request:

- (a) for a written submission—the Commission must, if the person who made it so requires, return the whole or the part of it to the person; and
- (b) for an oral submission—the person who made it may inform the Commission that the person withdraws the whole or the part of it; and
- (c) if the Commission returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Commission must not:
 - (i) make the whole or the part of the submission available under subsection (4); and
 - (ii) publish or make available the whole or the part of the submission under section 44PF; and
 - (iii) have regard to the whole or the part of the submission in making its decision.

44PF Commission must publish its decisions

- (1) The Commission must publish, by electronic or other means, a decision under subsection 44PA(3) or 44PC(1) or (2) and its reasons for the decision.
- (2) The Commission must give a copy of the publication to:
 - (a) for any decision—the applicant under subsection 44PA(1); and
 - (b) for a decision under subsection 44PC(2)—the provider of the service.

It may also give a copy to any other person the Commission considers appropriate.

Consultation

- (3) Before publishing under subsection (1), the Commission may give the following persons:
 - (a) for any decision—the applicant under subsection 44PA(1) or any other person the Commission considers appropriate;
 - (b) for a decision under subsection 44PC(2)—the provider of the service;a notice in writing:
 - (c) specifying what the Commission is proposing to publish; and
 - (d) inviting the person to make a written submission to the Commission within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.
- (4) The Commission must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

44PG Review of Commission's initial decision

Application

- (1) A person whose interests are affected by a decision of the Commission under subsection 44PA(3) may apply in writing to the Tribunal for review of the decision.

Section 44PG

- (2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
- (5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.

Tribunal's decision

- (6) If the Commission refused to approve a tender process as a competitive tender process, the Tribunal must, by writing:
- (a) affirm the Commission's decision; or
 - (b) set aside the Commission's decision and approve the process as a competitive tender process.

- (7) A decision of the Tribunal to approve a process as a competitive tender process is taken to be a decision by the Commission for all purposes of this Part (except this section).
- (8) If the Commission approved a tender process as a competitive tender process, the Tribunal must, by writing, affirm or set aside the Commission's decision.

Note: If the Tribunal sets aside a decision of the Commission to approve a tender process as a competitive tender process, the Commission's decision is no longer in force. This means the designated Minister is no longer prevented by subsection 44H(3A) from declaring a service provided by means of the facility concerned.

44PH Review of decision to revoke an approval

Application

- (1) If the Commission makes a decision under subsection 44PC(1) or (2), the following persons may apply in writing to the Tribunal for review of the decision:
 - (a) for either decision—the applicant under subsection 44PA(1) or any other person whose interests are affected by the decision;
 - (b) for a decision under subsection 44PC(2)—the provider of the service.
- (2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.
 - Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).
- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
- (5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

Section 44PH

- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and
 - (iii) for a review of a decision under subsection 44PC(2)—the provider of the service; and
 - (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.

Tribunal's decision

- (6) The Tribunal must, by writing, affirm or set aside the Commission's decision.

Division 2C—Register of decisions and declarations

44Q Register of decisions, declarations and ineligibility decisions

The Commission must maintain a public register that includes:

- (a) each decision of the Commonwealth Minister that a regime established by a State or Territory for access to a service is an effective access regime for the service or proposed service; and
- (aa) each decision of the Commonwealth Minister to extend the period for which a decision under section 44N is in force; and
- (b) each declaration (including a declaration that is no longer in force); and
- (ba) each decision of a designated Minister under section 44LG that a service is ineligible to be a declared service; and
- (bb) each decision of a designated Minister under section 44LI to revoke his or her decision that a service is ineligible to be a declared service; and
- (c) each decision of the Commission under subsection 44PA(3) to approve a tender process as a competitive tender process; and
- (d) each decision of the Commission under section 44PC to revoke a decision under subsection 44PA(3).

Division 3—Access to declared services

Subdivision A—Scope of Division

44R Constitutional limits on operation of this Division

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

- (a) the provider is a corporation (or a partnership or joint venture consisting wholly of corporations); or
- (b) the third party is a corporation; or
- (c) the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

Subdivision B—Notification of access disputes

44S Notification of access disputes

- (1) If a third party is unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the Commission in writing that an access dispute exists, but only to the extent that those aspects of access are not the subject of an access undertaking that is in operation in relation to the service.

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

- (2) On receiving the notification, the Commission must give notice in writing of the access dispute to:
 - (a) the provider, if the third party notified the access dispute;
 - (b) the third party, if the provider notified the access dispute;
 - (c) any other person whom the Commission thinks might want to become a party to the arbitration.

44T Withdrawal of notifications

- (1) A notification may be withdrawn as follows (and not otherwise):
 - (a) if the provider notified the dispute:

- (i) the provider may withdraw the notification at any time before the Commission makes its final determination;
 - (ii) the third party may withdraw the provider's notification at any time after the Commission issues a draft final determination, but before it makes its final determination;
 - (b) if the third party notified the dispute, the third party may withdraw the notification at any time before the Commission makes its determination.
- (2) Despite subparagraph (1)(a)(ii), if the provider notified a dispute over variation of a final determination, the third party may not withdraw the provider's notification.
- (3) If the notification is withdrawn, it is taken for the purposes of this Part never to have been given.

Subdivision C—Arbitration of access disputes

44U Parties to the arbitration

The parties to the arbitration of an access dispute are:

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

44V Determination by Commission

- (1) Unless it terminates the arbitration under section 44Y, 44YA, 44ZZCB or 44ZZCBA, the Commission:
- (a) must make a written final determination; and
 - (b) may make a written interim determination;
- on access by the third party to the service.

Note 1: There are time limits that apply to the Commission's final determination: see section 44XA.

Note 2: The Commission may defer arbitration of the access dispute if it is also considering an access undertaking: see section 44ZZCB.

- (2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis

Section 44W

for notification of the dispute. By way of example, the determination may:

- (a) require the provider to provide access to the service by the third party;
 - (b) require the third party to accept, and pay for, access to the service;
 - (c) specify the terms and conditions of the third party's access to the service;
 - (d) require the provider to extend the facility;
 - (da) require the provider to permit interconnection to the facility by the third party;
 - (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.
- (3) A determination does not have to require the provider to provide access to the service by the third party.
- (4) Before making a determination, the Commission must give a draft determination to the parties.
- (5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.
- (6) A determination is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

44W Restrictions on access determinations

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

- (e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;
 - (f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.
 - (2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.
 - (3) A determination is of no effect if it is made in contravention of subsection (1).
 - (4) If the Commission makes a determination that has the effect of depriving a person (the *second person*) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:
 - (a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and
 - (b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.
- Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference between the total amount of service the person was entitled to under a pre-notification right and the amount that the person actually needs to meet his or her actual requirements.
- (4A) If an application for review of a declaration of a service has been made under subsection 44K(1), the Commission must not make a determination in relation to the service until the Tribunal has made its decision on the review.
 - (5) In this section:

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

Section 44X

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

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

44X Matters that the Commission must take into account

Final determinations

- (1) The Commission must take the following matters into account in making a final determination:
 - (aa) the objects of this Part;
 - (a) the legitimate business interests of the provider, and the provider's investment in the facility;
 - (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
 - (c) the interests of all persons who have rights to use the service;
 - (d) the direct costs of providing access to the service;
 - (e) the value to the provider of extensions whose cost is borne by someone else;
 - (ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;
 - (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
 - (g) the economically efficient operation of the facility;
 - (h) the pricing principles specified in section 44ZZCA.
- (2) The Commission may take into account any other matters that it thinks are relevant.

Interim determinations

- (3) The Commission may take the following matters into account in making an interim determination:
 - (a) a matter referred to in subsection (1);
 - (b) any other matter it considers relevant.

Section 44XA

- (4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in subsection (1).

44XA Time limit for Commission's final determination

Commission to make final determination within 180 days

- (1) The Commission must make a final determination within the period of 180 days (the ***expected period***) starting at the start of the day the application is received.

Stopping the clock

- (2) In working out the expected period in relation to a final determination, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
- (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Stopping the clock			
Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the arbitration under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A direction is given under subsection 44ZG(1) to give information or make a submission within a specified period	The first day of the period specified for the giving of the information or the making of the submission	The last day of the period specified for the giving of the information or the making of the submission

Section 44XA

Stopping the clock			
Item	Column 1 Situation	Column 2 Start day	Column 3 End day
3	A decision is published under subsection 44ZZCB(4) deferring consideration of the dispute while the Commission considers an access undertaking	The day on which the decision is published	The day on which the Commission makes its decision on the access undertaking under subsection 44ZZA(3)
4	The Commission, under subsection 44ZZCBA(1) or (2), defers arbitrating the dispute while a declaration is under review by the Tribunal	The day on which the Commission gives the notice to defer arbitrating the dispute	The day the Tribunal makes its decision under section 44K on the review

- (3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

- (4) The Commission and the parties to the access dispute may agree in writing that a specified period is to be disregarded in working out the expected period.
- (5) The Commission must publish, by electronic or other means, the agreement.

Deemed final determination

- (6) If the Commission does not publish under section 44ZNB a written report about a final determination within the expected period, it is taken, immediately after the end of the expected period, to have:

- (a) made a final determination that does not impose any obligations on the parties or alter any obligations (if any) that exist at that time between the parties; and
- (b) published a written report about the final determination under section 44ZNB.

44Y Commission may terminate arbitration in certain cases

- (1) The Commission may at any time terminate an arbitration (without making a final determination) if it thinks that:
 - (a) the notification of the dispute was vexatious; or
 - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (c) the party who notified the dispute has not engaged in negotiations in good faith; or
 - (d) access to the service should continue to be governed by an existing contract between the provider and the third party.
- (2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

44YA Commission must terminate arbitration if declaration varied or set aside by Tribunal

If the Commission is arbitrating a dispute in relation to a declared service and the Tribunal sets aside or varies the declaration in relation to the service under section 44K, the Commission must terminate the arbitration.

Subdivision D—Procedure in arbitrations

44Z Constitution of Commission for conduct of arbitration

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

Section 44ZA

44ZA Member of the Commission presiding at an arbitration

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

44ZB Reconstitution of Commission

- (1) This section applies if a member of the Commission who is one of the members who constitute the Commission for the purposes of a particular arbitration:
 - (a) stops being a member of the Commission; or
 - (b) for any reason, is not available for the purpose of the arbitration.
- (2) The Chairperson must either:
 - (a) direct that the Commission is to be constituted for the purposes of finishing the arbitration by the remaining member or members; or
 - (b) direct that the Commission is to be constituted for that purpose by the remaining member or members together with one or more other members of the Commission.
- (3) If a direction under subsection (2) is given, the Commission as constituted in accordance with the direction must continue and finish the arbitration and may, for that purpose, have regard to any record of the proceedings of the arbitration made by the Commission as previously constituted.

44ZC Determination of questions

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

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

44ZD Hearing to be in private

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

44ZE Right to representation

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

44ZF Procedure of Commission

- (1) In an arbitration hearing about an access dispute, the Commission:
 - (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and
 - (c) may inform itself of any matter relevant to the dispute in any way it thinks appropriate.
- (2) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods.
- (3) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.
- (4) The Commission may determine that an arbitration hearing is to be conducted by:

Section 44ZG

- (a) telephone; or
- (b) closed circuit television; or
- (c) any other means of communication.

44ZG Particular powers of Commission

- (1) The Commission may do any of the following things for the purpose of arbitrating an access dispute:
 - (a) give a direction in the course of, or for the purposes of, an arbitration hearing;
 - (b) hear and determine the arbitration in the absence of a person who has been summoned or served with a notice to appear;
 - (c) sit at any place;
 - (d) adjourn to any time and place;
 - (e) refer any matter to an expert and accept the expert's report as evidence;
 - (f) generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the access dispute.

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

Penalty: Imprisonment for 6 months.

- (3) Subsection (1) has effect subject to any other provision of this Part and subject to the regulations.
- (4) The Commission may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration unless the person has the Commission's permission.
- (5) A person who contravenes an order under subsection (4) is guilty of an offence, punishable on conviction by imprisonment for a term not exceeding 6 months.

44ZH Power to take evidence on oath or affirmation

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

44ZI Failing to attend as a witness

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

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

Penalty: Imprisonment for 6 months.

44ZJ Failing to answer questions etc.

- (1) A person appearing as a witness before the Commission must not, without reasonable excuse:
 - (a) refuse or fail to be sworn or to make an affirmation; or
 - (b) refuse or fail to answer a question that the person is required to answer by the Commission; or
 - (c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part served on him or her as prescribed.

Penalty: Imprisonment for 6 months.

- (2) It is a reasonable excuse for the purposes of subsection (1) for an individual to refuse or fail to answer a question or produce a document on the ground that the answer or the production of the document might tend to incriminate the individual or to expose the

Section 44ZK

individual to a penalty. This subsection does not limit what is a reasonable excuse for the purposes of subsection (1).

44ZK Intimidation etc.

A person must not:

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

because that other person:

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

Penalty: Imprisonment for 12 months.

44ZL Party may request Commission to treat material as confidential

- (1) A party to an arbitration hearing may:
 - (a) inform the Commission that, in the party's opinion, a specified part of a document contains confidential commercial information; and
 - (b) request the Commission not to give a copy of that part to another party.
- (2) On receiving a request, the Commission must:
 - (a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and
 - (b) ask the other party or parties whether there is any objection to the Commission complying with the request.
- (3) If there is an objection to the Commission complying with a request, the party objecting may inform the Commission of its objection and of the reasons for it.
- (4) After considering:
 - (a) a request; and
 - (b) any objection; and

- (c) any further submissions that any party has made in relation to the request;
- the Commission may decide not to give to the other party or parties a copy of so much of the document as contains confidential commercial information that the Commission thinks should not be so given.

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

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

44ZN Parties to pay costs of an arbitration

The regulations may provide for the Commission to:

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

44ZNA Joint arbitration hearings

Joint arbitration hearing

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

Consulting the parties

- (3) Before doing so, the Chairperson must give each party to the arbitration of each nominated dispute a notice in writing:
 - (a) specifying what the Chairperson is proposing to do; and

Section 44ZNA

- (b) inviting the party to make a written submission on the proposal to the Chairperson within 14 days after the notice is given.
- (4) The Chairperson must have regard to any submission so made in deciding whether to do so. He or she may have regard to any other matter he or she considers relevant.

Directions to presiding member

- (5) The Chairperson may, for the purposes of the conduct of the joint arbitration hearing, give written directions to the member of the Commission presiding at the hearing.

Constitution and procedure of Commission

- (6) Sections 44Z to 44ZN apply to the joint arbitration hearing in a corresponding way to the way in which they apply to a particular arbitration.

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

Record of proceedings etc.

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

Legislative Instruments Act

- (9) The following are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*:
 - (a) a notice made under subsection (1);
 - (b) a direction given under subsection (5).

Subdivision DA—Arbitration reports

44ZNB Arbitration reports

- (1) The Commission must prepare a written report about a final determination it makes. It must publish, by electronic or other means, the report.
- (2) The report may include the whole or a part of the determination and the reasons for the determination or the part of the determination.

Report must include certain matters

- (3) The report must set out the following matters:
 - (a) the principles the Commission applied in making the determination;
 - (b) the methodologies the Commission applied in making the determination and the reasons for the choice of the asset valuation methodology;
 - (c) how the Commission took into account the matters mentioned in subsection 44X(1) in making the determination;
 - (d) any matter the Commission took into account under subsection 44X(2) in making the determination and the reasons for doing so;
 - (e) any information provided by the parties to the arbitration that was relevant to those principles or methodologies;

Note: Confidentiality issues are dealt with in subsections (5) to (7).

 - (f) any implications the Commission considers the determination has for persons seeking access to the service or to similar services in the future;
 - (g) if applicable—the reasons for the determination dealing with matters that were already agreed between the parties to the arbitration at the time the access dispute was notified;
 - (h) if applicable—the reasons for the access dispute being the subject of a joint arbitration hearing under section 44ZNA despite the objection of a party to the arbitration.

Section 44ZO

Report may include other matters

- (4) The report may include any other matter that the Commission considers relevant.

Confidentiality

- (5) The Commission must not include in the report any information the Commission decided not to give to a party to the arbitration under section 44ZL.
- (6) Before publishing the report, the Commission must give each party to the arbitration a notice in writing:
- (a) specifying what the Commission is proposing to publish; and
 - (b) inviting the party to make a written submission to the Commission within 14 days after the notice is given identifying any information the party considers should not be published because of its confidential commercial nature.
- (7) The Commission must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Legislative Instruments Act

- (8) A report prepared under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Subdivision E—Effect of determinations

44ZO Operation of final determinations

- (1) If none of the parties to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's final determination, the determination has effect 21 days after the determination is made.
- (2) If a party to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's final determination, the determination is of no effect until the Tribunal makes its determination on the review.

Backdating

- (3) Any or all of the provisions of a final determination may be expressed to apply from a specified day that is earlier than the day on which it takes effect under subsection (1) or (2).

Example: The Commission makes a final determination on 1 August. It takes effect under subsection (1) on 22 August, but it is expressed to apply from 1 July.

- (4) The specified day must not be earlier than the following day:
- (a) if the third party and provider commenced negotiations on access to the service after the service became a declared service—the day on which the negotiations commenced;
 - (b) if the third party and provider commenced negotiations on access to the service before the service became a declared service—the day on which the declaration began to operate.

However, the specified day cannot be a day on which the third party did not have access to the service.

Operation of interim determination

- (5) If a provision of a final determination is expressed to apply from a day when an interim determination was in effect, the provision of the final determination prevails over the interim determination to the extent set out in the final determination.

Interest

- (6) If:
- (a) a provision of a final determination is covered by subsection (3); and
 - (b) the provision requires a party to the determination (the **first party**) to pay money to another party;
- the determination may require the first party to pay interest to the other party, at the rate specified in the determination, on the whole or a part of the money, for the whole or a part of the period:
- (c) beginning on the day specified under subsection (3); and
 - (d) ending on the day on which the determination takes effect under subsection (1) or (2).

Section 44ZOA

Guidelines

- (7) In exercising the power conferred by subsection (3) or (6), the Commission must have regard to any guidelines in force under subsection (8). It may have regard to any other matter it considers relevant.
- (8) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (7).
- (9) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (8) is made within 6 months after the commencement of this subsection.

44ZOA Effect and duration of interim determinations

- (1) An interim determination takes effect on the day specified in the determination.
- (2) Unless sooner revoked, an interim determination continues in effect until the earliest of the following:
 - (a) the notification of the access dispute is withdrawn under section 44T;
 - (b) a final determination relating to the access dispute takes effect;

Note: A backdated final determination may prevail over an interim determination: see subsection 44ZO(5).

 - (c) an interim determination made by the Tribunal (while reviewing a final determination relating to the access dispute) takes effect.

Subdivision F—Review of final determinations

44ZP Review by Tribunal

- (1) A party to a final determination may apply in writing to the Tribunal for a review of the determination.
- (2) The application must be made within 21 days after the Commission made the final determination.

- (3) A review by the Tribunal is a re-arbitration of the access dispute based on the information, reports and things referred to in section 44ZZOAA.

Note: There are time limits that apply to the Tribunal's decision on the review: see section 44ZZOA.

- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
- (5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the other party or parties to the final determination; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (6) The Tribunal may either affirm or vary the Commission's determination.
- (7) The determination, as affirmed or varied by the Tribunal, is to be taken to be a determination of the Commission for all purposes of this Part (except this section).
- (8) The decision of the Tribunal takes effect from when it is made.

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

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

Section 44ZR

44ZR Appeals to Federal Court from determinations of the Tribunal

- (1) A party to an arbitration may appeal to the Federal Court, on a question of law, from the decision of the Tribunal under section 44ZP.
- (2) An appeal by a person under subsection (1) must be instituted:
 - (a) not later than the 28th day after the day on which the decision of the Tribunal is made or within such further period as the Federal Court (whether before or after the end of that day) allows; and
 - (b) in accordance with the Rules of Court made under the *Federal Court of Australia Act 1976*.
- (3) The Federal Court must hear and determine the appeal and may make any order that it thinks appropriate.
- (4) The orders that may be made by the Federal Court on appeal include (but are not limited to):
 - (a) an order affirming or setting aside the decision of the Tribunal; and
 - (b) an order remitting the matter to be decided again by the Tribunal in accordance with the directions of the Federal Court.

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

- (1) Subject to this section, the fact that an appeal is instituted in the Federal Court from a decision of the Tribunal does not affect the operation of the decision or prevent action being taken to implement the decision.
- (2) If an appeal is instituted in the Federal Court from a decision of the Tribunal, the Federal Court or a judge of the Federal Court may make any orders staying or otherwise affecting the operation or implementation of the decision of the Tribunal that the Federal Court or judge thinks appropriate to secure the effectiveness of the hearing and determination of the appeal.
- (3) If an order is in force under subsection (2) (including an order previously varied under this subsection), the Federal Court or a

judge of the Federal Court may make an order varying or revoking the first-mentioned order.

- (4) An order in force under subsection (2) (including an order previously varied under subsection (3)):
- (a) is subject to any conditions that are specified in the order; and
 - (b) has effect until:
 - (i) the end of any period for the operation of the order that is specified in the order; or
 - (ii) the giving of a decision on the appeal;whichever is earlier.

44ZT Transmission of documents

If an appeal is instituted in the Federal Court:

- (a) the Tribunal must send to the Federal Court all documents that were before the Tribunal in connection with the matter to which the appeal relates; and
- (b) at the conclusion of the proceedings before the Federal Court in relation to the appeal, the Federal Court must return the documents to the Tribunal.

Subdivision G—Variation and revocation of determinations

44ZU Variation of final determinations

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

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

- (2) Sections 44W and 44X apply to a variation under this section as if:
- (a) an access dispute arising out of the final determination had been notified when the application was made to the Commission for the variation of the determination; and
 - (b) the variation were the making of a final determination in the terms of the varied determination.

Section 44ZUA

44ZUA Variation and revocation of interim determinations

- (1) The Commission may, by writing, vary or revoke an interim determination.
- (2) The Commission must, by writing, revoke an interim determination if requested to do so by the parties to the determination.

Division 4—Registered contracts for access to declared services

44ZV Constitutional limits on operation of this Division

This Division does not apply to a contract unless:

- (a) the contract provides for access to a declared service; and
- (b) the contract was made after the service was declared; and
- (c) the parties to the contract are the provider of the service and a third party; and
- (d) at least one of the following conditions is met:
 - (i) the provider is a corporation (or a partnership or joint venture consisting wholly of corporations);
 - (ii) the third party is a corporation;
 - (iii) the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

44ZW Registration of contract

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

Section 44ZX

- (2A) The Commission must not register a contract if it deals with a matter or matters relating to access to the service that are dealt with in an access undertaking that is in operation.
- (3) The Commission must publish a decision not to register a contract.
- (4) If the Commission publishes a decision not to register a contract, it must give the parties to the contract reasons for the decision when it publishes the decision.

44ZX Review of decision not to register contract

- (1) If the Commission decides not to register a contract, a party to the contract may apply in writing to the Tribunal for review of the decision.
- (2) An application for review must be made within 21 days after publication of the Commission's decision.
- (3) The review by the Tribunal is a re-consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.
 - Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).
- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
- (5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

- (5B) The Tribunal must:
 - (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the other party or parties to the contract; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice; and

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

44ZY Effect of registration of contract

The parties to a contract that has been registered:

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

Division 5—Hindering access to declared services

44ZZ Prohibition on hindering access to declared services

- (1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.
- (2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).
- (3) In this section, a *user* of a service includes a person who has a right to use the service.

Division 6—Access undertakings and access codes for services

Subdivision A—Giving of access undertakings and access codes

44ZZA Access undertakings by providers

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

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

- (a) terms and conditions of access to the service;
 - (b) procedures for determining terms and conditions of access to the service;
 - (c) an obligation on the provider not to hinder access to the service;
 - (d) an obligation on the provider to implement a particular business structure;
 - (e) an obligation on the provider to provide information to the Commission or to another person;
 - (f) an obligation on the provider to comply with decisions of the Commission or another person in relation to matters specified in the undertaking;
 - (g) an obligation on the provider to seek a variation of the undertaking in specified circumstances.
- (2) The undertaking must specify the expiry date of the undertaking.
- (3) The Commission may accept the undertaking, if it thinks it appropriate to do so having regard to the following matters:
- (aa) the objects of this Part;
 - (ab) the pricing principles specified in section 44ZZCA;
 - (a) the legitimate business interests of the provider;
 - (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
 - (c) the interests of persons who might want access to the service;
 - (da) whether the undertaking is in accordance with an access code that applies to the service;
 - (e) any other matters that the Commission thinks are relevant.

Section 44ZZA

Note 1: There are grounds on which the Commission may reject the undertaking if it contains, or should contain, fixed principles: see section 44ZZAAB.

Note 2: The Commission may defer consideration of the undertaking if it is also arbitrating an access dispute: see section 44ZZCB.

- (3AA) The Commission must not accept the undertaking if a decision of the Commonwealth Minister is in force under section 44N that a regime established by a State or Territory for access to the service is an effective access regime.
- (3AB) The Commission may reject the undertaking if it incorporates one or more amendments (see subsection 44ZZAAA(5)) and the Commission is satisfied that the amendment or amendments are of a kind, are made at a time, or are made in a manner that:
- (a) unduly prejudices anyone the Commission considers has a material interest in the undertaking; or
 - (b) unduly delays the process for considering the undertaking.
- (3A) The Commission must not accept the undertaking unless:
- (a) the provider, or proposed provider, is a corporation (or a partnership or joint venture consisting wholly of corporations); or
 - (b) the undertaking provides for access only to third parties that are corporations; or
 - (c) the undertaking provides for access that is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.
- (6) If the undertaking provides for disputes about the undertaking to be resolved by the Commission, then the Commission may resolve the disputes in accordance with the undertaking.
- (6A) If the undertaking provides for the Commission to perform functions or exercise powers in relation to the undertaking, the Commission may perform those functions and exercise those powers. If the Commission decides to do so, it must do so in accordance with the undertaking.
- (6B) The Commission may accept the undertaking even if the service is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be a declared service.
- (7) The provider may:

Section 44ZZAAA

- (a) withdraw the application given under subsection (1) at any time before the Commission makes a decision on whether to accept the application; and
- (b) withdraw or vary the undertaking at any time after it has been accepted by the Commission, but only with the consent of the Commission.

The Commission may consent to a variation of the undertaking if it thinks it appropriate to do so having regard to the matters in subsection (3).

Note 1: There are time limits that apply to a decision of the Commission under this section: see section 44ZZBC.

Note 2: The Commission may request information and invite public submissions in relation to its decision: see sections 44ZZBCA and 44ZZBD.

Note 3: The Commission must publish its decision: see section 44ZZBE.

44ZZAAA Proposed amendments to access undertakings

Commission may give an amendment notice in relation to an undertaking

- (1) Before deciding whether to accept an undertaking given to it under subsection 44ZZA(1) by a person who is, or expects to be, the provider of a service, the Commission may give the person an amendment notice in relation to the undertaking.
- (2) An ***amendment notice*** is a notice in writing that specifies:
 - (a) the nature of the amendment or amendments (the ***proposed amendment or amendments***) that the Commission proposes be made to the undertaking; and
 - (b) the Commission's reasons for the proposed amendment or amendments; and
 - (c) the period (the ***response period***) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person.
- (3) The Commission may publish, by electronic or other means, the amendment notice.
- (4) The Commission may give more than one amendment notice in relation to an undertaking.

Section 44ZZAAA

Person may give a revised undertaking in response to notice

- (5) If a person receives an amendment notice, the person may, within the response period, respond to the notice by giving a revised undertaking to the Commission that incorporates one or more amendments.
- (6) If the revised undertaking incorporates one or more amendments that the Commission considers are not of the nature proposed in the amendment notice and do not address the reasons for the proposed amendments given in the amendment notice, the Commission must not accept the revised undertaking and must return it to the person within 21 days of receiving it.
- (7) If the person gives a revised undertaking under subsection (5) and the revised undertaking is not returned to the person under subsection (6), the revised undertaking is taken, after the time it is given to the Commission, to be the undertaking given under section 44ZZA for the purposes of this Part.
- (8) The person is taken to have not agreed to the proposed amendment or amendments if the person does not respond within the response period.

Commission not required to accept revised undertaking

- (9) The Commission is not required to accept the revised undertaking under section 44ZZA.

No duty to propose amendments

- (10) In considering whether to accept an undertaking, the Commission does not have a duty to consider whether to propose one or more amendments to the undertaking.

Notice of proposed amendment is not a legislative instrument

- (11) A notice given under subsection (1) is not a legislative instrument.

44ZZAAB Access undertakings containing fixed principles

Access undertakings may contain fixed principles

- (1) An access undertaking given to the Commission under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period.
- (2) Each of the terms is a ***fixed principle*** and the specified period is a ***fixed period***. Different periods may be specified for different fixed principles.
- (3) The fixed period must:
 - (a) start:
 - (i) when the access undertaking comes into operation; or
 - (ii) at a later time ascertained in accordance with the undertaking; and
 - (b) extend beyond the expiry date of the undertaking.

Consideration of fixed principles

- (4) The Commission may reject the undertaking if it:
 - (a) includes a term that is not a fixed principle and that the Commission considers should be a fixed principle; or
 - (b) includes a fixed principle that the Commission considers should not be fixed; or
 - (c) includes a fixed principle that the Commission considers should be fixed for a period that is different from the period specified in the undertaking.

However, the Commission must not reject the undertaking solely on the basis that it is consistent with a fixed principle that is included in the undertaking in compliance with subsection (6).

Fixed principles must be carried over to later undertakings

- (5) Subsection (6) applies if:
 - (a) the Commission accepts an undertaking (the ***earlier undertaking***) in connection with the provision of access to a service that includes a fixed principle; and
 - (b) an undertaking (the ***later undertaking***) is given to the Commission in connection with the provision of access to the service within the fixed period for the fixed principle; and

Section 44ZZAAB

- (c) at the time the later undertaking is given:
 - (i) the fixed principle has not been revoked under subsection (7); and
 - (ii) the earlier undertaking has not been varied under subsection 44ZZA(7) so that the fixed principle is no longer a term of the earlier undertaking.
- (6) The Commission must not accept the later undertaking under section 44ZZA unless the undertaking includes a term that is the same as the fixed principle.

Variation or revocation of fixed principles when no undertaking is in operation

- (7) If there is no access undertaking in operation in connection with the provision of access to a service, the provider may revoke or vary a fixed principle that relates to the service (including the fixed period for the principle), but only with the consent of the Commission. The Commission may consent to the revocation or variation of the fixed principle if it thinks it appropriate to do so having regard to the matters in subsection 44ZZA(3).

Note: Subsection 44ZZA(7) contains provision for fixed principles to be varied or revoked in the situation where there is an access undertaking in operation. This may include a variation of the fixed period for the fixed principle.

Alteration of fixed principles

- (8) If an undertaking that is accepted by the Commission contains one or more fixed principles, the undertaking is accepted on the basis that:
 - (a) the principle may be varied or revoked under subsection (7) or 44ZZA(7); and
 - (b) the principle may be cancelled, revoked, terminated or varied by or under later legislation; and
 - (c) no compensation is payable if the principle is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.
- (9) Subsection (8) does not, by implication, affect the interpretation of any other provision of this Act.

44ZZAA Access codes prepared by industry bodies

- (1) An industry body may give a written code to the Commission setting out rules for access to a service.
- (2) The code must specify the expiry date of the code.
- (3) The Commission may accept the code, if it thinks it appropriate to do so having regard to the following matters:
 - (aa) the objects of this Part;
 - (ab) the pricing principles specified in section 44ZZCA;
 - (a) the legitimate business interests of providers who might give undertakings in accordance with the code;
 - (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
 - (c) the interests of persons who might want access to the service covered by the code;
 - (e) any matters specified in regulations made for the purposes of this subsection;
 - (f) any other matters that the Commission thinks are relevant.
- (3A) The Commission must not accept the code if a decision of the Commonwealth Minister is in force under section 44N that a regime established by a State or Territory for access to the service is an effective access regime.
- (6) The industry body may:
 - (a) withdraw the code given under subsection (1) at any time before the Commission makes a decision whether to accept the code; and
 - (b) withdraw or vary the code at any time after it has been accepted by the Commission, but only with the consent of the Commission.

The Commission may consent to a variation of the code if it thinks it appropriate to do so having regard to the matters in subsection (3).

Note: The Commission may rely on industry body consultations before giving its consent: see section 44ZZAB.

- (7) If the industry body that gave the code to the Commission has ceased to exist, a withdrawal or variation under subsection (6) may

Section 44ZZAB

be made by a body or association prescribed by the regulations as a replacement for the original industry body.

(8) In this section:

code means a set of rules (which may be in general terms or detailed terms).

industry body means a body or association (including a body or association established by a law of a State or Territory) prescribed by the regulations for the purposes of this section.

Note 1: There are time limits that apply to a decision of the Commission under this section: see section 44ZZBC.

Note 2: The Commission may request information and invite public submissions in relation to its decision: see sections 44ZZBCA and 44ZZBD.

Note 3: The Commission must publish its decision: see section 44ZZBE.

44ZZAB Commission may rely on industry body consultations

- (1) The Commission may accept a code if the industry body has done the following before giving the code to the Commission under subsection 44ZZAA(1):
 - (a) published the code or a draft of the code and invited people to make submissions to the industry body on the code or draft;
 - (b) specified the effect of this subsection and subsection (2) when it published the code or draft;
 - (c) considered any submissions that were received within the time limit specified by the industry body when it published the code or draft.
- (2) In deciding whether to accept the code, the Commission may consider any submission referred to in paragraph (1)(c).
- (3) Before consenting to a variation or withdrawal of a code under subsection 44ZZAA(6), the Commission may rely on:
 - (a) publication of the variation or notice of the withdrawal by the industry body, including specification of the effect of this subsection and subsection (4); and
 - (b) consideration by the industry body of any submissions that were received within the time limit specified by the industry body when it published the variation or notice.

- (4) In deciding whether to consent to the variation or withdrawal, the Commission may consider any submission referred to in paragraph (3)(b).

- (5) In this section:

code has the same meaning as it has in section 44ZZAA.

industry body has the same meaning as it has in section 44ZZAA.

Subdivision B—Effect of access undertakings and access codes

44ZZBA When access undertakings and access codes come into operation

Acceptance of access undertakings or access codes

- (1) If the Commission accepts an access undertaking or an access code, it comes into operation at:
- (a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or
 - (b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.
- (2) If the Tribunal decides under paragraph 44ZZBF(7)(e) to accept an access undertaking or access code, it comes into operation at the time of the Tribunal's decision.
- (3) An access undertaking or access code continues in operation until its expiry date, unless it is earlier withdrawn.

Note: The period for which an access undertaking or access code is in operation may be extended: see section 44ZZBB.

Withdrawal or variation of access undertakings or access codes

- (4) If the Commission consents to the withdrawal or variation of an access undertaking or an access code, the withdrawal or variation comes into operation at:
- (a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

Section 44ZZBB

- (b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal’s decision.
- (5) If the Tribunal decides under paragraph 44ZZBF(7)(e) to consent to the withdrawal or variation of an access undertaking or access code, the withdrawal or variation comes into operation at the time of the Tribunal’s decision.

Revocation or variation of fixed principles in access undertakings

- (6) If the Commission consents to the revocation or variation of a fixed principle that is included as a term of an access undertaking under subsection 44ZZAAB(7), the revocation or variation comes into operation at:
 - (a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or
 - (b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal’s decision.
- (7) If the Tribunal decides under paragraph 44ZZBF(7)(e) to consent to the revocation or variation of a fixed principle that is included as term of an access undertaking, the revocation or variation comes into operation at the time of the Tribunal’s decision.

Subdivision C—Extensions of access undertakings and access codes

44ZZBB Extensions of access undertakings and access codes

Access undertakings

- (1) If an access undertaking is in operation under section 44ZZBA (including as a result of an extension under this section), the provider of the service may apply in writing to the Commission for an extension of the period for which it is in operation.

Note: The Commission may extend the period for which the undertaking is in operation more than once: see subsection (8). This means there may be multiple applications under this subsection.

- (2) The provider of the service must specify in the application a proposed extension period.
- (3) The Commission may, by notice in writing, extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3). The notice must specify the extension period.

Access codes

- (4) If an access code is in operation under section 44ZZBA (including as a result of an extension under this section), the industry body may apply in writing to the Commission for an extension of the period for which it is in operation.

Note: The Commission may extend the period for which the code is in operation more than once: see subsection (8). This means there may be multiple applications under this subsection.

- (5) The industry body must specify in the application a proposed extension period.
- (6) The Commission may, by notice in writing, extend the period for which the code is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZAA(3). The notice must specify the extension period.
- (7) If the industry body that gave the code to the Commission has ceased to exist, an application under subsection (4) may be made by a body or association referred to in subsection 44ZZAA(7).

Multiple extensions

- (8) The Commission may extend the period for which an access undertaking or an access code is in operation more than once.

Note 1: There are time limits that apply to a decision of the Commission under this section: see section 44ZZBC.

Note 2: The Commission may request information and invite public submissions in relation to its decision: see sections 44ZZBCA and 44ZZBD.

Note 3: The Commission must publish its decision: see section 44ZZBE.

Subdivision D—Procedural provisions

44ZZBC Time limit for Commission decisions

Commission to make decision on application within 180 days

- (1) The Commission must make a decision on an access undertaking application or an access code application within the period of 180 days (the ***expected period***) starting at the start of the day the application is received.

Stopping the clock

- (2) In working out the expected period in relation to an access undertaking application or an access code application, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
- (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Stopping the clock			
Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44ZZBCA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

Stopping the clock			
Item	Column 1 Situation	Column 2 Start day	Column 3 End day
3	A notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application	The day on which the notice is published	The day specified in the notice as the day by which submissions may be made
4	A decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the Commission arbitrates an access dispute	The day on which the decision is published	The day on which the final determination in relation to the arbitration of the access dispute is made

- (3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

- (4) The Commission and:
- (a) for an access undertaking application—the provider of the service; and
 - (b) for an access code application—the industry body or its replacement;
- may agree in writing that a specified period is to be disregarded in working out the expected period.
- (5) The Commission must publish, by electronic or other means, the agreement.

Section 44ZZBCA

Deemed final determination

- (6) If the Commission does not publish under section 44ZZBE an access undertaking decision or an access code decision within the expected period, it is taken, immediately after the end of the expected period, to have:
- (a) made a decision to not accept the application; and
 - (b) published its decision under section 44ZZBE and its reasons for that decision.

44ZZBCA Commission may request information

- (1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of a kind specified in the notice that the Commission considers may be relevant to making a decision on an access undertaking application or an access code application.
- (2) The Commission must:
- (a) give a copy of the notice to:
 - (i) in the case of an access undertaking application—the provider of the service (unless the provider is the person); and
 - (ii) in the case of an access code application—the industry body that gave the application to the Commission (unless the body is the person); and
 - (b) publish, by electronic or other means, the notice.
- (3) In making a determination, the Commission:
- (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

44ZZBD Commission may invite public submissions

Invitation

- (1) The Commission may publish, by electronic or other means, a notice inviting public submissions on an access undertaking
-

application or an access code application if it considers that it is appropriate and practicable to do so.

- (2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least 14 days after the day the notice is published).

Consideration of submissions

- (3) Subject to subsection (6), in making its decision on the application, the Commission:
- (a) must have regard to any submission made on or before the day specified in the notice; and
 - (b) may disregard any submission made after the day specified in the notice.

Commission may make submissions publicly available

- (4) The Commission may make any written submission, or a written record (which may be a summary) of any oral submission, publicly available.

Confidentiality

- (5) A person may, at the time of making a submission, request that the Commission:
- (a) not make the whole or a part of the submission available under subsection (4); and
 - (b) not publish or make available the whole or a part of the submission under section 44ZZBE;
- because of the confidential commercial information contained in the submission.
- (6) If the Commission refuses such a request:
- (a) for a written submission—the Commission must, if the person who made it so requires, return the whole or the part of it to the person; and
 - (b) for an oral submission—the person who made it may inform the Commission that the person withdraws the whole or the part of it; and

Section 44ZZBE

- (c) if the Commission returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Commission must not:
 - (i) make the whole or the part of the submission available under subsection (4); and
 - (ii) publish or make available the whole or the part of the submission under section 44ZZBE; and
 - (iii) have regard to the whole or the part of the submission in making its decision on the application.

44ZZBE Commission must publish its decisions

- (1) The Commission must publish, by electronic or other means, an access undertaking decision or an access code decision and its reasons for the decision.
- (2) The Commission must give a copy of the publication to:
 - (a) for an access undertaking decision—the provider of the service; or
 - (b) for an access code decision—the industry body or its replacement.

Consultation

- (3) Before publishing under subsection (1), the Commission may give any one or more of the following persons:
 - (a) for an access undertaking decision—the provider of the service;
 - (b) for an access code decision—the industry body or its replacement;
 - (c) in any case—any other person the Commission considers appropriate;a notice in writing:
 - (d) specifying what the Commission is proposing to publish; and
 - (e) inviting the person to make a written submission to the Commission within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

- (4) The Commission must have regard to any submission so made in deciding what to publish. It may have regard to any other matter it considers relevant.

Subdivision E—Review of decisions

44ZZBF Review of decisions

Application

- (1) A person whose interests are affected by an access undertaking decision or an access code decision may apply in writing to the Tribunal for review of the decision.
- (2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

- (4) For the purposes of the review, the Tribunal has the same powers as the Commission (other than the power to propose amendments under section 44ZZAAA).
- (5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the provider of the service; and

- (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
- (b) publish, by electronic or other means, the notice.

Tribunal's decision

(6) If the Commission:

- (a) accepted an access undertaking or access code; or
- (b) consented to the withdrawal or variation of an access undertaking or access code; or
- (ba) consented to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or
- (c) extended the period for which an access undertaking or access code is in operation;

the Tribunal must, by writing, affirm or set aside the Commission's decision.

(7) If the Commission:

- (a) rejected an access undertaking or access code; or
- (b) refused to consent to the withdrawal or variation of an access undertaking or access code; or
- (ba) refused to consent to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or
- (c) refused to extend the period for which an access undertaking or access code is in operation;

the Tribunal must, by writing:

- (d) affirm the Commission's decision; or
- (e) set aside the Commission's decision and accept the undertaking or code, consent to the withdrawal or variation of the undertaking or code, consent to the revocation or variation of the fixed principle or extend the period for which the undertaking or code is in operation.

Subdivision F—Register of access undertakings and access codes

44ZZC Register of access undertakings and access codes

- (1) The Commission must maintain a public register that includes all access undertakings and access codes that have been accepted by the Commission, including those that are no longer in operation.
- (1A) For the purposes of subsection (1), if an access undertaking includes one or more fixed principles, the register must also include details of the fixed principles, including their fixed periods.
- (2) The register must include all variations of access undertakings and access codes.
- (3) The register must also include details of all extensions of the period for which an access undertaking or an access code is in operation.

Division 6A—Pricing principles for access disputes and access undertakings or codes

44ZZCA Pricing principles for access disputes and access undertakings or codes

The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.

Division 6B—Overlap among determinations, registered contracts, access undertakings and Tribunal review

44ZZCB Deferring access disputes or access undertakings

- (1) If, at a particular time, the Commission is:
- (a) arbitrating an access dispute under Division 3 relating to one or more matters of access to a declared service; and
 - (b) considering whether to accept an access undertaking relating to the service and to one or more of those matters;
- then the Commission may, by notice in writing, decide to:
- (c) defer arbitrating the access dispute, in whole or in part, while it considers the access undertaking; or
 - (d) defer considering whether to accept the access undertaking, in whole or in part, while it arbitrates the access dispute.

Deferral of arbitration of access dispute

- (2) If:
- (a) the Commission defers arbitrating the access dispute; and
 - (b) the Commission then accepts the access undertaking and it comes into operation;
- then the Commission must terminate the arbitration when the undertaking comes into operation, but only to the extent of the matters relating to access to the service that are dealt with in the undertaking.

Note: The third party's access to the service is determined under the access undertaking to the extent of the matters it deals with. If the access dispute deals with other matters, the third party's access to the service in relation to those other matters is determined under any determination the Commission makes.

Deferral of consideration of access undertaking

- (3) If:
- (a) the Commission defers considering whether to accept the access undertaking; and

Part IIIA Access to services

Division 6B Overlap among determinations, registered contracts, access undertakings and Tribunal review

Section 44ZZCBA

- (b) the Commission then makes a final determination in relation to the arbitration of the access dispute;
then the Commission must resume considering whether to accept the access undertaking.

Publication

- (4) The Commission must publish, by electronic or other means, any decision it makes under subsection (1) and its reasons for the decision. The Commission must give a copy of the decision (including the reasons for the decision) to each party to the arbitration.

Guidelines

- (5) In exercising the power conferred by subsection (1), the Commission must have regard to:
 - (a) the fact that the access undertaking will, if accepted, apply generally to access seekers and a final determination relating to the access dispute will only apply to the parties to the arbitration; and
 - (b) any guidelines in force under subsection (6).It may have regard to any other matter it considers relevant.
- (6) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (5).
- (7) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (6) is made within 6 months after the commencement of this subsection.

Legislative Instruments Act

- (8) A notice made under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

44ZZCBA Deferral of arbitration if review is underway

Commission may defer arbitration if declaration not stayed

- (1) If:
 - (a) the Commission is arbitrating an access dispute relating to one or more matters of access to a declared service; and
-

Section 44ZZCBA

(b) an application for review of the declaration of the service has been made under subsection 44K(1); and

(c) the Tribunal does not make an order under section 44KA staying the operation of the declaration;

then the Commission may, by notice in writing to each party to the arbitration, decide to defer arbitrating the access dispute until the Tribunal has made its decision on the review if it considers it appropriate to do so.

Commission must defer arbitration if declaration stayed

(2) If:

(a) the Commission is arbitrating an access dispute relating to one or more matters of access to a declared service; and

(b) an application for review of the declaration of the service has been made under subsection 44K(1); and

(c) the Tribunal makes an order under section 44KA staying the operation of the declaration;

then the Commission must, by notice in writing to each party to the arbitration, defer arbitrating the access dispute until the Tribunal has made its decision on the review.

Resumption of arbitration if declaration affirmed

(3) If the Commission defers arbitrating the access dispute and the Tribunal affirms the declaration, the Commission must resume arbitrating the dispute.

Termination of arbitration if declaration varied or set aside

(4) If the Commission defers arbitrating the access dispute and the Tribunal sets aside or varies the declaration, the Commission must terminate the arbitration.

(5) If:

(a) an arbitration is terminated under subsection (4) or section 44YA; and

(b) an access dispute is notified under section 44S in relation to access to the same declared service; and

(c) the parties to the dispute are the same parties to the terminated arbitration;

Part IIIA Access to services

Division 6B Overlap among determinations, registered contracts, access undertakings and Tribunal review

Section 44ZZCC

then the Commission may have regard to any record made in the course of the terminated arbitration if it considers it appropriate to do so.

Notices are not legislative instruments

- (6) A notice given under subsection (1) or (2) is not a legislative instrument.

44ZZCC Overlap between determinations and access undertakings

If, at a particular time:

- (a) a final determination is in operation in relation to a declared service; and
- (b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with a matter or matters relating to access to the service that are not dealt with in the determination.

44ZZCD Overlap between registered contracts and access undertakings

If, at a particular time:

- (a) a contract is registered under Division 4 in relation to a declared service; and
- (b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with a matter or matters relating to access to the service that are not dealt with in the contract.

Division 7—Enforcement and remedies

44ZZD Enforcement of determinations

- (1) If the Federal Court is satisfied, on the application of a party to a determination, that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination, the Court may make all or any of the following orders:
 - (a) an order granting an injunction on such terms as the Court thinks appropriate:
 - (i) restraining the other party from engaging in the conduct; or
 - (ii) if the conduct involves refusing or failing to do something—requiring the other party to do that thing;
 - (b) an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;
 - (c) any other order that the Court thinks appropriate.
- (2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.
- (3) A reference in this section to a person involved in the contravention is a reference to a person who has:
 - (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention, whether through threats or promises or otherwise; or
 - (c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or
 - (d) conspired with others to effect the contravention.

44ZZE Enforcement of prohibition on hindering access

- (1) If the Federal Court is satisfied, on the application of any person, that another person (the **obstructor**) has engaged, is engaging, or is proposing to engage in conduct constituting a contravention of

Section 44ZZF

section 44ZZ, the Court may make all or any of the following orders:

- (a) an order granting an injunction on such terms as the Court thinks appropriate:
 - (i) restraining the obstructor from engaging in the conduct; or
 - (ii) if the conduct involves refusing or failing to do something—requiring the obstructor to do that thing;
 - (b) an order directing the obstructor to compensate a person who has suffered loss or damage as a result of the contravention;
 - (c) any other order that the Court thinks appropriate.
- (2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.
- (3) The grounds on which the Court may decide not to make an order under this section include the ground that Divisions 2 and 3 provide a more appropriate way of dealing with the issue of the applicant's access to the service concerned.
- (4) A reference in this section to a person involved in the contravention is a reference to a person who has:
- (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention, whether through threats or promises or otherwise; or
 - (c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or
 - (d) conspired with others to effect the contravention.

44ZZF Consent injunctions

On an application for an injunction under section 44ZZD or 44ZZE, the Federal Court may grant an injunction by consent of all of the parties to the proceedings, whether or not the Court is satisfied that the section applies.

44ZZG Interim injunctions

- (1) The Federal Court may grant an interim injunction pending determination of an application under section 44ZZD or 44ZZE.
- (2) If the Commission makes an application under section 44ZZE to the Federal Court for an injunction, the Court must not require the Commission or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

44ZZH Factors relevant to granting a restraining injunction

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE restraining a person from engaging in conduct may be exercised whether or not:

- (a) it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
- (b) the person has previously engaged in conduct of that kind; or
- (c) there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

44ZZI Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE requiring a person to do a thing may be exercised whether or not:

- (a) it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing; or
- (b) the person has previously refused or failed to do that thing; or
- (c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

44ZZJ Enforcement of access undertakings

- (1) If the Commission thinks that the provider of an access undertaking in operation under Division 6 has breached any of its terms, the Commission may apply to the Federal Court for an order under subsection (2).

Section 44ZZK

- (2) If the Federal Court is satisfied that the provider has breached a term of the undertaking, the Court may make all or any of the following orders:
- (a) an order directing the provider to comply with that term of the undertaking;
 - (b) an order directing the provider to compensate any other person who has suffered loss or damage as a result of the breach;
 - (c) any other order that the Court thinks appropriate.

44ZZK Discharge or variation of injunction or other order

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

Division 8—Miscellaneous

44ZZL Register of determinations

The Commission must maintain a public register that specifies the following information for each determination:

- (a) the names of the parties to the determination;
- (b) the service to which the determination relates;
- (c) the date on which the determination was made.

44ZZM Commonwealth consent to conferral of functions etc. on the Commission or Tribunal by State or Territory laws

- (1) A State or Territory access regime law may confer functions or powers, or impose duties, on the Commission or Tribunal.

Note: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a law of a State or Territory to the extent to which:
- (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the Commission or Tribunal; or
 - (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.
- (3) The Commission or Tribunal cannot perform a duty or function, or exercise a power, under a State or Territory access regime law unless the conferral of the function or power, or the imposition of the duty, is in accordance with an agreement between the Commonwealth and the State or Territory concerned.

44ZZMA How duty is imposed

Application

- (1) This section applies if a State or Territory access regime law purports to impose a duty on the Commission or Tribunal.

Section 44ZZMB

Note: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

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 Commission or Tribunal.

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

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

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Act to the extent necessary to ensure that validity.
- (4) If, because of subsection (3), this Act is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Act.
- (5) The duty is taken to be imposed by this Act in accordance with subsection (3) only to the extent to which imposing the duty:
- (a) is within the legislative powers of the Commonwealth; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the Commission or Tribunal.
- (6) Subsections (1) to (5) do not limit section 44ZZM.

44ZZMB When a law of a State or Territory imposes a duty

For the purposes of sections 44ZZM and 44ZZMA, a State or Territory access regime law ***imposes a duty*** on the Commission or Tribunal if:

- (a) the law confers a function or power on the Commission or Tribunal; and
- (b) the circumstances in which the function or power is conferred give rise to an obligation on the Commission or Tribunal to perform the function or to exercise the power.

44ZZN Compensation for acquisition of property

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

44ZZNA Operation of Parts IV and VII not affected by this Part

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

44ZZO Conduct by directors, servants or agents

- (1) If, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is sufficient to show:

Section 44ZZO

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
 - (b) that the director, servant or agent had the state of mind.
- (2) Any conduct engaged in on behalf of a body corporate:
 - (a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or
 - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;is taken for the purposes of this Part to have been engaged in also by the body corporate, unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.
- (3) If, in a proceeding under this Part in respect of conduct engaged in by an individual, it is necessary to establish the state of mind of the individual, it is sufficient to show:
 - (a) that the conduct was engaged in by a servant or agent of the individual within the scope of his or her actual or apparent authority; and
 - (b) that the servant or agent had the relevant state of mind.
- (4) Conduct engaged in on behalf of an individual:
 - (a) by a servant or agent of the individual within the scope of the actual or apparent authority of the servant or agent; or
 - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the individual, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;is taken, for the purposes of this Part, to have been engaged in also by that individual, unless that individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.
- (5) If:
 - (a) an individual is convicted of an offence; and

- (b) the individual would not have been convicted of the offence if subsections (3) and (4) had not been enacted;
the individual is not liable to be punished by imprisonment for that offence.
- (6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:
 - (a) the knowledge, intention, opinion, belief or purpose of the person; and
 - (b) the person's reasons for the intention, opinion, belief or purpose.
- (7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

44ZZOAAA Information to be given to Tribunal

Tribunal to notify decision maker

- (1) If an application for review of a decision (however described) is made under this Part, the Tribunal must notify the decision maker of the application.
- (2) If the application is made under section 44K, 44L, 44LJ, 44LK or 44O, the Tribunal must also notify the Council of the application.

Decision maker to give material to Tribunal

- (3) The decision maker must give the following information to the Tribunal within the period specified by the Tribunal:
 - (a) if the decision is taken to have been made because of the operation of subsection 44H(9), 44J(7), 44LG(6), 44LI(7), 44N(4) or 44NB(3A)—all of the information that the Council took into account in connection with making the recommendation to which the decision under review relates;
 - (b) if the decision is taken to have been made because of the operation of subsection 44PD(6), 44XA(6) or 44ZZBC(6)—any information or documents given to the Commission in connection with the decision to which the review relates, other than information or documents in relation to which the

Section 44ZZOAAA

Commission could not have regard because of subparagraph 44PE(6)(c)(iii) or 44ZZBD(6)(c)(iii);

- (c) otherwise—all of the information that the decision maker took into account in connection with the making of the decision to which the review relates.

Tribunal may request further information

- (4) The Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part.
- (5) A request under subsection (4) must be made by written notice given to a person specifying the information requested and the period within which the information must be given to the Tribunal.
- (6) The Tribunal must:
 - (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and
 - (iii) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and
 - (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (7) Without limiting the information that may be given in accordance with the notice, information may include information that could not have reasonably been made available to the decision maker at the time the decision under review was made.

Certain material before the Tribunal not to be disclosed

- (8) The Tribunal may, on the application of a person, prohibit or restrict the disclosure of the contents of a document or other information given to the Tribunal under this section if the Tribunal is satisfied that it is desirable to do so because of the confidential nature of the document or other information, or for any other reason.
- (9) In this section:

decision maker, in relation to an application for review under this Part, means:

- (a) if the application was made under section 44K, 44L, 44LJ or 44LK—the designated Minister; or
- (b) if the application was made under section 44O—the Commonwealth Minister; or
- (c) if the application was made under section 44PG, 44PH, 44ZP, 44ZX, or 44ZZBF—the Commission.

44ZZOAA Tribunal only to consider particular material

For the purposes of a review under this Part, the Tribunal:

- (a) subject to paragraph (b), must have regard to:
 - (i) information that was given to the Tribunal under subsection 44ZZOAAA(3); and
 - (ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and
 - (iii) any thing done as mentioned in subsection 44K(6), 44L(5), 44LJ(5), 44LK(5), 44O(5), 44PG(5), 44PH(5), 44ZP(5), 44ZX(5) or 44ZZBF(5); and
 - (iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) within the specified period; and
- (b) may disregard:
 - (i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and
 - (ii) any information or report of the kind specified in a notice under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) that is given to the Tribunal after the specified period has ended.

44ZZOA Time limit for Tribunal decisions

- (1) The Tribunal must make a decision on a review under this Part within the consideration period.

Section 44ZZOA

- (2) The consideration period is a period of 180 days (the *expected period*), starting at the start of the day the application for review is received, unless the consideration period is extended under subsection (7).

Stopping the clock

- (3) In working out the expected period in relation to an application for review, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:
- (a) starting on the day referred to in column 2 of the item; and
 - (b) ending on the day referred to in column 3 of the item.

Stopping the clock			
Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44ZZOAAA(5) requesting information in relation to the decision to which the application relates	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

Section 44ZZOA

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
3	A notice is given under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) requiring information or a report to be given in relation to the review	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information or the report

- (4) Despite subsection (3), do not disregard any day more than once.

Stopping the clock by agreement

- (5) The following may agree in writing that a specified period is to be disregarded in working out the expected period:
- (a) the Tribunal;
 - (b) the person who applied for review;
 - (c) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council;
 - (d) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission;
 - (e) any other person who has been made a party to the proceedings for review by the Tribunal.
- (6) The Tribunal must publish, by electronic or other means, the agreement.

Section 44ZZP

Extension of time for making decision

- (7) If the Tribunal is unable to make a decision on an application for review within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.
- (8) The notice must:
 - (a) specify when the Tribunal must now make its decision on the application for review; and
 - (b) include a statement explaining why the Tribunal has been unable to make a decision on the review within the consideration period.
- (9) The Tribunal must give a copy of the notice to:
 - (a) the person who applied for review; and
 - (b) if the application for review is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and
 - (c) if the application for review is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and
 - (d) any other person who has been made a party to the proceedings for review by the Tribunal.

Publication

- (10) If the Tribunal extends the consideration period under subsection (7), it must publish a notice in a national newspaper:
 - (a) stating that it has done so; and
 - (b) specifying the day by which it must now make a decision on the application for review.

Failure to comply with time limit does not affect validity

- (11) Failure by the Tribunal to comply with a time limit set in this section does not affect the validity of a decision made by the Tribunal under this Part.

44ZZP Regulations about review by the Tribunal

- (1) The regulations may make provision about the following matters in relation to the functions of the Tribunal under this Part:

- (a) the constitution of the Tribunal;
 - (b) the arrangement of the business of the Tribunal;
 - (c) the disclosure of interests by members of the Tribunal;
 - (d) determining questions before the Tribunal and questions that arise during a review;
 - (e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report).
- (2) Regulations made for the purposes of subsection (1) do not apply in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law.

Note: See section 44ZZR.

44ZZQ Regulations about fees for inspection etc. of registers

The regulations may make provision about the inspection of registers maintained under this Part (including provision about fees).

44ZZR Procedure of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law

- (1) Sections 103, 105, 106, 107, 108 and 110 of this Act apply to the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law.
- (2) The regulations may make provision about the following matters in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law:
- (a) the constitution of the Tribunal;
 - (b) the arrangement of the business of the Tribunal;
 - (c) the disclosure of interests by members of the Tribunal;
 - (d) determining questions before the Tribunal and questions that arise during a review;
 - (e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report);
 - (f) the fees and expenses of witnesses in proceedings before the Tribunal.

Section 44ZZR

- (3) Subsection (1), and regulations made for the purposes of subsection (2), have no effect to the extent (if any) to which they are inconsistent with the State/Territory energy law, or the designated Commonwealth energy law, concerned.

Part IV—Restrictive trade practices

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

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.

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.

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.
-

Section 44ZZRD

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
 - (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

Section 44ZZRE

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 corporation commits an offence if:
- (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
 - (b) the contract, arrangement or understanding contains a cartel provision.

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

- (2) The fault element for paragraph (1)(b) is knowledge or belief.

Penalty

- (3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
- (a) \$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 corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

Indictable offence

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

44ZZRG Giving effect to a cartel provision*Offence*

- (1) A corporation commits an offence if:
- (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the corporation gives effect to the cartel provision.

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

- (2) The fault element for paragraph (1)(a) is knowledge or belief.

Penalty

- (3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
- (a) \$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;

Section 44ZZRH

3 times that total value;

- (c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

Pre-commencement contracts etc.

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

Indictable offence

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

44ZZRH Determining guilt

- (1) A corporation 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.

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

- (2) A corporation 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 corporation contravenes this section if:

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

Note: For enforcement, see Part VI.

44ZZRK Giving effect to a cartel provision

(1) A corporation contravenes this section if:

- (a) a contract, arrangement or understanding contains a cartel provision; and
- (b) the corporation gives effect to the cartel provision.

Note: For enforcement, see Part VI.

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

Subdivision D—Exceptions

44ZZRL Conduct notified

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply to a corporation in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
 - (a) the cartel provision:
 - (i) has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); or

Section 44ZZRM

- (ii) has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); and
- (b) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) setting out particulars of the contract, arrangement or understanding; and
- (c) the notice is in force under section 93AD.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK 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 corporation is granted an authorisation to give effect to the provision; and
 - (b) the corporation applies for the grant of such an authorisation within 14 days after the contract is made.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ 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 parties to the contract, arrangement or understanding are bodies corporate that are related to each other.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK 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 1: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code*).

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (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

Section 44ZZRO

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

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

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

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

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

Notice to prosecutor

- (2) 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.
- (3) 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 (2); or
 - (b) extend the time within which the person is required to comply with subsection (2).
- (4) For the purposes of paragraph (2)(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

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.

Section 44ZZRQ

- (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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK 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.

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

- (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the giving effect to a cartel provision by way of:
- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 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.

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

- (3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 44ZZRJ or 44ZZRK 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.

Section 44ZZRU

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

- (2) Sections 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.

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

- (3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 44ZZRJ or 44ZZRK 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK 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 the *Trade Practices Amendment Act 1977*:
 - (a) is an exclusionary provision; or
 - (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.
- (2) A corporation shall not:
 - (a) make a contract or arrangement, or arrive at an understanding, if:
 - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
 - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
 - (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
 - (i) is an exclusionary provision; or
 - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- (3) For the purposes of this section, **competition**, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the

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

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

Section 45

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 corporation engaging in conduct described in that subsection if:

- (a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and
 - (b) the notice is in force under section 93AD.
- (9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:
 - (a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and
 - (b) the corporation 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 corporation 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 corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.
- (2) A corporation or a person associated with a corporation shall not:
 - (a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:
 - (i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or
 - (ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is

Section 45B

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

- (b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or
- (c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(3) Where a person:

- (a) issues an invitation to another person to enter into a contract containing a covenant;
- (b) makes an offer to another person to enter into a contract containing a covenant; or
- (c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms;

the first-mentioned person shall, by issuing that invitation, making that offer or making that fact known, be deemed to require the giving of the covenant.

(4) For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which:

- (a) a corporation that, or person who, is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or
- (b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragraph;

is or would be, or but for subsection (1) would be, entitled.

- (5) The requiring of the giving of, or the giving of, a covenant does not constitute a contravention of this section by reason that giving effect to the covenant would, or would but for the operation of subsection 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to engaging in conduct in relation to a covenant by way of:
- (a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or
 - (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an 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), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:
- (a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the corporation in relation to the covenant or proposed covenant; or
 - (b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A(1)(a)(ii).

Section 45C

- (8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:
- (a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an 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 corporation or any person associated with

the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services” were omitted.

- (2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words “require the giving of a covenant, or give a covenant” were omitted.
- (3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:
 - (a) the form of the covenant or proposed covenant; or
 - (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,

Section 45D

controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them; and

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

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

- (1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
 - (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

Section 45DA

- (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
- (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

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

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

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
- (3) Subsection (1) applies if the fourth person is a corporation.
- (4) Subsection (1) also applies if:
 - (a) the third person is a corporation and the fourth person is not a corporation; and
 - (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

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

- (1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:
 - (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
 - (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

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

Section 45DB

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

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
- (3) Subsection (1) applies if:
 - (a) the third person or the fourth person is a corporation, or both of them are corporations; and
 - (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

45DB Boycotts affecting trade or commerce

- (1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

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

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

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

45DC Involvement and liability of employee organisations

Certain organisations taken to be acting in concert

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

- (b) to have engaged in that conduct for the purposes for which the participants engaged in it.

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

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

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

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

Taking proceedings if organisation is a body corporate

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

Taking proceedings if organisation is not a body corporate

- (5) If the organisation is not a body corporate:
 - (a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all the persons who were members of the organisation at the time when the conduct was engaged in; and
 - (b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and
 - (c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and

Section 45DD

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

45DD Situations in which boycotts permitted

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

- (1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

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

- (2) If:
- (a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:
 - (i) an organisation of employees; or
 - (ii) an officer of an organisation of employees; and
 - (b) the conduct is only engaged in by the persons covered by paragraph (a); and
 - (c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a);
- the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in the conduct.

Dominant purpose of conduct relates to environmental protection or consumer protection

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

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

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

Section 45DD

- Note 2: If an environmental organisation or a consumer organisation is not a body corporate:
- (a) it is not a “person” and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but
 - (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

*Meaning of **industrial action**—basic definition*

- (4) In subsection (3), **industrial action** means:
- (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
 - (i) the terms and conditions of the work are prescribed, wholly or partly, by a workplace instrument or an order of an industrial body; or
 - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or
 - (b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by a workplace instrument or by an order of an industrial body; or
 - (c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or
 - (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

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

*Meaning of **industrial action**—further clarification*

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

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

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

Defences to contravention of subsection 45DB(1)

- (7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:
- (a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or
 - (b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

Each person to prove defence

- (8) If:
- (a) a person engages in conduct in concert with another person; and
 - (b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct;
- in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

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

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

Situations to which section applies

- (1) This section applies in the following situations:
- (a) a **supply situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to

Section 45E

supply goods or services to another person (the *second person*); or

- (b) an *acquisition situation*—in this situation, a person (the *first person*) has been accustomed, or is under an obligation, to acquire goods or services from another person (the *second person*).

Despite paragraphs (a) and (b), this section does not apply unless the first or second person is a corporation or both of them are corporations.

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

Prohibition in a supply situation

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

Prohibition in an acquisition situation

- (3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a

provision included for the purpose, or for purposes including the purpose, of:

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

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

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

*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

Section 45E

- (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).

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

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

46 Misuse of market power

- (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
 - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
- (1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.

Section 46

- (1AA) A corporation 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 corporation of supplying such goods or services, for the purpose of:
- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; 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 corporation has a substantial share of a market, the Court may have regard to the number and size of the competitors of the corporation 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 corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or
 - (b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;
- the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.
- (3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court shall have regard to the extent to which the conduct of the

body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

- (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
- (b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(3A) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate 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 body corporate or bodies corporate has or have, or may have, with another party or other parties; and
- (b) any covenants, or proposed covenants, that the body corporate 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 body corporate 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 body corporate has a substantial degree of power in a market, a body corporate may have a substantial degree of power in a market even though:

- (a) the body corporate does not substantially control the market; or
- (b) the body corporate does not have absolute freedom from constraint by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate in that market; or
 - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(3D) To avoid doubt, for the purposes of this section, more than 1 corporation may have a substantial degree of power in a market.

Section 46

- (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 corporation has contravened subsection (1), the court may have regard to:
 - (a) any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services; and
 - (b) the reasons for that conduct.
- (5) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that it acquires plant or equipment.
- (6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 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 corporation has taken advantage of its 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 corporation's substantial degree of power in the market;
 - (b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
 - (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;
 - (d) whether the conduct is otherwise related to the corporation'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 corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

46A Misuse of market power—corporation with substantial degree of power in trans-Tasman market

- (1) In this section:

conduct, in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market.

impact market means a market in Australia that is not a market exclusively for services.

market power, in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market.

trans-Tasman market means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

- (2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:
- (a) eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or
 - (b) preventing the entry of a person into an impact market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in an impact market.

- (2A) For the purposes of subsection (2):

Section 46A

- (a) the reference in paragraph (2)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
 - (b) the reference in paragraphs (2)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.
- (3) If:
 - (a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of market power in a trans-Tasman market; or
 - (b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to the corporation, together have a substantial degree of market power in a trans-Tasman market;the corporation is taken, for the purposes of this section, to have a substantial degree of market power in the trans-Tasman market.
- (4) In determining for the purposes of this section the degree of market power that a body corporate or bodies corporate has or have in a trans-Tasman market, the Federal Court is to have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:
 - (a) competitors, or potential competitors, of the body corporate, or of any of those bodies corporate, in the trans-Tasman market; or
 - (b) persons to whom or from whom the body corporate, or any of those bodies corporate, supplies or acquires goods or services in the trans-Tasman market.
- (5) Without extending by implication the meaning of subsection (2), a corporation is not taken to contravene that subsection merely because it acquires plant or equipment.
- (6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 49 and 50, because an authorisation or clearance is in force or because of the operation of subsection 45(8A) or section 93.

- (7) Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its market power for a purpose referred to in subsection (2) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.
- (8) It is the intention of the Parliament that this section, and the provisions of Parts VI and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the Commonwealth and authorities of the Commonwealth.
- (9) Subsection (8) has effect despite section 9 of the *Foreign States Immunities Act 1985*.

46B No immunity from jurisdiction in relation to certain New Zealand laws

- (1) It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 36A, 98H and 99A of the Commerce Act 1986 of New Zealand.
- (2) This section applies in and outside Australia.

47 Exclusive dealing

- (1) Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.
- (2) A corporation engages in the practice of exclusive dealing if the corporation:
 - (a) supplies, or offers to supply, goods or services;
 - (b) supplies, or offers to supply, goods or services at a particular price; or

Section 47

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

- (e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or
 - (f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.
- (4) A corporation also engages in the practice of exclusive dealing if the corporation:
- (a) acquires, or offers to acquire, goods or services; or
 - (b) acquires, or offers to acquire, goods or services at a particular price;
- on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
- (c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (d) in particular places or classes of places or in places other than particular places or classes of places.
- (5) A corporation also engages in the practice of exclusive dealing if the corporation refuses:
- (a) to acquire goods or services from a person; or
 - (b) to acquire goods or services at a particular price from a person;
- for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has supplied, or has

Section 47

not agreed not to supply, goods or services, or goods or services of a particular kind or description:

- (c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (d) in particular places or classes of places or in places other than particular places or classes of places.
- (6) A corporation also engages in the practice of exclusive dealing if the corporation:
- (a) supplies, or offers to supply, goods or services;
 - (b) supplies, or offers to supply, goods or services at a particular price; or
 - (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;
- on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.
- (7) A corporation also engages in the practice of exclusive dealing if the corporation refuses:
- (a) to supply goods or services to a person;
 - (b) to supply goods or services at a particular price to a person; or
 - (c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a person;
- for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.
- (8) A corporation also engages in the practice of exclusive dealing if the corporation grants or renews, or makes it known that it will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

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

Section 47

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

(13) In this section:

- (a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;
- (b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:
 - (i) the corporation engaging in the conduct or any body corporate related to that corporation; or
 - (ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and
- (c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

48 Resale price maintenance

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

49 Dual listed company arrangements that affect competition

- (1) A corporation must not:
 - (a) make a dual listed company arrangement if a provision of the proposed arrangement has the purpose, or would have or be

Section 49

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

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

Meaning of competition

- (3) For the purposes of this section, **competition**, in relation to a provision of a dual listed company arrangement or of a proposed dual listed company arrangement, means competition in any market in which:
 - (a) a corporation that is a party to the arrangement or would be a party to the proposed arrangement; or
 - (b) any body corporate related to such a corporation; supplies or acquires, or is likely to supply or acquire, goods or services or would, apart from the provision, supply or acquire, or be likely to supply or acquire, goods or services.
- (4) For the purposes of the application of this section in relation to a particular corporation, a provision of a dual listed company arrangement or of a proposed dual listed company arrangement is taken to have, or to be likely to have, the effect of substantially lessening competition if that provision and any one or more of the following provisions:

- (a) the other provisions of that arrangement or proposed arrangement;
 - (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;
- together have or are likely to have that effect.

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

- (1) A corporation must not directly or indirectly:

- (a) acquire shares in the capital of a body corporate; or
- (b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Note: The corporation 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).

- (2) A person must not directly or indirectly:

- (a) acquire shares in the capital of a corporation; or
- (b) acquire any assets of a corporation;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Note: The person will not be prevented from making the acquisition if the person 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 subsections (1) and (2) 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;

Section 50

- (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.

50A Acquisitions that occur outside Australia

(1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the **first controlling interest**) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest (the **second controlling interest**) in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:

- (a) the person's obtaining the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and
- (b) the person's obtaining the second controlling interest would not, in all the circumstances, result, or be likely to result, in such a benefit to the public that the obtaining should be disregarded for the purposes of this section;

make a declaration accordingly.

(1A) Without limiting the matters that may be taken into account in determining whether the obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the matters mentioned in subsection 50(3) must be taken into account for that purpose.

(1B) In determining whether the obtaining of the second controlling interest would result, or be likely to result, in such a benefit to the public that it should be disregarded for the purposes of this section:

Section 50A

- (a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.
- (2) Where an application under subsection (1) is made:
 - (a) the Tribunal shall give to:
 - (i) each corporation in relation to which the application relates; and
 - (ii) the Minister and the Commission;a notice in writing stating that the application has been made; and
 - (b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person are entitled to appear, or be represented, at the proceedings following the application.
- (3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.
- (4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under subsection (1).
- (5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).
- (6) After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the

declaration remains in force, carry on business in the market to which the declaration relates.

- (7) Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.
- (8) For the purposes of this section:
- (a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and
 - (b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate:
 - (i) controls the composition of the board of directors of another body corporate;
 - (ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or
 - (iii) holds shares in the capital of another body corporate; the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.

- (9) In this section:

market means a substantial market for goods or services in Australia, in a State or in a Territory.

51 Exceptions

- (1) In deciding whether a person has contravened this Part, the following must be disregarded:
- (a) anything specified in, and specifically authorised by:
 - (i) an Act (not including an Act relating to patents, trade marks, designs or copyrights); or
 - (ii) regulations made under such an Act;

Section 51

- (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.
- (1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:
- (a) a licence or other instrument issued or made under the law specifies one or both of the following:
 - (i) the person authorised to engage in the conduct;
 - (ii) the place where the conduct is to occur; and
 - (b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).
- For this purpose, **law** means an Act, State Act, enactment or Ordinance.
- (1B) Subsections (1) and (1A) apply regardless of when the Acts, State Acts, enactments, Ordinances, regulations or instruments referred to in those subsections were passed, made or issued.
- (1C) The operation of subsection (1) is subject to the following limitations:
- (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;

- (b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;
- (c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;
- (d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations:
 - (i) referred to in the subparagraph concerned; and
 - (ii) that came into operation more than 2 years before the particular thing happened;
- (e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:
 - (i) at the time of the alleged contravention referred to in subsection (1) the State or Territory was a fully-participating jurisdiction and a party to the Competition Principles Agreement; or
 - (ii) all of the following conditions are met:
 - (A) the Minister published a notice in the *Gazette* under subsection 150K(1) in relation to the State or Territory, or the State or Territory ceased to be a party to the Competition Principles Agreement, within 12 months before the alleged contravention referred to in subsection (1);
 - (B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the Minister published the notice or the State or Territory ceased to be a party;
 - (C) the law authorising the thing was in force immediately before the Minister published the notice or the State or Territory ceased to be a party;
- (f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things

Section 51

are prescribed by regulations made under this Act for the purposes of this paragraph.

- (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:
- (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;
 - (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 commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.
- (3) A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of:
- (a) the imposing of, or giving effect to, a condition of:
 - (i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or
 - (ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design;to the extent that the condition relates to:
 - (iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;
 - (iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;
 - (v) the work or other subject matter in which the copyright subsists; or
 - (vi) the eligible layout in which the EL rights subsist;
 - (b) the inclusion in a contract, arrangement or understanding 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

Section 51AAA

- (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.
- (5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

51AAA Concurrent operation of State and Territory laws

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.

Part IVB—Industry codes

Division 1—Preliminary

51ACA Definitions

(1) In this Part:

applicable industry code, in relation to a corporation that is a participant in an industry, means:

- (a) the prescribed provisions of any mandatory industry code relating to the industry; and
- (b) the prescribed provisions of any voluntary industry code that binds the corporation.

consumer, in relation to an industry, means a person to whom goods or services are or may be supplied by participants in the industry.

industry code means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

mandatory industry code means an industry code that is declared by regulations under section 51AE to be mandatory.

related contravention: a person engages in conduct that constitutes a ***related contravention*** of an applicable industry code, if the person:

- (a) aids, abets, counsels or procures a corporation to contravene the applicable industry code; or
- (b) induces, whether by threats or promises or otherwise, a corporation to contravene the applicable industry code; or
- (c) is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a corporation of the applicable industry code; or
- (d) conspires with others to effect a contravention by a corporation of the applicable industry code.

voluntary industry code means an industry code that is declared by regulations under section 51AE to be voluntary.

Section 51ACA

- (2) For the purposes of this Part, a voluntary industry code binds a person who has agreed, as prescribed, to be bound by the code and who has not subsequently ceased, as prescribed, to be bound by it.
- (3) To avoid doubt, it is declared that:
 - (a) franchising is an industry for the purposes of this Part; and
 - (b) franchisors and franchisees are participants in the industry of franchising, whether or not they are also participants in another industry.

Division 2—Contravention of industry codes

51AD Contravention of industry codes

A corporation must not, in trade or commerce, contravene an applicable industry code.

Division 3—Public warning notices

51ADA Commission may issue a public warning notice

Commission may issue a public warning notice

- (1) The Commission may issue to the public a written notice containing a warning about the conduct of a person if:
 - (a) the Commission has reasonable grounds to suspect that the conduct may constitute:
 - (i) if the person is a corporation—a contravention of an applicable industry code by the corporation; or
 - (ii) in any case—a related contravention of an applicable industry code by the person; and
 - (b) the Commission is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
 - (c) the Commission is satisfied that it is in the public interest to issue the notice.

Notice is not a legislative instrument

- (2) A notice issued under subsection (1) is not a legislative instrument.

Division 4—Orders to redress loss or damage suffered by non-parties etc.

51ADB Orders to redress loss or damage suffered by non-parties etc.

Orders

(1) If:

- (a) a person engaged in conduct (the *contravening conduct*) that:
 - (i) if the person was a corporation—constituted a contravention of an applicable industry code; or
 - (ii) in any case—constituted a related contravention of an applicable industry code; and
- (b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and
- (c) the class includes persons (*non-parties*) who are not, or have not been, parties to a proceeding (an *enforcement proceeding*) instituted under Part VI in relation to the contravening conduct;

any court having jurisdiction in the matter may, on the application of the Commission, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the court may make include all or any of the orders set out in section 51ADC.

(2) An order under subsection (1) may be made against:

- (a) the person mentioned in paragraph (1)(a); or
- (b) a person involved in the contravening conduct.

(3) A court must not make an order under subsection (1) unless the court considers that the order will:

- (a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct; or
- (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct.

Section 51ADB

Application for orders

- (4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.
- (5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

- (6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), a court may have regard to the conduct of:
 - (a) the person; and
 - (b) the non-parties;in relation to the contravening conduct, since the contravention occurred.
- (7) In determining whether to make an order under subsection (1), a court need not make a finding about either of the following matters:
 - (a) which persons are non-parties in relation to the contravening conduct;
 - (b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party is bound by an order etc.

- (8) If:
 - (a) an order is made under subsection (1) against a person; and
 - (b) the loss or damage suffered, or likely to be suffered, by a non-party in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and
 - (c) the non-party has accepted the redress, prevention or reduction;then:
 - (d) the non-party is bound by the order; and
 - (e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party; and

- (f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party in relation to that loss or damage.

51ADC Kinds of orders that may be made to redress loss or damage suffered by non-parties etc.

Without limiting subsection 51ADB(1), the orders that a court may make under that subsection against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a non-party referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to a non-party referred to in that subsection;
- (e) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party referred to in that subsection;
- (f) an order directing the respondent, at his or her own expense, to supply specified services to a non-party referred to in that subsection;

Section 51ADC

- (g) an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 53A), directing the respondent to execute an instrument that:
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

Division 5—Investigation power

51ADD Commission may require corporation to provide information

- (1) This section applies if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code.
- (2) The Commission may give the corporation a written notice that requires the corporation to give the information, or to produce the document, to the Commission within 21 days after the notice is given to the corporation.
- (3) The notice must:
 - (a) name the corporation to which it is given; and
 - (b) specify:
 - (i) the information or document to which it relates; and
 - (ii) the provisions of the applicable industry code which require the corporation to keep, to generate or to publish the information or document; and
 - (c) explain the effect of sections 51ADE, 51ADF and 51ADG.
- (4) The notice may relate to more than one piece of information or more than one document.

51ADE Extending periods for complying with notices

- (1) A corporation that has been given a notice under section 51ADD may, at any time within 21 days after the notice was given to the corporation, apply in writing to the Commission for an extension of the period for complying with the notice.
- (2) The Commission may, by written notice given to the corporation, extend the period within which the corporation must comply with the notice.

51ADF Compliance with notices

A corporation that is given a notice under section 51ADD must comply with it within:

Section 51ADG

- (a) the period of 21 days specified in the notice; or
- (b) if the period for complying with the notice has been extended under section 51ADE—the period as so extended.

51ADG False or misleading information etc.

- (1) A corporation must not, in compliance or purported compliance with a notice given under section 51ADD:
 - (a) give to the Commission false or misleading information; or
 - (b) produce to the Commission documents that contain false or misleading information.
- (2) This section does not apply to:
 - (a) information that the corporation could not have known was false or misleading; or
 - (b) the production to the Commission of a document containing false or misleading information if the document is accompanied by a statement of the corporation that the information is false or misleading.

Division 6—Miscellaneous

51AE Regulations relating to industry codes

The regulations may:

- (a) prescribe an industry code, or specified provisions of an industry code, for the purposes of this Part; and
- (b) declare the industry code to be a mandatory industry code or a voluntary industry code; and
- (c) for a voluntary industry code, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be so bound (by reference to provisions of the code or otherwise).

51AEA Concurrent operation of State and Territory laws

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.

Part VI—Enforcement and remedies

75B Interpretation *[see Note 2]*

- (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 95AZN, shall be read as a reference to a person who:
 - (a) has aided, abetted, counselled or procured the contravention;
 - (b) has induced, whether by threats or promises or otherwise, the contravention;
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - (d) has conspired with others to effect the contravention.
- (2) In this Part, unless the contrary intention appears:
 - (a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;
 - (b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
 - (c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

76 Pecuniary penalties

- (1) If the Court is satisfied that a person:
 - (a) has contravened any of the following provisions:
 - (i) a provision of Part IV (other than section 44ZZRF or 44ZZRG);
 - (iii) section 95AZN; or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision; the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (*Boycott conduct* is defined in subsection 87AA(2).)

- (1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:
- (aa) for each act or omission to which this section applies that relates to section 44ZZRJ or 44ZZRK—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the court can determine the total value of the benefits that have been obtained (within the meaning of Division 1 of Part IV) by one or more persons and that are reasonably attributable to the act or omission—3 times that total value;
 - (iii) if the Court cannot determine the total value of those benefits—10% of the annual turnover (within the meaning of Division 1 of Part IV) of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred; and
 - (a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—\$750,000; and
 - (b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly

Section 76

and that is reasonably attributable to the act or omission—3 times the value of that benefit;

- (iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred; and

- (c) for each act or omission to which this section applies that relates to section 95AZN—\$33,000; and
- (d) for each other act or omission to which this section applies—\$10,000,000.

Note: For *annual turnover*, see subsection (5).

- (1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:
 - (a) for each act or omission to which this section applies that relates to section 95AZN—\$6,600; and
 - (b) for each other act or omission to which this section applies—\$500,000.
- (2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of, section 45D, 45DA, 45DB, 45E or 45EA.
- (3) If conduct constitutes a contravention of two or more provisions of Part IV (other than section 44ZZRF or 44ZZRG), a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.
- (4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which 2 or more of the limits in paragraphs (1A)(aa), (a) and (b) apply is an amount up to the highest of those limits.

Annual turnover

- (5) For the purposes of this section, the *annual turnover* of a body corporate, during the turnover period, is 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 that 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.
- (6) Expressions used in subsection (5) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

76A Defence to proceedings under section 76 relating to a contravention of section 95AZN

- (1) In this section:

contravention, in relation to a section, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section.

- (2) In proceedings against a person (the **respondent**) under section 76 in relation to an alleged contravention of section 95AZN, it is a defence if the respondent establishes:
- (a) that the contravention in respect of which the proceedings were instituted was due to reasonable mistake; or
 - (b) that the contravention in respect of which the proceedings were instituted was due to reasonable reliance on information supplied by another person; or
 - (c) that:
 - (i) the contravention in respect of which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the respondent's control; and
 - (ii) the respondent took reasonable precautions and exercised due diligence to avoid the contravention.

Section 76B

- (3) In paragraphs (2)(b) and (c), *another person* does not include a person who was:
- (a) a servant or agent of the respondent; or
 - (b) if the respondent is a body corporate—a director, servant or agent of the respondent;
- at the time when the alleged contravention occurred.

76B What happens if substantially the same conduct is a contravention of Part IV or section 95AZN and an offence?

- (1) In this section:

contravention, in relation to a section or Part, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section or Part.

pecuniary penalty order means an order under section 76 for the payment of a pecuniary penalty.

- (2) The Court must not make a pecuniary penalty order against a person in relation to a contravention of Part IV or section 95AZN if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.
- (3) Proceedings for a pecuniary penalty order against a person in relation to a contravention of Part IV or section 95AZN are stayed if:
- (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
- The proceedings for the pecuniary penalty order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings are dismissed.
- (4) Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of Part IV or section 95AZN regardless of whether a pecuniary penalty order has been made against the person in respect of the contravention.

- (5) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:
- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of Part IV or section 95AZN (whether or not the order was made); and
 - (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

- (6) In this section:

offence means an offence against a law of the Commonwealth, a State or a Territory.

76C Defence to proceedings relating to exclusionary provisions

Defence

- (1) In proceedings against a person in relation to a contravention of subparagraph 45(2)(a)(i) or (b)(i) in relation to an exclusionary provision, it is a defence if the person establishes that the provision:
- (a) is for the purposes of a joint venture; and
 - (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

Application of subsections 45(3) and (4)

- (2) Subsections 45(3) and (4) apply for the purposes of subsection (1) in the same way as they apply for the purposes of section 45.

Section 77

Definitions

- (3) In this section:

contravention of subparagraph 45(2)(a)(i) or (b)(i) includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of subparagraph 45(2)(a)(i) or (b)(i).

proceedings means proceedings instituted under:

- (a) this Part or section 163A; or
- (b) section 21 or 23 of the *Federal Court of Australia Act 1976*; or
- (c) section 39B of the *Judiciary Act 1903*.

77 Civil action for recovery of pecuniary penalties

- (1) The Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.
- (2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

77A Indemnification of officers

- (1) A body corporate (the ***first body***), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:
 - (a) a civil liability;
 - (b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Penalty: 25 penalty units.

- (2) For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

Definitions

- (3) In this section:

civil liability means a liability to pay a pecuniary penalty under section 76 for a contravention of a provision of Part IV.

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

77B Certain indemnities not authorised and certain documents void

- (1) Section 77A does not authorise anything that would otherwise be unlawful.
- (2) Anything that purports to indemnify a person against a liability is void to the extent that it contravenes section 77A.

77C Application of section 77A to a person other than a body corporate

If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:

- (a) convicted of an offence (the ***relevant offence***) against subsection 77A(1) of this Act; or
- (b) convicted of an offence (the ***relevant offence***) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection 77A(1) of this Act;

the relevant offence is taken to be punishable on conviction by a fine not exceeding 5 penalty units.

78 Criminal proceedings not to be brought for contraventions of Part IV or V [see Note 2]

Criminal proceedings do not lie against a person by reason only that the person:

- (a) has contravened a provision of Part IV (other than section 44ZZRF or 44ZZRG); or
- (b) has attempted to contravene such a provision;
- (c) has aided, abetted, counselled or procured a person to contravene such a provision;

Section 79

- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision.

79 Offences against section 44ZZRF or 44ZZRG

- (1) A person who:
 - (aa) attempts to contravene; or
 - (a) aids, abets, counsels or procures a person to contravene; or
 - (b) induces, or attempts to induce, a person (whether by threats or promises or otherwise) to contravene; or
 - (c) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
 - (d) conspires with others to contravene;

a cartel offence provision is taken to have contravened that provision and is punishable:

- (e) in a case where:
 - (i) the provision is a cartel offence provision; and
 - (ii) the person is not a body corporate;
- by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both; or
- (f) in any other case—accordingly.

- (1AA) For the purposes of the application of subsection (1) to a case where:

- (a) the provision is a cartel offence provision; and
 - (b) the person is a body corporate other than a corporation;

assume that each reference in paragraph 44ZZRF(3)(c) or 44ZZRG(3)(c) to a corporation were read as a reference to a body corporate.

- (1AB) Subsections 11.1(2) to (6) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(aa) in the same way that they apply in relation to the offence of attempt under subsection 11.1(1) of the *Criminal Code*.

- (1A) Subsections 11.2(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(a) in the same way that they apply in relation to subsection 11.2(1) of the *Criminal Code*.
- (1B) Subsections 11.5(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(d) in the same way that they apply in relation to the offence of conspiracy under subsection 11.5(1) of the *Criminal Code*.
- (5) Subsections 11.1(1), 11.2(1), 11.2A(1), and 11.4(1) of the *Criminal Code* do not apply in relation to an offence against a cartel offence provision.
- (7) In this section:
cartel offence provision means section 44ZZRF or 44ZZRG.

79A Enforcement and recovery of certain fines

- (1) If:
 - (a) a fine has been imposed on a person for:
 - (i) an offence against section 44ZZRF, 44ZZRG, 154Q or 155; or
 - (ii) an offence against section 149.1 of the *Criminal Code* that relates to Part XID; and
 - (b) the person defaults in payment of the fine;a Court may:
 - (c) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or
 - (d) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.
- (2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.
- (3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to

Section 79A

pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

- (a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and
 - (b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.
- (4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:
 - (a) on payment of the fine; or
 - (b) if the fine is not paid—on full compliance with the order.
- (5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* (including an order described in subsection 15A(1AA) of that Act) in respect of a fine shall be calculated at the rate of one day's imprisonment for each \$25 of the amount of the fine that is from time to time unpaid.
- (6) Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.
- (7) Subject to subsection (8), where:
 - (a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and
 - (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

- (8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.
- (9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).
- (11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

79B Preference must be given to compensation for victims

If the Court considers that:

- (a) it is appropriate to order a person (the *defendant*):
 - (i) to pay a pecuniary penalty under section 76; or
 - (ii) to impose a fine under section 44ZZRF or 44ZZRG; in respect of a contravention, or an involvement in a contravention, of this Act; and
 - (b) it is appropriate to order the defendant to pay compensation to a person who has suffered loss or damage in respect of the contravention or the involvement; and
 - (c) the defendant does not have sufficient financial resources to pay both the pecuniary penalty or fine and the compensation;
- the Court must give preference to making an order for compensation.

80 Injunctions

- (1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
 - (a) a contravention of a provision of:
 - (i) Part IV; or
 - (ii) Division 2 or 5 of Part IVB; or
 - (b) attempting to contravene such a provision; or
 - (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or

Section 80

- (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
 - (f) conspiring with others to contravene such a provision;
- the Court may grant an injunction in such terms as the Court determines to be appropriate.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (**Boycott conduct** is defined in subsection 87AA(2).)

- (1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).
- (1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50.
- (1AAA) Subject to subsection (1B), a person other than the Minister or the Commission may not apply for an injunction on the ground of:
 - (a) a person's actual, attempted or proposed contravention of section 50A; or
 - (b) a person's actual or proposed involvement in a contravention of section 50A.
- (1B) Where the Tribunal has, on the application of a person (in this subsection referred to as the **applicant**) other than the Minister or the Commission, made a declaration under subsection 50A(1) in relation to the acquisition by a person of a controlling interest in a corporation, the applicant is entitled to make an application under subsection (1) for an injunction by reason that the corporation has contravened or attempted to contravene or is proposing to contravene subsection 50A(6) in relation to that declaration.

- (2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (3) The Court may rescind or vary an injunction granted under subsection (1) or (2).
- (4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
 - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.
- (6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.
- (7) Where:
 - (a) in a case to which subsection (6) does not apply the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and

Section 80AB

- (b) the Minister gives the undertaking;
the Court shall accept the undertaking by the Minister and shall not require a further undertaking from any other person.
- (8) Subsection (7) does not apply in relation to an application for an injunction relating to Part IV.
- (9) If the Director of Public Prosecutions makes an application to the Court for the grant of an injunction under this section in relation to:
 - (a) a person's contravention, or proposed contravention, of section 44ZZRF or 44ZZRG; or
 - (b) a person's involvement, or proposed involvement, in a contravention of section 44ZZRF or 44ZZRG;the Court must not require the Director of Public Prosecutions or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

80AB Stay of injunctions

- (1) The Court may stay the operation of an injunction granted under section 80 if:
 - (a) the injunction is in respect of conduct that constitutes or would constitute a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA or an associated contravention; and
 - (b) there is a proceeding in respect of a dispute relating to the conduct pending before a court, tribunal or authority of a State or Territory under a prescribed provision of a law of the State or Territory; and
 - (c) the conduct relates to the supply of goods or services to, or the acquisition of goods or services from, a person who is or becomes a party to the proceeding referred to in paragraph (b); and
 - (d) any of the following has applied for the stay:
 - (i) a Minister of the Commonwealth;
 - (ii) if subparagraph (b)(ii) applies—a Minister of the State or Territory concerned;
 - (iii) a party to the proceeding for the injunction; and
 - (e) the Court considers that granting the stay:
 - (i) would be likely to facilitate the settlement of the dispute by conciliation; and

- (ii) would, in all the circumstances, be just.
- (2) An order staying the operation of the injunction may be expressed to have effect for a specified period and may be varied or rescinded by the Court at any time.
- (3) If the proceeding referred to in paragraph (1)(b) is terminated because the State or Territory court, tribunal or authority has settled the dispute to which the conduct relates by conciliation, the Court must not make any order in relation to the costs of the proceedings in respect of the granting of the injunction or in relation to the costs of any proceedings for the rescission of the injunction.
- (4) Nothing in this section affects other powers of the Court.
- (5) In this section:

associated contravention means:

- (a) attempting to contravene subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or
- (b) aiding, abetting, counselling or procuring a person to contravene any of those provisions; or
- (c) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene any of those provisions; or
- (d) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of any of those provisions; or
- (e) conspiring with others to contravene any of those provisions.

injunction includes an interim injunction.

80AC Injunctions to prevent mergers if clearance or authorisation granted on the basis of false or misleading information

- (1) If, on the application of the Commission, the Court is satisfied that:
 - (a) a person is proposing to acquire shares in the capital of a body corporate or assets of a person; and
 - (b) the person was granted, under Division 3 of Part VII (mergers), a clearance or an authorisation for the proposed acquisition on the basis of information that was false or misleading in a material particular; and

Section 81

- (c) that information was given by the person or a body corporate that was related to the person; and
 - (d) if that information had not been given, the clearance or authorisation would not have been granted; and
 - (e) apart from the clearance or authorisation, the acquisition would contravene section 50 if it occurred;
- then the Court may grant an injunction in such terms as the Court determines to be appropriate.
- (2) However, the Court must not grant the injunction if:
- (a) the person was granted both a clearance and an authorisation for the acquisition under Division 3 of Part VII; and
 - (b) the Court could not grant an injunction under this section in relation to both the clearance and the authorisation.

Example: If a clearance for an acquisition was granted by the Commission on the basis of false or misleading information, and an authorisation for the acquisition was granted by the Tribunal on the basis of true information, then the Court cannot grant an injunction under this section because it would not be able to grant the injunction in relation to the authorisation.

81 Divestiture where merger contravenes section 50 or 50A

- (1) The Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of the shares or assets acquired in contravention of that section.
- (1A) Where:
- (a) the Court finds, in a proceeding instituted under this Part, that a person (in this subsection referred to as the **acquirer**) has acquired shares in the capital of a body corporate or any assets of a person in contravention of section 50;
 - (b) the Court finds, whether in that proceeding or any other proceeding instituted under this Part, that the person (in this section referred to as the **vendor**) from whom the acquirer acquired those shares or those assets, as the case may be, was involved in the contravention; and
 - (c) at the time when the finding referred to in paragraph (b) is made, any of those shares or those assets, as the case may be,

are vested in the acquirer or, if the acquirer is a body corporate, in any body corporate that is related to the acquirer;

the Court may, on the application of the Commission, declare that the acquisition, in so far as it relates to the shares or assets referred to in paragraph (c), is void as from the day on which it took place and, where the Court makes such a declaration:

- (d) the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and
 - (e) the vendor shall refund to the acquirer any amount paid to the vendor in respect of the acquisition of the shares or assets to which the declaration relates.
- (1B) Where a declaration has been made under subsection 50A(1) in relation to the obtaining of a controlling interest in a corporation, or in each of 2 or more corporations, the Court may, on the application of the Minister or the Commission, if it finds, or has in a proceeding instituted under section 80 found, that that corporation, or any of those corporations, as the case may be (in this subsection referred to as the **relevant corporation**), has contravened subsection 50A(6), by order, for the purpose of ensuring that the obtaining of that controlling interest ceases to have the result referred to in paragraph 50A(1)(a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.
- (1C) Where an application is made to the Court for an order under subsection (1) or a declaration under subsection (1A), the Court may, instead of making an order under subsection (1) for the purpose of securing the disposal by a person of shares or assets or an order under subsection (1A) that the acquisition by a person of shares or assets is void, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.
- (2) An application under subsection (1), (1A) or (1B) may be made at any time within 3 years after the date on which the contravention occurred.
- (3) Where an application for directions under subsection (1) or for a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a
-

Section 81A

declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsections (1) and (1A).

81A Divestiture where merger done under clearance or authorisation granted on false etc. information

Circumstances when this section applies

- (1) This section applies if the Court is satisfied that:
- (a) a person (the **acquirer**) has acquired shares in the capital of a body corporate or assets of another person; and
 - (b) before the acquisition, the acquirer was granted, under Division 3 of Part VII (mergers), a clearance or an authorisation for the acquisition on the basis of information that was false or misleading in a material particular; and
 - (c) that information was provided by the acquirer or a body corporate that was related to the acquirer; and
 - (d) the Court or another court has found that the acquirer or related body corporate has contravened section 95AZN or Part 7.4 of the *Criminal Code* by giving that information; and
 - (e) if that information had not been given, the clearance or authorisation would not have been granted; and
 - (f) apart from the clearance or authorisation, the acquisition would have contravened section 50; and
 - (g) any or all of those shares or assets are vested in the acquirer, the related body corporate or any other body corporate that is related to the acquirer.

Divestiture by the acquirer and related bodies corporate

- (2) The Court may, on the application of the Commission, by order, give directions for the purpose of securing the disposal of all or any of those shares or assets by the acquirer, the related body corporate or any other body corporate that is related to the acquirer.
- (3) However, the Court must not make an order under subsection (2) if:
- (a) the acquirer was granted, under Division 3 of Part VII, both a clearance and an authorisation for the acquisition; and

- (b) the matters in subsection (1) are not satisfied in relation to both the clearance and the authorisation.

Example: If a clearance for an acquisition was granted by the Commission on the basis of false or misleading information, and an authorisation for the acquisition was granted by the Tribunal on the basis of true information, then the Court cannot make an order under subsection (2) because subsection (1) would not be satisfied in relation to the authorisation.

Declaration that acquisition void—when vendor involved

- (4) In addition to being satisfied of the matters in subsection (1), if the Court, or another court, has found that the person (the **vendor**) from whom the acquirer acquired the shares or assets was involved in the contravention referred to in paragraph (1)(d), then the Court may, on the application of the Commission, by order, declare that the acquisition, in so far as it relates to those shares or assets, is void as from the day on which it occurred.
- (5) If the Court makes an order under subsection (4), then:
 - (a) the shares or assets to which the declaration relates are taken not to have been disposed of by the vendor; and
 - (b) the vendor must refund to the acquirer any amount paid to the vendor for acquiring the shares or assets.
- (6) However, the Court must not make an order under subsection (4) if:
 - (a) the acquirer was granted, under Division 3 of Part VII, both a clearance and an authorisation for the acquisition; and
 - (b) the matters in subsections (1) and (4) are not satisfied in relation to both the clearance and the authorisation.

Alternative to orders under subsections (2) and (4)

- (7) If an application is made to the Court for an order under subsection (2) or (4) against a person, the Court may, instead of making an order of the kind mentioned in that subsection, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

Section 82

When application for orders under this section must be made

- (8) An application under subsection (2) or (4) may be made at any time within 3 years after the day on which the acquisition occurred.

Court may make orders even if not satisfied of all matters

- (9) If an application for an order under subsection (2) or (4) is made, the Court may, if the Court determines it to be appropriate, make an order by consent of all the parties to the proceedings, whether or not the Court is satisfied of:
- (a) for an order under subsection (2)—the matters in subsection (1); and
 - (b) for an order under subsection (4)—the matters in subsections (1) and (4).

82 Actions for damages [see Note 2]

- (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

83 Finding in proceedings to be evidence [see Note 2]

In a proceeding against a person under section 82 or in an application under subsection 51ADB(1) or 87(1A) for an order against a person, a finding of any fact by a court made in proceedings under section 77, 80, 81, 86C, 86D or 86E, or for an offence against section 44ZZRF or 44ZZRG, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part IV, IVA, IVB, V or VC is *prima facie* evidence of that fact and the finding may be proved by production of a document under the seal of the court from which the finding appears.

84 Conduct by directors, employees or agents

(1) If, in:

- (a) a prosecution for an offence against section 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate; or
- (b) a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 44ZZRJ, 44ZZRK, 46 or 46A or Part IVB applies;

it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:

- (c) a director, employee or agent of the body corporate engaged in that conduct; and
- (d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
- (e) the director, employee or agent had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate:

- (a) by a director, employee or agent of the body corporate within the scope of the 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, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

(3) If, in:

- (a) a prosecution for an offence against section 44ZZRF or 44ZZRG in respect of conduct engaged in by a person other than a body corporate; or
- (b) a proceeding under this Part in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which section 44ZZRJ or 44ZZRK or Part IVB applies;

it is necessary to establish the state of mind of the person, it is sufficient to show that:

Section 85

- (c) an employee or agent of the person engaged in that conduct; and
 - (d) the employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
 - (e) the employee or agent had that state of mind.
- (4) Conduct engaged in on behalf of a person other than a body corporate:
 - (a) by an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or
 - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.
- (4A) If:
 - (a) a person other than a body corporate is convicted of an offence; and
 - (b) subsection (3) or (4) applied in relation to the conviction on the basis that the person was the person first mentioned in that subsection; and
 - (c) the person would not have been convicted of the offence if that subsection had not been enacted;the person is not liable to be punished by imprisonment for that offence.
- (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

85 Defences

If, in any proceedings under this Part against a person other than a body corporate, it appears to the Court that the person has or may have:

- (a) engaged in conduct in contravention of a provision of Part IV; or
- (b) engaged in conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f);

but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit.

86 Jurisdiction of courts *[see Note 2]*

- (1AA) A reference in this section to this Act, or to a Part, Division or section of this Act, is a reference to this Act, or to that Part, Division or section, as it has effect as a law of the Commonwealth.
- (1) Jurisdiction is conferred on the Federal Court in any matter arising under this Act in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part or has been instituted in relation to subsection 2(1) of the Australian Consumer Law (as applied under Division 1 of Part XI).
- (1A) Jurisdiction is conferred on the Federal Magistrates Court in any matter arising under section 46 or Part IVB in respect of which a civil proceeding is instituted by a person other than the Minister.
- (2) The several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise, and, subject to the Constitution, jurisdiction is conferred on the several courts of the Territories, with respect to any matter arising under Part IVB in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.
- (3) Nothing in subsection (2) shall be taken to enable an inferior court of a State or Territory to grant a remedy other than a remedy of a kind that the court is able to grant under the law of that State or Territory.
- (3A) The Supreme Court of a State is invested with federal jurisdiction with respect to any matter in respect of which a civil proceeding covered by section 44ZZRI is instituted in that Court.

Section 86AA

- (3B) Subject to the Constitution, the Supreme Court of a Territory is conferred with jurisdiction with respect to any matter in respect of which a civil proceeding covered by section 44ZZRI is instituted in that Court.
- (4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:
 - (a) the jurisdiction of the Federal Magistrates Court under subsection (1A); and
 - (b) the jurisdiction of the several courts of the States and Territories under subsection (2); and
 - (ba) the jurisdiction of the Supreme Courts of the States under subsection (3A); and
 - (bb) the jurisdiction of the Supreme Courts of the Territories under subsection (3B); and
 - (c) the jurisdiction of the High Court under section 75 of the Constitution.

86AA Limit on jurisdiction of Federal Magistrates Court

If proceedings under section 82 are instituted in, or transferred to, the Federal Magistrates Court, the Federal Magistrates Court does not have jurisdiction to award an amount for loss or damage that exceeds:

- (a) \$750,000; or
- (b) if another amount is specified in the regulations—that other amount.

Note: For transfers from the Federal Court to the Federal Magistrates Court, see section 32AB of the *Federal Court of Australia Act 1976*. For transfers from the Federal Magistrates Court to the Federal Court, see section 39 of the *Federal Magistrates Act 1999*.

86A Transfer of matters

- (1) Where:
 - (a) a civil proceeding instituted (whether before or after the commencement of this section) by a person other than the Minister or the Commission is pending in the Federal Court; and

- (b) a matter for determination in the proceeding arose under Part IVB;

the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Court's own motion, transfer to a court of a State or Territory the matter referred to in paragraph (b) and may also transfer to that court any other matter for determination in the proceeding.
- (2) The Federal Court shall not transfer a matter to another court under subsection (1) unless the other court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:
 - (a) the matter arises out of or is related to a proceeding that is pending in the other court; or
 - (b) it is otherwise in the interests of justice that the matter be determined by the other court.
- (3) Where the Federal Court transfers a matter to another court under subsection (1):
 - (a) further proceedings in the matter shall be as directed by the other court; and
 - (b) the judgment of the other court in the matter is enforceable throughout Australia and the external Territories as if it were a judgment of the Federal Court.

86C Non-punitive orders

- (1) The Court may, on application by the Commission, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
- (1A) The Court may, on application by the Director of Public Prosecutions, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct that is:
 - (a) a contravention of section 44ZZRF or 44ZZRG; or
 - (b) an involvement in a contravention of section 44ZZRF or 44ZZRG.
- (2) The orders that the Court may make in relation to the person are:
 - (a) a community service order; and
 - (b) a probation order for a period of no longer than 3 years; and

Section 86C

- (c) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
 - (d) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) This section does not limit the Court's powers under any other provision of this Act.
- (4) In this section:

community service order, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:

- (a) is specified in the order; and
- (b) relates to the conduct;

for the benefit of the community or a section of the community.

Example: The following are examples of community service orders:

- (a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and
- (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.

contravening conduct means conduct that:

- (a) contravenes Part IV or IVB or section 95AZN; or
- (b) constitutes an involvement in a contravention of any of those provisions.

probation order, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:

- (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to

the contravening conduct, similar conduct or related conduct;
and

- (b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

86D Punitive orders—adverse publicity

- (1) The Court may, on application by the Commission, make an adverse publicity order in relation to a person who:
 - (a) has been ordered to pay a pecuniary penalty under section 76;
or
 - (b) is guilty of an offence against section 44ZZRF or 44ZZRG.
- (1A) The Court may, on application by the Director of Public Prosecutions, make an adverse publicity order in relation to a person who is guilty of an offence against section 44ZZRF or 44ZZRG.
- (2) In this section, an ***adverse publicity order***, in relation to a person, means an order that:
 - (a) requires the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
 - (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) This section does not limit the Court's powers under any other provision of this Act.

Section 86E

86E Order disqualifying a person from managing corporations

- (1) On application by the Commission, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
- (a) the Court is satisfied that the person has contravened, has attempted to contravene or has been involved in a contravention of Part IV; and
 - (b) the Court is satisfied that the disqualification is justified.

Note: Section 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

- (1A) On application by the Director of Public Prosecutions, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
- (a) the Court is satisfied that the person has contravened or has been involved in a contravention of section 44ZZRF or 44ZZRG; and
 - (b) the Court is satisfied that the disqualification is justified.

Note: Section 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

- (2) In determining under subsection (1) or (1A) whether the disqualification is justified, the Court may have regard to:
- (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (3) The Commission must notify ASIC if the Court makes an order under subsection (1). The Commission must give ASIC a copy of the order.

Note: ASIC must keep a register of persons who have been disqualified from managing corporations: see section 1274AA of the *Corporations Act 2001*.

- (3A) The Director of Public Prosecutions must notify ASIC if the Court makes an order under subsection (1A). The Director of Public Prosecutions must give ASIC a copy of the order.

Section 86F

Note: ASIC must keep a register of persons who have been disqualified from managing corporations—see section 1274AA of the *Corporations Act 2001*.

(3B) For the purposes of this Act (other than this section or section 86F), an order under this section is not a penalty.

(4) In this section:

ASIC means the Australian Securities and Investments Commission.

86F Privilege against exposure to penalty—disqualification from managing corporations

Court proceeding

(1) In a civil or criminal proceeding under, or arising out of, this Act, a person is not entitled to refuse or fail to comply with a requirement:

- (a) to answer a question or give information; or
- (b) to produce a document or any other thing; or
- (c) to do any other act;

on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

(2) Subsection (1) applies whether or not the person is a defendant in the proceeding or in any other proceeding.

Statutory requirement

(3) A person is not entitled to refuse or fail to comply with a requirement under this Act:

- (a) to answer a question or give information; or
- (b) to produce a document or any other thing; or
- (c) to do any other act;

on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

Section 87

Definition

- (4) In this section:

penalty includes forfeiture.

87 Other orders [see Note 2]

- (1) Without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against section 44ZZRF or 44ZZRG, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA, IVB, V or VC, or of the Australian Consumer Law, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 82, 86C, 86D or 86E, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.
- (1A) Without limiting the generality of sections 51ADB and 80, the Court may:
- (a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Division 2 of Part IVB; or
 - (b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E) or Division 2 of Part IVB; or
 - (ba) on the application of the Director of Public Prosecutions in accordance with subsection (1BA) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:

- (c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or
 - (d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.
- (1B) The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:
 - (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E) or Division 2 of Part IVB; and
 - (b) have, before the application is made, consented in writing to the making of the application.
- (1BA) The Director of Public Prosecutions may make an application under paragraph (1A)(ba) on behalf of one or more persons identified in the application who:
 - (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG; and
 - (b) have, before the application is made, consented in writing to the making of the application.
- (1C) An application may be made under subsection (1A) in relation to a contravention of Part IV, IVA, IVB, V or VC, or of a provision of the Australian Consumer Law, even if a proceeding has not been instituted under another provision in relation to that contravention.
- (1CA) An application under subsection (1A) may be made at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.
- (2) The orders referred to in subsection (1) and (1A) are:
 - (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the

Section 87

loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;

- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;
- (ba) an order refusing to enforce any or all of the provisions of such a contract;
- (c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;
- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and
- (g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

(3) Where:

- (a) a provision of a contract made, or a covenant given, whether before or after the commencement of the *Trade Practices Amendment Act 1977*:
 - (i) in the case of a provision of a contract, is unenforceable by reason of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or
 - (ii) in the case of a covenant, is unenforceable by reason of section 45B in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation; or
- (b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47;

the Court may, on the application of a party to the contract or of a person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, as the case may be, make an order:

- (c) varying the contract or covenant, or a collateral arrangement relating to the contract or covenant, in such manner as the Court considers just and equitable; or
 - (d) directing another party to the contract, or another person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, to do any act in relation to the first-mentioned party or person that the Court considers just and equitable.
- (4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.
 - (5) The powers conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or covenant in proceedings instituted in that other court in respect of the contract or covenant.
 - (6) In subsection (2), **interest**, in relation to land, means:
 - (a) a legal or equitable estate or interest in the land; or

Section 87AA

- (b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
- (c) a right, power or privilege over, or in connection with, the land.

87AA Special provision relating to Court's exercise of powers under this Part in relation to boycott conduct

- (1) In exercising its powers in proceedings under this Part in relation to boycott conduct, the Court is to have regard to any action the applicant in the proceedings has taken, or could take, before an industrial authority in relation to the boycott conduct. In particular, the Court is to have regard to any application for conciliation that the applicant has made or could make.

- (2) In this section:

boycott conduct means conduct that constitutes or would constitute:

- (a) a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or
- (b) attempting to contravene one of those provisions; or
- (c) aiding, abetting, counselling or procuring a person to contravene one of those provisions; or
- (d) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene one of those provisions; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of one of those provisions; or
- (f) conspiring with others to contravene one of those provisions.

industrial authority means:

- (a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a law of a State to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or
- (b) a special board constituted under a law of a State relating to factories; or

- (c) any other State board, court, tribunal, body or official prescribed by the regulations for the purposes of this definition.

87B Enforcement of undertakings

- (1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).
- (1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a clearance or an authorisation under Division 3 of Part VII.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.
- (3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.

87C Enforcement of undertakings—Secretary to the Department

- (1) The Secretary to the Department may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Secretary has a power or function under this Act.

Section 87CA

- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Secretary to the Department.
- (3) If the Secretary to the Department considers that the person who gave the undertaking has breached any of its terms, the Secretary may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.

87CA Intervention by Commission

- (1) The Commission may, with the leave of the Court and subject to any conditions imposed by the Court, intervene in any proceeding instituted under this Act.
- (2) If the Commission intervenes in a proceeding, the Commission is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

Part VIA—Proportionate liability for misleading and deceptive conduct

87CB Application of Part

- (1) This Part applies to a claim (an *apportionable claim*) if the claim is a claim for damages made under section 236 of the Australian Consumer Law for:
 - (a) economic loss; or
 - (b) damage to property;caused by conduct that was done in a contravention of section 18 of the Australian Consumer Law.
- (2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (3) In this Part, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

87CC Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

Section 87CD

- (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

87CD Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim:
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
 - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

- (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

87CE Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

- (1) If:
- (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim; and
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
 - (i) the identity of the other person; and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
 - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;
- the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

87CF Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
- (b) cannot be required to indemnify any such wrongdoer.

Section 87CG

87CG Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

87CH Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

87CI Application of Part

Nothing in this Part:

- (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Part VIB—Claims for damages or compensation for death or personal injury

Division 1—Introduction

87D Definitions

In this Part, unless the contrary intention appears:

applicable percentage has the meaning given by subsection 87Q(2).

average weekly earnings has the meaning given by section 87V.

capable parent or guardian, of a minor, means a person who is a parent or guardian of the minor, and who is not under a disability.

date of discoverability has the meaning given by section 87G.

gratuitous attendant care services has the meaning given by subsection 87W(5).

incapacitated person means a person who is incapable of, or substantially impeded in, the management of his or her affairs in relation to a proceeding under this Act because of:

- (a) any disease, or any impairment of his or her mental condition; or
- (b) restraint of his or her person, lawful or unlawful, including detention or custody under a law of a State or Territory relating to mental health; or
- (c) war or warlike operations, or circumstances arising out of war or warlike operations.

index number has the meaning given by section 87N.

long-stop period has the meaning given by section 87H.

maximum amount of damages for non-economic loss has the meaning given by section 87M.

minor means a person under 18.

Section 87E

most extreme case has the meaning given by subsection 87P(2).

non-economic loss means any one or more of the following:

- (a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of expectation of life;
- (d) disfigurement.

personal injury damages means damages or compensation for loss or damage that is, or results from, the death of or personal injury to a person.

plaintiff, in relation to a proceeding, means:

- (a) if the proceeding is a proceeding that the Commission commences under paragraph 87(1A)(b), or under section 149 or paragraph 237(1)(b) of the Australian Consumer Law—a person on whose behalf the Commission commences the proceeding; or
- (aa) if the proceeding is a proceeding that the Director of Public Prosecutions commences under paragraph 87(1A)(ba)—a person on whose behalf the Director of Public Prosecutions commences the proceeding; or
- (b) in any other case—the person by whom the proceeding is brought (however described).

proceeding to which this Part applies means a proceeding referred to in section 87E.

quarter means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

smoking has the same meaning as in the *Tobacco Advertising Prohibition Act 1992*.

tobacco product has the same meaning as in the *Tobacco Advertising Prohibition Act 1992*.

87E Proceedings to which this Part applies

- (1) This Part applies to proceedings taken under the Australian Consumer Law:
 - (a) that relate to Part 2-2, 3-3, 3-4 or 3-5, or Division 2 of Part 5-4, of the Australian Consumer Law; and

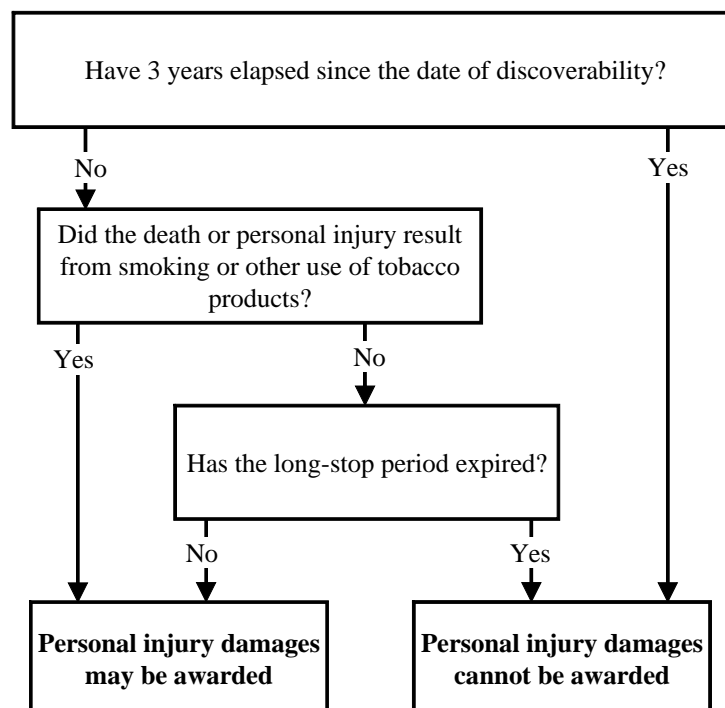
Section 87E

- (b) in which the plaintiff is seeking an award of personal injury damages; and
 - (c) that are not proceedings in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.
- (2) However, for the purposes of Divisions 2 and 7, paragraph (1)(c) does not apply.

Division 2—Limitation periods

87F Basic rule

- (1) A court must not award personal injury damages in a proceeding to which this Part applies if the proceeding was commenced:
- (a) after the end of the period of 3 years after the date of discoverability for the death or injury to which the personal injury damages would relate; or
 - (b) after the end of the long-stop period for that death or injury.
- (1A) However, paragraph (1)(b) does not apply in relation to a proceeding in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.
- (2) This diagram shows when this Division prevents an award of personal injury damages.



87G Date of discoverability

Definition

- (1) The ***date of discoverability*** for the death or injury is the first date when the plaintiff in the proceeding knows or ought to know each of the following:
 - (a) that the death or personal injury has occurred;
 - (b) that the death or personal injury was attributable to a contravention of this Act;
 - (c) that in the case of a personal injury—the injury was significant enough to justify bringing an action.

Constructive knowledge

- (2) For the purposes of subsection (1), the plaintiff ***ought to know*** a fact if the plaintiff would have ascertained the fact had the plaintiff taken all reasonable steps before the date in question to ascertain the fact.

Use of the plaintiff's conduct and statements

- (3) In determining what the plaintiff knows or ought to have known, the court may have regard to the plaintiff's conduct, and to the plaintiff's oral or written statements.

Minors

- (4) If the plaintiff is a minor, facts that a capable parent or guardian of the plaintiff knows or ought to know are taken for the purposes of subsection (1) to be facts that the plaintiff knows or ought to know.

Incapacitated persons

- (5) If:
 - (a) the plaintiff is an incapacitated person; and
 - (b) there is a guardian of the plaintiff, or other person to manage all or part of the plaintiff's estate, under a law of a State or Territory relating to the protection of incapacitated persons;facts that the guardian or other person knows or ought to know are taken for the purposes of subsection (1) to be facts that the plaintiff knows or ought to know.

Section 87H

Proceedings by personal representatives

- (6) Despite subsection (1), if the plaintiff brings the proceeding in the capacity of the personal representative of a deceased person, the ***date of discoverability*** for the death or injury is the earliest of:
- (a) if, had the deceased person commenced a proceeding, in relation to the contravention to which the death or injury relates, before his or her death, the date of discoverability under subsection (1) would have occurred more than 3 years before the death—that date; or
 - (b) if, at the time of the plaintiff’s appointment as personal representative, the plaintiff knew, or ought to have known, all of the matters referred to in paragraphs (1)(a), (b) and (c)—the date of the appointment; or
 - (c) if the first time at which the plaintiff knew, or ought to have known, all of the matters referred to in paragraphs (1)(a), (b) and (c) was after the date of appointment—the date of that first time.

87H Long-stop period

- (1) The ***long-stop period*** for the death or injury of a person is:
- (a) the period of 12 years following the act or omission alleged to have caused the death or injury; or
 - (b) that period as extended by the court.
- (2) The court must not extend the period by more than 3 years beyond the date of discoverability for the death or injury.
- (3) In considering whether to extend the period, the court must have regard to the justice of the case, and, in particular, must have regard to:
- (a) whether the passage of time has prejudiced a fair trial; and
 - (b) the nature and extent of the person’s loss or damage; and
 - (c) the nature of the defendant’s conduct alleged to have caused the death or injury; and
 - (d) the nature of the defendant’s conduct since the alleged act or omission.

87J The effect of minority or incapacity

In working out whether the period of 3 years after the date of discoverability, or the long-stop period, has expired, disregard any period during which the plaintiff has been:

- (a) a minor who is not in the custody of a capable parent or guardian; or
- (b) an incapacitated person in respect of whom there is no guardian, and no other person to manage all or part of the person's estate, under a law of a State or Territory relating to the protection of incapacitated persons.

87K The effect of close relationships

(1) If:

- (a) a cause of action to which the proceeding relates is founded on the death or injury to a person (the **victim**) who was a minor at the time of the act or omission alleged to have caused the death or injury; and
- (b) the proceeding is taken against a person who was at that time:
 - (i) a parent or guardian of the victim; or
 - (ii) a person in a close relationship with a parent or guardian of the victim;

in working out whether the period of 3 years after the date of discoverability, or the long-stop period, has expired, disregard any period:

- (c) before the victim turns 25; or
 - (d) if the victim dies before turning 25—before the victim's death.
- (2) For the purposes of subparagraph (1)(b)(ii), a person is taken to be in a **close relationship** with a parent or guardian of the victim if the person's relationship with the parent or guardian is such that:
- (a) the person might influence the parent or guardian not to bring a claim on behalf of the victim against the person; or
 - (b) the victim might be unwilling to disclose to the parent or guardian the acts, omissions or events in respect of which the cause of action is founded.

Division 3—Limits on personal injury damages for non-economic loss

87L Limits on damages for non-economic loss

A court must not, in a proceeding to which this Part applies, award as personal injury damages for non-economic loss an amount that exceeds the amount (if any) permitted under this Division.

87M Maximum amount of damages for non-economic loss

- (1) The *maximum amount of damages for non-economic loss* is:
- (a) during the year in which this Part commences—\$250,000; or
 - (b) during a later year—the amount worked out (to the nearest multiple of \$10) as follows:

$$\text{Previous maximum amount} \times \frac{\text{Current September CPI number}}{\text{Previous September CPI number}}$$

where:

current September CPI number is the index number for the quarter ending on 30 September in the year immediately preceding that later year.

previous maximum amount is the maximum amount of damages for non-economic loss during the year immediately preceding that later year.

previous September CPI number is the index number for the quarter ending on the 30 September immediately preceding the 30 September referred to in the definition of *current September CPI number*.

- (2) If an amount worked out under paragraph (1)(b) is a multiple of \$5 (but not a multiple of \$10), round the amount up to the nearest multiple of \$10.
- (3) This section does not affect the operation of section 86AA.

87N Index numbers

- (1) The *index number* for a quarter is the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.
- (2) Subject to subsection (3), if, at any time before or after the commencement of this Act:
 - (a) the Australian Statistician has published or publishes an index number in respect of a quarter; and
 - (b) that index number is in substitution for an index number previously published by the Australian Statistician in respect of that quarter;disregard the publication of the later index number for the purposes of this section.
- (3) If, at any time, the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, in applying this section after the change took place or takes place, have regard only to index numbers published in terms of the new reference base.
- (4) In this section:

Australian Statistician means the Australian Statistician referred to in subsection 5(2) of the *Australian Bureau of Statistics Act 1975*.

87P Most extreme cases

- (1) The court must not award as personal injury damages for non-economic loss the maximum amount of damages for non-economic loss except in a most extreme case.
- (2) A *most extreme case* is a case in which the plaintiff suffers non-economic loss of the gravest conceivable kind.

87Q Cases of 33% or more (but not 100%) of a most extreme case

- (1) If the non-economic loss the plaintiff suffers is at least 33%, but less than 100%, of a most extreme case, the court must not award as personal injury damages for non-economic loss an amount that

Section 87R

exceeds the applicable percentage of the maximum amount of damages for non-economic loss.

- (2) The *applicable percentage* is the extent of the non-economic loss the plaintiff suffers, expressed as a percentage of a most extreme case.

87R Cases of 15% or more (but less than 33%) of a most extreme case

If the non-economic loss the plaintiff suffers is at least 15%, but less than 33%, of a most extreme case, the court must not award as personal injury damages for non-economic loss an amount that exceeds the amount set out in the following table:

Cases of 15% or more (but less than 33%) of a most extreme case		
Item	Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount of damages for non-economic loss)
1	15%	1%
2	16%	1.5%
3	17%	2%
4	18%	2.5%
5	19%	3%
6	20%	3.5%
7	21%	4%
8	22%	4.5%
9	23%	5%
10	24%	5.5%
11	25%	6.5%
12	26%	8%
13	27%	10%
14	28%	14%
15	29%	18%
16	30%	23%
17	31%	26%
18	32%	30%

87S Cases of less than 15% of a most extreme case

If the non-economic loss the plaintiff suffers is less than 15% of a most extreme case, the court must not award personal injury damages for non-economic loss.

87T Referring to earlier decisions on non-economic loss

- (1) In determining personal injury damages for non-economic loss, the court may refer to earlier decisions of the court or of other courts for the purpose of establishing the appropriate award in the proceeding.
- (2) For that purpose, the parties to the proceeding or their counsel may bring the court's attention to awards of personal injury damages for non-economic loss in those earlier decisions.
- (3) This section does not affect the rules for determination of other damages or compensation.

Division 4—Limits on personal injury damages for loss of earning capacity

87U Personal injury damages for loss of earning capacity

In determining, in a proceeding to which this Part applies, personal injury damages for:

- (a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
- (b) future economic loss due to the deprivation or impairment of earning capacity; or
- (c) the loss of expectation of financial support;

a court must disregard the amount by which the plaintiff's gross weekly earnings during any quarter would (but for the personal injury or death in question) have exceeded:

- (d) if, at the time the award was made, the amount of average weekly earnings for the quarter was ascertainable—an amount that is twice the amount of average weekly earnings for the quarter; or
- (e) if:
 - (i) at the time the award was made, the amount of average weekly earnings for the quarter was not ascertainable; or
 - (ii) the award was made during, or before the start of, the quarter;

an amount that is twice the amount of average weekly earnings for the quarter that, at the time the award was made, was the most recent quarter for which the amount of average weekly earnings was ascertainable.

87V Average weekly earnings

- (1) ***Average weekly earnings***, for a quarter, means the amount:
 - (a) published by the Australian Statistician as the average weekly earnings for all employees (total earnings, seasonally adjusted) for the reference period in that quarter; or
 - (b) if the Australian Statistician fails or ceases to publish the amount referred to in paragraph (a)—the amount determined in the manner specified in the regulations.

- (2) Regulations made for the purposes of paragraph (1)(b) may specify matters by reference to which an amount is to be determined.

- (3) In this section:

reference period, in a quarter, is the period described by the Australian Statistician as the pay period ending on or before a specified day that is the third Friday of the middle month of that quarter.

Division 5—Limits on personal injury damages for gratuitous attendant care services

87W Personal injury damages for gratuitous attendant care services for plaintiff

- (1) A court must not, in a proceeding to which this Part applies, award personal injury damages for gratuitous attendant care services for the plaintiff, except in accordance with this section.
- (2) The court must be satisfied that:
 - (a) there is (or was) a reasonable need for the services to be provided; and
 - (b) the need has arisen (or arose) solely because of personal injury to which the personal injury damages relate; and
 - (c) the services would not be (or would not have been) provided to the plaintiff but for the injury; and
 - (d) the services are provided (or are to be provided) for at least 6 hours per week; and
 - (e) the services are provided (or are to be provided) over a period of at least 6 months.
- (3) If the services were provided during a quarter for which, at the time the award was made, the amount of average weekly earnings was ascertainable, the court must not award as personal injury damages for the services:
 - (a) if the services were provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for that quarter; or
 - (b) if the services were provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.
- (4) If the services:
 - (a) were provided during a quarter for which, at the time the award was made, the amount of average weekly earnings was not ascertainable; or
 - (b) are to be provided after the time the award was made;

the court must not award as personal injury damages for the services:

- (c) if the services were provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for the quarter that, at the time the award was made, was the most recent quarter for which the amount of average weekly earnings was ascertainable; or
 - (d) if the services were provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.
- (5) ***Gratuitous attendant care services*** are services that one person provides to another person:
- (a) that:
 - (i) are of a domestic nature; or
 - (ii) relate to nursing; or
 - (iii) aim to alleviate the consequences of a personal injury; and
 - (b) for which the other person has not paid or is not liable to pay.

87X Personal injury damages for loss of plaintiff's capacity to provide gratuitous attendant care services

- (1) A court must not, in a proceeding to which this Part applies, award personal injury damages for loss of the plaintiff's capacity to provide gratuitous attendant care services to other persons, except in accordance with this section.
- (2) The court must be satisfied that:
 - (a) prior to his or her loss of capacity to provide the services, the plaintiff had provided the services:
 - (i) for at least 6 hours per week; and
 - (ii) over a period of at least 6 months; and
 - (b) the other person would have been entitled, if the plaintiff had died as a result of the contravention of this Act to which the award relates, to recover damages under a law of a State or Territory for loss of the plaintiff's services.
- (3) If the plaintiff would have provided the services during a quarter for which, at the time the award was made, the amount of average

Section 87X

weekly earnings was ascertainable, the court must not award as personal injury damages for the services:

- (a) if the services would have been provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for that quarter; and
 - (b) if the services would have been provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.
- (4) If the plaintiff:
- (a) would have provided the services during a quarter for which, at the time the award was made, the amount of average weekly earnings was not ascertainable; or
 - (b) would have provided the services after the time the award was made;
- the court must not award as personal injury damages for the services:
- (c) if the services were provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for the quarter that, at the time the award was made, was the most recent quarter for which the amount of average weekly earnings was ascertainable; or
 - (d) if the services were provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.

Division 6—Other limits on personal injury damages

87Y Damages for future economic loss—discount rate

- (1) If an award of personal injury damages in a proceeding to which this Part applies is to include any component, assessed as a lump sum, for future economic loss of any kind, the present value of that future economic loss is to be determined by applying:
 - (a) a discount rate of the percentage prescribed by the regulations; or
 - (b) if no percentage is prescribed—a discount rate of 5%.
- (2) A regulation made for the purposes of paragraph (1)(a) does not take effect before the end of the period of 6 months starting:
 - (a) if the regulation is laid before each House of the Parliament under paragraph 48(1)(c) of the *Acts Interpretation Act 1901* on the same day—starting on that day; or
 - (b) if it is laid before each House of the Parliament under that paragraph on different days—starting on the later of those days.
- (3) Except as provided by this section, this section does not affect any other law relating to the discounting of sums awarded as damages or compensation.

87Z Damages for loss of superannuation entitlements

A court must not, in a proceeding to which this Part applies, award personal injury damages for economic loss due to the loss of employer superannuation contributions an amount that exceeds the following amount:

Superannuation percentage × Damages for earnings loss

where:

damages for earnings loss are the personal injury damages payable (in accordance with this Part) for:

- (a) any past economic loss due to loss of earnings, or the deprivation or impairment of earning capacity, on which the entitlement to those contributions is based; and

Section 87ZA

- (b) any future economic loss due to the deprivation or impairment of earning capacity on which the entitlement to those contributions would be based.

superannuation percentage is the highest employer's charge percentage for a quarter under section 19 of the *Superannuation Guarantee (Administration) Act 1992*.

87ZA Interest on damages

- (1) A court must not, in a proceeding to which this Part applies, order the payment of interest on personal injury damages for:
 - (a) non-economic loss; or
 - (b) gratuitous attendant care services for the plaintiff; or
 - (c) loss of the plaintiff's capacity to provide gratuitous attendant care services to other persons.
- (2) If, in a proceeding to which this Part applies, a court is satisfied that interest is payable on personal injury damages of another kind, the rate of interest to be used in working out the interest is:
 - (a) the rate of interest prescribed by the regulations; or
 - (b) if no rate is prescribed—the 10-year benchmark bond rate on the day on which the court determines the personal injury damages.
- (3) This section does not affect the payment of interest on a debt under a judgment or order of a court.
- (4) In this section:

10-year benchmark bond rate, on a day, means:

- (a) if the day occurs on or after 1 March in a particular year and before 1 September in that year—the Commonwealth Government 10-year benchmark bond rate:
 - (i) as published by the Reserve Bank of Australia in the Reserve Bank of Australia Bulletin (however described); and
 - (ii) applying on the first business day of January in that year; or
- (b) otherwise—the Commonwealth Government 10-year benchmark bond rate, as so published, applying on the first business day of July in the preceding year.

business day means a day other than a Saturday, a Sunday or a public or bank holiday in any State, the Australian Capital Territory or the Northern Territory.

87ZB Exemplary and aggravated damages

- (1) A court must not, in a proceeding to which this Part applies, award exemplary damages or aggravated damages in respect of death or personal injury.
- (2) This section does not affect whether a court has power to award exemplary damages or aggravated damages:
 - (a) otherwise than in respect of death or personal injury; or
 - (b) in a proceeding other than a proceeding to which this Part applies.

Division 7—Structured settlements

87ZC Court may make orders under section 87 for structured settlements

- (1) In a proceeding to which this Part applies, a court may, on the application of the parties, make an order under section 87 approving a structured settlement, or the terms of a structured settlement, even though the payment of damages is not in the form of a lump sum award of damages.
- (2) This section does not limit the powers of a court to make an order under section 87 in a proceeding that is not a proceeding to which this Part applies.
- (3) In this section:

structured settlement means an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

Part VII—Authorisations, notifications and clearances in respect of restrictive trade practices

Division 1—Authorisations (other than section 50 merger authorisations)

87ZP Definitions

- (1) In this Division:

authorisation means an authorisation under this Division.

industry code of practice means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

minor variation, in relation to an authorization, is a single variation that does not involve a material change in the effect of the authorization.

- (2) A reference in this Division to a proposal of the Commission is a reference to a notice of the Commission:
- (a) so far as the revocation of an authorization is concerned—under subsection 91B(3); and
 - (b) so far as the revocation of an authorization and the substitution of another—under subsection 91C(3).

88 Power of Commission to grant authorisations

- (1A) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorisation to the corporation:
- (a) to make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding would be, or might be, a cartel provision; or

Section 88

- (b) to give effect to a provision of a contract, arrangement or understanding if the provision is, or may be, a cartel provision;
 - and, while such an authorisation remains in force:
 - (c) in the case of an authorisation to make a contract or arrangement, or to arrive at an understanding—sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not prevent the corporation from making the contract or arrangement, or arriving at the understanding, in accordance with the authorisation; or
 - (d) in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding—sections 44ZZRG and 44ZZRK do not prevent the corporation from giving effect to the provision in accordance with the authorisation.
- (1) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorization to the corporation:
- (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45; or
 - (b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45;
- and, while such an authorization remains in force:
- (c) in the case of an authorization to make a contract or arrangement or to arrive at an understanding—subsection 45(2) does not prevent the corporation from making the contract or arrangement or arriving at the understanding in accordance with the authorization and giving effect in accordance with the authorization to any provision of the contract or arrangement so made or of the understanding so arrived at;
 - (d) in the case of an authorization to give effect to a provision of a contract:
-

- (i) the provision is not unenforceable by reason of subsection 45(1); and
 - (ii) subsection 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorization; or
 - (e) in the case of an authorization to give effect to a provision of an arrangement or understanding—subsection 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorization.
- (5) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorization to the person:
- (a) to require the giving of, or to give, a covenant where the proposed covenant would have the purpose, or would have or might have the effect, of substantially lessening competition in a market referred to in paragraph 45B(2)(a); or
 - (b) to enforce the terms of a covenant;
- and, while such an authorization remains in force:
- (c) in the case of an authorization to require the giving of, or to give, a covenant:
 - (i) the covenant is not unenforceable by reason of subsection 45B(1); and
 - (ii) subsection 45B(2) does not apply in relation to the covenant; or
 - (d) in the case of an authorization to enforce the terms of a covenant:
 - (i) the covenant is not unenforceable by reason of subsection 45B(1); and
 - (ii) paragraphs 45B(2)(b) and (c) do not apply in relation to the covenant.
- (6) An authorization granted by the Commission to a person under any of the preceding provisions of this section to:
- (a) make a contract or arrangement or arrive at an understanding;
 - (b) give effect to a provision of a contract, arrangement or understanding;
 - (c) require the giving of, or give, a covenant; or
 - (d) enforce the terms of a covenant;
- has effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the
-

Section 88

authorization as a party to the contract, arrangement or understanding or as a proposed party to the proposed contract, arrangement or understanding, or as a person who is or would be bound by, or entitled to the benefit of, the covenant or the proposed covenant, as the case may be.

- (7) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorization to the person, and to any other person acting in concert with the first-mentioned person, to engage in conduct to which section 45D, 45DA or 45DB would or might apply and, while such an authorization remains in force, that section does not apply in relation to the engaging in that conduct by the applicant and by any person acting in concert with the applicant.
- (7A) Subject to this Part, the Commission may, on application by or on behalf of a person, grant an authorisation to the person to engage in conduct to which section 45E or 45EA would or might apply. While the authorisation remains in force, that section does not apply in relation to the person engaging in that conduct.
- (8) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorization to the corporation to engage in conduct that constitutes or may constitute the practice of exclusive dealing and, while such an authorization remains in force, section 47 does not prevent the corporation from engaging in that conduct in accordance with the authorization.
- (8AA) If:
 - (a) the Commission grants an authorization to a corporation to engage in particular conduct under subsection (8); and
 - (b) the particular conduct referred to in the authorization is conduct expressly required or permitted under a contract, an arrangement, an understanding or an industry code of practice;then:
 - (c) the authorization has effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the authorization as a party or proposed party to the contract, arrangement, understanding or code; and

- (d) the authorization may be expressed so as to apply to or in relation to another person who becomes a party to the contract, arrangement, understanding or code at a time after the authorization is granted.
- (8AB) For the purposes of subsection (8AA), a reference in that subsection to a contract, an arrangement, an understanding or an industry code of practice includes a reference to a proposed contract, a proposed arrangement, a proposed understanding or a proposed industry code of practice (as the case requires).
- (8A) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person to engage in conduct that constitutes (or may constitute) the practice of resale price maintenance. While the authorisation remains in force, section 48 does not prevent the person from engaging in that conduct in accordance with the authorisation.
- (8B) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant it an authorisation:
 - (a) to make a dual listed company arrangement; or
 - (b) to give effect to a provision of a dual listed company arrangement;and, while such an authorisation remains in force:
 - (c) for an authorisation to make a dual listed company arrangement—section 49 does not prevent the corporation from:
 - (i) making the arrangement in accordance with the authorisation; and
 - (ii) giving effect, in accordance with the authorisation, to any provision of the arrangement so made; and
 - (d) for an authorisation to give effect to a provision of a dual listed company arrangement—section 49 does not prevent the corporation from giving effect to the provision in accordance with the authorisation.
- (8C) An authorisation granted by the Commission to a corporation under subsection (8B) has effect as if it were also an authorisation in the same terms to the other corporation named or referred to in the application for the authorisation as a party to the arrangement or proposed arrangement.

Section 88

- (8D) Subject to subsection 49(2), the Commission does not have power to grant an authorisation to a corporation to make a dual listed company arrangement if the arrangement has been made before the Commission makes a determination in respect of the application.
- (9) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person to acquire a controlling interest in a body corporate (within the meaning of section 50A) and, while such an authorisation remains in force, section 50A does not, to the extent specified in the authorisation, apply in relation to the acquisition of that controlling interest.
- (10) An authorization to a corporation under subsection (1A) or (1) may be expressed so as to apply to or in relation to another person who:
- (a) in the case of an authorization to make a contract or arrangement or arrive at an understanding—becomes a party to the proposed contract or arrangement at a time after it is made or becomes a party to the proposed understanding at a time after it is arrived at; or
 - (b) in the case of an authorization to give effect to a provision of a contract, arrangement or understanding—becomes a party to the contract, arrangement or understanding at a time after the authorization is granted.
- (11) An authorization under subsection (5) may be expressed so as to apply to or in relation to another person who:
- (a) in the case of an authorization to require the giving of, or to give, a covenant—becomes bound by, or entitled to the benefit of, the proposed covenant at a time after the covenant is given; or
 - (b) in the case of an authorization to enforce the terms of a covenant—becomes bound by, or entitled to the benefit of, the covenant at a time after the authorization is granted.
- (12) The Commission does not have power to grant an authorization to a corporation to make a contract or arrangement, to arrive at an understanding or to require the giving of, or to give, a covenant if the contract or arrangement has been made, the understanding has been arrived at or the covenant has been given before the Commission makes a determination in respect of the application.
-

- (13) An application made to the Commission under this section for an authorization in relation to a particular contract or proposed contract (including an application mentioned in subsection (8AA)) may be expressed to be made also in relation to another contract or proposed contract that is or will be, or in relation to two or more other contracts or proposed contracts that are or will be, in similar terms to the first-mentioned contract or proposed contract and, where an application is so expressed, the Commission may grant a single authorization in respect of all the contracts or proposed contracts or may grant separate authorizations in respect of any one or more of the contracts or proposed contracts.
- (14) Where an application made to the Commission under this section for an authorization in relation to a particular contract or proposed contract is expressed in accordance with subsection (13) to be made also in relation to another contract or contracts or proposed contract or proposed contracts:
- (a) the application shall set out:
 - (i) the names of the parties to each other contract; and
 - (ii) the names of the parties to each other proposed contract where those names are known to the applicant at the time when the application is made; and
 - (b) if an authorization is granted in respect of a proposed contract the names of the parties to which were not so known to the applicant, the authorization shall, by force of this subsection, be deemed to be expressed to be subject to a condition that any party to the contract will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract.
- (15) In subsections (13) and (14):
- (a) **contract** includes an arrangement, understanding, industry code of practice or covenant and **proposed contract** has a corresponding meaning; and
 - (b) the reference to the parties to a contract or proposed contract shall, for the purposes of the application of those subsections in relation to a covenant or proposed covenant by reason of paragraph (a) of this subsection, be read as a reference to the persons who are or will be, or but for subsection 45B(1) would be, respectively bound by, or entitled to the benefit of, the covenant or proposed covenant.
-

Section 89

- (16) A corporation that has made an application to the Commission for an authorisation, or a person other than a corporation who has made an application to the Commission for an authorisation under subsection (9), may at any time, by notice in writing to the Commission, withdraw the application.

89 Procedure for applications and the keeping of a register

- (1) To be valid, an application for an authorisation, a minor variation of an authorisation, a revocation of an authorisation, or a revocation of an authorisation and the substitution of another authorisation, must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by any other information or documents prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (1A) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
- (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.
- (1B) For the purposes of subsection (1A), **business day** means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.
- (2) If the Commission receives an application referred to in subsection (1), the Commission must cause notice of the receipt of that application to be made public in such manner as it thinks fit.
- (3) The Commission must keep a register of:
- (a) applications for authorizations; and
 - (b) applications for minor variations of authorizations; and
 - (c) applications for, or the Commission's proposals for, the revocation of authorizations; and

-
- (d) applications for, or the Commission's proposals for, the revocation of authorizations and the substitution of other authorizations;
including applications that have been withdrawn or proposals that have been abandoned.
 - (4) Subject to this section, the register kept under subsection (3) shall include:
 - (a) any document furnished to the Commission in relation to an application or proposal referred to in subsection (3);
 - (aa) any draft determination, and any summary of reasons, by the Commission that is furnished to a person under section 90A, or under that section as applied by section 91C;
 - (ab) any record of a conference made in accordance with subsection 90A(8), or with that subsection as applied by section 91C, and any certificate in relation to a conference given under subsection 90A(9), or under that subsection as so applied;
 - (b) particulars of any oral submission made to the Commission in relation to such an application or proposal; and
 - (c) the determination of the Commission on such an application or proposal and the statement of the reasons given by the Commission for that determination.
 - (5) Where a person furnishes a document to the Commission in relation to an application or proposal referred to in subsection (3) or makes an oral submission to the Commission in relation to such an application or proposal, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (3) by reason of the confidential nature of any of the matters contained in the document or submission.
 - (5A) Where such a request is made:
 - (a) if the document or the part of the document, or the submission or the part of the submission, to which the request relates contains particulars of:
 - (i) a secret formula or process;
-

Section 89

- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
 - (iii) the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (3); and
 - (b) in any other case—the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.
- (5B) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (3), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (4)(a) does not apply in relation to the document or part of the document.
- (5C) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (3), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (4)(b) does not apply in relation to the submission or that part of the submission, as the case may be.
- (5D) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (4)(a) or particulars referred to in paragraph (4)(b) from the register kept under subsection (3).
- (5E) If a person requests, in accordance with subsection (5) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from the
-

register kept under subsection (3), the document or part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

- (6) A document shall not be included in the register kept under subsection (3) if a direction in relation to that document was in force under paragraph 22(1)(b) of this Act immediately before the commencement of the *Trade Practices Amendment Act 1977*.

90 Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
- (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.

- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (4) The Commission shall state in writing its reasons for a determination made by it.

- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
- (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

Section 90

- (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or
 - (c) the proposed conduct were engaged in;as the case may be.
- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances

that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

- (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
- (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
- (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
- (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

- (8A) The Commission must not make a determination granting an authorisation under subsection 88(8B) to make a dual listed company arrangement unless it is satisfied in all the circumstances that the making of the arrangement would result, or be likely to

Section 90

result, in such a benefit to the public (see subsection (9A)) that the arrangement should be allowed to be made.

- (8B) The Commission must not make a determination granting an authorisation under subsection 88(8B) to give effect to a provision of a dual listed company arrangement unless it is satisfied in all the circumstances that the giving effect to the provision would result, or be likely to result, in such a benefit to the public (see subsection (9A)) that the provision should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public (see subsection (9A)) that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsections (8A), (8B) and (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.
- (10) If the Commission does not determine an application for an authorisation (other than an application for an authorisation under subsection 88(9)) within the relevant period, then it is taken to have granted the application at the end of that period.
- (10A) For the purposes of subsection (10), the **relevant period** is the period of 6 months beginning on the day the Commission received the application. However, if, before the end of that 6 month period:
- (a) the Commission has prepared a draft determination under subsection 90A(1) in relation to the application; and

- (b) the Commission determines in writing that that period is extended by a specified period of not more than 6 months; and
 - (c) the applicant agrees to that period being so extended;the **relevant period** is that period as so extended.
- (11) Subject to subsections (12) and (13), if the Commission does not determine an application for an authorisation under subsection 88(9) within:
 - (a) 30 days from the day on which the application is received by the Commission; or
 - (b) if the Commission, before the end of that period of 30 days, gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application—the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide;the Commission shall be deemed to have granted, at the end of that period, the authorisation applied for.
- (11A) The Commission may, within the 30 day period mentioned in subsection (11), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (11) to 30 days are to be treated as references to 45 days.
- (12) If the applicant for an authorization informs the Commission in writing before the expiration of the period referred to in subsection (11) (in this subsection and in subsection (13) referred to as the **base period**) that the applicant agrees to the Commission taking a specified longer period for the determination of the application, a reference to that longer period shall be deemed for the purposes of that application to be substituted in subsection (11) for the reference in that subsection to the base period.

Section 90A

- (13) For the purposes of any application of subsection (12), a reference in that subsection to the base period shall, if a reference to another period is deemed by any other application or applications of that subsection to have been substituted in subsection (11) for the reference in subsection (11) to the base period, be construed as a reference to that other period.
- (14) If a person to whom a notice has been sent under subsection 90A(2) in relation to a draft determination in respect of an application for an authorization notifies the Commission in accordance with subsection 90A(6) that he or she wishes the Commission to hold a conference in relation to the draft determination, the relevant period (worked out under subsection (10A) of this section) shall be deemed to be increased by a period equal to the period commencing on the day on which the first notification in relation to the draft determination was received by the Commission and ending on the seventh day after the day specified in the certificate given by a member of the Commission in pursuance of subsection 90A(9) as the day on which the conference terminated.
- (15) Where a party to a joint venture makes at the one time two or more applications for authorizations (other than an application for an authorisation under subsection 88(9)), being applications each of which deals with a matter relating to the joint venture:
 - (a) the Commission shall not make a determination in respect of any one of those applications unless it also makes a determination or determinations at the same time in respect of the other application or other applications; and
 - (b) if the Commission does not make a determination in respect of any one of the applications within the relevant period (worked out under subsection (10A)) in relation to that application, the Commission shall be deemed to have granted, at the expiration of that period, all the authorizations applied for.

90A Commission to afford opportunity for conference before determining application for authorisation

- (1) Before determining an application for an authorization (other than an application for an authorisation under subsection 88(9)), the

Commission shall prepare a draft determination in relation to the application.

- (2) The Commission shall, by notice in writing sent to the applicant and to each other interested person, invite the applicant or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.

- (3) If:

- (a) the draft determination provides for the granting of the application unconditionally; and
- (b) no person has made a written submission to the Commission opposing the application;

each notice by the Commission under subsection (2) shall inform the person to whom the notice is sent that the draft determination so provides.

- (4) If:

- (a) the draft determination does not provide for the granting of the application or provides for the granting of the application subject to conditions; or
- (b) the draft determination provides for the granting of the application unconditionally but a written submission has, or written submissions have, been made to the Commission opposing the application;

the Commission shall send with each notice under subsection (2) a copy of the draft determination and:

- (c) in a case to which paragraph (a) applies—a summary of the reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or
- (d) in a case to which paragraph (b) applies—a summary of the reasons why it is satisfied that the application should be granted unconditionally.

- (5) If each of the persons to whom a notice was sent under subsection (2):

Section 90A

- (a) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the Commission to hold a conference in relation to the draft determination; or
 - (b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference;

the Commission may make the determination at any time after the expiration of that period.
- (6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).
- (7) At the conference:
 - (a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft determination) nominated by the Chairperson; and
 - (b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and
 - (c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and
 - (e) no other person is entitled to be present.
- (8) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

- (9) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:
- (a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;
 - (b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and
 - (c) shall give a certificate certifying the day on which the first notification under subsection (6) in relation to the draft determination was received by the Commission and the day on which the conference terminated;
- and any such certificate shall be received in all courts as evidence of the matters certified.
- (10) A document purporting to be a certificate referred to in subsection (9) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.
- (11) The Commission shall take account of all matters raised at the conference and may at any time after the termination of the conference make a determination in respect of the application.
- (12) For the purposes of this section, ***interested person*** means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that, in the opinion of the Commission, is real and substantial.

Section 90B

- (13) Where the Commission is of the opinion that two or more applications for authorizations that are made by the same person, or by persons being bodies corporate that are related to each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application and may prepare one draft determination in relation to the applications and hold one conference in relation to that draft determination.

90B Commission may rely on consultations undertaken by the AEMC

- (1) This section applies if:
- (a) an application under section 88, 91A, 91B or 91C is made in relation to the National Electricity Rules or a provision of the Rules; and
 - (b) the AEMC has done the following:
 - (i) published the Rules or the provision and invited people to make submissions to it on the Rules or the provision;
 - (ii) specified the effect of subsection (2) when it published the Rules or the provision;
 - (iii) considered any submissions that were received within the time limit specified by it when it published the Rules or the provision.
- (2) In making a determination under section 90, 91A, 91B or 91C:
- (a) the Commission may rely on the process mentioned in paragraph (1)(b), instead of undertaking the process mentioned in section 90A, subsection 91A(2), 91B(2) or 91C(2) or (5); and
 - (b) the Commission may take into account:
 - (i) any submissions mentioned in subparagraph (1)(b)(iii); and
 - (ii) any submissions, in respect of the application, made by the AEMC; and
 - (c) despite subsection 90(2), the Commission may disregard any submissions, in relation to the application, made by the Commonwealth, by a State, or by any other person (other than the AEMC).

(3) In this section:

National Electricity Rules means:

- (a) the National Electricity Rules, as in force from time to time, made under the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia; or
- (b) those Rules as they apply as a law of another State; or
- (c) those Rules as they apply as a law of a Territory; or
- (d) those Rules as they apply as a law of the Commonwealth.

91 Grant and variation of authorisations

- (1) An authorization may be expressed to be in force for a period specified in the authorization and, if so expressed, remains in force for that period only.
- (1A) An authorisation, other than an authorisation deemed to have been granted under subsection 90(10) or (11), comes into force on the day specified for the purpose in the authorisation, not being a day earlier than, and an authorisation deemed to have been granted under subsection 90(10) or (11) comes into force on:
 - (a) where paragraph (b) or (c) does not apply—the end of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation;
 - (b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review;
 - (c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.
- (1B) A minor variation of an authorization comes into force on a day specified by the Commission in the determination making the variation, not being a day earlier than:
 - (a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of the determination of the Commission in respect of the application for the minor variation; or

Section 91

- (b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or
 - (c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.
- (1C) If an authorization (the *prior authorization*) is revoked and another authorization is made in substitution for it, that other authorization comes into force on the day specified for the purpose in that other authorization, not being a day earlier than:
 - (a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of an application, or the Commission’s proposal, for the revocation of the prior authorization and the substitution of that other authorization; or
 - (b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or
 - (c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.
- (2) If the Commission considers that it is appropriate to do so:
 - (a) for the purpose of enabling due consideration to be given to:
 - (i) an application for an authorization; or
 - (ii) an application for a minor variation of an authorization; or
 - (iii) an application for the revocation of an authorization and the substitution of a new one; or
 - (b) pending the expiration of the time allowed for the making of an application to the Tribunal for review of a determination by the Commission of an application referred to in paragraph (a) and, if such an application for a review is made, pending the making of a determination by the Tribunal on the review; or
 - (c) for any other reason;the Commission may at any time:

Section 91A

- (d) in the case of an application for an authorization—grant an authorization that is expressed to be an interim authorization; and
 - (e) in the case of an application for a minor variation of an authorization—grant an authorization that is expressed to be an interim authorization dealing only with the matter the subject of the application for a variation; and
 - (f) in the case of an application for the revocation of an authorization and the substitution of another—suspend the operation of the authorization sought to be revoked and grant an authorization that is expressed to be an interim authorization in substitution for the authorization suspended.
- (2AA) An authorization granted under paragraph 91(2)(d), (e) or (f) and expressed to be an interim authorization comes into force on such a date, not being a date before the grant of the interim authorization, as is specified by the Commission in the interim authorization.
- (2AB) The Commission may, at any time, revoke an authorization that is expressed to be an interim authorization and, where that interim authorization is in substitution for an authorization the operation of which has been suspended, the revocation of the interim authorization has the effect of reviving the operation of the suspended authorization.
- (2A) Subsections 90(4) to (9), inclusive, do not apply in relation to an authorization that is expressed to be an interim authorization.
- (3) An authorization may be expressed to be subject to such conditions as are specified in the authorization.

91A Minor variations of authorizations

- (1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a minor variation of the authorization.
- (2) On receipt of an application, the Commission must, if it is satisfied that the variation sought in the application is a minor variation, by notice in writing given to any persons who appear to the Commission to be interested:
 - (a) indicate the nature of the variation applied for; and

Section 91A

- (b) invite submissions in respect of the variation within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (3) After considering the application and any submissions received within the period specified, the Commission may make a determination in writing varying the authorization or dismissing the application.
- (4) The Commission must not make a determination varying an authorization to which, if it were a new authorization, subsection 90(5A), (5B), (6) or (7) would apply, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorization outweighs any detriment to the public caused by the authorization.
- (5) The Commission must not make a determination varying an authorization to which, if it were a new authorization, subsection 90(8), (8A), (8B) or (9) would apply, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorization.
- (6) Nothing in this section prevents a person from applying for 2 or more variations in the same application.
- (7) If:
 - (a) a person applies for 2 or more variations:
 - (i) at the same time; or
 - (ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and
 - (b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorization;the Commission may deal with all of those variations together as if they were a single minor variation.
- (8) An application for a minor variation may be withdrawn by notice in writing to the Commission at any time.

91B Revocation of an authorization

- (1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization.
- (2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:
 - (a) indicate that the revocation of the authorization has been applied for; and
 - (b) indicate the basis on which the revocation has been applied for; and
 - (c) invite submissions in respect of the revocation within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (3) If, at any time after granting an authorization, it appears to the Commission that:
 - (a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or
 - (b) a condition to which the authorization was expressed to be subject has not been complied with; or
 - (c) there has been a material change of circumstances since the authorization was granted;the Commission may, by notice in writing given to any persons who appear to the Commission to be interested:
 - (d) inform those persons that it is considering the revocation of the authorization; and
 - (e) indicate the basis on which the revocation is being proposed; and
 - (f) invite submissions in respect of the revocation within a period specified by the Commission.
- (4) After considering any submissions invited under subsection (2) or (3) that are received within the period specified by the Commission under that subsection, the Commission may make a determination in writing:
 - (a) revoking the authorization; or

Section 91C

- (b) deciding not to revoke the authorization.
- (5) If an objection to the revocation is included in any submission
 - (a) that was invited under subsection (2) or (3); and
 - (b) that is received within the period specified by the Commission under that subsection;the Commission must not make a determination revoking the authorization unless the Commission is satisfied that it would, if the authorization had not already been granted, be prevented under subsection 90(5A), (5B), (6), (7), (8), (8A), (8B) or (9) from making a determination granting the authorization in respect of which the revocation is sought.
- (6) An application for revocation may be withdrawn by notice in writing to the Commission at any time.
- (7) The Commission may disregard any objection that, in its opinion, is either vexatious or frivolous.

91C Revocation of an authorization and substitution of a replacement

- (1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization and the substitution of a new authorization for the one revoked.
- (2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:
 - (a) indicate that the revocation of the authorization, and the substitution of another authorization for it, has been applied for; and
 - (b) indicate the basis upon which the revocation and substitution has been applied for and the nature of the substituted authorization so applied for; and
 - (c) invite submissions in respect of the revocation and substitution within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (3) If, at any time after granting an authorization, it appears to the Commission that:
- (a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or
 - (b) a condition to which the authorization was expressed to be subject has not been complied with; or
 - (c) there has been a material change of circumstances since the authorization was granted;
- the Commission may, by notice in writing given to any persons who appear to be interested:
- (d) inform those persons that it is considering the revocation of the authorization and the substitution of a new authorization; and
 - (e) indicate the basis on which the revocation and substitution is being proposed and the nature of the substituted authorization proposed; and
 - (f) invite submissions in respect of the proposed action within a period specified by the Commission.
- (4) After considering any submissions invited under subsection (2) or (3) in relation to an authorization that are received within the period specified by the Commission under that subsection and after compliance with the requirements of section 90A in accordance with subsection (5), the Commission may make a determination in writing:
- (a) revoking the authorization and granting another such authorization that it considers appropriate, in substitution for it; or
 - (b) deciding not to revoke the authorization.
- (5) Before making a determination under subsection (4) in relation to an application, or a proposal, for the revocation of an authorization and the substitution of another, the Commission must comply with the requirements of section 90A.
- Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (6) For the purposes of complying with section 90A in accordance with subsection (5), section 90A has effect:
-

Part VII Authorisations, notifications and clearances in respect of restrictive trade practices

Division 1 Authorisations (other than section 50 merger authorisations)

Section 91C

- (a) as if the reference in subsection (1) to an application for an authorization (other than an application for an authorization under subsection 88(9)) were a reference to an application, or to a proposal, for the revocation of an authorization (other than an authorization granted on an application granted under subsection 88(9)) and the substitution of another authorization; and
 - (b) as if references in other provisions of that section to an application, or to an application for an authorization, were references either to an application, or to a proposal, for the revocation of an authorization and the substitution of another; and
 - (c) as if subsection 90A(2) had provided, in its operation in relation to a proposal for the revocation of an authorization and the substitution of another, that:
 - (i) the reference to the applicant and to each other interested person were a reference only to each interested person; and
 - (ii) each reference to the applicant or other person were a reference only to the other person.
- (7) The Commission must not make a determination revoking an authorization and substituting another authorization unless the Commission is satisfied that it would not be prevented under subsection 90(5A), (5B), (6), (7), (8), (8A), (8B) or (9) from making a determination granting the substituted authorization, if it were a new authorization sought under section 88.
- (8) An application for the revocation of an authorization and the substitution of another authorization may be withdrawn by notice in writing to the Commission at any time.

Division 2—Notifications

Subdivision A—Exclusive dealing

93 Notification of exclusive dealing

- (1) Subject to subsection (2), a corporation that engages, or proposes to engage, in conduct of a kind referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9) may give to the Commission a notice setting out particulars of the conduct or proposed conduct.
- (1A) To be valid, a notice under subsection (1) must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by any other information or documents prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2) A corporation may not give a notice for conduct or proposed conduct if:
 - (a) the corporation applied for an authorisation for the conduct or proposed conduct; and
 - (b) the Commission or the Trade Practices Commission made a determination dismissing the application; and
 - (c) either:
 - (i) the Tribunal or the Trade Practices Tribunal made a determination on an application for a review of a determination described in paragraph (b); or
 - (ii) the time for making such an application for review has ended without the making of an application.
- (2A) In subsection (2):

Trade Practices Commission means the Trade Practices Commission established by section 6A of this Act as in force immediately before this subsection commenced.

Section 93

Trade Practices Tribunal means the Trade Practices Tribunal continued in existence by section 30 of this Act as in force immediately before this subsection commenced.

- (2B) If the Commission receives a purported notice under subsection (1) that it considers is not a valid notice, it must, within 5 business days of receiving the purported notice, give the person who made the purported notice a written notice:
- (a) stating that the person has not given a valid notice; and
 - (b) giving reasons why the purported notice does not comply with this Division.

Definition

- (2C) In subsection (2B):

business day means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

- (3) If the Commission is satisfied that the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2), (3), (4) or (5) or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c) and referred to in a notice given by the corporation to the Commission under subsection (1) has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:
- (a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or
 - (b) any benefit to the public that has resulted or is likely to result from the conduct, or would result or be likely to result from the proposed conduct, would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct;
- the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(3A) If:

- (a) a corporation has notified the Commission under subsection (1) of conduct or proposed conduct described in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d); and
- (b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct;

the Commission may give the corporation a written notice stating that the Commission is so satisfied.

(3B) The Commission must also give the corporation a written statement of its reasons for giving notice when the Commission gives the notice.

(4) Before giving a notice under subsection (3) or (3A) the Commission shall comply with the requirements of section 93A.

(5) In satisfying itself for the purposes of subsection (3) or (3A) in relation to any conduct or proposed conduct referred to in a notice given to the Commission by a corporation under subsection (1), the Commission shall seek such relevant information as it considers reasonable and appropriate and may make a decision on the basis of any information so obtained and any other information furnished to it by the corporation or any other person or otherwise in its possession.

(6) A corporation that has given a notice to the Commission under this section in relation to any conduct or proposed conduct may, at any time before the Commission has given to the corporation a notice under subsection (3) or (3A) in relation to the conduct or proposed conduct, by notice in writing to the Commission, withdraw the first-mentioned notice.

(7) Where a corporation has given notice to the Commission under subsection (1):

- (a) in the case of a notice given before the expiration of the period of 3 months commencing on the date of commencement of the *Trade Practices Amendment Act 1977*, the engaging by the corporation in the conduct referred to in the notice on or after that date and before the giving of the notice shall not be taken, for the purposes of section 47, to

Section 93

have had the effect of substantially lessening competition within the meaning of that section; and

- (b) in any case, the engaging by the corporation in the conduct referred to in the notice after the giving of the notice shall not be taken, for the purposes of section 47, to have the purpose, or to have or be likely to have the effect, of substantially lessening competition within the meaning of that section unless:

- (i) the Commission has given notice to the corporation under subsection (3) of this section in relation to the conduct and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or
- (ii) the notice has been, or is deemed to have been, withdrawn and the conduct takes place after the day on which the notice was, or is deemed to have been, withdrawn.

- (7A) A notice under subsection (1) describing conduct or proposed conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) comes into force:

- (a) at the end of a prescribed period that started on the day when the corporation gave the Commission the notice; or
- (b) if the Commission gives notice to the corporation under subsection 93A(2) during that period—when the Commission decides not to give the corporation a notice under subsection (3A) of this section.

- (7B) A notice under subsection (1) describing conduct or proposed conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) does not come into force:

- (a) if the notice is withdrawn, or deemed to be withdrawn, before it would come into force under subsection (7A); or
- (b) if the Commission:
 - (i) gives notice to the corporation under subsection 93A(2) during the period described in paragraph (7A)(a); and
 - (ii) gives notice to the corporation under subsection (3A).

- (7C) A notice under subsection (1) describing conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) ceases to be in force:
- (a) when the notice is withdrawn or deemed to be withdrawn; or
 - (b) if the Commission gives the corporation a notice under subsection (3A)—on the 31st day after the Commission gave the notice under subsection (3A) or on a later day specified in writing by the Commission.
- (8) Where:
- (a) a corporation gives a notice to the Commission under subsection (1) in relation to any conduct or proposed conduct;
 - (b) before or after the notice is given the corporation makes an application to the Commission for an authorization to engage in that conduct;
 - (c) the Commission:
 - (i) makes a determination dismissing the application; or
 - (ii) makes a determination granting an authorization in respect of the application; and
 - (d) the Tribunal makes a determination on an application for a review of the determination of the Commission or the time for making such an application for review expires without an application for review having been made;
- the notice shall thereupon be deemed to be withdrawn.
- (9) If an application is made to the Tribunal for a review of the giving of a notice by the Commission under subsection (3) or (3A), a reference in subsection (7) or paragraph (7C)(b) to the day on which the Commission gave the notice shall be read as a reference to:
- (a) if the application is withdrawn—the day on which the application is withdrawn;
 - (b) if the Tribunal, on the application of the Commission or of any other person who the Tribunal is satisfied has an interest in the subject matter of the review, declares that the application for the review is not being proceeded with by the applicant with due diligence—the day on which the Tribunal makes the declaration; or

Section 93AA

- (c) in any other case—the day on which the Tribunal makes a determination on the review.
- (10) Where:
 - (a) a corporation has given a notice to the Commission under subsection (1) in relation to conduct or proposed conduct and the Commission has given notice to the corporation in writing under subsection (3) or (3A) in relation to the conduct or the proposed conduct; or
 - (b) a notice given by a corporation to the Commission under subsection (1) in relation to conduct or proposed conduct is withdrawn or deemed to be withdrawn;the corporation is not entitled to give a further notice under subsection (1) to the Commission in relation to the same conduct or proposed conduct or in relation to conduct or proposed conduct to the like effect.

Subdivision B—Collective bargaining

93AA Definitions

In this Subdivision:

collective bargaining notice means a notice under subsection 93AB(1A) or (1).

conference notice means a notice under subsection 93A(2).

contract means a contract, arrangement or understanding.

objection notice means a notice under subsection 93AC(1) or (2).

93AB Notification of collective bargaining

Notice to Commission—cartel provisions

- (1A) A corporation that:
 - (a) has made, or proposes to make, a contract (the ***initial contract***) that contains a cartel provision that:
 - (i) has the purpose; or
 - (ii) has or is likely to have the effect; mentioned in subsection 44ZZRD(2); or

- (b) has made, or proposes to make, a contract (the *initial contract*) that contains a cartel provision that has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); or
- (c) proposes to give effect to a provision of a contract (the *initial contract*) where the provision is a cartel provision that:
 - (i) has the purpose; or
 - (ii) has or is likely to have the effect;mentioned in subsection 44ZZRD(2); or
- (d) proposes to give effect to a provision of a contract (the *initial contract*) where the provision is a cartel provision that has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c);

may give the Commission a notice (the *collective bargaining notice*) setting out particulars of the contract or proposed contract, but only if the 3 requirements set out in subsections (2), (3) and (4) are satisfied.

Note 1: Subsection (6) deals with the form etc. of a collective bargaining notice.

Note 2: Section 93AD sets out when a collective bargaining notice comes into force.

Notice to Commission—per se and competition provisions

- (1) A corporation that:
 - (a) has made, or proposes to make, a contract (the *initial contract*) containing a provision of the kind referred to in paragraph 45(2)(a); or
 - (b) proposes to give effect to a provision of a contract (the *initial contract*) where the provision is of the kind referred to in paragraph 45(2)(b);

may give the Commission a notice (the *collective bargaining notice*) setting out particulars of the contract or proposed contract, but only if the 3 requirements set out in subsections (2), (3) and (4) are satisfied.

Note 1: Subsection (6) deals with the form etc. of a collective bargaining notice.

Note 2: Section 93AD sets out when a collective bargaining notice comes into force.

Section 93AB

First—making of initial contract

- (2) First, the corporation must have made, or propose to make, the initial contract with 1 or more persons (the ***contracting parties***) about:
- (a) the supply of particular goods or services to; or
 - (b) the acquisition of particular goods or services from;
- another person (the ***target***) by the corporation and the contracting parties.

Second—making of contracts with target

- (3) Second, the corporation must reasonably expect that it will make 1 or more contracts with the target about:
- (a) the supply of 1 or more of those goods or services to; or
 - (b) the acquisition of 1 or more of those goods or services from;
- the target by the corporation.

Third—price of contracts with target

- (4) Third, the corporation must reasonably expect that:
- (a) in the case where the corporation reasonably expects to make only 1 contract with the target—the price for the supply or acquisition of those goods or services under that contract; or
 - (b) in the case where the corporation reasonably expects to make 2 or more contracts with the target—the sum of the prices for the supply or acquisition of those goods or services under those contracts;
- will not exceed \$3,000,000, or such other amount as is prescribed by the regulations, in any 12 month period. The regulations may prescribe different amounts in relation to different industries.

Timing of reasonable expectation

- (5) The corporation must have the reasonable expectation referred to in subsections (3) and (4):
- (a) at the time of giving the collective bargaining notice; and
 - (b) if the initial contract has been made—at the time it was made.

Form of notice etc.

- (6) To be valid, a collective bargaining notice must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by any other information or documents prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.

Notice given by, or on behalf of, contracting persons

- (7) A collective bargaining notice may be expressed to be given on behalf of one or more of the contracting parties, but only if those parties could have given the notice on their own behalf. If the notice is so expressed, then it is also taken to have been given by those parties.

When a notice may not be given

- (8) A corporation may not give a collective bargaining notice in relation to a contract or proposed contract if:
- (a) it has applied for an authorisation in relation to the contract or proposed contract; and
 - (b) the Commission has made a determination dismissing the application; and
 - (c) either:
 - (i) the Tribunal has made a determination on an application for a review of the Commission's determination; or
 - (ii) the time for making such an application for review has ended without the making of an application.

Notice is invalid if given by union etc. on behalf of the corporation

- (9) A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:
- (a) a trade union; or
 - (b) an officer of a trade union; or
 - (c) a person acting on the direction of a trade union.

Section 93AB

Invalid collective bargaining notice

- (10) If the Commission receives a purported collective bargaining notice that it considers is not a valid collective bargaining notice, it must, within 5 business days of receiving the purported notice, give the person who made the purported notice a written notice:
- (a) stating that the person has not given a valid collective bargaining notice; and
 - (b) giving reasons why the purported collective bargaining notice does not comply with this Division.
- (10A) The Commission must, as soon as practicable after receiving a valid collective bargaining notice, give a copy of the notice to the target.

Purpose/effect of a provision

- (10B) Subsections 44ZZRD(6), (7), (8) and (10) apply for the purposes of paragraphs (1A)(a) and (c) in a corresponding way to the way in which they apply for the purposes of Division 1 of Part IV.

Purpose of a provision

- (10C) Subsections 44ZZRD(7), (9) and (11) apply for the purposes of paragraphs (1A)(b) and (d) in a corresponding way to the way in which they apply for the purposes of Division 1 of Part IV.

Definition

- (11) In this section:

business day means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

trade union means the following:

- (a) an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009*;
- (b) an association of employees that is registered or recognised as a trade union (however described) under the law of a State or Territory;

- (c) an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

93AC Commission's objection notice

Commission's objection notice—cartel provisions or per se provisions

- (1) If a corporation gives the Commission:
 - (aa) a collective bargaining notice under subsection 93AB(1A) in relation to a contract, or proposed contract, containing a cartel provision of the kind referred to in that subsection; or
 - (a) a collective bargaining notice under subsection 93AB(1) in relation to a contract, or proposed contract, containing a provision of the kind referred to in subparagraph 45(2)(a)(i) or (b)(i) (exclusionary provisions);

then the Commission may, if it is satisfied that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision does not or would not outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision, give the corporation a written notice (the **objection notice**) stating that it is so satisfied.

Commission's objection notice—competition provisions

- (2) If a corporation gives the Commission a collective bargaining notice under subsection 93AB(1) in relation to a contract, or proposed contract, containing a provision of the kind referred to in subparagraph 45(2)(a)(ii) or (b)(ii), then the Commission may, if it is satisfied that:
 - (a) the provision has or would have the purpose, or has or is likely to have or would have or be likely to have the effect, of substantially lessening competition (within the meaning of section 45); and
 - (b) in all the circumstances, either:
 - (i) the provision has not resulted or is not likely to result, or would not result or be likely to result, in a benefit to the public; or

Section 93AD

- (ii) any benefit to the public that has resulted or is likely to result, or would result or be likely to result, from the provision does not or would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;

give the corporation a written notice (the ***objection notice***) stating that it is so satisfied.

Reasons for objection notice

- (3) The Commission must, at the time it gives a corporation an objection notice, give the corporation a written statement of its reasons for giving the notice.

Conference before objection notice

- (4) The Commission must comply with section 93A (conferences about draft objection notices) before giving an objection notice.

Commission to seek additional information

- (5) For the purposes of deciding whether or not to give an objection notice:
 - (a) the Commission must seek such relevant information as it considers reasonable and appropriate; and
 - (b) the Commission may make a decision on the basis of:
 - (i) any information so obtained; or
 - (ii) any other information given to it by the corporation or any other person; or
 - (iii) any other information in its possession.

93AD When collective bargaining notice comes into force and ceases to be in force

When collective bargaining notice comes into force

- (1) A collective bargaining notice comes into force:
 - (a) at the end of the period which is 14 days or such longer period as is prescribed by the regulations, starting on the day the corporation gave the Commission the notice; or

Section 93AD

- (b) if the Commission gives the corporation a conference notice during the period referred to in paragraph (a) and then decides not to give the corporation an objection notice—when the Commission makes that decision.
- (2) However, a collective bargaining notice does not come into force if:
 - (a) it is withdrawn, or taken to be withdrawn, before it would come into force under subsection (1); or
 - (b) the Commission gives the corporation a conference notice during the period referred to in paragraph (1)(a) and then gives the corporation an objection notice.

Note: Section 93AE deals with the withdrawal of a collective bargaining notice.

When collective bargaining notice ceases to be in force

- (3) A collective bargaining notice ceases to be in force at the earliest of the following times:
 - (a) when it is withdrawn or taken to be withdrawn;
 - (b) if the Commission gives the corporation an objection notice—on the 31st day after the relevant day or on a later day specified in writing by the Commission;
 - (c) at the end of the period of 3 years beginning on the day the corporation gave the collective bargaining notice.

Note: Section 93AE deals with the withdrawal of a collective bargaining notice.

- (4) For the purposes of subsection (3), the **relevant day** is worked out in accordance with this table:

Relevant day	
In this situation:	the relevant day is:
1 If an application is not made to the Tribunal for a review of the Commission's decision to give the objection notice	the day the Commission gave the notice.

Section 93AE

<i>Relevant day</i>	
In this situation:	the <i>relevant day</i> is:
2 If an application is made to the Tribunal for a review of the Commission's decision to give the objection notice	(a) if the review application is withdrawn—the day of the withdrawal; or (b) if, on the application of the Commission or any other person who the Tribunal is satisfied has an interest in the subject matter of the review, the Tribunal declares that the applicant is not proceeding with the review application with due diligence—the day of the declaration; or (c) in any other case—the day on which the Tribunal makes a determination on the review.

93AE Withdrawal of collective bargaining notice

Withdrawal by corporation

- (1) A corporation may, by written notice given to the Commission, withdraw a collective bargaining notice it has given the Commission.
- (2) The corporation may do so at any time before the Commission gives it an objection notice in relation to the collective bargaining notice.

Deemed withdrawal

- (3) If:
 - (a) a corporation gives the Commission a collective bargaining notice in relation to a contract or proposed contract; and
 - (b) before or after the corporation gave the notice, it applies to the Commission for an authorisation for that contract or proposed contract; and
 - (c) the Commission makes a determination either dismissing the application or granting an authorisation in respect of the application; and

(d) either:

- (i) the Tribunal makes a determination on an application for a review of the Commission's determination; or
- (ii) the time for making such an application for review ends without the making of an application;

then the collective bargaining notice is taken to be withdrawn.

93AEA Only 1 collective bargaining notice under subsection 93AB(1A) may be given

If:

- (a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a contract or proposed contract; and
- (b) either:
 - (i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or
 - (ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then a further collective bargaining notice under subsection 93AB(1A) cannot be given by any person in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

93AF Only 1 collective bargaining notice under subsection 93AB(1) may be given

If:

- (a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1) in relation to a contract or proposed contract; and
- (b) either:
 - (i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or
 - (ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then the corporation may not give the Commission a further collective bargaining notice under subsection 93AB(1) in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

Subdivision C—Conferences

93A Commission to afford opportunity for conference before giving notice

- (1) Before giving a notice under subsection 93(3) or (3A) or 93AC(1) or (2) in relation to any conduct or proposed conduct, the Commission shall prepare a draft notice in relation to that conduct or proposed conduct.
- (2) The Commission shall, by notice in writing sent to the corporation to the conduct or proposed conduct of which the draft notice relates and to each other interested person, invite the corporation or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the corporation or other person wishes the Commission to hold a conference in relation to the draft notice.
- (3) The Commission shall send with each notice under subsection (2) a copy of the draft notice and a summary of the reasons why it proposes to give the notice under subsection 93(3) or (3A) or 93AC(1) or (2).
- (4) If each of the persons to whom a notice was sent under subsection (2):
 - (a) notifies the Commission in writing within the period of 14 days mentioned in that subsection that the person does not wish the Commission to hold a conference in relation to the draft notice; or
 - (b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference;the Commission must decide after the end of that period whether or not to give the notice under subsection 93(3) or (3A) or 93AC(1) or (2).
- (5) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft notice, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed

to each of the persons to whom a notice was sent under subsection (2).

- (6) At the conference:
- (a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft notice) nominated by the Chairperson; and
 - (b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and
 - (c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and
 - (e) no other person is entitled to be present.
- (7) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.
- (8) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:
- (a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;
 - (b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and
 - (c) shall give a certificate certifying the day on which the first notification under subsection (5) in relation to the draft notice

Section 95

was received by the Commission and the day on which the conference terminated;
and any such certificate shall be received in all courts as evidence of the matters certified.

- (9) A document purporting to be a certificate referred to in subsection (8) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.
- (10) The Commission must take account of all matters raised at the conference.
- (10A) After the conference, the Commission must decide whether or not to give a notice under subsection 93(3) or (3A) or 93AC(1) or (2).
- (11) For the purposes of this section, *interested person* means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the matter, being an interest that, in the opinion of the Commission, is real and substantial.
- (12) Where the Commission is of the opinion that two or more notices given to the Commission under subsection 93(1) or 93AB(1A) or (1) by the same person, or by persons being bodies corporate that are related to each other, deal with substantially similar conduct or proposed conduct, the Commission may treat the notices as if they constituted a single notice and may prepare one draft notice in relation to the notices so given to the Commission and hold one conference in relation to that draft notice.

Subdivision D—Register of notifications

95 Register of notifications

- (1) The Commission shall keep a register containing:
 - (aa) notices relating to voluntary industry codes given to the Commission pursuant to regulations made under section 51AE (including notices that have been withdrawn pursuant to those regulations); and
 - (a) draft notices, and summaries of reasons, by the Commission furnished to any person under section 93A; and

- (b) records of conferences made in accordance with subsection 93A(7) and certificates in relation to conferences given under subsection 93A(8); and
 - (c) notices (including notices that have been withdrawn) given to the Commission under section 93 or 93AB; and
 - (d) documents furnished to the Commission in relation to such notices; and
 - (e) particulars of any oral submissions made to the Commission in relation to such notices; and
 - (f) particulars of notices given by the Commission to corporations in relation to notices given by corporations under section 93 or 93AB; and
 - (g) particulars of any permits given by the Commission under subparagraph 93(7)(b)(i); and
 - (ga) details of the specification of any day by the Commission under paragraph 93(7C)(b); and
 - (gb) details of the specification of any day by the Commission under paragraph 93AD(3)(b); and
 - (h) records of proceedings at conferences held under section 65J or 65M; and
 - (j) particulars of recommendations made to the Minister by the Commission under section 65K or 65N.
- (2) Where a person furnishes a document to the Commission:
- (a) in relation to a notice given to the Commission under section 93 or 93AB; or
 - (b) in relation to a conference held under Division 3 of Part XI;
- or makes an oral submission to the Commission in relation to the notice or the conference, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (1) by reason of the confidential nature of any of the matters contained in the document or submission.
- (3) Where such a request is made:
- (a) if the document or part of the document, or the submission or part of the submission, to which the request relates contains particulars of:
-

Section 95

- (i) a secret formula or process;
 - (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or of assets of a person; or
 - (iii) the current costs of manufacturing, producing or marketing goods or services;
 - the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (1); and
 - (b) in any other case—the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.
- (4) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (1), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (1)(d) does not apply in relation to the document or part of the document.
- (5) Subsection (4) does not apply in relation to a document that was produced to the Minister or the Commission in pursuance of a notice under section 65Q or 155.
- (6) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (1), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (1)(e) does not apply in relation to the submission or that part of the submission, as the case may be.
- (7) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (1)(d) or particulars referred to in paragraph (1)(e) from the register kept under subsection (1).

- (8) If a person requests in accordance with subsection (2) that a document or part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (1), the document or the part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

Division 3—Merger clearances and authorisations

Subdivision A—Preliminary

95AA Simplified outline of this Division

This Division is about merger clearances and merger authorisations.

It relates to section 50: that section prohibits a person acquiring shares in the capital of a body corporate or assets of another person if the acquisition would have, or be likely to have, the effect of substantially lessening competition in a market. If a person has a clearance or authorisation for the acquisition, section 50 will not prevent the person from making the acquisition.

The main differences between merger clearances and authorisations are:

- different bodies decide whether they should be granted;
- different timeframes apply for when the body must make its decision;
- they have different tests that need to be satisfied for them to be granted;
- merits review is not available for decisions on authorisations.

For merger clearances (see Subdivision B):

- the Commission grants them;
- it must make its decision whether to grant within 40 business days (which can be extended if the applicant agrees or the Commission so decides), and if it does not, the application is taken to be refused;

- it cannot grant the clearance unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in a market;
- if it refuses to grant a clearance, or grants a clearance subject to conditions, then the person who applied for the clearance may apply to the Tribunal under Division 3 of Part IX for review of the Commission's decision.

For merger authorisations (see Subdivision C):

- the Tribunal grants them;
- it must make its decision whether to grant within 3 months (which can be extended to 6 months in special circumstances), and if it does not, the application is taken to be refused;
- it cannot grant the authorisation unless it is satisfied that the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Subdivision D contains a prohibition on providing false or misleading information to the Commission or Tribunal under this Division or Division 3 of Part IX.

95AB Definitions

In this Division:

authorisation means an authorisation granted under this Division.

business day means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

clearance means a clearance granted under this Division.

merger authorisation register means the register kept under section 95AZ.

merger clearance register means the register kept under section 95AH.

Section 95AC

minor variation, in relation to a clearance or an authorisation, is a single variation that does not involve a material change in the effect of the clearance or authorisation.

Subdivision B—Merger clearances

95AC Commission may grant clearance for a merger

- (1) The Commission may grant a clearance to a person:
 - (a) to acquire shares in the capital of a body corporate; or
 - (b) to acquire assets of another person.

Note: Section 95AN prohibits the Commission from granting a clearance for an acquisition unless the Commission is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition.

- (2) If the Commission does so, then section 50 does not prevent the person from acquiring the shares or assets in accordance with the clearance.

Note: The acquisition will only be protected from the operation of section 50 if it takes place in accordance with the clearance. If it does not, then section 50 will apply to the acquisition. If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (3) Without limiting subsection (2), an acquisition will not be in accordance with a clearance if any conditions of the clearance are not complied with (whether the conditions are to be complied with before, during or after the acquisition).

95AD Application for clearance

A person who wants a clearance to acquire shares or assets must apply to the Commission for it.

95AE Requirements for valid clearance application

- (1) To be valid, the application must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and

- (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.

95AF Commission to notify if clearance application is invalid

If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:

- (a) stating that the person has not made a valid application; and
- (b) giving reasons why the purported application does not comply with this Division.

95AG Application to be published on the internet

After receiving an application for a clearance, the Commission must:

- (a) subject to section 95AI (confidentiality), put a copy of the application, and accompanying information or documents, on its website; and
- (b) by notice on its website, invite submissions in respect of the application within the period specified by it.

95AH Merger clearance register

- (1) The Commission must keep a register (the *merger clearance register*) of:

- (a) applications for clearances; and
- (b) applications for minor variations of clearances; and
- (c) applications for, or the Commission's proposals under section 95AS for, the revocation of clearances or for the revocation of clearances and the substitution of other clearances;

including applications that have been withdrawn or proposals that have been abandoned.

Section 95AI

- (2) The register must include:
- (a) any document given to the Commission in relation to an application or proposal referred to in subsection (1); and
 - (b) particulars of any oral submission made to the Commission in relation to such an application or proposal; and
 - (c) the determination of the Commission on such an application or proposal and the statement of the reasons given by the Commission for that determination;
- unless section 95AI (confidentiality) prevents the inclusion.

95AI Confidentiality claims etc.

Requests for confidential treatment

- (1) If a person gives information to the Commission in relation to an application or proposal referred to in subsection 95AH(1), the person may, at the time of giving the information, request that the information be excluded from the merger clearance register and the Commission's website because of its confidential nature.

Confidentiality claims to be determined first

- (2) If such a request is made, the Commission must exclude the information from the register and its website until it has made a determination on the request.

When Commission must exclude information—request made

- (3) If such a request is made, the Commission must exclude the information from the register and its website if the information contains particulars of:
- (a) a secret formula or process; or
 - (b) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
 - (c) the current costs of manufacturing, producing or marketing goods or services.

When Commission may exclude information—request made

- (4) If such a request is made, the Commission may, if it is satisfied that it is desirable to do so because of the confidential nature of the

information, exclude the information from the register and its website.

If request refused, document may be withdrawn

- (5) If the Commission refuses such a request and the information is contained in a document, the Commission must, if the person who gave the document to it so requires, return the document or part of the document to the person. In that case, it must exclude the document or the part of the document (as the case requires) from the register and its website.

If request refused, oral submission may be withdrawn

- (6) If the Commission refuses such a request and the information was given by way of oral submission, the person who made the submission may withdraw all or part of the submission. In that case, the Commission must exclude the submission or part of the submission (as the case requires) from the register and its website.

When Commission may exclude information—no request made

- (7) The Commission may exclude information from the register and its website if it is satisfied that it is desirable to do so for any reason other than the confidential nature of the information.

95AJ Commission may seek additional information from applicant

The Commission may give the applicant a written notice requesting the applicant to give the Commission, within a specified period, additional information relevant to making its determination on the application.

95AK Commission may seek further information and consult others

- (1) The Commission may give a person a written notice requesting the person to give the Commission, within a specified period, particular information relevant to making its determination on the application.
- (2) The Commission may consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application.

Section 95AL

95AL Applicant may withdraw application

The applicant may, by notice in writing to the Commission, withdraw the application at any time.

95AM Commission to make determination on application

(1) The Commission must make a determination in writing:

- (a) granting the clearance; or
- (b) refusing to grant the clearance.

Note: The Commission must make its determination within the time limit set out in section 95AO. If it does not, then it is taken to have refused to grant the clearance.

(2) In making its determination, the Commission must take into account:

- (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received within the period specified under paragraph 95AG(b); and
- (b) any information received under section 95AJ within the period specified in the relevant notice under that section; and
- (c) any information received under subsection 95AK(1) within the period specified in the relevant notice under that subsection; and
- (d) any information obtained from consultations under subsection 95AK(2).

(2A) In making its determination, the Commission may disregard:

- (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received after the period specified under paragraph 95AG(b); and
- (b) any information received under section 95AJ after the period specified in the relevant notice under that section; and
- (c) any information received under subsection 95AK(1) after the period specified in the relevant notice under that subsection.

(3) The Commission must notify the applicant in writing of its determination and give written reasons for it.

95AN When clearance must not be granted

- (1) The Commission must not grant a clearance in relation to a proposed acquisition of shares or assets unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition (within the meaning of section 50).
- (2) To avoid doubt, a clearance cannot be granted for an acquisition that has occurred.

95AO Time limits for determining application

- (1) If the Commission has not made a determination on the application within the period that begins on the day the application was given to the Commission and ends on the 40th business day after that day, the Commission is, subject to subsection (3), taken to have made a determination refusing to grant the clearance.
- (2) The applicant may, before the end of the period referred to in subsection (1) (including any period that is taken to be substituted for that period by any other application or applications of this subsection), agree to the Commission taking a specified longer period to make its determination. If the applicant does, the longer period is taken to be substituted for the period referred to in subsection (1).
- (3) However, if before the end of the period referred to in subsection (1) (including any period that is taken to be substituted for that period by any other application or applications of subsection (2)), the Commission decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, which must be notified in writing by the Commission to the applicant, the period is extended by a further 20 business days and the longer period is taken to be substituted for the period referred to in subsection (1) (or any other period that is taken to be substituted for that period by any other application or applications of subsection (2)).

95AP Clearance subject to conditions

- (1) The Commission may grant a clearance subject to such conditions as are specified in the clearance.

Section 95AQ

Note 1: Under subsection 95AS(5), the Commission may revoke a clearance if a condition of the clearance has not been complied with.

Note 2: If an acquisition takes place without complying with a condition of the clearance (whether the condition is to be complied with before, during or after the acquisition), the acquisition will not be in accordance with the clearance and so might contravene section 50 (see subsections 95AC(2) and (3)). If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (2) Without limiting subsection (1), the Commission may grant a clearance subject to the condition that the person to whom the clearance is granted must make, and comply with, an undertaking to the Commission under section 87B.

95AQ When clearance is in force

- (1) A clearance that is not subject to conditions comes into force on the day on which the determination granting the clearance is made.
- (2) A clearance that is subject to conditions comes into force:
- (a) if an application is made to the Tribunal for a review of the Commission's determination and the application is not withdrawn—on the day on which the Tribunal makes a determination on the review; or
 - (b) if an application is made to the Tribunal for a review of the Commission's determination and the application is withdrawn—on the day on which the application is withdrawn; or
 - (c) if the person to whom the clearance was given gives a notice in writing to the Commission stating that the person will not make an application to the Tribunal for review—on the day on which the notice is given; or
 - (d) in any other case—at the end of the period in which an application may be made to the Tribunal for review of the determination.
- (3) A clearance may be expressed to be in force for a period specified in the clearance and, if so expressed, remains in force for that period only.

95AR Minor variations of clearances

Application for variation

- (1) A person to whom a clearance was granted may apply to the Commission for a minor variation of the clearance.

Requirements for valid application

- (2) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.

Commission to notify if application is invalid

- (3) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
- (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Application to be published on the internet

- (4) The Commission must, if it is satisfied that the variation sought in the application is a minor variation:
- (a) subject to section 95AI (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application within a period specified by it.

Section 95AR

Commission must make a determination on the application

- (5) The Commission must make a determination in writing:

- (a) varying the clearance; or
- (b) refusing to vary the clearance.

The Commission must notify the applicant in writing of its determination and give written reasons for it.

- (5A) In making its determination, the Commission must take into account:

- (a) any submissions received within the period specified under subsection (4); and
- (b) any information received under section 95AJ within the period specified in the relevant notice under that section (as that section applies because of subsection (11) of this section); and
- (c) any information received under subsection 95AK(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (11) of this section); and
- (d) any information obtained from consultations under subsection 95AK(2) (as that subsection applies because of subsection (11) of this section).

- (5B) In making its determination, the Commission may disregard:

- (a) any submissions received after the period specified under subsection (4); and
- (b) any information received under section 95AJ after the period specified in the relevant notice under that section (as that section applies because of subsection (11) of this section); and
- (c) any information received under subsection 95AK(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (11) of this section).

When variation must not be granted

- (6) The Commission must not make a determination varying a clearance unless it is satisfied that the acquisition to which the clearance (as varied) would apply would not have the effect, or be

likely to have the effect, of substantially lessening competition (within the meaning of section 50).

Determination varying clearance may also vary clearance conditions

- (6A) A determination varying a clearance may also vary the conditions (if any) of the clearance to take account of the variation of the clearance.

Time limits for determining application

- (7) If the Commission has not made a determination on the application within the period that begins on the day the application was given to the Commission and ends on the 40th business day after that day, the Commission is, subject to subsection (8A), taken to have made a determination refusing to vary the clearance.
- (8) The applicant may, before the end of the period referred to in subsection (7) (including any period that is taken to be substituted for that period by any other application or applications of this subsection), agree to the Commission taking a specified longer period to make its determination. If the applicant does, the longer period is taken to be substituted for the period referred to in subsection (7).
- (8A) However, if before the end of the period referred to in subsection (7) (including any period that is taken to be substituted for that period by any other application or applications of subsection (8)), the Commission decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, which must be notified in writing by the Commission to the applicant, the period is extended by a further 20 business days and the longer period is taken to be substituted for the period referred to in subsection (7) (or any other period that is taken to be substituted for that period by any other application or applications of subsection (8)).

2 or more variations at the same time

- (9) If:
- (a) a person applies for 2 or more variations:
 - (i) at the same time; or

Section 95AS

- (ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and
 - (b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the clearance;
- the Commission may deal with all of those variations together as if they were a single minor variation.

Applicant may withdraw application

- (10) The applicant may, by notice in writing to the Commission, withdraw the application at any time.

Powers of Commission

- (11) The following sections apply in relation to an application for a minor variation of a clearance in the same way as they apply in relation to an application for a clearance:
- (a) section 95AJ (Commission may seek additional information from applicant);
 - (b) section 95AK (Commission may seek further information and consult others).

95AS Revocation of clearance or revocation of clearance and substitution of a new clearance

Application for revocation etc.

- (1) The Commission may revoke a clearance, or revoke a clearance and substitute a new clearance, if the person to whom the clearance was granted applies to the Commission for this to occur.

Requirements for valid application

- (2) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.

- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.

Commission to notify if application is invalid

- (3) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
- (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Application to be published on the internet

- (4) The Commission must:
- (a) subject to section 95AI (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application within a period specified by it.

Commission's power to revoke etc. where no application

- (5) The Commission may also revoke a clearance, or revoke a clearance and substitute a new clearance, if it is satisfied that:
- (a) the clearance was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the clearance has not been complied with; or
 - (c) there has been a material change of circumstances since the clearance was granted.

Commission to give notice

- (6) If the Commission is considering making a determination under subsection (5), it must give a notice to the person to whom the clearance was granted and put a notice on its website:
- (a) stating that it is considering making the determination; and
 - (b) indicating the basis on which the determination is being proposed; and

Section 95AS

- (c) inviting submissions in respect of the determination within the period specified by it.

Commission must make a determination

- (7) The Commission must make a determination in writing:
 - (a) revoking the clearance, or revoking the clearance and substituting a new clearance for the one revoked; or
 - (b) refusing to revoke the clearance.

The Commission must notify, in writing, the person to whom the clearance was granted of its determination and give written reasons for it.

- (7A) In making its determination, the Commission must take into account:
 - (a) any submissions invited under subsection (4) or (6) that are received within the period specified under that subsection; and
 - (b) any information received under section 95AJ within the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
 - (c) any information received under subsection 95AK(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section); and
 - (d) any information obtained from consultations under subsection 95AK(2) (as that subsection applies because of subsection (13) of this section).
- (7B) In making its determination, the Commission may disregard:
 - (a) any submissions invited under subsection (4) or (6) that are received after the period specified under that subsection; and
 - (b) any information received under section 95AJ after the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
 - (c) any information received under subsection 95AK(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section).

When revocation etc. must not be granted

- (8) If an objection (other than an objection that, in the Commission's opinion, is vexatious or frivolous) to a revocation of a clearance is made in a submission:
- (a) that was invited under subsection (4) or (6); and
 - (b) that is received within the period specified;
- the Commission must not make a determination revoking the clearance unless it is satisfied that it would, if the clearance had not already been granted, be prevented under section 95AN from granting the clearance.
- (9) The Commission must not make a determination revoking a clearance and substituting another clearance unless it is satisfied that it would not be prevented under section 95AN from granting the substituted clearance, if it were a new clearance sought under section 95AD.

Time limits for determining application

- (10) If the Commission has not made a determination on an application made under subsection (1) within the period that begins on the day the application was given to the Commission and ends on the 40th business day after that day, the Commission is, subject to subsection (11A), taken to have made a determination refusing to revoke the clearance.
- (11) The applicant may, before the end of the period referred to in subsection (10) (including any period that is taken to be substituted for that period by any other application or applications of this subsection), agree to the Commission taking a specified longer period to make its determination. If the applicant does, the longer period is taken to be substituted for the period referred to in subsection (10).
- (11A) However, if before the end of the period referred to in subsection (10) (including any period that is taken to be substituted for that period by any other application or applications of subsection (11)), the Commission decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, which must be notified in writing by the Commission to the applicant, the period is extended by a further 20 business days and the longer period is taken to be

Section 95AT

substituted for the period referred to in subsection (10) (or any other period that is taken to be substituted for that period by any other application or applications of subsection (11)).

Withdrawal of application

- (12) The applicant may, by notice in writing to the Commission, withdraw the application at any time.

Powers of Commission

- (13) The following sections apply in relation to an application for a revocation, or a revocation and substitution, of a clearance in the same way as they apply in relation to an application for a clearance:
- (a) section 95AJ (Commission may seek additional information from applicant);
 - (b) section 95AK (Commission may seek further information and consult others).

Substituted clearances

- (14) The following sections apply in relation to a clearance substituted under this section in the same way as they apply in relation to a clearance granted under section 95AM:
- (a) section 95AP (Clearance subject to conditions);
 - (b) section 95AQ (When clearance is in force).

Subdivision C—Merger authorisations

95AT Tribunal may grant authorisation for a merger

- (1) The Tribunal may grant an authorisation to a person:
- (a) to acquire shares in the capital of a body corporate; or
 - (b) to acquire assets of another person.

Note 1: Section 95AZH prohibits the Tribunal from granting an authorisation for an acquisition unless the Tribunal is satisfied the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Note 2: Division 2 of Part IX contains provisions about procedure and evidence that relate to proceedings before the Tribunal.

- (2) If the Tribunal does so, then section 50 does not prevent the person from acquiring the shares or assets in accordance with the authorisation.

Note: The acquisition will only be protected from the operation of section 50 if it takes place in accordance with the authorisation. If it does not, then section 50 will apply to the acquisition. If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (3) Without limiting subsection (2), an acquisition will not be in accordance with an authorisation if any conditions of the authorisation are not complied with (whether the conditions are to be complied with before, during or after the acquisition).

95AU Application for authorisation

A person who wants an authorisation to acquire shares or assets must apply to the Tribunal for it.

95AV Requirements for valid authorisation application

- (1) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

95AW Tribunal to notify if authorisation application is invalid

If the Tribunal receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:

- (a) stating that the person has not made a valid application; and

Section 95AX

- (b) giving reasons why the purported application does not comply with this Division.

95AX Tribunal to notify Commission of authorisation application

The Tribunal must, within 3 business days of receiving an application for an authorisation, give a copy of it to the Commission.

95AY Application to be published on the internet

After receiving a copy of an application for an authorisation, the Commission must:

- (a) subject to section 95AZA (confidentiality), put a copy of the application, and accompanying information or documents, on its website; and
- (b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

95AZ Merger authorisation register

- (1) The Tribunal must keep a register (the *merger authorisation register*) of:
 - (a) applications for authorisations; and
 - (b) applications for minor variations of authorisations; and
 - (c) applications for the revocation of authorisations or for the revocation of authorisations and the substitution of other authorisations;including applications that have been withdrawn.
- (2) The register must include:
 - (a) any document given to the Tribunal in relation to an application referred to in subsection (1); and
 - (b) particulars of any oral submission made to the Tribunal in relation to such an application; and
 - (c) the determination of the Tribunal on such an application and the statement of the reasons given by the Tribunal for that determination;unless section 95AZA (confidentiality) prevents the inclusion.

95AZA Confidentiality claims etc.

Requests for confidential treatment

- (1) If a person gives information to the Tribunal in relation to an application or proposal referred to in subsection 95AZ(1), the person may, at the time of giving the information, request that the information be excluded from the merger authorisation register and the Commission's website because of its confidential nature.

Confidentiality claims to be determined first

- (2) If such a request is made, the information must be excluded from the register and the Commission's website until the Tribunal has made a determination on the request.

When Tribunal must exclude information—request made

- (3) If such a request is made, the Tribunal must exclude the information from the register and the Commission's website if the information contains particulars of:
 - (a) a secret formula or process; or
 - (b) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
 - (c) the current costs of manufacturing, producing or marketing goods or services.

When Tribunal may exclude information—request made

- (4) If such a request is made, the Tribunal may, if it is satisfied that it is desirable to do so because of the confidential nature of the information, exclude the information from the register and the Commission's website.

If request refused, document may be withdrawn

- (5) If the Tribunal refuses such a request and the information is contained in a document, the Tribunal must, if the person who gave the document to it so requires, return the document or part of the document to the person. In that case, it must exclude the document or the part of the document (as the case requires) from the register and the Commission's website.

Section 95AZC

If request refused, oral submission may be withdrawn

- (6) If the Tribunal refuses such a request and the information was given by way of oral submission, the person who made the submission may withdraw all or part of the submission. In that case, the Tribunal must exclude the submission or part of the submission (as the case requires) from the register and the Commission's website.

When Tribunal may exclude information—no request made

- (7) The Tribunal may exclude information from the register and the Commission's website if it is satisfied that it is desirable to do so for any reason other than the confidential nature of the information.

95AZC Tribunal may seek additional information from applicant

The Tribunal may give the applicant a written notice requesting the applicant to give the Tribunal, within a specified period, additional information relevant to making its determination on the application.

95AZD Tribunal may seek further information and consult others etc.

- (1) The Tribunal may give a person a written notice requesting the person to give the Tribunal, within a specified period, particular information relevant to making its determination on the application.
- (2) The Tribunal may consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application.
- (3) The Tribunal may disclose information excluded from the merger authorisation register under subsection 95AZA(3), (4) or (7) to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application.

95AZE Applicant may withdraw application

The applicant may, by notice in writing to the Tribunal, withdraw the application at any time.

95AZE A Tribunal must require Commission to give report

- (1) For the purposes of determining the application, the member of the Tribunal presiding on the application must require the Commission to give a report to the Tribunal. The report must be:
 - (a) in relation to the matters specified by that member; and
 - (b) given within the period specified by that member.
- (2) The Commission may also include in the report any matter it considers relevant to the application.

95AZF Commission to assist Tribunal

- (1) For the purposes of determining the application:
 - (a) the Commission may call a witness to appear before the Tribunal and to give evidence in relation to the application; and
 - (b) the Commission may report on statements of fact put before the Tribunal in relation to the application; and
 - (c) the Commission may examine or cross-examine any witnesses appearing before the Tribunal in relation to the application; and

Note: The Commission may be represented by a lawyer: see paragraph 110(d).

 - (d) the Commission may make submissions to the Tribunal on any issue the Commission considers relevant to the application.
- (2) For the purposes of determining the application, the member of the Tribunal presiding on the application may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal, as the member specifies.

Section 95AZFA

95AZFA Commission may make enquiries

The Commission may, for the purposes of section 95AZE or 95AZF, make such enquiries as it considers reasonable and appropriate.

95AZG Tribunal to make determination on application

(1) The Tribunal must make a determination in writing:

- (a) granting the authorisation; or
- (b) refusing to grant the authorisation.

Note: The Tribunal must make its determination within the time limit set out in section 95AZI. If it does not, then it is taken to have refused to grant the authorisation.

(2) In making its determination, the Tribunal must take into account:

- (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received within the period specified under paragraph 95AY(b); and
- (b) any information received under section 95AZC within the period specified in the relevant notice under that section; and
- (c) any information received under subsection 95AZD(1) within the period specified in the relevant notice under that subsection; and
- (d) any information obtained from consultations under subsection 95AZD(2); and
- (e) the report given to it under section 95AZE; and
- (f) any thing done as mentioned in section 95AZF.

(2A) In making its determination, the Tribunal may disregard:

- (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received after the period specified under paragraph 95AY(b); and
- (b) any information received under section 95AZC after the period specified in the relevant notice under that section; and
- (c) any information received under subsection 95AZD(1) after the period specified in the relevant notice under that subsection.

- (3) The Tribunal must notify the applicant in writing of its determination and give written reasons for it.

95AZH When authorisation must not be granted

- (1) The Tribunal must not grant an authorisation in relation to a proposed acquisition of shares or assets unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.
- (2) In determining what amounts to a benefit to the public for the purposes of subsection (1):
- (a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.
- (3) To avoid doubt, an authorisation cannot be granted for an acquisition that has occurred.

95AZI Time limits for determining application

- (1) If the Tribunal has not made a determination on the application within the relevant period, the Tribunal is taken to have refused to grant the authorisation.
- (2) The *relevant period* is the period of 3 months beginning on the day the application was given to the Tribunal. However, if before the end of that 3 month period the Tribunal determines in writing that:
- (a) the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances; and

Section 95AZJ

- (b) that period is extended by a specified period of not more than 3 months;
the *relevant period* is that period as so extended.
- (3) If the Tribunal makes a determination under subsection (2), it must notify the applicant in writing of its determination before the end of that 3 month period.

95AZJ Authorisation subject to conditions

- (1) The Tribunal may grant an authorisation subject to such conditions as are specified in the authorisation.

Note 1: Under subsection 95AZM(6), the Commission may apply to the Tribunal to revoke an authorisation if a condition of the authorisation has not been complied with.

Note 2: If an acquisition takes place without complying with a condition of the authorisation (whether the condition is to be complied with before, during or after the acquisition), the acquisition will not be in accordance with the authorisation and so might contravene section 50 (see subsections 95AT(2) and (3)). If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (2) Without limiting subsection (1), the Tribunal may grant an authorisation subject to the condition that the person to whom the authorisation is granted must make, and comply with, an undertaking to the Commission under section 87B.

95AZK When authorisation is in force

- (1) An authorisation comes into force on the day on which the determination granting the authorisation is made.
- (2) An authorisation may be expressed to be in force for a period specified in the authorisation and, if so expressed, remains in force for that period only.

95AZL Minor variations of authorisations

Application for variation

- (1) The person to whom an authorisation was granted may apply to the Tribunal for a minor variation of the authorisation.

Requirements for valid application

- (2) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

Tribunal to notify if application is invalid

- (3) If the Tribunal receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
- (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Tribunal to give the Commission a copy of the application

- (4) The Tribunal must, if it is satisfied that the variation sought in the application is a minor variation, give a copy of it to the Commission within 3 business days of receiving it.

Application to be published on the internet

- (5) After receiving a copy of the application, the Commission must:
- (a) subject to section 95AZA (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

Section 95AZL

Tribunal must make a determination on the application

- (6) The Tribunal must make a determination in writing:

- (a) varying the authorisation; or
- (b) refusing to vary the authorisation.

The Tribunal must notify the applicant in writing of its determination and give written reasons for it.

- (6A) In making its determination, the Tribunal must take into account:

- (a) any submissions received within the period specified under subsection (5); and
- (b) any information received under section 95AZC within the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
- (c) any information received under subsection 95AZD(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section); and
- (d) any information obtained from consultations under subsection 95AZD(2) (as that subsection applies because of subsection (13) of this section); and
- (e) the report given to it under section 95AZE (as that section applies because of subsection (13) of this section); and
- (f) any thing done as mentioned in section 95AZF (as that section applies because of subsection (13) of this section).

- (6B) In making its determination, the Tribunal may disregard:

- (a) any submissions received after the period specified under subsection (5); and
- (b) any information received under section 95AZC after the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
- (c) any information received under subsection 95AZD(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section).

When variation must not be granted

- (7) The Tribunal must not make a determination varying an authorisation unless the Tribunal is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.

Determination varying authorisation may also vary authorisation conditions

- (7A) A determination varying an authorisation may also vary the conditions (if any) of the authorisation to take account of the variation of the authorisation.

Time limits for determining application

- (8) If the Tribunal has not made a determination on the application within the relevant period, the Tribunal is taken to have refused to vary the authorisation.
- (9) For the purposes of subsection (8), the **relevant period** is the period of 3 months beginning on the day the application was given to the Tribunal. However, if before the end of that 3 month period the Tribunal determines in writing that:
- (a) the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances; and
 - (b) that period is extended by a specified period of not more than 3 months;
- the **relevant period** is that period as so extended.
- (10) If the Tribunal makes a determination under subsection (9), it must notify the applicant in writing of its determination before the end of that 3 month period.

2 or more variations at the same time

- (11) If:
- (a) a person applies for 2 or more variations:
 - (i) at the same time; or

Section 95AZM

- (ii) in such close succession that the variations could conveniently be dealt with by the Tribunal at the same time; and
 - (b) the Tribunal is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation;
- the Tribunal may deal with all of those variations together as if they were a single minor variation.

Applicant may withdraw application

- (12) The applicant may, by notice in writing to the Tribunal, withdraw the application at any time.

Powers and procedures of the Tribunal

- (13) The following sections apply in relation to an application for a minor variation of an authorisation in the same way as they apply in relation to an application for an authorisation:
- (b) section 95AZC (Tribunal may seek additional information from applicant);
 - (c) section 95AZD (Tribunal may seek further information and consult others etc.);
 - (ca) section 95AZE (Tribunal must require Commission to give report);
 - (d) section 95AZF (Commission to assist Tribunal);
 - (e) section 95AZFA (Commission may make enquiries).

95AZM Revocation of authorisation or revocation of authorisation and substitution of a new authorisation

Application for revocation

- (1) The Tribunal may revoke an authorisation, or revoke an authorisation and substitute a new authorisation, if the person to whom the authorisation was granted applies to the Tribunal for this to occur.

Requirements for valid application

- (2) To be valid, the application must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

Tribunal to notify if application is invalid

- (3) If the Tribunal receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
 - (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Tribunal to give the Commission a copy of the application

- (4) The Tribunal must give a copy of the application to the Commission within 3 business days of receiving it.

Application to be published on the internet

- (5) After receiving a copy of the application, the Commission must:
 - (a) subject to section 95AZA (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

Section 95AZM

Commission may apply for revocation

- (6) The Commission may apply to the Tribunal for an authorisation to be revoked, or for an authorisation to be revoked and a new authorisation substituted for it, if the Commission is satisfied that:
- (a) the authorisation was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the authorisation has not been complied with; or
 - (c) there has been a material change of circumstances since the authorisation was granted.

Tribunal to give notice

- (7) If the Tribunal is considering making a determination under subsection (6), the Tribunal must give a notice to the person to whom the authorisation was granted and cause a notice to be put on the Commission's website:
- (a) stating that it is considering making the determination; and
 - (b) indicating the basis on which the determination is being proposed; and
 - (c) inviting submissions in respect of the determination within a period specified by the Tribunal.

Tribunal must make a determination

- (8) The Tribunal must make a determination in writing:
- (a) revoking the authorisation, or revoking the authorisation and substituting a new authorisation; or
 - (b) refusing to revoke the authorisation.

The Tribunal must notify, in writing, the person to whom the authorisation was granted of its determination and give written reasons for it.

- (8A) In making its determination, the Tribunal must take into account:
- (a) any submissions invited under subsection (5) or (7) that are received within the period specified under that subsection; and
 - (b) any information received under section 95AZC within the period specified in the relevant notice under that section (as

- that section applies because of subsection (15) of this section); and
- (c) any information received under subsection 95AZD(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (15) of this section); and
 - (d) any information obtained from consultations under subsection 95AZD(2) (as that subsection applies because of subsection (15) of this section); and
 - (e) the report given to it under section 95AZE (as that section applies because of subsection (15) of this section); and
 - (f) any thing done as mentioned in section 95AZF (as that section applies because of subsection (15) of this section).
- (8B) In making its determination, the Tribunal may disregard:
- (a) any submissions invited under subsection (5) or (7) that are received after the period specified under that subsection; and
 - (b) any information received under section 95AZC after the period specified in the relevant notice under that section (as that section applies because of subsection (15) of this section); and
 - (c) any information received under subsection 95AZD(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (15) of this section).

When revocation etc. must not be granted

- (9) If an objection (other than an objection that, in the Tribunal's opinion, is vexatious or frivolous) to a revocation of an authorisation is made in a submission:
- (a) that was invited under subsection (5) or (7); and
 - (b) that is received within the period specified;
- the Tribunal must not make a determination revoking the authorisation unless the Tribunal is satisfied that it would, if the authorisation had not already been granted, be prevented under section 95AZH from granting the authorisation.
- (10) The Tribunal must not make a determination revoking an authorisation and substituting another authorisation unless it is satisfied that it would not be prevented under section 95AZH from

Section 95AZM

making a determination granting the substituted authorisation, if it were a new authorisation sought under section 95AU.

Time limits for determining application

- (11) If the Tribunal has not made a determination on an application under subsection (1) or (6) within the relevant period, the Tribunal is taken to have refused to revoke the authorisation.
- (12) For the purposes of subsection (11), the **relevant period** is the period of 3 months beginning on the day the application was given to the Tribunal. However, if before the end of that 3 month period the Tribunal determines in writing that:
- (a) the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances; and
 - (b) that period is extended by a specified period of not more than 3 months;
- the **relevant period** is that period as so extended.
- (13) If the Tribunal makes a determination under subsection (12), it must notify the applicant in writing of its determination before the end of that 3 month period.

Withdrawal of application

- (14) The applicant may withdraw an application under subsection (1), and the Commission may withdraw an application under subsection (6), by notice in writing to the Tribunal at any time.

Powers and procedures of the Tribunal

- (15) The following sections apply in relation to an application for a revocation, or a revocation and substitution, of an authorisation in the same way as they apply in relation to an application for an authorisation:
- (b) section 95AZC (Tribunal may seek additional information from applicant);
 - (c) section 95AZD (Tribunal may seek further information and consult others etc.);
 - (ca) section 95AZE (Tribunal must require Commission to give report);

- (d) section 95AZF (Commission to assist Tribunal);
- (e) section 95AZFA (Commission may make enquiries).

Substituted authorisations

- (16) The following sections apply in relation to an authorisation substituted under this section in the same way as they apply in relation to an authorisation granted under section 95AZG:
 - (a) section 95AZJ (Authorisation subject to conditions);
 - (b) section 95AZK (When authorisation is in force).

Subdivision D—Miscellaneous

95AZN Providing false or misleading information

- (1) A person must not give information to the Commission or Tribunal under this Division or Division 3 of Part IX if the person is negligent as to whether the information is false or misleading in a material particular.

Note: Under section 76, the Court may order a person who contravenes this section to pay a pecuniary penalty. See also sections 80AC, 81A and 86C for other related remedies.

- (2) For the purposes of subsection (1), proof that the person knew, or was reckless as to whether, the information was false or misleading in a material particular is taken to be proof that the person was negligent as to whether the information was false or misleading in a material particular.

Part VIIA—Prices surveillance

Division 1—Preliminary

95A Interpretation

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

applicable period, in relation to a locality notice, has the meaning given by section 95ZB.

body means any organisation or body, whether incorporated or unincorporated, and includes a group of 2 or more individuals.

business notice means a notice under subsection 95L(3).

Commonwealth authority means:

- (a) the Commonwealth; or
- (b) an authority, institution or other body (other than a society, association or incorporated company) established for a public purpose by or under a law of the Commonwealth; or
- (c) a society, association or incorporated company in which the Commonwealth, or an authority, institution or other body of the kind referred to in paragraph (b), has a controlling interest.

declared person, in relation to goods or services of a particular description, means a person in relation to whom a declaration under subsection 95X(2) in relation to goods or services of that description is in force.

exempt supply, in relation to goods or services of a particular description, means a supply of goods or services of that description in relation to which a declaration under section 95B is in force.

external inquiry means an inquiry by a body other than the Commission.

goods includes:

- (a) ships, aircraft and other vehicles; and
- (b) animals, including fish; and

- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) water; and
- (e) gas and electricity.

inquiry means an inquiry held in accordance with this Part into a matter or matters relating to prices for the supply of goods or services.

inquiry body means:

- (a) in relation to an inquiry to be held, or being held, by the Commission—the Commission; or
- (b) in relation to an inquiry to be held, or being held, by a body other than the Commission—the other body.

inquiry Chair means:

- (a) in relation to an inquiry to be held, or being held, by the Commission—the member of the Commission presiding at the inquiry; or
- (b) in relation to an inquiry to be held, or being held, by a body other than the Commission—the person presiding at the inquiry.

inquiry notice means a notice under section 95H.

law of the Commonwealth does not include:

- (a) the *Northern Territory (Self-Government) Act 1978*; or
- (b) the *Norfolk Island Act 1979*; or
- (c) a law made under, or continued in force by, an Act referred to in paragraph (a) or (b).

locality notice means a notice under subsection 95Z(5).

member of the staff of the Commission means a person referred to in subsection 27(1) or a person engaged under section 27A.

notified goods or services means goods or services of a particular description in relation to which a declaration under subsection 95X(1) is in force.

person includes a Commonwealth authority and a State or Territory authority.

Section 95A

price includes:

- (a) a charge of any description; and
- (b) in relation to goods or services—any pecuniary benefit, whether direct or indirect, received or to be received by a person for or in connection with the supply by the person of the goods or services.

response notice means a notice under subparagraph 95Z(6)(c)(i).

services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and includes, but is not limited to, the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

- (a) a contract for or in relation to:
 - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods; or
 - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
- (b) a contract of insurance; or
- (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
- (d) any contract for or in relation to the lending of moneys;

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

State or Territory authority means:

- (a) a State, the Australian Capital Territory or the Northern Territory; or
- (b) an authority, institution or other body (except a society, association or incorporated company) established for a public purpose by or under a law of a State, the Australian Capital Territory or the Northern Territory; or

- (c) a society, association or incorporated company in which a State, the Australian Capital Territory or the Northern Territory, or an authority, institution or other body of the kind referred to in paragraph (b), has a controlling interest.

supply includes:

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
 - (b) in relation to services—provide, grant or confer.
- (2) In this Part, unless the contrary intention appears:
- (a) a reference to the supply of goods or services includes a reference to agreeing to supply goods or services; and
 - (b) a reference to the supply of goods includes a reference to the supply of goods together with other property or services, or both; and
 - (c) a reference to the supply of services includes a reference to the supply of services together with property or other services, or both; and
 - (d) a reference to the supply of goods does not include a reference to:
 - (i) a supply for use outside Australia; or
 - (ii) a supply for which a price is not charged; or
 - (iii) any other supply prescribed by the regulations; and
 - (e) a reference to the supply of services does not include a reference to:
 - (i) a supply outside Australia; or
 - (ii) a supply for which a price is not charged; or
 - (iii) any other supply prescribed by the regulations.
- (3) For the purposes of this Part, a supply by way of retail sale is taken not to be a supply on terms and conditions that are the same as, or substantially similar to, the terms and conditions of a supply by way of wholesale sale.

95B Exempt supplies

- (1) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* declare a supply of goods or services of a specified description, that is a supply in a specified

Section 95C

manner, of a specified kind or in specified circumstances, to be an exempt supply for the purposes of this Part.

- (2) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* vary or revoke a declaration under subsection (1).

95C Application of Part

- (1) This Part applies in relation to the supply of goods or services:
- (a) by a Commonwealth authority; or
 - (b) by a foreign corporation; or
 - (c) by a trading corporation in the course of, or for the purposes of, its trading operations; or
 - (d) by a financial corporation in the course of, or for the purposes of, its business operations; or
 - (e) by a body corporate incorporated in a Territory (other than the Northern Territory or Norfolk Island); or
 - (f) in an internal Territory (other than the Northern Territory), the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or
 - (g) in the course of, or in connection with, trade or commerce:
 - (i) among the States; or
 - (ii) between a State and an internal Territory; or
 - (iii) between a State and the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or
 - (iv) between an internal Territory and the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or
 - (v) between the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands; or
 - (vi) between 2 internal Territories;
- and not otherwise.
- (2) However, this Part does not apply in relation to the supply of goods or services by:
- (a) an authority, institution or other body (except a society, association or incorporated company) established for a public purpose by or under a law of Norfolk Island; or

- (b) a society, association or incorporated company in which a controlling interest is held by Norfolk Island, or an authority, institution or other body covered by paragraph (a).

95D Crown to be bound

- (1) This Part binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.
- (2) Nothing in this Part makes the Crown liable to be prosecuted for an offence.
- (3) The protection in subsection (2) does not apply to an incorporated Commonwealth authority or an incorporated State or Territory authority.

95E Object of this Part

The object of this Part is to have prices surveillance applied only in those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers.

95F Simplified overview of this Part

- (1) This Part deals with 3 main things.

Price inquiries

- (2) First, it provides for the Commission or another body to hold price inquiries in relation to the supply of goods or services.
- (3) These inquiries may relate to the supply of goods or services by a particular person. If so, the person's ability to increase the prices of those goods or services during a particular period is restricted. However, there is a way for the person to increase prices during that period.

Price notifications

- (4) Second, this Part allows the Minister or the Commission to declare goods or services to be notified goods or services and to declare a person to be a declared person in relation to such goods or services.

Section 95F

- (5) If this happens, the person's ability to increase the prices of such goods or services during a particular period is restricted. However, there is a way for the person to increase prices during that period.

Price monitoring

- (6) Third, this Part allows the Minister to direct the Commission to undertake price monitoring.
- (7) This may be in relation to supplies of goods or services in a particular industry or in relation to supplies of goods or services by particular persons.

Division 2—Commission's functions under this Part

95G Commission's functions under this Part

- (1) The Commission's functions under this Part are set out in this section.

Price inquiries

- (2) The Commission is to hold such inquiries as it is required to hold under section 95H.
- (3) The Commission may, with the Minister's approval under section 95H, hold such other inquiries as it thinks fit.
- (4) The Commission is to give the Minister a report on the results of each inquiry it holds.

Price notifications

- (5) The Commission is to consider locality notices and to take, in relation to such notices, such action in accordance with this Part as it considers appropriate.

Price monitoring

- (6) The Commission is to monitor prices, costs and profits in any industry or business that the Minister directs it to monitor and is to give the Minister a report on the results of such monitoring.

General

- (7) In exercising its powers and performing its functions under this Part, the Commission must, subject to any directions given under section 95ZH, have particular regard to the following:
- (a) the need to maintain investment and employment, including the influence of profitability on investment and employment;
 - (b) the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices;

Part VIIA Prices surveillance

Division 2 Commission's functions under this Part

Section 95G

- (c) the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

Division 3—Price inquiries

Subdivision A—Holding of inquiries

95H Price inquiries

Inquiries by Commission

- (1) The Minister may, by notice in writing given to the Chairperson, require the Commission to hold an inquiry into a specified matter or specified matters.
- (2) The Minister may, by notice in writing given to the Chairperson, approve the Commission holding an inquiry into a specified matter or specified matters.

Inquiries by other bodies

- (3) The Minister may, by notice in writing, request a body other than the Commission to hold an inquiry into a specified matter or specified matters.
- (4) The other body must, if it agrees to hold the inquiry, appoint a person to preside at the inquiry. The appointment must be in writing.
- (5) However, if the other body is a group of 2 or more individuals, the Minister must, by writing, appoint one of those individuals to preside at the inquiry.
- (5A) The Minister must, as soon as practicable after confirmation that the other body will hold the inquiry, table a statement in each House of the Parliament:
 - (a) specifying that the body will hold the inquiry; and
 - (b) giving the Minister's reasons for requesting the body, rather than the Commission, to hold the inquiry.

No inquiry in relation to exempt supply

- (6) A notice under this section must not authorise the holding of an inquiry into a supply of goods or services of a particular

Section 95J

description that is an exempt supply in relation to goods or services of that description.

No inquiry in relation to a State or Territory authority

- (7) A notice under this section must not authorise the holding of an inquiry into the supply by a State or Territory authority of goods or services.

95J Content of inquiry notices

Description of goods or services

- (1) An inquiry notice must specify the description of the goods or services in relation to which the inquiry is to be held.

Supply of goods or services by particular persons

- (2) An inquiry notice must also specify whether the inquiry is to be held in relation to the supply of goods or services of that description by a particular person or persons.
- (3) If such an inquiry is to be held, the notice may also specify that person or persons. If it does not, the inquiry body must, by writing, determine that person or persons.
- (4) The inquiry Chair must give the Minister notice in writing of the determination.

No inquiry in relation to a State or Territory authority

- (5) The inquiry body must not determine a State or Territory authority as a person in relation to whom an inquiry will be held.

Ministerial directions

- (6) The Minister may, in an inquiry notice, give such directions as he or she thinks fit as to the holding of the inquiry and the matters to be taken into consideration in the inquiry.
- (7) The inquiry body must comply with any such directions.

95K Period for completing inquiry

Inquiry period

- (1) An inquiry notice must specify the period within which the inquiry is to be completed and a report on the inquiry is to be given to the Minister.
- (2) The inquiry body must complete the inquiry and give the report to the Minister within that period.

Extensions

- (3) The Minister may, before the end of the completion period, extend or further extend that period by notice in writing given to the inquiry Chair.

Example: A notice under subsection (1) specifies that an inquiry is to be completed and a report given by 1 August.

On 30 July the Minister gives a notice under subsection (3) extending the deadline to 8 August.

On 6 August the Minister gives another notice under subsection (3) further extending the deadline to 12 August.

- (4) If the Minister does so, the inquiry body must complete the inquiry and give its report within the completion period as so extended or further extended.
- (5) In this section:

completion period means the period within which the inquiry body is required by this section to complete an inquiry and to give its report on the inquiry.

95L Notice of holding of inquiry

General notice

- (1) An inquiry body must, as soon as practicable, give notice of an inquiry it is to hold.
- (2) The notice must be given in each State, the Australian Capital Territory and the Northern Territory by advertisement published in the *Gazette* and in a newspaper circulating in that State or Territory.

Section 95M

Notice to particular person or persons

- (3) If the inquiry is to be held in relation to the supply of goods or services by a particular person or persons, the inquiry body must, as soon as practicable, give the person, or each of the persons, a notice in writing.

Content of notice

- (4) A notice under this section must:
- (a) state that the inquiry body is to hold the inquiry; and
 - (b) specify the matter or matters in relation to which the inquiry is to be held; and
 - (c) specify the time and place at which the inquiry is to start; and
 - (d) in the case of a notice under subsection (3)—set out the effect of section 95N; and
 - (e) specify any other matter prescribed by the regulations.

95M Notice of extension of period for completing inquiry

If:

- (a) an inquiry is being held in relation to the supply of goods or services of a particular description by a particular person or persons; and
- (b) the Minister extends, or further extends, the period within which the inquiry is required to be completed and a report on the inquiry given to the Minister;

the inquiry body must, as soon as possible, give the person, or each of the persons, a notice in writing giving details of the extension or further extension.

95N Price restrictions

- (1) This section applies if an inquiry body gives a person a business notice stating that it is to hold an inquiry in relation to the supply by the person of goods or services of a particular description.

Offence: previous local supply

- (2) The person is guilty of an offence if:
- (a) before the applicable day in relation to the business notice, the person supplies (the **current supply**) goods or services of

that description in a locality on particular terms and conditions; and

- (b) the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
- (c) the current supply is at a price that exceeds the highest price at which the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in that period; and
- (d) in a case where a notice has been given to the person under subsection (5)—the current supply is not in accordance with the notice.

Penalty: 100 penalty units.

Offence: no previous local supply

- (3) The person is guilty of an offence if:
- (a) before the applicable day in relation to the business notice, the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions; and
 - (b) the person has not supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply, but has supplied goods or services of that description elsewhere in Australia on the same or substantially similar terms and conditions in that period; and
 - (c) the current supply is at a price that exceeds the highest price at which the person has supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in that period; and
 - (d) in a case where a notice has been given to the person under subsection (5)—the current supply is not in accordance with the notice.

Penalty: 100 penalty units.

Section 95N

Offence: no previous supply in Australia

- (4) The person is guilty of an offence if:
- (a) before the applicable day in relation to the business notice, the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions; and
 - (b) the person has not supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
 - (c) in a case where a notice has been given to the person under subsection (5)—the current supply is not in accordance with the notice.

Penalty: 100 penalty units.

Approval to increase prices

- (5) The Commission may give the person a notice in writing stating that the person is permitted, during the period:
- (a) beginning on a specified day; and
 - (b) ending at the beginning of the applicable day in relation to the business notice;
- to supply goods or services of a specified description in a specified locality on specified terms and conditions at a price not exceeding a specified price.
- (6) The Commission may give a notice under subsection (5) on its own initiative or on the application of the person.

Consultation

- (7) In an external inquiry, the Commission must consult the body holding the inquiry before giving a notice under subsection (5).

Definition

- (8) In this section:

applicable day, in relation to a business notice, means the 14th day after whichever is the earlier of the following days:

- (a) the day on which the person given the notice receives a copy of the report by the inquiry body on the inquiry to which the notice relates;
- (b) the last day of the period within which the inquiry body is required to complete the inquiry to which the notice relates and to give the Minister a report on the inquiry.

Subdivision B—Reports on inquiries

95P Copies of report to be made available

Inquiry into supply of goods or services by particular persons

- (1) For an inquiry held in relation to the supply of goods or services by a particular person or persons, the inquiry body must send the person, or each of the persons, a copy of the report on the inquiry on the day on which it gives the Minister the report.
- (2) A copy of a report sent to a person must be accompanied by a notice in writing setting out the effect of section 95Q.

All inquiries

- (3) For any inquiry, the inquiry body must, unless the Minister directs otherwise, make copies of the report on the inquiry available for public inspection as soon as practicable after the period of 28 days beginning on the day on which it gives the Minister the report.

95Q Notification of proposed prices after receipt of report

- (1) This section applies if a person receives a copy of a report on an inquiry held in relation to the supply by the person of goods or services of a particular description.

Price notification

- (2) The person must, within 14 days after receiving the copy, give the Commission a notice in writing specifying the price or prices at which the person is supplying, or proposing to supply, goods or services of that description.

Section 95R

Offence

- (3) A person is guilty of an offence if the person contravenes subsection (2).

Penalty: 10 penalty units.

Public notification

- (4) The Commission must, within 14 days after it receives the notice under subsection (2), make publicly available details of the price or prices specified in the notice.

Subdivision C—Procedure at inquiries

95R Public inquiries etc.

Public inquiries

- (1) An inquiry body must hold an inquiry in public, unless the Minister directs otherwise.

Taking of evidence

- (2) The inquiry body may take evidence in private at an inquiry held in public if:
- (a) a witness objects to giving, in public, evidence that the inquiry body is satisfied is of a confidential nature; and
 - (b) the inquiry body considers that it is desirable to do so.
- (3) The inquiry body may permit a person appearing as a witness at the inquiry to give evidence by giving, and verifying by oath or affirmation, a written statement.
- (4) If a statement is so given in an inquiry held in public, the inquiry body must make available to the public in such manner as it thinks fit the contents of the statement other than any matter:
- (a) that the person who gave the evidence objects to being made public; and
 - (b) the evidence of which the body is satisfied would have been taken in private if that evidence had been given orally and the person had objected to giving it in public.

Written submissions

- (5) The inquiry body may require or permit a person desiring to make a submission to the body to make the submission in writing.
- (6) If a submission is so made in an inquiry held in public, the inquiry body must make available to the public in such manner as it thinks fit the contents of the submission.

Procedure

- (7) The procedure to be followed at an inquiry is within the discretion of the inquiry Chair. The inquiry body is not bound by the rules of evidence.
- (8) Subsection (7) operates:
 - (a) subject to this Part; and
 - (b) in any case—subject to any direction given to the inquiry body by the Minister; and
 - (c) in an inquiry held by the Commission and at which the inquiry Chair is not the Chairperson—subject to any direction given to the inquiry Chair by the Chairperson.

Note: See also section 95ZN (about confidentiality of information).

95S Taking of evidence on oath or affirmation

Evidence on oath or affirmation

- (1) An inquiry body may take evidence at an inquiry on oath or affirmation.
- (2) An oath or affirmation may be administered by:
 - (a) in an inquiry by the Commission—a member of the Commission; or
 - (b) in an external inquiry—the person presiding at the inquiry.

Summons

- (3) The inquiry Chair may, by writing signed by him or her, summon a person to appear at an inquiry to give evidence and to produce such documents (if any) as are specified in the summons.

Section 95T

- (4) In an inquiry by the Commission, the power conferred on the inquiry Chair by subsection (3) may, at his or her discretion, be exercised on the application of another person.

95T Failure of witness to attend

- (1) A person is guilty of an offence if:
- (a) the person is given a summons to appear as a witness at an inquiry; and
 - (b) the person fails to attend as required by the summons or fails to appear and report himself or herself from day to day; and
 - (c) the person has not been excused, or released from further attendance, by:
 - (i) in an inquiry by the Commission—a member of the Commission; or
 - (ii) in an external inquiry—the person presiding at the inquiry.

Penalty: 10 penalty units.

- (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*).

95U Refusal to be sworn or to answer question

- (1) A person appearing as a witness at an inquiry must not:
- (a) refuse or fail to swear an oath or to make an affirmation if required to do so by:
 - (i) in an inquiry by the Commission—a member of the Commission; or
 - (ii) in an external inquiry—the person presiding at the inquiry; or
 - (b) refuse or fail to answer a question that he or she is required to answer by the inquiry Chair; or
 - (c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part given to him or her.

Penalty: 10 penalty units.

- (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*).

- (3) It is a reasonable excuse for the purposes of subsection (2) for a person to refuse or fail to answer a question on the ground that the answer might tend to incriminate the person or to expose the person to a penalty.
- (4) It is a reasonable excuse for the purposes of subsection (2) for a person to refuse or fail to produce a document on the ground that the production of the document might tend to incriminate the person or to expose the person to a penalty.
- (5) Subsections (3) and (4) do not limit what is a reasonable excuse for the purposes of subsection (2).

95V Protection of witnesses

Subject to this Part, a person summoned to attend or appearing as a witness at an inquiry has the same protection, and is, in addition to the penalties provided by this Part, subject to the same liabilities, in any civil or criminal proceedings as a witness in proceedings in the High Court.

95W Allowances to witnesses

- (1) A witness summoned under this Part to appear at an inquiry is entitled to be paid such allowances for his or her travelling, and such other expenses, as are prescribed by the regulations.
- (2) The witness is entitled to be paid by:
- (a) if the witness was summoned by the inquiry Chair—the Commonwealth; or
 - (b) if the witness was summoned on the application of a person—that person.
- (3) The regulations may provide for those allowances and expenses by reference to a scale of expenses for witnesses who attend before a court specified in the regulations.

Division 4—Price notifications

95X Declarations by Minister or Commission

Notified goods or services

- (1) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* declare goods or services of a specified description to be notified goods or services for the purposes of this Part.

Declared persons

- (2) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* declare a person to be, in relation to goods or services of a specified description, a declared person for the purposes of this Part.
- (3) The Commission must give the person notice in writing of a declaration under subsection (2). The notice must set out the effect of section 95Z.
- (4) A declaration under subsection (2) must specify the time when it is to cease to have effect. Such a declaration ceases to have effect at the time specified, unless it is revoked sooner.

Variation or revocation

- (5) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* vary or revoke a declaration under this section.

95Y Declarations in relation to State or Territory authorities

- (1) The Minister must not make or approve a declaration of a State or Territory authority under section 95X unless:
 - (a) the appropriate Minister of the State or Territory concerned has agreed to the declaration being made; or
 - (b) the Council has, on the request (the *current request*) of an Australian government, recommended the declaration and the

Minister has consulted the appropriate Minister of the State or Territory concerned.

Role of Council

- (2) The Council must not recommend a declaration of a State or Territory authority in relation to goods or services unless it is satisfied that:
 - (a) at least one Australian government has notified the State or Territory concerned that the government is not satisfied that there is effective supervision of the prices charged by the authority for the supply of those goods or services; and
 - (b) there is not such effective supervision; and
 - (c) the supply of those goods or services by the authority has a significant direct or indirect impact on qualifying trade or commerce.
- (3) The Council must also not recommend a declaration of a State or Territory authority in relation to goods or services if:
 - (a) in the 5 year period before it received the current request, it was satisfied (when considering a previous request) that there was effective supervision of prices charged by the authority for the supply of those goods or services; and
 - (b) it is satisfied that there has not been a substantial change in the mechanism for that supervision since it was satisfied as mentioned in paragraph (a).
- (4) In deciding whether there is effective supervision of prices charged by a State or Territory authority, if the State or Territory concerned is a party to the Competition Principles Agreement, the Council must apply the relevant principles set out in the agreement.

Definitions

- (5) In this section:

Australian government means the Commonwealth, a State, the Australian Capital Territory or the Northern Territory.

qualifying trade or commerce means trade or commerce described in paragraph 95C(1)(g) or trade and commerce between Australia and another place.

Section 95Z

95Z Price restrictions

Offence: previous local supply

- (1) A person is guilty of an offence if:
- (a) the person is a declared person in relation to notified goods or services; and
 - (b) the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions (the **actual terms**) at a particular price (the **actual price**); and
 - (c) the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
 - (d) the actual price exceeds the highest price at which the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in that period; and
 - (e) the current supply is not an exempt supply.

Penalty: 100 penalty units.

Note: Subsection (4) contains a defence to this offence.

Offence: no previous local supply

- (2) A person is guilty of an offence if:
- (a) the person is a declared person in relation to notified goods or services; and
 - (b) the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions (the **actual terms**) at a particular price (the **actual price**); and
 - (c) the person has not supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply, but has supplied goods or services of that description elsewhere in Australia on the same or substantially similar terms and conditions in that period; and

- (d) the actual price exceeds the highest price at which the person has supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in that period; and
- (e) the current supply is not an exempt supply.

Penalty: 100 penalty units.

Note: Subsection (4) contains a defence to this offence.

Offence: no previous supply in Australia

- (3) A person is guilty of an offence if:
 - (a) the person is a declared person in relation to notified goods or services; and
 - (b) the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions (the **actual terms**) at a particular price (the **actual price**); and
 - (c) the person has not supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
 - (d) the current supply is not an exempt supply.

Penalty: 100 penalty units.

Note: Subsection (4) contains a defence to this offence.

Defence

- (4) Subsection (1), (2) or (3) does not apply if the following 4 requirements are satisfied.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Locality notice

- (5) The first requirement is that the person has given the Commission a notice (a **locality notice**) in writing stating that the person proposes to supply goods or services of that description in that locality on specified terms and conditions (the **proposed terms**) at a specified price (the **proposed price**).

Section 95ZA

Note: The person may give further notices modifying the locality notice: see section 95ZA.

Response to locality notice

- (6) The second requirement is that:
- (a) the applicable period in relation to the locality notice has ended; or
 - (b) the Commission has given the person a notice in writing stating that it has no objection to the person supplying goods or services of that description in that locality on the proposed terms at the proposed price; or
 - (c) both of the following apply:
 - (i) the Commission has given the person a notice (the **response notice**) in writing stating that it would have no objection to the person supplying goods or services of that description in that locality on the proposed terms at a specified price (the **approved price**) that is less than the proposed price;
 - (ii) the person has, not later than 7 days after being given the response notice, given the Commission a notice in writing stating that the person proposes to supply goods or services of that description in that locality on the proposed terms at a price not exceeding the approved price.

Actual terms

- (7) The third requirement is that the actual terms are the same as, or substantially similar to, the proposed terms.

Actual price

- (8) The fourth requirement is that the actual price does not exceed:
- (a) if paragraph (6)(a) or (b) applies—the proposed price; or
 - (b) if paragraph (6)(c) applies—the approved price.

95ZA Later notices modifying a locality notice

- (1) If a person gives the Commission a locality notice, the person may give the Commission one or more further notices in writing stating

that the locality notice is to have effect as if there were substituted for the proposed price another specified price.

- (2) A price specified in a notice under subsection (1) must be:
 - (a) less than the proposed price; and
 - (b) less than the price specified in any previous notice under that subsection in relation to the locality notice.
- (3) If a notice is given under subsection (1), the locality notice has effect accordingly.
- (4) In this section:

proposed price has the meaning given by subsection 95Z(5).

95ZB Applicable period in relation to a locality notice

- (1) The *applicable period* in relation to a locality notice is the period (the *price-freeze period*) of 21 days starting on the day on which the notice was given.
- (2) However, the Commission may, with the consent of the person who gave the locality notice, determine, before the end of the price-freeze period, that the applicable period in relation to the notice for the purposes of this section is a specified longer period.
- (3) If the Commission so determines, that longer period is taken to become the *applicable period* in relation to the locality notice.
- (4) Also, if the Commission has given a response notice, the period that is the *applicable period* (worked out under subsections (1) to (3)) in relation to the locality notice is taken to be increased by a period of 14 days.

Example: On 1 May the person gives the Commission a locality notice.

Under subsection (1), the applicable period ends on 21 May.

On 9 May the Commission, with the consent of the person, determines, under subsection (2), that the applicable period ends on 31 May.

If the Commission also gives the person a response notice, under subsection (4), the applicable period instead of ending on 31 May ends on 14 June.

Section 95ZC

95ZC Register of price notifications

Keeping of register

- (1) The Commission must keep, at such place as it thinks fit, a register for the purposes of this section.

Information on the register

- (2) If a person has given the Commission a locality notice, the Commission must, as soon as practicable after the end of the applicable period in relation to the notice, include in the register:
 - (a) a copy of the notice, on which has been endorsed, or to which has been attached, a statement indicating the outcome of the Commission's consideration of the notice (including any action taken by it in relation to the notice and the outcome of any such action); and
 - (b) a copy of each notice given under this Part to, or by, the Commission in relation to the locality notice; and
 - (c) a statement of the reasons for the outcome of the Commission's consideration of the locality notice.

Gazette notice

- (3) The Commission must, within 3 months after the end of the applicable period in relation to the locality notice, cause to be published in the *Gazette* a notice:
 - (a) stating that the Commission received the locality notice and specifying the date it received the notice; and
 - (b) setting out such particulars (if any) relating to the outcome of the Commission's consideration of the locality notice as it considers appropriate.

Exclusion of confidential information

- (4) A person who gives the Commission a document in relation to a locality notice, or who makes an oral submission to the Commission in relation to such a notice, may ask it to exclude from a document to be placed in the register any information:
 - (a) that was in the document given by the person or in the submission made by the person; and
 - (b) that the person claims is confidential.

- (5) The Commission may exclude the information if it is satisfied that the claim is justified and is not of the opinion that disclosure of the information is necessary in the public interest.
- (6) An application may be made to the Administrative Appeals Tribunal for the review of a decision under subsection (5) to refuse to exclude the information.

Inspection of register

- (7) A person may, at any time during ordinary office hours in the place where the register is kept, inspect or make copies of, or take extracts from, the register.

Validity of acts done

- (8) The validity of an act done by the Commission in relation to a locality notice is not affected by a failure of the Commission to comply with this section.

95ZD Delegation by Commission

- (1) The Commission may, by writing, delegate to a member of the Commission:
 - (a) the Commission's price notification powers in relation to specified locality notices; and
 - (b) the Commission's power under section 95ZJ relating to a notice given by the member exercising (as a delegate) the Commission's price notification powers.
- (2) In this section:

price notification powers means the Commission's powers under paragraph 95Z(6)(b) or (c).

Division 5—Price monitoring

95ZE Directions to monitor prices, costs and profits of an industry

- (1) The Minister may give the Commission a written direction:
 - (a) to monitor prices, costs and profits relating to the supply of goods or services by persons in a specified industry; and
 - (b) to give the Minister a report on the monitoring at a specified time or at specified intervals within a specified period.

Commercial confidentiality

- (2) The Commission must, in preparing such a report, have regard to the need for commercial confidentiality.

Public inspection

- (3) The Commission must make copies of the report available for public inspection as soon as practicable after it gives the Minister the report.

95ZF Directions to monitor prices, costs and profits of a business

- (1) The Minister may give the Commission a written direction:
 - (a) to monitor prices, costs and profits relating to the supply of goods or services by a specified person; and
 - (b) to give the Minister a report on the monitoring at a specified time or at specified intervals within a specified period.

Commercial confidentiality

- (2) The Commission must, in preparing such a report, have regard to the need for commercial confidentiality.

Commission to send person a copy of the report

- (3) The Commission must send the person a copy of the report on the day it gives the Minister the report.

Public inspection

- (4) The Commission must also make copies of the report available for public inspection as soon as practicable after the person has received a copy of the report.

95ZG Exceptions to price monitoring

Exempt supplies

- (1) The Minister must not direct the Commission under this Division to monitor prices, costs and profits relating to a supply of goods or services of a particular description that is an exempt supply in relation to goods or services of that description.

State or Territory authorities

- (2) The Minister must not direct the Commission under this Division to monitor prices, costs and profits of a State or Territory authority that supplies goods or services unless the State or Territory concerned has agreed to the direction being given.

Division 6—Other provisions

95ZH Ministerial directions

Commission

- (1) The Minister may, by notice in writing give to the Chairperson, direct the Commission to give special consideration to a specified matter or matters in exercising its powers and performing its functions under this Part.
- (2) The Commission must comply with any such directions.

Other bodies

- (3) The Minister may, by notice in writing given to the person presiding at an external inquiry, direct the body holding the inquiry to give special consideration to a specified matter or matters in holding the inquiry.
- (4) The body must comply with any such directions.

95ZI Inquiries by an unincorporated body or a group of 2 or more individuals

- (1) This section applies to inquiries by an unincorporated body or a group of 2 or more individuals.
- (2) The regulations may make provision for and in relation to the manner in which the unincorporated body or group of individuals is to:
 - (a) give a notice, report or other document to a person under this Part; or
 - (b) do any other thing under this Part.

95ZJ Withdrawal of notices

Commission

- (1) The Commission may give a person a notice (the ***withdrawal notice***) in writing withdrawing a notice it previously gave the person under this Part (other than this section).
- (2) If the Commission does so, this Part has effect, from the time at which the withdrawal notice is given to the person, as if the other notice had not been given to the person.

Other bodies

- (3) The body holding an external inquiry may give a person a notice (the ***withdrawal notice***) in writing withdrawing a notice it previously gave the person under this Part (other than this section).
- (4) If the body does so, this Part has effect, from the time at which the withdrawal notice is given to the person, as if the other notice had not been given to the person.

95ZK Power to obtain information or documents

Notice by Commission

- (1) If the Chairperson has reason to believe that a person is capable of giving information or producing documents relevant to:
 - (a) the Commission considering the matters contained in a locality notice that the person has given it; or
 - (b) an inquiry that is being held in relation to the person; or
 - (c) a supply of goods or services by the person that is of a kind in relation to which the Commission is carrying out an inquiry; or
 - (d) a supply of goods or services by the person that is of a kind in relation to which the Commission is monitoring under section 95ZE or 95ZF;the Chairperson may, by notice in writing signed by him or her and given to the person, require the person to do one or more of the following:
 - (e) give the Commission, by writing signed by the person or his or her agent or, in the case of a Commonwealth authority or a

Section 95ZK

body corporate, by a competent officer of the authority or body, within the specified period and in the specified manner, specified information relating to the affairs of the person;

- (f) produce to the Commission, within the specified period and in the specified manner, specified documents relating to the affairs of the person;
- (g) if the person is a body corporate and the notice relates to the matter in paragraph (d)—give the Commission, together with the information or documents concerned, a declaration in a form approved by the Chairperson and signed by:
 - (i) the Chief Executive Officer (however described) of the body corporate; or
 - (ii) a person nominated by the Chief Executive Officer; stating that the information or documents are true and correct.

Notice by other bodies

(2) If:

- (a) an external inquiry is being held in relation to a person; and
- (b) the inquiry Chair has reason to believe that the person is capable of giving information or producing documents relevant to the inquiry;

the inquiry Chair may, by notice in writing signed by him or her and given to the person, require the person:

- (c) to give the body, by writing signed by the person or his or her agent or, in the case of a Commonwealth authority or a body corporate, by a competent officer of the authority or body, within the specified period and in the specified manner, specified information relating to the affairs of the person; or
- (d) to produce to the body, within the specified period and in the specified manner, specified documents relating to the affairs of the person.

Period specified in notice

- (3) A period specified in a notice under subsection (1) or (2) must end at least 14 days after the notice was given.

Offence: refusal or failure to comply with notice

- (4) A person is guilty of an offence if the person refuses or fails to comply with a notice given to the person under this section.

Penalty: 20 penalty units.

- (5) Subsection (4) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

- (6) It is a reasonable excuse for the purposes of subsection (4) for an individual to refuse or fail to give information or produce a document on the ground that the information or production of the document might tend to incriminate the individual or to expose the individual to a penalty.

- (7) Subsection (6) does not limit what is a reasonable excuse for the purposes of subsection (5).

Offence: false or misleading declarations

- (8) A person must not, in a declaration made for the purposes of paragraph (1)(g), make a statement if the person knows, or is reckless as to whether, the statement is false or misleading.

Penalty: 20 penalty units.

Making information or documents publicly available

- (9) If:
- (a) a notice is given to a person under this section relating to an inquiry that is being held in public in relation to the person; and
 - (b) the person gives the information concerned or produces the documents concerned to the inquiry body in connection with the inquiry;

the inquiry body must make the information or documents available to the public in such manner as it thinks fit.

Note: See also section 95ZN (about confidentiality of information).

Section 95ZL

95ZL Inspection of documents etc.

Members or staff members

- (1) A member of the Commission, or a member of the staff of the Commission, may inspect documents:
 - (a) given to the Commission for the purposes of the exercise of its powers or the performance of its functions under this Part; or
 - (b) produced at an inquiry.
- (2) A member of the Commission, or a member of the staff of the Commission, may also make copies of, or take extracts from, those documents.

Associate members

- (3) An associate member of the Commission may inspect documents:
 - (a) given to the Commission for the purposes of the exercise of its powers or the performance of its functions under this Part in relation to an inquiry for the purposes of which the Chairperson has directed that the associate member be taken to be a member of the Commission; or
 - (b) produced at that inquiry.
- (4) An associate member of the Commission may also make copies of, or take extracts from, those documents.

External inquiries

- (5) In an external inquiry, the person presiding at the inquiry, or a person providing assistance in the inquiry to the body holding the inquiry, may:
 - (a) inspect documents given to the body for the purposes of the inquiry; and
 - (b) make copies of, or take extracts from, those documents.

95ZM Retention of documents

- (1) The Commission, or a body other than the Commission, may retain a document given or produced to it as mentioned in section 95ZL. It may retain the document for such reasonable period as it thinks fit.

- (2) The person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by the Commission or other body, as the case may be, to be a true copy.
- (3) The certified copy must be received in all courts and tribunals as evidence as if it were the original.
- (4) Until a certified copy is supplied, the Commission or other body, as the case may be, must, at such times and places as it thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of, or take extracts from, the document.

95ZN Confidential information

- (1) This section applies if a person claims that disclosure of the following information would damage the competitive position of the person:
 - (a) information made available, or to be made available, by or on behalf of the person (whether in oral evidence or in a written statement, submission or other document) at the hearing of an inquiry by the Commission or another body;
 - (b) information given, or contained in a document produced, by the person under section 95ZK to the Commission or another body.

Commission or other body to take confidentiality steps

- (2) If the Commission or other body, as the case may be:
 - (a) is satisfied that the claim is justified; and
 - (b) is not of the opinion that disclosure of the information is necessary in the public interest;it must take all reasonable steps to ensure that the information is not disclosed, without the consent of the person, in the proceedings or by it, to a person other than:
 - (c) in relation to the Commission:
 - (i) a member of the Commission or an associate member of the Commission; or
 - (ii) a member of the staff of the Commission who receives the information in the course of his or her duties; or

Section 95ZO

- (d) in relation to the other body:
 - (i) the person presiding at the inquiry concerned; or
 - (ii) a person providing assistance in the inquiry to the other body.

Interpretation

- (3) This section has effect despite anything in sections 95R and 95ZK.

95ZO Immunity

Members or associate members of the Commission

- (1) A member of the Commission, or an associate member of the Commission, has, in the performance of his or her functions or the exercise of his or her powers under this Part as a member or associate member, the same protection and immunity as a Justice of the High Court.

Person presiding at an external inquiry

- (2) In an external inquiry, the person presiding at the inquiry has, in the performance of his or her functions or the exercise of his or her powers under this Part in that capacity, the same protection and immunity as a Justice of the High Court.

95ZP Secrecy: members or staff members of the Commission etc.

Offence

- (1) An entrusted person is guilty of an offence if:
 - (a) the person:
 - (i) makes a copy or other record of any protected information or of all or part of any protected document; or
 - (ii) discloses any protected information to another person or to a court; or
 - (iii) produces all or part of a protected document to another person or to a court; and
 - (b) in doing so, the person is not acting in the course of performing or exercising functions, powers or duties under or in relation to this Act.

Penalty: Imprisonment for 2 years.

Courts

- (2) An entrusted person cannot be required to:
- (a) disclose any protected information to a court; or
 - (b) produce all or part of a protected document to a court;
- unless that disclosure or production is necessary for the purpose of carrying into effect the provisions of this Act.

Definitions

- (3) In this section:

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

entrusted person means a person who is or was:

- (a) a member of the Commission or an associate member of the Commission; or
- (b) a member of the staff of the Commission; or
- (c) appointed or engaged under the *Public Service Act 1999*.

produce includes permit access to.

protected document means a document that:

- (a) is given to or otherwise acquired by the Commission for the purposes of this Part; and
- (b) has not been made available to the public by the Commission under this Part.

protected information means information that:

- (a) is disclosed to, or obtained by, an entrusted person for the purposes of this Part or as permitted by the repealed Part; and
- (b) has not been made available to the public under this Part by the Commission and is not contained in oral evidence given in public at the hearing of an inquiry.

repealed Part means Part V of the *Prices Surveillance Act 1983*, as continued in operation by Schedule 2 to the *Trade Practices Legislation Amendment Act 2003*.

95ZQ Secrecy: persons involved in inquiries by bodies other than the Commission

Offence

- (1) An external person is guilty of an offence if:
- (a) the person:
 - (i) makes a copy or other record of any protected information or of all or part of any protected document; or
 - (ii) discloses any protected information to another person or to a court; or
 - (iii) produces all or part of a protected document to another person or to a court; and
 - (b) in doing so, the person is not acting in the course of performing or exercising functions, powers or duties under or in relation to this Act.

Penalty: Imprisonment for 2 years.

Courts

- (2) An external person cannot be required to:
- (a) disclose any protected information to a court; or
 - (b) produce all or part of a protected document to a court;
- unless that disclosure or production is necessary for the purpose of carrying into effect the provisions of this Act.

Definitions

- (3) In this section:

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

external person means a person who is or was:

- (a) the person presiding at an external inquiry; or
- (b) a person providing assistance in such an inquiry to the body holding the inquiry.

produce includes permit access to.

protected document means a document that:

- (a) is given to or otherwise acquired by the body holding the external inquiry concerned for the purposes of that inquiry; and
- (b) has not been made available to the public by that body under this Part.

protected information means information that:

- (a) is disclosed to, or obtained by, an external person for the purposes of the inquiry concerned; and
- (b) has not been made available to the public under this Part by the body holding that inquiry and is not contained in oral evidence given in public at the hearing of that inquiry.

Part VIII—Resale price maintenance

96 Acts constituting engaging in resale price maintenance

- (1) Subject to this Part, a corporation (in this section called *the supplier*) engages in the practice of resale price maintenance if that corporation does an act referred to in any of the paragraphs of subsection (3).
- (2) Subject to this Part, a person (not being a corporation and also in this section called *the supplier*) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.
- (3) The acts referred to in subsections (1) and (2) are the following:
 - (a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;
 - (b) the supplier inducing, or attempting to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier;
 - (c) the supplier entering into an agreement, or offering to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;
 - (d) the supplier withholding the supply of goods to a second person for the reason that the second person:
 - (i) has not agreed as mentioned in paragraph (a); or
 - (ii) has sold, or is likely to sell, goods supplied to him or her by the supplier, or goods supplied to him or her by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price

specified by the supplier as the price below which the goods are not to be sold;

- (e) the supplier withholding the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the second person:
 - (i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or
 - (ii) has sold, or is likely to sell, goods supplied to him or her, or to be supplied to him or her, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; and
 - (f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold.
- (4) For the purposes of subsection (3):
- (a) where a price is specified by another person on behalf of the supplier, it shall be deemed to have been specified by the supplier;
 - (b) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier;
 - (c) where a formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that formula, that price shall be deemed to have been specified by the supplier; and
 - (d) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price ascertained by calculation from, or by reference to, a formula specified by another person in respect of those goods or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier.
- (5) In subsection (4), **formula** includes a set form or method.
-

Section 96A

- (6) For the purposes of subsection (3), anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.
- (7) A reference in any of paragraphs (3)(a) to (e), inclusive, including a reference in negative form, to the selling of goods at a price less than a price specified by the supplier shall be construed as including references to:
 - (a) the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale;
 - (b) the displaying of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be displayed for sale; and
 - (c) the offering of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be offered for sale;and a reference in paragraph (3)(d), (e) or (f) to a price below which the goods are not to be sold shall be construed as including a reference to the price below which the goods are not to be advertised for sale, to the price below which the goods are not to be displayed for sale and to the price below which the goods are not to be offered for sale.

96A Resale price maintenance in relation to services

- (1) This Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods.
- (2) For the purposes of subsection (1), this Part is to be read with appropriate modifications, including the following modifications:
 - (a) references in this Part to goods are to be read as references to services;
 - (b) references to the sale of goods are to be read as references to the re-supply of services.

97 Recommended prices

For the purposes of paragraph 96(3)(b), the supplier is not to be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods:

- (a) by reason only of a statement of a price being applied to the goods as mentioned in paragraph 99(1)(a) or being applied to a covering, label, reel or thing as mentioned in paragraph 99(1)(b), provided that the statement is preceded by the words “recommended price”; or
- (b) by reason only of his or her having given notification in writing to the second person (not being a notification by way of a statement being applied as mentioned in paragraph (a)) of the price that he or she recommends as appropriate for the sale of those goods, provided that there is included in the notification, and in each writing that refers, whether expressly or by implication, to the notification, a statement to the following effect:

“The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation.”.

98 Withholding the supply of goods

- (1) For the purposes of paragraph 96(3)(d) or (e), the supplier shall be deemed to withhold the supply of goods to another person if:
 - (a) the supplier refuses or fails to supply those goods to, or as requested by, the other person;
 - (b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;
 - (c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, method or place of delivery or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or
 - (d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this subsection.
- (2) Paragraph 96(3)(d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person:
 - (a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods; or

Section 99

- (b) otherwise for the purpose of promoting the business of that other person.
- (3) For the purposes of subsection (2), there shall be disregarded:
 - (a) a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale; or
 - (b) a sale of goods that took place with the consent of the supplier.

99 Statements as to the minimum price of goods

- (1) For the purposes of paragraph 96(3)(f), if:
 - (a) a statement is applied to goods, whether by being woven in, impressed on, worked into or annexed or affixed to the goods or otherwise;
 - (b) a statement is applied to a covering, label, reel or thing in or with which goods are supplied; or
 - (c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to lead to the belief that it refers to goods;the statement shall be deemed to have been used in relation to those goods.
- (2) For the purposes of subsection (1), **covering** includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and **label** includes a band or ticket.

100 Evidentiary provisions

- (1) Where, in proceedings under this Act by a person (in this section referred to as **the plaintiff**) against another person (in this section referred to as **the defendant**), it is claimed that the defendant has engaged in the practice of resale price maintenance and it is established that:
 - (a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 98(1)(a), (b), (c) or (d);
 - (b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and

- (c) during the period of 6 months immediately before the time when the defendant so acted, the defendant became aware of a matter or circumstance capable of constituting a reason referred to in paragraph 96(3)(d) or (e) for the defendant's so acting;

then, subject to subsection (2), it shall be presumed, unless the contrary is established, that that matter or circumstance was the reason for the defendant's so acting.

- (2) Subsection (1) does not apply where the plaintiff establishes the matter mentioned in paragraph 98(1)(b) or (c) but the terms disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.
- (3) In the application of this section in proceedings by the Commission for an injunction, references to the plaintiff shall be construed as references to a person specified in the application for the injunction as the person in relation to whom the defendant is claimed to have acted as mentioned in paragraph (1)(a).

Part IX—Review by Tribunal of Determinations of Commission

Division 1—Applications for review (other than for merger clearances)

101 Applications for review

- (1) A person dissatisfied with a determination by the Commission under Division 1 of Part VII:
 - (a) in relation to an application for an authorization or a minor variation of an authorization; or
 - (b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

- (1AAA) Subsection (1) does not apply to a determination under subsection 89(1A).

(1AA) If:

- (a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for the minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and the substitution of another authorization; or
- (b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

- (1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters

referred to in subsection 90(5A), (5B), (6), (7), (8), (8A), (8B) or (9).

(1B) A presidential member may, on the application of a person concerned:

- (a) in an application for an authorization under subsection 88(9); or
- (b) in an application for a minor variation or a revocation of such an authorization; or
- (c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

(2) A review by the Tribunal is a re-hearing of the matter and subsections 90(5A), (5B), (6), (7), (8), (8A), (8B) and (9), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

101A Application for review of notice under subsection 93(3) or (3A) or 93AC(1) or (2)

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

102 Functions and powers of Tribunal

- (1) On a review of a determination of the Commission under Division 1 of Part VII in relation to:
- (a) an application for an authorization; or
 - (b) an application for a minor variation of an authorization; or
 - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or

Section 102

- (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.
- (1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:
 - (a) the grant of an authorisation under subsection 88(9); or
 - (b) the minor variation, or the revocation, of an authorization granted under that subsection; or
 - (c) the revocation of an authorization granted under that subsection and the substitution of another authorization;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.
- (1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.
- (1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.
- (2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission under Division 1 of Part VII in relation to:
 - (a) an application for an authorization; or
 - (b) an application for a minor variation of an authorization; or
 - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
 - (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

- (4) Upon a review of the giving of a notice by the Commission under subsection 93(3):
 - (a) if the person who applied for the review satisfies the Tribunal that:
 - (i) the conduct or proposed conduct does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 47); or
 - (ii) in all the circumstances:
 - (A) the conduct or proposed conduct has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
 - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the conduct or proposed conduct;the Tribunal must make a determination setting aside the notice; or
 - (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.
- (5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.
- (5AA) Upon a review of the giving of a notice by the Commission under subsection 93AC(1):
 - (a) if the person who applied for the review satisfies the Tribunal that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision outweighs or would outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision—the Tribunal must make a determination setting aside the notice; or

Section 102

- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.
- (5AB) Upon a review of the giving of a notice by the Commission under subsection 93AC(2):
 - (a) if the person who applied for the review satisfies the Tribunal that:
 - (i) the provision does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 45); or
 - (ii) in all the circumstances:
 - (A) the provision has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
 - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;the Tribunal must make a determination setting aside the notice; or
 - (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.
- (5AC) If the Tribunal sets aside a notice (the *objection notice*) given by the Commission under subsection 93AC(1) or (2), then:
 - (a) if the Commission gave the objection notice as part of a process starting when the Commission gave a notice under subsection 93A(2) (conference notice) during the period described in paragraph 93AD(1)(a)—the Commission is taken for the purposes of paragraph 93AD(1)(b) to have decided not to give the objection notice at the time the Tribunal set it aside; and
 - (b) for the purposes of subsections 93AD(2) and (3), the objection notice is taken not to have been given.

- (5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.
- (5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).
- (5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:
 - (a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and
 - (b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.
- (6) For the purposes of a review by the Tribunal under this Division, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.
- (7) For the purposes of a review under this Division, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

Division 2—Procedure and Evidence

102A Definition

In this Part:

proceedings includes:

- (a) applications made to the Tribunal under Subdivision C of Division 3 of Part VII; and
- (b) applications made to the Tribunal under section 111 (about review of Commission’s decisions on merger clearances).

103 Procedure generally

- (1) In proceedings before the Tribunal:
 - (a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
 - (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence.
- (2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by a presidential member.
- (3) The powers mentioned in subsection (2) may be exercised by a presidential member:
 - (a) whether or not the Tribunal has been constituted under section 37 in relation to the proceedings; and
 - (b) once the Tribunal is so constituted—whether or not that member is part of the Division of the Tribunal so constituted.

104 Regulations as to certain matters

The regulations may make provision:

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the

Tribunal by all persons participating in any proceedings before the Tribunal; and

- (aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and
- (b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

105 Power to take evidence on oath

- (1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation.
- (2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

106 Hearings to be in public except in special circumstances

- (1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.
- (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may:
 - (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or
 - (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.
- (3) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

107 Evidence in form of written statement

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

108 Taking of evidence by single member

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

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

109 Participants in proceedings before Tribunal

- (1) A person to whom an authorization under Division 1 of Part VII was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorization.
- (1A) A person to whom a notice was given by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.
- (2) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

110 Representation

In proceedings before the Tribunal:

- (a) a natural person may appear in person;
- (aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;

- (b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;
- (c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by a member or officer of the association approved by the Tribunal; and
- (d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.

Division 3—Review of Commission's determinations on merger clearances

111 Applications for review

- (1) A person who applied under Subdivision B of Division 3 of Part VII for:
 - (a) a clearance; or
 - (b) a minor variation of a clearance; or
 - (c) a revocation of a clearance; or
 - (d) a revocation of a clearance and a substitution of another clearance;and who is dissatisfied with the determination by the Commission in relation to the application may, as prescribed and within the time allowed by or under the regulations or under subsection (5), apply to the Tribunal for a review of the determination.
- (2) A person who was granted a clearance under Subdivision B of Division 3 of Part VII that was:
 - (a) revoked by a determination of the Commission under section 95AS; or
 - (b) revoked and substituted with another clearance by a determination of the Commission under section 95AS;may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the determination.
- (2A) The regulations may make it a requirement that an applicant under subsection (1) or (2) give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.
- (3) The Tribunal must review the determination after receiving the application and the prescribed fee.

Note: Division 2 contains provisions about procedure and evidence that relate to proceedings before the Tribunal.
- (4) If a person has made an application under subsection (1) or (2) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of

the applicant and the Commission, whether or not the Tribunal is satisfied of the matters referred to in section 95AN.

- (5) A presidential member may, on the application by the applicant, shorten the time allowed by or under the regulations within which an application under subsection (1) may be made if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

112 Tribunal to notify Commission

The Tribunal must notify the Commission of the application for review.

113 Commission to give material to Tribunal

- (1) After being notified of the application for review, the Commission must, within 2 business days, give to the Tribunal all the information that the Commission took into account in connection with the making of the determination to which the review relates.
- (1A) The Commission must identify which of that information (if any) the Commission excluded from the merger clearance register under subsection 95AI(3), (4) or (7).
- (2) In this section:

business day means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

merger clearance register means the register kept under section 95AH.

114 Tribunal may consult etc. to clarify information

- (1) The Tribunal may seek such relevant information, and consult with such persons, as it considers reasonable and appropriate for the purposes of clarifying the information given to it under section 113.
- (2) The Tribunal may disclose information identified under subsection 113(1A) to such persons and on such terms as it considers reasonable and appropriate for the purposes of clarifying the information.

Section 115

115 Commission to assist Tribunal

For the purposes of the review, 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.

116 Tribunal only to consider material before the Commission

For the purposes of the review, the Tribunal may have regard only to:

- (a) the information given to the Commission in connection with the making of the determination to which the review relates and that was given to the Tribunal under section 113; and
- (b) any other information that was referred to in the Commission's reasons for making the determination to which the review relates; and
- (c) any information given to the Tribunal under section 114; and
- (d) any information or report given to the Tribunal under section 115.

117 Tribunal to make decision on review

On the review of the Commission's determination, the Tribunal must make a determination affirming, setting aside or varying the Commission's determination.

118 Time limits for making review decision

- (1) The Tribunal must make its decision on the review within 30 business days after receiving the application for review.
- (2) However, if before the end of that period the Tribunal decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, the period is extended by a further 60 business days.
- (3) If the Tribunal makes a decision under subsection (2), the Tribunal must notify the applicant of it before the end of the 30 business day period.

(3A) If the Tribunal has not made its decision on the review within the period applicable under subsection (1) or (2), the Tribunal is taken to have made a determination affirming the Commission's determination.

(4) In this section:

business day means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

119 Tribunal's decision taken to be Commission's

The Tribunal's decision affirming, setting aside or varying the Commission's determination is, for the purposes of this Act other than this Part, taken to be the Commission's determination.