



REPRINTED ACT

[WITH AMENDMENTS INCORPORATED]

COMMERCE

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THE COMMERCE ACT 1986 1986, No. 5

An Act to promote competition in markets within New Zealand and to repeal the Commerce Act 1975

[28 April 1986

1. Short Title and commencement—

- (1) This Act may be cited as the Commerce Act 1986.
- (2) This Act shall come into force on the 1st day of May 1986.

2. Interpretation—

- (1) In this Act, unless the context otherwise requires,—
“Acquire”,—

- (a) In relation to goods, includes obtain by way of gift, purchase, or exchange; and also includes take on lease, hire, or hire purchase:

- (b) In relation to services, includes accept:

- (c) In relation to interests in land, includes obtain by way of gift, purchase, exchange, lease or licence:

“Arrive at”, in relation to an understanding, includes reach, and enter into:

[“Assets” includes intangible assets:]

“Authorisation” means an authorisation granted by the Commission under Part V of this Act, or by the Court on appeal under Part VI of this Act against a determination of the Commission:

“Business” means any undertaking—

- (a) That is carried on for gain or reward; or
- (b) In the course of which—
 - (i) Goods or services are acquired or supplied; or
 - (ii) Any interest in land is acquired or disposed of—

otherwise than free of charge:

“Chairman” means the Chairman of the Commission:

“Clearance” means a clearance given by the Commission under Part V of this Act, or by the Court on appeal under Part VI of this Act against a determination of the Commission:

“Commission” means the Commerce Commission established by section 8 of this Act; and includes a Division of the Commission, or a member of the Commission, performing any function of the Commission:

“Court” means the High Court of New Zealand:

“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:

“Credit instrument” means any agreement (whether in writing or not) acknowledging an obligation to pay a sum or sums of money on demand or at any future time or times:

“Deputy Chairman” means the Deputy Chairman of the Commission and includes a person acting as Deputy Chairman of the Commission:

“Document” means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes—

- (a) Any writing on any material:
- (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:
- (c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:
- (d) Any book, map, plan, graph, or drawing:
- (e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced:

“Give effect to”, in relation to a provision of a contract, arrangement, or understanding, includes—

- (a) Do an act or thing in pursuance of or in accordance with that provision:
- (b) Enforce or purport to enforce that provision:

“Goods” includes—

- (a) Ships, aircraft, and vehicles:
- (b) Animals, including fish:
- (c) Minerals, trees, and crops, whether on, under, or attached to land or not:
- (d) Gas and electricity:

“Local authority” includes every local authority and every public body or other authority created by or pursuant to any public Act or local Act:

“Member of the Commission” includes the Chairman and, in the circumstances mentioned in section 11 (3) of this Act, includes an associate member of the Commission:

[“Minister” means the Minister of Commerce:]

“Officer of the Commission” means—

- (a) Any person appointed pursuant to section 18 (1) of this Act:
- (b) Any person employed or engaged under section 18 (2) of this Act:

“Person”, includes a local authority, and any association of persons whether incorporated or not:

[“Place” includes any premises, building, aircraft, ship, carriage, vehicle, or receptacle:]

“Prescribed” means prescribed by regulations under this Act or by the Commission:

“Price”, includes valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the acquisition or supply of goods or services or the acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing:

“Provision”, in relation to an understanding or arrangement, means any matter forming part of or relating to the understanding or arrangement:

“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; and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:

- (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, accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation; 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, including life assurance, and life reinsurance:
- (c) A contract between a bank and a customer of the bank:
- (d) Any contract for or in relation to the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits;—

but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service:

[“Share” means a share in the share capital of a company or other body corporate, whether or not it carries the right to vote at general meetings; and includes—

- (a) A beneficial interest in any such share:
- (b) A power to exercise, or control the exercise of, a right to vote attaching to any such share that carries the right to vote at general meetings:
- (c) A power to acquire or dispose of, or control the acquisition or disposition of, any such share:
- (d) A perpetual debenture and perpetual debenture stock:]

“Supply”,—

- (a) In relation to goods, includes supply (or resupply) by way of gift, sale, exchange, lease, hire, or hire purchase; and
- (b) In relation to services, includes provide, grant, or confer;—

and “supply” as a noun, “supplied”, and “supplier” have corresponding meanings:

“Trade” means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land:

“Working day” means any day of the week other than—

(a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign’s birthday, and Waitangi Day; and

(b) A day in the period commencing with the 25th day of December in any year and ending with the 15th day of January in the following year.

[(1A) In this Act (except section 47 (3) and (4)) “substantial” means real or of substance.]

(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—

(i) The entering into, or the giving effect to a provision of, a contract or arrangement; or

(ii) The arriving at, or the giving effect to a provision of, an understanding; or

(iii) 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) of this subsection, shall be read as a reference to the doing of, or the refusing to do, any act, including—

(i) The entering into, or the giving effect to a provision of, a contract or arrangement; or

(ii) The arriving at, or the giving effect to a provision of, an understanding; or

(iii) 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:

(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 any provision of this Act is expressed to render a provision of a contract or 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 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 resupply 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 other goods in which the goods have been incorporated.

(5) For the purposes of this Act—

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

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

(ii) That purpose was or is a substantial purpose:

- (b) A person shall be deemed to have engaged, or to engage, in conduct for a particular purpose or a particular reason if—
 - (i) That person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason; and
 - (ii) That purpose or reason was or is a substantial purpose or reason.
- (6) 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, any land or a building or part of a building, and shall be so construed notwithstanding any express reference in this Act to any such lease or licence:
 - (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:
 - (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.
- [(7) For the purposes of this Act, any 2 bodies corporate are to be treated as interconnected if—
 - (a) One of them is a body corporate of which the other is a subsidiary (within the meaning of section 158 of the Companies Act 1955); or
 - (b) Both of them are subsidiaries (within the meaning of that section) of the same body corporate; or
 - (c) Both of them are interconnected with bodies corporate that, in accordance with paragraph (a) or paragraph (b) of this subsection, are interconnected—

and “interconnected bodies corporate” has a corresponding meaning].

- (8) For the purposes of this Act—
 - (a) Any contract or arrangement entered into, or understanding arrived at by an association or body of persons, shall be deemed to have been entered into or arrived at by all the persons who are members of the association or body:
 - (b) Any recommendation made by an association or body of persons to its members or to any class of its members shall, notwithstanding anything to the contrary in the constitution or rules of the association or body of persons, be deemed to be an arrangement made between those members or the members of that class and between the association or body of persons and those members or the members of that class.
- (9) Nothing in subsection (8) of this section applies to—
 - (a) Any member of an association or body of persons who expressly notifies the association or body in writing that he disassociates himself from the contract, arrangement, or understanding or any provision thereof and who does so disassociate himself:
 - (b) Any member of an association or body of persons who establishes that he had no knowledge and could not reasonably have been expected to have had knowledge of the contract, arrangement, or understanding.

Cf. 1975, No. 113, ss. 2 (1), 67A (3); 1976, No. 67, ss. 22, 23 (3); 1979, No. 140, ss. 2; 1983, No. 144, s. 26; Trade Practices Act 1974 (Aust.), ss. 4, 4C, 4F, 4H

“Assets”: The definition of this term was inserted by s. 2 (1) of the Commerce Amendment Act 1990.

“Minister” The definition of this term was substituted for the original definition by s. 4 (1) of the Trade and Industry Act Repeal Act 1988.

“Place”: The definition of this term was inserted by s. 2 (3) of the Commerce Act 1990.

“Share”: The definition of this term was inserted by s. 2 (3) of the Commerce Amendment Act 1990.

“Substantial”: A definition of this term was repealed by s. 2 (4) of the Commerce Amendment Act 1990.

Subs. (1A) was inserted by s. 2 (5) of the Commerce Amendment Act 1990.

Subs. (7) was substituted for the original subs. (7) by s. 2 (6) of the Commerce Amendment Act 1990.

3. Certain terms defined in relation to competition—

- [(1) In this Act “competition”, means workable or effective competition.

(1A) Every reference in this Act, except the reference in section 36A (1) (b) and (c) of this Act, to the term “market” is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

(1B) The reference in 36A (1) (b) of this Act to the term “market”, in relation to a market in Australia, is a reference to a market in Australia for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

(1C) The reference in 36A (1) (c) of this Act to the term “market” in relation to a market in New Zealand and Australia, is a reference to a market in New Zealand and Australia for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.]

(2) In this Act, unless the context otherwise requires, references to the lessening of competition include references to the hindering or preventing of competition.

(3) For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand.

(4) In sections 27 and 28 of this Act, a reference to a market in relation to the purpose or effect in respect of competition of a provision of a contract, arrangement, or understanding, or of a covenant, or of conduct, shall be read as including a reference to—

(a) A market in which a person who is a party to the contract, arrangement, or understanding, or any interconnected body corporate, or, as the case may be, the person or any associated person (within the meaning of section 28 (7) of this Act) who requires the giving of, or gives the covenant, supplies or acquires or is likely to supply or acquire, or would, but for that provision, covenant, or conduct, supply or acquire or be likely to supply or acquire goods or services; and

(b) Any other market in which those goods or services may be supplied or acquired.

(5) For the purposes of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if that provision and—

(a) The other provisions of that contract, arrangement, or understanding; or

(b) The provisions of any other contract, arrangement, or understanding to which that person or any interconnected body corporate is a party—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

(6) For the purposes of section 28 of this Act, a covenant shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if—

(a) That covenant; and

(b) Any other covenant to the benefit of which that person or an associated person (within the meaning of section 28 (7) of this Act) is entitled or would be entitled if the covenant were enforceable—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

(7) For the purposes of sections 27 and 28 of this Act, the engaging in conduct shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if—

(a) The engaging in that conduct; and

(b) The engaging by that person in conduct of the same or a similar kind—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

(8) For the purposes of [sections 36 and 36A] of this Act, a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to—

(a) The share of the market, the technical knowledge, the access to materials or capital of that person or that person together with any interconnected body corporate:

- (b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market:
- (c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods or services in that market.

[(9) For the purposes of sections 47 and 48 of this Act, a person has, or 2 more persons that are interconnected or associated together have, as the case may be, a dominant position in a market if that person as a supplier or an acquirer, or those persons as suppliers or acquirers, of goods or services, is or are in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is, or 2 or more persons that are interconnected or associated, are, in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services a market regard shall be had to—

- (a) The share of the market, the technical knowledge, the access to materials or capital of that person or those persons:
- (b) The extent to which that person is, or those persons are, constrained by the conduct of competitors or potential competitors in that market:
- (c) The extent to which that person is, or those persons are, constrained by the conduct of suppliers or acquirers of goods or services in that market.]

Cf. Trade Practices Act 1974 (Aust.), ss. 4, 4E, 4G, 45 (3), (4), 45B (4), 46

Subss. (1) to (1) (c) were substituted for the original subs. (1) by s. 3 (1) of the Commerce Amendment Act 1990.

In subs. (8) the expression “sections 36 and 36A” was substituted for the expression “sections 36, 66, and 67” by s. 3 (2) of the Commerce Amendment Act 1990.

Subs. (9) was added by s. 3 (3) of the Commerce Amendment Act 1990.

[3A. Commission to consider efficiency—

Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.]

This section was inserted by s. 4 of the Commerce Amendment Act 1990.

[4. Application of Act to conduct outside New Zealand—

- (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.
- (2) Without limiting subsection (1) of this section, section 36A of this Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.]

This section was substituted for the original s. 4 by s. 5 of the Commerce Amendment Act 1990.

5. Application of Act to the Crown—

- (1) Subject to this section, this Act shall bind the Crown in so far as the Crown engages in trade.
- (2) The Crown shall not be liable to pay a pecuniary penalty under section 80 of this Act.
- (3) The Crown shall not be liable to be prosecuted for an offence this Act.
- (4) Where it is alleged that the Crown has contravened any provision of this Act and that contravention constitutes an offence, the Commission or the person directly affected by the contravention may apply to the Court for a declaration that the Crown has contravened that provision; and, if the Court is satisfied beyond a reasonable doubt that the Crown has contravened that provision, it may make a declaration accordingly.

Cf. 1975, No. 113, s. 20B; 1979, No. 140, s. 12; Trade Practices Act 1974 (Aust.), s. 2A

6. Application of Act to Crown corporations—

(1) This Act applies to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade.

(2) Notwithstanding any enactment or rule of law, proceedings under Part VI of this Act may be brought against a body corporate referred to in subsection (1) of this section.

Cf. 1975, No. 113, s. 20A; 1979, No. 140, s. 11

[6A. Special provisions relating to application of Act to the Crown in right of Australia and to Australian Crown corporations—

Section 36A of this Act, and Parts VI and VII of this Act, in so far as they relate to a contravention of, or confer powers that may be exercised in relation to, that section, apply to—

- (a) The Crown in right of the Commonwealth of Australia, each of the States of the Commonwealth of Australia, and the Northern Territory and the Australian Capital Territory, in so far as the Crown engages in trade; and
- (b) Every body corporate that is an authority of the Commonwealth of Australia within the meaning of section 4 of the Trade Practices Act 1984 of the Parliament of the Commonwealth of Australia in so far as it engages in trade; and
- (c) Every body corporate established for a purpose of a State of the Commonwealth of Australia by or under a law of that State in so far as it engages in trade; and
- (d) Every body corporate in which a State of the Commonwealth of Australia or in which a body corporate referred to in paragraph (c) of this section has a controlling interest in so far as it engages in trade.

[6B. Crown and Crown corporations not immune from jurisdiction in relation to certain provisions of Trade Practices Act 1974—

Neither the Crown nor a body corporate that is an instrument of the Crown in respect of the Government of New Zealand is immune, and neither the Crown nor such a body corporate may claim immunity, from the jurisdiction of the Courts of New Zealand and Australia in relation to a contravention of section 46A of the Trade Practices Act 1974 of the Parliament of the Commonwealth of Australia and in relation to Parts VI and XII of that Act in so far as they relate to a contravention of that section.

[6C. Application of Evidence Amendment Act 1980—

Nothing in the Evidence Amendment Act 1980 applies in relation to the application of section 46A of the Trade Practices Act 1974 of the Parliament of the Commonwealth of Australia or Parts VI and XII of that Act in so far as they relate to a contravention of that section.]

Sections 6A to 6C were inserted by s. 6 of the Commerce Amendment Act 1990.

7. Law relating to restraint of trade and breaches of confidence not affected—

(1) Nothing in this Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of this Act.

(2) Nothing in this Act limits or affects any rule of law relating to breaches of confidence.

(3) No rule of law referred to in subsection (1) or subsection (2) of this section affects the interpretation of any of the provisions of this Act.

Cf. Trade Practices Act 1974 (Aust.), s. 4M

PART I
THE COMMERCE COMMISSION

8. Establishment of Commission—

(1) There is hereby established a Commission to be called the Commerce Commission.

(2) The Commission shall be a body corporate with perpetual succession and a common seal.

(3) The Commission shall be capable of suing and being sued, and, in the exercise of its functions and powers under this Act, it may acquire, hold, and dispose of real and personal property and do and suffer all such acts and things as bodies corporate may do and suffer.

(4) *Repealed by s. 7 of the Commerce Amendment Act 1990.*

9. Membership of Commission—

(1) The Commission shall consist of not less than 3 and not more than 5 members, of whom at least one shall be a barrister or solicitor of at least 5 years' standing.

(2) The members of the Commission shall be appointed by the Governor-General on the recommendation of the Minister, which recommendation shall, in the case of any person who is a barrister or solicitor, be given only after consultation by the Minister with the Attorney-General.

(3) One member shall be appointed as Chairman of the Commission, and another shall be appointed as Deputy Chairman of the Commission.

(4) No person shall be recommended for appointment as a member of the Commission unless, in the opinion of the Minister, that person is qualified for appointment, having regard to the functions and powers of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, or consumer affairs.

(5) The powers of the Commission shall not be affected by any vacancy in its membership, or by any deficiency in the appointment of any member.

Cf. 1975, No. 113, ss. 3 (2), (2A), (3), (6), 4 (4); 1976, No. 67, s. 4; 1979, No. 140, s. 3; 1983, No. 144, s. 2

10. Terms and conditions of appointment—

(1) Subject to section 13 of this Act, every member of the Commission shall hold office for such term, not exceeding 5 years, as the Governor-General shall specify in that member's instrument of appointment, but may from time to time be reappointed.

(2) There shall be paid to the members of the Commission such remuneration by way of fees, salary, wages, or allowances as may from time to time be fixed, either generally or in respect of any particular member or members, by the Higher Salaries Commission.

(3) The Commission is hereby declared to be a statutory Board within the meaning of the Fees and Travelling Allowances Act 1951.

(4) There shall be paid to the members of the Commission travelling allowances and expenses, in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly.

[(5) For the purpose of providing a superannuation fund or retiring allowance for members of the Commission, sums by way of subsidy or contribution may from time to time be paid into any superannuation scheme which is registered under the Superannuation Schemes Act 1989.]

(6) Subject to the foregoing provisions of this section, every member of the Commission shall be appointed upon and subject to such terms and conditions as the Governor-General shall determine.

Cf. 1975, No. 113, ss. 4 (1), 10, 17B; 1979, No. 140, s. 9 (1)

Subs. (5) was substituted for the original subs. (5) by s. 80 of the National Provident Fund Restructuring Act 1990.

11. Associate members—

(1) The Minister may from time to time appoint any person to be an associate member of the Commission.

(2) An associate member shall be appointed only in relation to a matter or a class of matters to be specified in that member's instrument of appointment, and for such period, not exceeding 3 years, as is specified in that instrument.

(3) Subject to subsection (4) of this section, an associate member shall be deemed to be a member of the Commission for the purposes of the performance or exercise of any function, duty, or power of a member of the Commission under this Act; and, except where this section or the context otherwise requires, a reference in this Act to a member shall be construed as including a reference to an associate member.

(4) An associate member may attend and vote only at a meeting of the Commission relating to the matter or class of matters specified in that member's instrument of appointment (including a meeting relating to matters incidental to the matter or class of matters so specified).

Cf. 1975, No. 113, s. 3B; 1979, No. 140, s. 5; 1983, No. 144, s. 3

12. Deputy Chairman and acting Deputy Chairman—

(1) Where the Chairman becomes incapable of acting by reason of illness, absence, or other sufficient cause or during any vacancy in the office of Chairman, or if the Chairman considers it not proper or desirable to adjudicate personally on any specified matter, the Deputy Chairman shall have and may exercise all the powers, functions, and duties of the Chairman.

(2) Where, in any case to which subsection (1) of this section applies, the Deputy Chairman is incapable of acting by reason of illness, or other sufficient cause or there is a vacancy in the office of Deputy Chairman, or if the Deputy Chairman considers it not proper or desirable to adjudicate personally on any specified matter, the members of the Commission appointed under section 9 of this Act shall, by resolution, appoint one of their number to act for the Deputy Chairman for the period or purpose stated in the appointment.

(3) Any member of the Commission appointed to act for the Deputy Chairman under subsection (2) of this section shall, while acting as such, be deemed to be the Deputy Chairman, and shall have and may exercise all the powers, functions, and duties of that office for the period or for the purpose stated in the appointment.

(4) No appointment of a member of the Commission to the office of Deputy Chairman and no act done by that member as such, and no act done by the Commission while any member is acting as such, shall in any proceedings be questioned on the ground that the occasion for the appointment had not arisen or had ceased.

Cf. 1975, No. 113, s. 3A; 1976, No. 67, s. 5 (1); 1979, No. 140, s. 4

13. Termination of appointment of member—

(1) The Governor-General may terminate the appointment of a member of the Commission for disability, bankruptcy, neglect of duty, misconduct, or failure to comply with section 14 of this Act proved to the satisfaction of the Governor-General.

(2) The Minister may terminate the appointment of an associate member of the Commission for disability, bankruptcy, neglect of duty, misconduct, or failure to comply with section 14 of this Act.

(3) Any member may resign his office by notice in writing to the Minister.

(4) Notwithstanding that the term of office of a member has expired or that a member has resigned that office, that person shall be deemed to continue as a member for the purpose of—

(a) Completing the determination of any matter before that person, as a member, which was commenced before the expiration of the term of office or before the resignation took effect, as the case may be;

(b) Giving reconsideration to any matter following a direction of the Court under Part VI of this Act.

Cf. 1975, No. 113, s. 4 (2), (3); 1976, No. 67, s. 23 (3); 1979, No. 140, s. 6

[14. Disclosure of financial interest—

(1) If the Chairman is taking part, or is to take part, in the consideration or determination by the Commission of a matter that relates to or affects a business or body corporate in which the Chairman has an interest that, in accordance with the rules of natural justice, disqualifies, or would disqualify, the Chairman from taking part in the consideration or determination of that matter,—

(a) The Chairman shall disclose that interest to the Minister in writing; and

(b) The Chairman shall not continue to take part, or take part, in the consideration or determination of the matter.

(2) If a member of the Commission is taking part, or is to take part, in the consideration or determination by the Commission of a matter that relates to or affects a business or body corporate in which

that member has an interest that, in accordance with the rules of natural justice, disqualifies, or would disqualify, the member from taking part in the consideration or determination of that matter,—

- (a) The member shall disclose that interest to the Chairman; and
- (b) The member shall not continue to take part, or take part, in the consideration or determination of the matter.]

This section was substituted for the original s. 14 by s. 8 of the Commerce Amendment Act 1990.

15. Meetings of Commission—

- (1) Subject to this section, the Chairman shall convene such meetings of the Commission as the Chairman thinks necessary for the efficient performance of the functions of the Commission under this Act.
- (2) Meetings of the Commission shall be held at such times and places as the Chairman determines.
- (3) The Chairman shall preside at every meeting of the Commission, unless absent from that meeting.
- (4) At any meeting of the Commission, or of any separate Division of the Commission acting under section 16 (1) of this Act, the quorum shall be 3 members.
- (5) All questions arising at any meeting of the Commission shall be determined by a majority of votes of the members present and voting.
- (6) The Chairman shall have a deliberative vote and, in the event of an equality of votes, shall also have a casting vote.
- (7) Subject to the provisions of this Act, the Chairman may give directions regarding the procedure to be followed at or in connection with any meeting of the Commission.

Cf. 1975, No. 113, s. 6; 1983, No. 144, s. 5 (1), (2)

16. Chairman may direct Commission to sit in Divisions—

- (1) The Chairman may, by writing signed by him, direct that the powers of the Commission under this Act in relation to any matter or class of matter, shall be exercised by separate Divisions of the Commission.
- (2) Each Division shall consist of such members as are for the time being assigned to that Division by the Chairman.
- (3) If the members appointed to any Division do not include either the Chairman or the Deputy Chairman, the Chairman shall from time to time nominate the member who is to be Chairman of that Division.
- (4) In the absence of the member so nominated from any meeting of the Division, the members present shall appoint one of their number to be the Chairman of the Division for the purposes of that meeting.
- (5) For the purpose of the determination of a matter or class of matters specified in a direction given under subsection (1) of this section, the Commission shall be deemed to consist of the Division of the Commission specified in the direction; and the powers of any such Division shall not be affected by any changes or vacancies in its membership.
- (6) 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.
- (7) Any direction given under subsection (1) of this section may be revoked or amended by the Chairman by writing signed by him.

Cf. 1975, No. 113, s. 7; 1976, No. 67, s. 7

17. Assent to determination—

A determination in writing signed, or assented to by letter, telegram, cable, or telex [or facsimile] message, by all the members of the Commission or, of a Division of the Commission, as the case may be, necessary to constitute a quorum shall be as valid and effectual as if it had been made at a meeting of the Commission or Division duly called and constituted by those members.

Cf. 1975, No. 113, s. 7A; 1983, No. 144, s. 6

The words in square brackets were inserted by s. 9 of the Commerce Amendment Act 1990.

[18. Officers and employees—

(1) The Commission may from time to time appoint such employees (including employees on secondment from other organisations) as it thinks necessary for the efficient performance and exercise of its functions and powers, and, subject to subsection (2) of this section, may at any time remove any employee from office or employment.

(2) Employees appointed under subsection (1) of this section shall be employed on such terms and conditions of employment and shall be paid such salaries and allowances as the Commission from time to time determines.

(3) Subject to the terms and conditions of employment, the Commission may at any time terminate or suspend the employment of any employee.

(4) No person shall be deemed to be in the service of the Crown or in any part of the State services within the meaning of the State Sector Act 1988 by reason only of being employed under this section.

This section (together with ss. 18A to 18D) were substituted for the original s. 18 on 1 July 1990 by s. 10 of the Commerce Amendment Act 1990.

An amendment to s. 18 repealing and substituting a new subs. (5) on 1 April 1991 by s. 80 of the National Provident Fund Restructuring Act 1990 is obviously otiose, as there is no subs. (5) in the above printed new s. 18 to repeal and substitute.

[18A. Personnel policy—

(1) The Commission shall operate a personnel policy that complies with the principle of being a good employer.

(2) For the purposes of this section, a “good employer” is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—

- (a) Good and safe working conditions; and
- (b) An equal employment opportunities programme; and
- (c) The impartial selection of suitably qualified persons for appointment; and
- (d) Recognition of—
 - (i) The aims and aspirations of the Maori people; and
 - (ii) The employment requirements of the Maori people; and
 - (iii) The need for greater involvement of the Maori people as employees of the employer operating the personnel policy; and
- (e) Opportunities for the enhancement of the abilities of individual employees; and
- (f) Recognition of the aims and aspirations, and the cultural differences, of ethnic or minority groups; and
- (g) Recognition of the employment requirements of women; and
- (h) Recognition of the employment requirements of persons with disabilities.

[18B. Equal employment opportunities—

(1) The Commission—

- (a) Shall in each year develop and publish an equal employment opportunities programme;
- (b) Shall ensure in each year that the equal employment opportunities programme for that year is complied with.

(2) For the purposes of this section and section 18A of this Act, an equal employment opportunities programme means a programme that is aimed at the identification and elimination of all aspects of policies, procedures, and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate, inequality in respect of the employment of any persons or group of persons.

[18C. Choice of procedure—

Where the circumstances giving rise to a personal grievance by a person employed by the Commission are also such that that person would be entitled to make a complaint under the Human Rights

Commission Act 1977 or the Race Relations Act 1971 or to exercise a right of review or appeal, that person may take one, but not more than one, of the following steps:

- (a) The person may invoke, in relation to those circumstances, the procedures applicable in relation to personal grievances under [[the Employment Contracts Act 1991]] or the relevant [[collective employment contract]]:
- (b) The person may make, in relation to those circumstances, a complaint under the Human Rights Commission Act 1977 or the Race Relations Act 1971:
- (c) The person may exercise the right of review or appeal.

In para. (a) the Employment Contracts Act 1991, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Labour Relations Act 1987, and the reference to a collective employment contract has been substituted for a reference to an award or agreement pursuant to s. 176 of the Employment Contracts Act 1991.

[18D. Superannuation and retiring allowances—

(1) For the purposes of providing superannuation or retiring allowances for its officers or employees appointed under this Act, the Commission may from time to time pay sums of money by way of subsidy or contribution into any scheme under the National Provident Fund Act 1950 containing provision for employer subsidy or into any other employer. subsidised scheme approved by the Minister of Finance for the purposes of this section.

(2) Notwithstanding anything in this Act, any person who, immediately before the commencement of this Act was assisting the Commission by virtue of an appointment under section 18 (1) of this Act and was a contributor to the Government Superannuation Fund under Part II of the Government Superannuation Fund Act 1956 shall be deemed, for the purposes of the Government Superannuation Fund Act 1956, to be employed in the Government service so long as that person continues to be an officer or employee of the Commission; and that Act shall apply to the person in all respects as if service as such an officer or employee were Government service. For the purposes of the Government Superannuation Fund Act 1956, the controlling authority in relation to any such person shall be the Commission.

(3) Subject to the Government Superannuation Fund Act 1956, nothing in subsection (2) of this section shall entitle any person to whom that subsection applies to become a contributor to the Government Superannuation Fund after ceasing to be a contributor to that Fund.]

In subs. (1) of s. 18D, the National Provident Fund Act 1950 was repealed by s. 81 (1) of the National Provident Fund Restructuring Act 1990.

Ss. 18 and 18A to 18D were substituted for the original s 18 by s. 10 of the Commerce Amendment Act 1990.

19. Money to be appropriated by Parliament for purposes of this Act—

All fees, salaries, wages, allowances, expenses, and other expenditure payable or incurred under or in the administration of this Act shall be payable out of money to be appropriated by Parliament for the purpose.

Cf. 1975, No. 113, s. 19A; 1976, No. 67, s. 11

20. Funds of Commission—

The funds of the Commission shall consist of—

- (a) Any money appropriated by Parliament for the purposes of the Commission under this Act or any other Act and paid to the Commission for those purposes:
- (b) All other money lawfully received by the Commission for the purposes of the Commission:
- (c) All accumulations of income derived from any such money.

Cf. 1975, No. 113, s. 19B; 1983, No. 144, s. 12

21. Bank accounts—

(1) The Commission shall open at any bank or banks such accounts as are necessary for the exercise of its functions and powers.

(2) All money received by the Commission, or by any officer or employee of the Commission on behalf of the Commission, shall, as soon as practicable after it has been received, be paid into such bank account of the Commission as the Commission from time to time determines.

(3) The withdrawal or payment of money from any such account shall be authorised by a prior resolution of the Commission, or shall be submitted to the Commission for confirmation at its first ordinary meeting after the date of payment.

(4) The withdrawal or payment of money from any such account shall be by cheque signed by such person or persons as the Commission may from time to time authorise.

Cf. 1975, No. 113, s. 19C; 1983, No. 144, s. 12

[22. Crown entity—

(1) The Commission shall be a Crown entity for the purposes of the Public Finance Act 1989.

(2) The annual financial statements of the Commission shall be audited by the Audit Office which, for that purpose, shall have and may exercise all such powers as it has under the Public Finance Act 1977 in respect of public money and public stores.]

This section was substituted for the former s. 22 (as amended by s. 11 of the Commerce Amendment Act 1990) by s. 42 of the Public Finance Amendment Act 1992.

23. Investment of money—

Any money belonging to the Commission that is not immediately required for expenditure by the Commission may be invested [pursuant to section 25 of the Public Finance Act 1989].

Cf. 1975, No. 113, s. 19E; 1983, No. 144, s. 12

The words in square brackets were substituted for the former words by s. 86 (1) of the Public Finance Amendment Act 1989.

24. Exemption from income tax—

The income of the Commission shall be exempt from income tax.

Cf. 1975, No. 113, s. 19F; 1983, No. 144, s. 12

25. Functions of Commission in relation to dissemination of information —

In addition to the functions conferred on the Commission by this Act, the Commission shall make available or co-operate in making available information with respect to—

- (a) The carrying out of the functions and the exercise of the powers of the Commission under this Act; and
- (b) The purposes and provisions of this Act.

Cf. 1975, No. 113, s. 11 (1A); 1983, No. 144, s. 7; Trade Practices Act 1974 (Aust.), s. 28 (1) (a)

26. Commission to have regard to economic policies of Government—

(1) In the exercise of its powers under ... this Act, the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister.

(2) The Minister shall cause every statement of economic policy transmitted to the Commission under subsection (1) of this section to be published in the *Gazette* and laid before Parliament as soon as practicable after so transmitting it.

Cf. 1975, No. 113, s. 2A (1) (e); 1976, No. 67, s. 3; Trade Practices Act 1974 (Aust.), s. 29

In subs. (1) the words “Part V of” were omitted by s. 12 of the Commerce Amendment Act 1990.

PART II
RESTRICTIVE TRADE PRACTICES

Practices Substantially Lessening Competition

27. Contracts, arrangements, or understandings substantially lessening competition prohibited—

(1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.

(4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

Cf. Trade Practices Act 1974 (Aust.), s. 45 (1), (2)

28. Covenants substantially lessening competition prohibited—

(1) No person, either on his own or on behalf of an associated person, shall—

- (a) Require the giving of a covenant; or
- (b) Give a covenant—

that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person, either on his own or on behalf of an associated person, shall carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) of this section applies to a covenant whether given before or after the commencement of this Act.

(4) No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

(5) No person shall—

- (a) Threaten to engage in particular conduct if a person who, but for subsection (4) of this section, would be bound by a covenant, does not comply with the terms of the covenant; or
- (b) Engage in particular conduct because a person who, but for subsection (4) of this section, would be bound by a covenant, has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(6) Where a person—

- (a) Issues an invitation to another person to enter into a contract containing a covenant; or
- (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,—

that person shall, by issuing that invitation, making that offer, or making that fact known, be deemed to require the giving of the covenant.

(7) For the purposes of this section, 2 persons shall be taken to be associated with each other in relation to a covenant or proposed covenant if, but only if,—

- (a) One person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with the directions, instructions, or wishes of the other person in relation to the covenant or proposed covenant; or

- (b) The persons are interconnected bodies corporate.
Cf. Trade Practices Act 1974 (Aust.), s. 45B (1)–(3), (7)

29. Contracts, arrangements, or understandings containing exclusionary provisions prohibited—

[(1) For the purposes of this Act, a provision of a contract, arrangement, or understanding is an exclusionary provision if—

- (a) It is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any 2 or more are in competition with each other; and
- (b) It has the purpose of preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the contract, arrangement, or understanding, or if a party is a body corporate, by a body corporate that is interconnected with that party; and
- (c) The particular person or the class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.]

(2) For the purposes of subsection (1) (a) of this section, a person is in competition with another person if that person or any interconnected body corporate is, or is likely to be, or, but for the relevant provision, would be or would be likely to be, in competition with the other person, or with an interconnected body corporate, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

(3) No person shall enter into a contract, or arrangement, or arrive at an understanding, that contains an exclusionary provision.

(4) No person shall give effect to an exclusionary provision of a contract, arrangement, or understanding.

(5) Subsection (4) of this section applies to an exclusionary provision of a contract or arrangement made, or understanding arrived at, whether before or after the commencement of this Act.

(6) No exclusionary provision of a contract, whether made before or after the commencement of this Act, is enforceable.

Cf. Trade Practices Act 1974 (Aust.), ss. 4D, 45 (1)–(3)

Subs. (1) was substituted for the original subs. (1) by s. 13 of the Commerce Amendment Act 1990.

Price Fixing

30. Certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition—

(1) Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—

- (a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
- (b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.

(2) The reference in subsection (1) (a) of this section 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 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.

Cf. Trade Practices Act 1974 (Aust.), s. 45A (1), (7), (8)

31. Joint venture pricing exempt from application of section 30—

- (1) For the purposes of this section—
- (a) Joint venture means an activity in trade—
- (i) Carried on by 2 or more persons, whether or not in partnership; or
 - (ii) Carried on by a body corporate for the purpose of enabling 2 or more 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 or an interconnected body corporate:
- (b) A reference to a contract or arrangement entered into, or an understanding 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 in terms of paragraph (a) (ii) of this subsection, be read as including a reference to the memorandum and articles of association, rules, or other document that constitute or constitutes, or is or are to constitute, that body corporate.
- (2) Nothing in section 30 of this Act applies to a provision of a contract or arrangement entered into, or an understanding arrived at for the purposes of a joint venture, to the extent that the provision relates to—
- (a) The joint supply by the parties to the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by those parties in pursuance of the joint venture; or
 - (b) The joint supply by the parties to the joint venture of services in pursuance of the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of services in pursuance of, and made available as a result of, the joint venture; or
 - (c) In the case of a joint venture carried on by a body corporate in terms of subsection (1) (a) (ii) of this section,—
 - (i) The supply by that body corporate of goods produced by it in pursuance of the joint venture; or
 - (ii) The supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by a person who is the owner of shares in the capital of the body corporate, or a body corporate that is interconnected with such a person.

Cf. Trade Practices Act 1974 (Aust.), ss. 4J, 45A (2)

32. Certain recommendations as to prices for goods and services exempt from application of section 30—

Nothing in section 30 of this Act applies to a provision of a contract, arrangement, or understanding, to the extent that the provision recommends or provides for the recommending of the price for, or a discount, allowance, rebate or credit in relation to goods or services where the parties to the contract, or arrangement, or understanding include not less than 50 persons (bodies corporate that are interconnected being counted as a single person) who supply or acquire, in trade, goods or services to which the provision applies.

Cf. Trade Practices Act 1974 (Aust.), s. 45A (3)

33. Joint buying and promotion arrangements exempt from application of section 30—

Nothing in section 30 of this Act applies to a provision of a contract, arrangement, or understanding that—

- (a) Relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement, or understanding; or
- (b) Provides for joint advertising of the price for the resupply of goods so acquired.

Cf. Trade Practices Act 1974 (Aust.), s. 45A (4)

34. Certain provisions of covenants with respect to prices deemed to substantially lessen competition—

(1) Without limiting the generality of section 28 of this Act, a covenant shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the covenant has the purpose or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling or maintaining of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—

- (a) Supplied or acquired by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by bodies corporate that are interconnected with any of them, in competition with each other; or
- (b) Resupplied by persons to whom the goods are supplied by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by bodies corporate that are interconnected with any of them, in competition with each other.

(2) The reference in subsection (1) (a) of this section 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 the covenant, would be in competition with each other in relation to the supply or acquisition of the goods or services.

Cf. Trade Practices Act 1974 (Aust.), s. 45C

*Practices Substantially Lessening Competition
Conditional Upon Authorisation*

35. Contracts or covenants subject to authorisation not prohibited under certain conditions—

(1) Notwithstanding anything in this Act, but subject to subsection (3) of this section,—

- (a) A contract to which section 27 or section 29 of this Act applies may be entered into if the requirements of subsection (2) of this section are complied with:
- (b) A covenant to which section 28 of this Act applies may be required to be given, or may be given, if the requirements of subsection (2) of this section are complied with.

(2) For the purposes of subsection (1) of this section, the requirements that must be met are—

- (a) In the case of a contract to which section 27 or section 29 of this Act applies, that the contract shall be subject to a condition that the provision, or exclusionary provision, as the case may be, shall not come into force unless and until authorisation is granted to give effect to the provision, or exclusionary provision and that application shall be made for that authorisation within 15 working days after the contract is entered into:
- (b) In the case of a covenant to which section 28 of this Act applies, that the covenant is subject to the condition that it shall not have effect unless and until authorisation is granted to give effect to it and that application shall be made for that authorisation within 15 working days after the covenant is made.

(3) Nothing in this section—

- (a) Prevents the giving effect to a provision of a contract or an exclusionary provision, as the case may be, from constituting a contravention of section 27 or section 29 of this Act, as the case may be:

- (b) Prevents the giving effect to a covenant from constituting a contravention of section 28 of this Act.

Cf. Trade Practices Act 1974 (Aust.), ss. 45 (9), 45B (8)

Use of Dominant Position in a Market

36. Use of dominant position in a market—

- (1) No person who has a dominant position in a market shall use that position for the purpose of—
- (a) Restricting the entry of any person into that or any other market; or
- (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
- (c) Eliminating any person from that or any other market.

[(2) For the purposes of this section, a person does not use a dominant position in a market for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of this section by reason only that that person seeks to enforce any statutory intellectual property right within the meaning of section 45 (2) of this Act in New Zealand.]

(3) Nothing in this section applies to any practice or conduct to which this Part of this Act applies which has been authorised pursuant to Part V of this Act.

Cf. Trade Practices Act 1974 (Aust.), s. 46

Subs. (2) was substituted for the original subs. (2) by s. 14 of the Commerce Amendment Act 1990.

[36a. Use of dominant position in trans-Tasman markets—

- (1) No person who has—
- (a) A dominant position in a market; or
- (b) A dominant position in a market in Australia; or
- (c) A dominant position in a market in New Zealand and Australia—
- shall use that person's dominant position for the purpose of—
- (d) Restricting the entry of any person into any market, not being a market exclusively for services; or
- (e) Preventing or deterring any person from engaging in competitive conduct in any market, not being a market exclusively for services; or
- (f) Eliminating any person from any market, not being a market exclusively for services.

(2) For the purposes of this section, a person does not use a dominant position in a market for any of the purposes specified in paragraphs (d) to (f) of subsection (1) of this section by reason only that that person seeks to enforce any statutory intellectual property right, within the meaning of section 45 (2) of this Act, in New Zealand.

(3) Nothing in this section applies to any practice or conduct to which this Part of this Act applies that has been authorised pursuant to Part V of this Act.]

This section was inserted by s. 15 of the Commerce Amendment Act 1990.

Resale Price Maintenance

37. Resale price maintenance by suppliers prohibited—

- (1) No person shall engage in the practice of resale price maintenance.

(2) For the purposes of this section a person engages in the practice of resale price maintenance if that person (in this section referred to as the supplier) does any of the acts referred to in subsection (3) of this section.

- (3) The acts referred to for the purposes of subsection (2) of this section are—
- (a) The supplier making it known to another person that the supplier will not supply goods to the other person unless the other 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, another person not to sell, at a price less than a price specified by the supplier, goods supplied to the other person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier:
 - (c) The supplier entering or offering to enter into an agreement, for the supply of goods to another person, where one of the terms is or would be that the other 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 another person for the reason that the other person—
 - (i) Has not agreed to the condition mentioned in paragraph (a) of this subsection; or
 - (ii) Has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him 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 another person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the other 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 or to be supplied to that third person, by the other person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold.
- (4) For the purposes of subsection (3) of this section,—
- (a) Where the supplier makes it known, in respect of any 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:
 - (b) Where a set form, method, or formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the supplier:
 - (c) Where the supplier makes it known, in respect of any 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 set form, method, or 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:
 - (d) Where the supplier makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the supplier as the price below which the goods are not to be sold:
 - (e) 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.
- (5) For the purposes of this section, “sale” includes advertise for sale, display for sale, and offer for sale, and “sell”, “selling”, and “sold” have corresponding meanings.

38. Resale price maintenance by others prohibited—

- (1) No person (in this section referred to as the “third party”) shall—
 - (a) Make it known to another person that the third party proposes to engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of any goods to,

or the acquisition of any goods from, that person unless that person agrees not to sell those goods at a price less than the price specified by the third party; or

- (b) Engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of goods to, or the acquisition of goods from, another person for the purpose of inducing that person not to sell those goods at a price less than a price specified by the third party.
- (2) For the purposes of subsection (1) of this section,—
 - (a) Where the third party makes it known, in respect of any 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 third party:
 - (b) Where a set form, method, or formula is specified by or on behalf of the third party and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the third party:
 - (c) Where the third party makes it known, in respect of any 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 set form, method, or 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 third party:
 - (d) Where the third party makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the third party as the price below which the goods are not to be sold:
 - (e) Anything done by a person acting on behalf of, or by arrangement with, the third party shall be deemed to have been done by the third party.
- (3) For the purposes of this section “sale” includes advertise for sale, display for sale, and offer for sale, and “sell”, “selling”, and “sold” have corresponding meanings.

39. Recommended prices—

For the purposes of section 37 (3) (b) of this Act, a supplier of any goods is not to be taken as inducing, or attempting to induce, another person not to sell those goods at a price less than a price specified by the supplier merely because—

- (a) A statement of a price is applied or used in relation to the goods or is applied to a covering, label, reel, or thing if the statement is preceded by the words “recommended price”; or
- (b) The supplier has given notification in writing to the other person (not being a notification in the form of a statement applied to the goods or to any covering, label, reel, or thing as mentioned in paragraph (a) of this subsection) of the price that the supplier recommends as appropriate for the sale of those goods, if the notification, and each writing that refers, whether expressly or by implication, to the notification, includes a statement to the effect that the price is a recommended price only and there is no obligation to comply with the recommendation.

Cf. Trade Practices Act 1974 (Aust.), s. 97

40. Withholding the supply of goods—

For the purposes of section 37 (3) (d) and (e) of this Act, 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; or
- (b) The supplier refuses to supply those goods except on terms that are disadvantageous to the other person; or
- (c) In supplying those 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 act in relation to the supply of goods in the manner specified in paragraphs (a), (b), or (c), as the case may be, of this section.

Cf. Trade Practices Act 1974 (Aust.), s. 98

41. Preventing the supply of goods—

For the purposes of section 38 of this Act,—

- (a) The supply of goods shall be deemed to be prevented if—
- (i) The supply of those goods is refused except on terms that are disadvantageous to the person acquiring the goods; or
 - (ii) The supply of those goods is on terms which are less favourable, whether in respect of time, method, or place of delivery, or otherwise, than the person who supplies the goods treats other persons to whom the same or similar goods are supplied:
- (b) The acquisition of goods shall be deemed to be prevented if—
- (i) The acquisition of those goods is refused except on terms that are disadvantageous to the person supplying the goods; or
 - (ii) The acquisition of those goods is on terms which are less favourable, whether in respect of time, method, or place of delivery, or otherwise, than the person who acquires the goods treats other persons from whom the same or similar goods are acquired.

42. Special evidentiary provisions in respect of certain resale price maintenance practices—

(1) Where, in proceedings under this Act against a supplier for a contravention of section 37 (3) (d) or section 37 (3) (e) of this Act it is proved that—

- (a) The supplier has acted in a manner referred to in section 40 of this Act; and
- (b) During a period ending immediately before the supplier so acted, the supplier had been supplying goods of the kind withheld either to—
- (i) The person in respect of whom the contravention is alleged; or
 - (ii) A person carrying on a similar business to that person; and
- (c) During a period of 6 months immediately before the supplier so acted, the supplier became aware of a matter or circumstance capable of constituting a reason referred to in section 37 (3) (d) or (e) of this Act—

it shall be presumed, in the absence of evidence to the contrary, that the supplier so acted on account of that matter.

(2) Nothing in subsection (1) of this section applies in respect of terms imposed by a supplier that are disadvantageous or treatment that is less favourable than the supplier accords other persons if the terms of treatment consists only of a requirement by the supplier 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.

Cf. Trade Practices Act 1974 (Aust.), s. 100 (1), (2)

43. Statutory exceptions—

(1) Nothing in this Part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.

(2) For the purposes of subsection (1) of this section, an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office, or, in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.

(3) No act, matter, or thing authorised under section 7 (2) (i) of the Sharebrokers Amendment Act 1981 or section 70 (1) (n) of the Real Estate Agents Act 1976 as enacted immediately before the commencement of this Act, shall be taken to be specifically authorised under subsection (1) of this section.

Cf. 1975, No. 113, ss. 22 (7), 27 (3) (c); 1976, No. 67, ss. 15 (1), 20 (2) (b)

44. Other exceptions—

- (1) Nothing in this Part of this Act applies—
 - (a) To the entering into of a contract, or arrangement, or arriving at an understanding between partners none of whom is a body corporate in so far as it contains 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 that party is, or after that party ceases to be, a partner:
 - (b) To the entering into of a contract, or arrangement, or arriving at an understanding, or the giving or requiring the giving of a covenant, where the only parties, or (in the case of a covenant or proposed covenant) the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant, are or would be interconnected bodies corporate:
 - (c) To the entering into of a contract of service or a contract for the provision of services in so far as it contains a provision by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during, or after the termination of, the contract:
 - (d) To the entering into of a contract for, or the giving or requiring the giving of a covenant in connection with, the sale of a business or shares in the capital of a body corporate carrying on a business in so far as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the business:
 - (e) To the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision obligating a person to comply with or apply standards of dimension, design, quality, or performance prepared or approved by the Standards Association of New Zealand or by any association or body prescribed for the purpose of this paragraph by regulations made under this Act:
 - (f) To the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision that relates to the remuneration, conditions of employment, hours of work, or working conditions of employees:
 - (g) To the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision that relates exclusively to the export of goods from New Zealand or exclusively to the supply of services wholly outside New Zealand, 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 15 working days after the date on which the contract or arrangement was made or the understanding was arrived at, or 60 working days after the commencement of this Act, whichever is the later:
 - (h) To any act done, otherwise than in trade, in concert by users of goods or services against the suppliers of those goods or services:
 - (i) To any act done to give effect to a provision of a contract, arrangement, or understanding, or to a covenant referred to in paragraphs (a) to (g) of this subsection.
- (2) Nothing in this Part of this Act applies—
 - (a) To the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand or from a place outside New Zealand to a place in New Zealand; or
 - (b) To any act done to give effect to a provision of a contract, arrangement, or understanding referred to in paragraph (a) of this subsection.

[(3) For the purposes of subsection (2) of this section, a provision of a contract, arrangement, or understanding is not a provision exclusively for the carriage of goods by sea if it relates to the carriage of goods to or from a ship or the loading or unloading of a ship.]

Cf. Trade Practices Act 1974 (Aust.), s. 51 (2), (2A)

Subs. (3) was added by s. 11 (1) of the Port Companies Amendment Act 1990.

[45. Exceptions in relation to copyright, patents, plant varieties, registered designs, and trade marks—

- (1) Nothing in this Part of this Act, except sections 36, 36A, 37, and 38 of this Act, applies—
 - (a) To the entering into of a contract or arrangement or arriving at an understanding in so far as it contains a provision authorising any act that would otherwise be prohibited by reason of the existence of a statutory intellectual property right; or
 - (b) To any act done to give effect to a provision of a contract, arrangement, or understanding referred to in paragraph (a) of this subsection.
- (2) For the purposes of subsection (1) of this section, a statutory intellectual property right means a right, privilege, or entitlement that is conferred, or acknowledged as valid, by or under—
 - (a) The Patents Act 1953; or
 - (b) The Designs Act 1953; or
 - (c) The Trade Marks Act 1953; or
 - (d) The Copyright Act 1962; or
 - (e) The Plant Variety Rights Act 1987.
- (3) For the purposes of subsection (2) of this section—
 - (a) A person who has applied for a patent in accordance with the Patents Act 1953 and filed the complete specification in relation to the application shall, until the application is determined, be deemed to have been granted the patent to which the application relates:
 - (b) A person who has made an application for the registration of a design in accordance with section 7 of the Designs Act 1953 shall, until the application is determined, be deemed to be the registered proprietor of the design:
 - (c) A person who has made an application in accordance with section 26 of the Trade Marks Act 1953 for registration of a trade mark, shall, until the application is determined, be deemed to be the registered proprietor of the trade mark:
 - (d) A person who has made an application in accordance with section 5 of the Plant Variety Rights Act 1987, shall, until the application is determined, be deemed to have been granted the plant variety rights to which the application relates.]

This section was substituted for the original s. 45 by s. 16 (1) of the Commerce Amendment Act 1990. See s. 16 (2) and (3) of that Act.

46. Repealed by s. 17 of the Commerce Amendment Act 1990.

**[PART III
[BUSINESS ACQUISITIONS**

[47. Certain acquisitions prohibited—

- (1) No person shall acquire assets of a business or shares if, as a result of the acquisition,—
 - (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
 - (b) That person's or another person's dominant position in a market would be, or would be likely to be, strengthened.
- (2) For the purposes of this section and section 48 of this Act, where 2 or more persons are interconnected or associated and together are in a dominant position in a market, each of them is deemed to be in a dominant position in that market.
- (3) For the purposes of this section and section 48 of this Act, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.
- (4) A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of subsection (3) of this section, by reason only of the fact that—
 - (a) Those persons are in competition in the same market; or

- (b) One of them supplies goods or services to the other.

[48. Bare transfer of market dominance excluded—

Nothing in section 47 of this Act applies to the acquisition of assets of a business or shares if—

- (a) Before the acquisition either—
- (i) The person acquiring the assets or shares; or
 - (ii) The business the assets of which are acquired or the body corporate in which the shares are acquired, as the case may be,—
- already had a dominant position in a market; and
- (b) The acquisition has not resulted or will not result in the strengthening of that dominant position.]

49–51. *These sections were repealed, together with the original ss. 47 and 48, by s. 18 of the Commerce Amendment Act 1990.*

This Part III (comprising ss. 47 and 48) was substituted for the original Part III (comprising ss. 47 to 51) by s. 18 of the Commerce Amendment Act 1990.

PART IV CONTROL OF PRICES

Declaration of Price Control

52. “Controlled goods or services” defined—

In this Act, unless the context otherwise requires, “controlled goods or services” means goods or services in respect of which there is for the time being in force an Order in Council made under section 53 of this Act.

53. Governor-General may impose price control in circumstances of restricted competition—

(1) The Governor-General may, from time to time, on the recommendation of the Minister, by Order in Council, declare that the prices for goods or services specified in the order shall be controlled in accordance with this Act.

(2) The Minister shall not make a recommendation under subsection (1) of this section unless the Minister is satisfied that—

- (a) Goods or services to which the recommendation relates are or will be supplied or acquired in a market in which competition is limited or is likely to be lessened; and
- (b) It is necessary or desirable for the prices of those goods or services to be controlled in accordance with this Act in the interests of users, or consumers, or, as the case may be, of suppliers.

(3) Any Order in Council made under this section may identify the goods or services to which it relates—

- (a) By a description of the goods or services; or
- (b) By a description of the kind or class to which the goods or services belong.

(4) Any Order in Council made under this section may apply to goods and, with all necessary modifications, to services—

- (a) Supplied in or for delivery within specified regions, areas, or localities in New Zealand;
 - (b) Supplied in different quantities, qualities, grades, or classes;
 - (c) Supplied by or to or for the use of different persons or classes of persons.
- (5) Every Order in Council made under this section shall specify the date on which it shall expire.

Cf. 1975, No. 113, s. 82 (1), (4), (5)

54. Commission may report to Minister as to price control—

- (1) The Minister may, by notice in writing to the Commission, require it to report to him, by such date as the Minister shall specify, on whether he should make any recommendation to make, or amend, or vary or revoke an Order in Council under section 53 of this Act.
- (2) Where the Commission is required by the Minister to report to him under subsection (1) of this section,—
 - (a) The Commission shall cause to be published, in the *Gazette* and in such other manner (if any) as the Commission considers appropriate, a notice—
 - (i) Stating that the requirement has been made and specifying the matter to which it relates; and
 - (ii) Inviting interested persons to furnish their views on that matter to the Commission, and specifying the time and manner within which they may do so:
 - (b) The Commission shall not submit a report to the Minister until it has given a reasonable opportunity to interested persons to furnish their views in accordance with paragraph (a) (ii) of this subsection.
- (3) The Commission may, of its own motion, recommend to the Minister that he make a recommendation to make, or amend, or vary or revoke an Order in Council under section 53 of this Act.
- (4) The Minister shall cause a copy of every report submitted to him by the Commission under this section to be published in such manner as he considers appropriate.
- (5) Nothing in this section limits or affects the powers of the Minister under section 53 of this Act.
Cf. 1975, No. 113, s. 82 (7)

Authorised Prices for Controlled Goods or Services

55. Controlled goods or services not to be supplied except in accordance with authorised price—

- (1) No person shall supply any controlled goods or services unless a price for those goods or services has been authorised by the Commission or an undertaking has been given in relation to those goods or services in accordance with the provisions of Part V of this Act, and the goods or services are supplied in compliance with all the provisions of the authorisation or undertaking.
- (2) No provision of a contract and no covenant in contravention of subsection (1) of this section is enforceable.

Miscellaneous Provisions

56. Records to be kept for pricing purposes—

- (1) Every supplier of controlled goods or services shall retain such accounts and costing records in relation to the controlled goods or services as the Commission may from time to time specify either in relation to suppliers of those goods or services generally or in relation to a particular supplier of the goods or services.
- (2) Every supplier of controlled goods or services shall retain the accounts and records referred to in subsection (1) of this section for a period of 3 years from the date of the revocation or expiry of the Order in Council in respect of the controlled goods or services to which they relate.

Cf. 1975, No. 113, s. 87

57. Other Acts relating to price control not affected—

Nothing in this Part and Part V of this Act shall limit or affect the exercise by any person of any power to authorise the prices for goods or services under any other Act.

Cf. 1975, No. 113, s. 118

PART V
AUTHORISATIONS AND CLEARANCES

Restrictive Trade Practices

[58. Commission may grant authorization for restrictive trade practices—

- (1) A person who wishes to enter into a contract or arrangement, or arrive at an understanding, to which that person considers section 27 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so and the Commission may grant an authorisation for that person to enter into the contract or arrangement, or arrive at the understanding.
- (2) A person who wishes to give effect to a provision of a contract or arrangement or understanding to which that person considers section 27 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to give effect to the provision of the contract or arrangement or understanding.
- (3) A person who wishes to require the giving of, or to give, a covenant to which that person considers section 28 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to require the giving of, or to give, the covenant.
- (4) A person who wishes to carry out or enforce a covenant to which that person considers section 28 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to carry out or enforce the covenant.
- (5) A person who wishes to enter into a contract or arrangement, or arrive at an understanding to which that person considers section 29 of this Act would apply, or might apply, may apply to the Commission for an authorisation for that person to enter into the contract or arrangement or arrive at the understanding.
- (6) A person who wishes to give effect to an exclusionary provision of a contract or arrangement or understanding to which that person considers section 29 of this Act would apply, or might apply, may apply to the Commission to do so, and the Commission may grant an authorisation for that person to give effect to the exclusionary provision of the contract or arrangement or understanding.
- (7) A person who wishes to engage in the practice of resale price maintenance to which that person considers section 37 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to engage in the practice.
- (8) A person who wishes to do an act to which that person considers section 38 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to do that act.

[58A. Effect of authorisation—

- (1) While an authorisation under subsection (1) or subsection (5) of section 58 of this Act remains in force, as the case may be, nothing in section 27 or section 29 of this Act, as the case may be, shall prevent the applicant from—
 - (a) Entering into, or in accordance with the authorisation, giving effect to or enforcing any provision of the contract to which the authorisation relates; or
 - (b) Entering into, or in accordance with the authorisation, giving effect to the arrangement to which the authorisation relates; or
 - (c) Arriving at, or in accordance with the authorisation, giving effect to the understanding to which the authorisation relates.

(2) While an authorisation under subsection (2) or subsection (6) of section 58 of this Act remains in force, as the case may be, nothing in section 27 or section 29 of this Act, as the case may be, shall prevent the applicant from—

- (a) In accordance with the authorisation, giving effect to or enforcing the contract to which the authorisation relates; or
- (b) In accordance with the authorisation, giving effect to the arrangement or understanding.

(3) While an authorisation under subsection (3) of section 58 of this section remains in force, nothing in section 28 of this Act shall prevent the applicant from—

- (a) Requiring the giving of, or giving, the covenant to which the authorisation relates; or
- (b) Carrying out or enforcing the terms of the covenant to which the authorisation relates in accordance with the authorisation.

(4) While an authorisation under subsection (4) of section 58 of this Act remains in force, nothing in section 28 of this Act shall prevent the applicant from carrying out or enforcing the terms of the covenant to which the authorisation relates in accordance with the authorisation.

(5) While an authorisation under subsection (7) of section 58 of this Act remains in force, nothing in section 37 of this Act shall prevent the applicant from engaging in the practice to which the authorisation relates in accordance with the authorisation.

(6) While an authorisation under subsection (8) of section 58 of this Act remains in force, nothing in section 38 of this Act shall prevent the applicant from doing the act to which the authorisation relates in accordance with the authorisation.

[58B. Additional provisions relating to authorisations—

- (1) Every authorisation granted by the Commission to a person under section 58 of this Act to—
 - (a) Enter into a contract or arrangement or arrive at an understanding; or
 - (b) Give effect to a provision of a contract, arrangement, or understanding; or
 - (c) Require the giving of, or give, a covenant; or
 - (d) Carry out or enforce the terms of a covenant; or
 - (e) Engage in the practice of resale price maintenance; or
 - (f) Do any act referred to in section 38 of this Act,—

shall have effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as a party to the contract, arrangement, or understanding, or the practice or act, or as a person who is or would be bound by, or entitled to the benefit of, the covenant, as the case may be.

(2) An authorisation granted to a person under section 58 of this Act may be expressed to apply to or in relation to another person who,—

- (a) In the case of an authorisation to enter into a contract or arrangement or arrive at an understanding, becomes a party to the proposed contract or arrangement at a time after it is entered into or becomes a party to the proposed understanding at a time after it is arrived at;
- (b) In the case of an authorisation to give effect to a provision of a contract, arrangement, or understanding, becomes a party to the contract, arrangement, or understanding at a time after the authorisation is granted;
- (c) In the case of an authorisation to require the giving of, or to give, a covenant, becomes bound by, or entitled to the benefit of, the covenant at a time after the covenant is given;
- (d) In the case of an authorisation to carry out or enforce the terms of a covenant, becomes bound by, or entitled to the benefit of, the covenant at a time after the authorisation is granted.]

Ss. 58 to 58B were substituted for the original s. 58 by s. 19 of the Commerce Amendment Act 1990.

As to application fees, see S.R. 1990/356/2 (a).

59. Authorisation not to be granted in relation to contracts, etc., made before determination by Commission—

(1) Subject to section 35 of this Act, but notwithstanding anything in section 58 of this Act, the Commission shall not grant an authorisation to any person—

- (a) To enter into a contract or arrangement, or to arrive at an understanding if the contract or arrangement has been entered into, or the understanding has been arrived at before the Commission makes a determination in respect of the application for that authorisation; or
- [(b) To require the giving of, or to give a covenant if the covenant has been given before the Commission makes a determination in respect of the application for that authorisation; or
- (c) To engage in the practice of resale price maintenance if the practice is already being engaged in by the applicant for the authorisation before the Commission makes a determination in respect of the application for that authorisation; or
- (d) To do an act or engage in conduct referred to in section 38 of this Act if the applicant has done the act or is engaging in the conduct, before the Commission makes a determination in respect of the application for that authorisation.]

(2) Nothing in subsection (1) of this section shall prevent the Commission granting an authorisation to any person—

- (a) To give effect to a provision of a contract or arrangement entered into, or understanding arrived at, before the commencement of this Act; or
- (b) To carry out or enforce a covenant given before the commencement of this Act.

In subs. (1) paras. (b) to (d) were substituted for the original para. (b) by s. 20 of the Commerce Amendment Act 1990.

60. Procedure for applications for authorisation of restrictive trade practices—

(1) Every application for an authorisation under section 58 of this Act shall be made in the prescribed form, shall contain such particulars as may be specified in the form and shall be accompanied by payment of such fee as may be prescribed.

(2) On receipt of an application that complies with subsection (1) of this section, the Commission shall forthwith—

- (a) Record the application in the register to be kept by the Commission for the purpose:
- (b) Give written notice of the date of registration to the person by or on whose behalf the application was made:
- (c) Give notice of the application to any other person who, in the Commission's opinion, is likely to have an interest in the application:
- (d) Give public notice of the application in such manner as the Commission thinks fit.

(3) Any person who has an interest in any application in respect of which a notice is given under subsection (2) (d) of this section may give written notice to the Commission of that person's interest and the reason therefor.

(4) On receipt of an application that does not comply with subsection (1) of this section, the Commission may, at its discretion, either—

- (a) Accept the application and take the steps referred to in subsection (2) of this section in respect of that application; or
- (b) Return the application to the person by or on whose behalf it was made; or
- (c) Decline to register the application until it complies with subsection (1) of this section.

(5) Where the Commission declines to register an application under subsection (4) (c) of this section, it shall forthwith notify the person by or on whose behalf the application was made.

(6) The person making the application under subsection (1) of this section, and any person on whose behalf it was made, and any person to whom the application relates, shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as it may specify, such further documents or information in relation to the application as may be required by the Commission for the purpose of enabling it to exercise its functions under this Part of this Act.

(7) Notwithstanding anything in subsection (2) or subsection (4) of this section, where the Commission is of the opinion that the matters to which an application relates are, for reasons other than arising from the application of any provision of this Act, unlikely to be proceeded with, the Commission may, in its discretion, return the application to the person by or on whose behalf the application was made.

(8) Any person who has made an application to the Commission for an authorisation may, at any time, by notice in writing to the Commission, withdraw the application.

Cf. 1975, No. 113, s. 70; 1983, No. 144, s. 26; Trade Practices Act 1974 (Aust.), s. 89 (1), (2)

61. Determination of applications for authorisation of restrictive trade practices —

(1) The Commission shall, in respect of an application for an authorisation under section 58 of this Act, make a determination in writing—

- (a) Granting such authorisation as it considers appropriate;
- (b) Declining the application.

(2) Any authorisation granted pursuant to section 58 of this Act may be granted subject to such conditions not inconsistent with this Act and for such period as the Commission thinks fit.

(3) The Commission shall take into account any submissions in relation to the application made to it by the applicant or by any other person.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorisation, the Commission shall comply with the requirements of section 62 of this Act.

(6) The Commission shall not make a determination granting an authorisation [pursuant to an application under section 58 (1) to (4)] of this Act unless it is satisfied that—

- (a) The entering into of the contract or arrangement or the arriving at the understanding; or
- (b) The giving effect to the provision of the contract, arrangement or understanding; or
- (c) The giving or the requiring of the giving of the covenant; or
- (d) The carrying out or enforcing of the terms of the covenant—

as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom.

(7) The Commission shall not make a determination granting an authorisation [pursuant to an application under section 58 (5) or (6)] of this Act unless it is satisfied that—

- (a) The entering into of the contract or arrangement or the arriving at the understanding; or
- (b) The giving effect to the exclusionary provision of the contract, or arrangement or understanding—

as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in such a benefit to the public that—

- (c) The contract or arrangement or understanding should be permitted to be entered into or arrived at; or
- (d) The exclusionary provision should be permitted to be given effect to.

[(8) The Commission shall not make a determination granting an authorisation pursuant to an application under section 58 (7) or (8) of this Act unless it is satisfied that—

- (a) The engaging in the practice of resale price maintenance to which the application relates; or
- (b) The act or conduct to which the application relates—

as the case may be, will in all the circumstances result, or be likely to result, in such a benefit to the public that—

- (c) The engaging in the practice should be permitted; or
- (d) The act or conduct should be permitted.]

Cf. Trade Practices Act 1974 (Aust.), s. 90 (1), (2), (4), (5), (6), (7), (8)

In subs. (6) the words in square brackets were substituted for the words “under section 58 (1) (a) to (d)” by s. 21 (1) of the Commerce Amendment Act 1990.

In subs. (7) the words in square brackets were substituted for the words “[under section 58 (1) (e) or (f)]” by s. 21 (2) of the Commerce Amendment Act 1990.

Subs. (8) was added by s. 21 (3) of the Commerce Amendment Act 1990.

62. Commission to prepare draft determination in relation to restrictive trade practices —

(1) Before determining an application for an authorisation under section 58 of this Act, the Commission shall prepare a draft determination in relation to the application.

(2) The Commission shall send a copy of the draft determination and a summary of the reasons therefor to—

(a) The applicant;

(b) Any person to whom a notice has been given pursuant to section 60 (2) (c) of this Act;

(c) Any person who has given a notice pursuant to section 60 (3) of this Act and who in the opinion of the Commission has such an interest in the application as to justify the Commission sending a copy of the draft determination to that person;

(d) Any other person who in the opinion of the Commission may assist the Commission in its determination of the application.

(3) The applicant and each other person to whom a copy of the draft determination is sent shall notify the Commission within 10 working days after a date fixed by the Commission (not being a date 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.

(4) If each of the persons to whom a draft determination was sent under subsection (2) of this section—

(a) Notifies the Commission within the period of 10 working days prescribed in subsection (3) of this section that the person 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 the person wishes the Commission to hold such a conference—

the Commission may make the determination at any time after the expiration of that period.

(5) If any of the persons to whom a draft determination was sent under subsection (2) of this section notifies the Commission, in writing, within the period of 10 working days prescribed in subsection (3) of this section that he wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (not being a date later than 20 working 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 draft determination was sent under subsection (2) of this section.

(6) The Commission may, of its own motion, determine to hold a conference in relation to the draft determination and shall appoint a date (not being a date later than 20 working days after the expiration of the period referred to in subsection (3) of this section), 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 the draft determination was sent under subsection (2) of this section.

(7) Where the Commission is of the opinion that 2 or more applications for authorisations that are made by the same person, or by bodies corporate that are interconnected with 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 a single draft determination in relation to the applications and hold a single conference in relation to that draft determination.

Cf. Trade Practices Act 1974 (Aust.), s. 90A (1), (2), (5), (6), (13)

63. Repealed by s. 22 of the Commerce Amendment Act 1990.

64. Procedure at conference—

(1) At every conference called under section 62 of this Act,—

(a) The Commission shall be represented by a member or members nominated by the Chairman:

- (b) Each person to whom a draft determination was sent under section 62 (2) of this Act, and any other person whose presence at the conference is considered by the Commission to be desirable, is entitled to attend and participate personally or, in the case of a body corporate, be represented by a person who, or by persons each of whom, is a director, officer, or employee of the body corporate:
- (c) A person participating in the conference in accordance with paragraph (b) of this subsection is entitled to have another person or other persons present to assist him:
- (d) No other person is entitled to be present.

(2) The Commission may require any officer of the Commission to attend a conference called under section 62 of this Act where in the opinion of the Commission that officer may assist the Commission in the determination of the application.

(3) At every conference called under section 62 of this Act the Commission shall provide for as little formality and technicality as the requirements of this Act and a proper consideration of the application permits.

(4) The Commission shall cause such record of the conference to be made as is sufficient to set out the matters raised by the persons participating in the conference.

(5) Any member of the Commission attending the conference may terminate the conference when that member is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

(6) The Commission shall have regard to 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.

Cf. Trade Practices Act 1974 (Aust.), s. 90A (7), (8), (9), (11)

65. Commission may vary or revoke authorisations—

(1) Subject to subsection (2) of this section, if at any time after the Commission has granted an authorisation under section 58 of this Act the Commission is satisfied that—

- (a) The authorisation was granted on information that was false or misleading in a material particular; or
- (b) There has been a material change of circumstances since the authorisation was granted; or
- (c) A condition upon which the authorisation was granted has not been complied with—

the Commission may revoke or amend the authorisation or revoke the authorisation and grant a further authorisation in substitution for it.

(2) The Commission shall not revoke or amend an authorisation or revoke an authorisation and substitute a further authorisation pursuant to subsection (1) of this section unless the person to whom the authorisation was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter is given a reasonable opportunity to make submissions to the Commission and the Commission has regard to those submissions.

Cf. Trade Practices Act 1974 (Aust.), s. 91 (4)

[Business Acquisitions]

[66. Commission may give clearances for business acquisitions—

(1) A person who proposes to acquire assets of a business or shares may give the Commission a notice seeking clearance for the acquisition.

(2) Subsections (1), (2) (a) and (b), (4), and (5) of section 60 of this Act shall apply in respect of every notice given under subsection (1) of this section as if the notice was an application under section 58 of this Act.

- (3) Within 10 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall either—
- (a) If it is satisfied that the acquisition will not result in an effect described in paragraph (a) or paragraph (b) of section 47 (1) of this Act, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or
 - (b) If it is not satisfied that the acquisition will not result in an effect described in paragraph (a) or paragraph (b) of section 47 (1) of this Act, by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance for the acquisition.
- (4) If the period specified in subsection (3) of this section expires without the Commission having given a clearance for the acquisition and without having given a notice under subsection (3) (b) of this section, the Commission shall be deemed to have declined to give a clearance for the acquisition.
- (5) A clearance given under subsection (3) of this section expires—
- (a) Twelve months after the date on which it was given; or
 - (b) In the event of an appeal being made against the determination of the Commission giving the clearance, and the determination being confirmed by the Court, 12 months after the date on which the determination is confirmed.

As to the fee for giving a notice under subs. (1), see S.R. 1990/356/2 (b).

[67. Commission may grant authorisations for business acquisitions—

- (1) A person who proposes to acquire assets of a business or shares may give the Commission a notice seeking an authorisation for the acquisition.
- (2) Subsections (1), (2) (a) and (b), (4), and (5) of section 60 of this Act shall apply in respect of every notice given under subsection (1) of this section as if the notice was an application under section 58 of this Act.
- (3) Within 60 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall—
- (a) If it is satisfied that the acquisition will not result in an effect described in paragraph (a) or paragraph (b) of section 47 (1) of this Act, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or
 - (b) If it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, by notice in writing to the person by or on whose behalf the notice was given, grant an authorisation for the acquisition; or
 - (c) If it is not satisfied as to the matters referred to in paragraph (a) or paragraph (b) of this subsection, by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance or grant an authorisation for the acquisition.
- (4) If the period specified in subsection (3) of this section expires without the Commission having given a clearance or having granted an authorisation or having declined to do so, the Commission shall be deemed to have declined to give a clearance or grant an authorisation.
- (5) The Commission shall state in writing its reasons for a determination made by it under subsection (3) of this section.
- (6) A clearance given or an authorisation granted under subsection (3) of this section expires—
- (a) Twelve months after the date on which it was given or granted; or
 - (b) In the event of an appeal being made against the determination of the Commission giving the clearance or granting the authorisation, and the determination of the Commission being confirmed by the Court, 12 months after the date on which the determination is confirmed.

As to the fee for giving notice under subs. (1), see S.R. 1990/356/2 (c).

[68. Provisions applying to applications for clearances and authorisations for business acquisitions—

- (1) Every person who gives a notice under section 66 or section 67 of this Act shall from time to time produce or, as the case may be, furnish to the Commission, within such time as it may specify, such

documents and information in relation to the acquisition as may be required by the Commission for the purpose of enabling it to exercise its functions under this section or section 66 or section 67 of this Act.

(2) Notwithstanding section 66 or section 67 of this Act, where the Commission is of the opinion that a proposed acquisition is, for reasons other than arising from the application of any provision of this Act, unlikely to be proceeded with, the Commission may, in its discretion, decline to give a clearance or grant an authorisation for that acquisition under this section.

(3) The Commission shall state in writing its reasons for declining to give a clearance or grant an authorisation under subsection (2) of this section.

(4) A person who has given a notice in respect of an acquisition under section 66 or section 67 of this Act may at any time, by notice in writing to the Commission, advise the Commission that it does not wish the Commission to give a clearance or grant an authorisation and the Commission shall accordingly not give a clearance or grant an authorisation in respect of that acquisition.

(5) The Commission may consult with any person who, in the opinion of the Commission, is able to assist it in making a determination under section 66 or section 67 of this Act, as the case may be.

[69. Effect of clearance or authorisation—

Nothing in section 27 or section 47 of this Act applies to the acquisition of assets of a business or shares if the assets or shares are acquired in accordance with a clearance or an authorisation and while the clearance or authorisation is in force.

[69A. Commission may accept undertakings—

(1) In giving a clearance or granting an authorisation under section 66 or section 67 of this Act, the Commission may accept a written undertaking given by or on behalf of the person who gave a notice under section 66 (1) or section 67 (1) of this Act, as the case may be, to dispose of assets or shares specified in the undertaking.

(2) The Commission shall not accept an undertaking in relation to the giving of a clearance or the granting of an authorisation under section 66 or section 67 of this Act, other than an undertaking given under subsection (1) of this section.

(3) An undertaking given to the Commission under subsection (1) of this section is deemed to form part of the clearance given or the authorisation granted in relation to the acquisition to which the undertaking relates.

[69B. Conferences in relation to business acquisitions—

(1) Before making a determination under section 66 (3) or section 67 (3) of this Act in relation to an acquisition, the Commission may determine to hold a conference and shall appoint a date, time, and place for the holding of the conference and give notice of the date, time, and place so appointed and of the matters to be considered at the conference to the persons entitled to be present at the conference.

(2) The provisions of section 64 of this Act shall apply to every conference held under this section as if—

- (a) Every reference in that section to a conference called under section 62 of this Act, were a reference to a conference held under this section; and
- (b) The reference in subsection (1) (b) of that section to a person to whom a draft determination was sent under section 62 (2) of this Act, were a reference to the person by or on whose behalf a notice was given under section 66 (1) or section 67 (1) of this Act, as the case may be; and
- (c) The reference in subsection (6) of that section to a determination in respect of an application, were a reference to a determination under section 66 (3) or section 67 (3) of this Act, as the case may be.]

Ss. 66 to 69 and the heading immediately preceding those sections were repealed, and a new heading and sections 66 to 69B were substituted, by s. 23 of the Commerce Amendment Act 1990.

Authorisation of Prices for Controlled Goods or Services

70. Authorised prices for controlled goods or services to be determined by Commission—

- (1) Subject to section 71 of this Act, the Commission may, on application by any person who is a supplier of controlled goods or services, authorise a maximum, actual, or minimum price, as the case may require, for those controlled goods or services by notice in writing to that person.
- (2) All the provisions of section 60 of this Act except subsections (2) (c) and (d), (3) and (6) of that section, shall apply to every application under subsection (1) of this section as if it were an application under section 58 of this Act.
- (3) The Commission may, of its own motion, from time to time by notice in the *Gazette*, authorise a maximum, actual, or minimum price, as the case may require, for any controlled goods or services.
- (4) The Commission shall authorise prices in such manner as it thinks fit, and may authorise different prices for goods or services to meet different circumstances relating to the supply of those goods or services.
- (5) An authorisation granted by the Commission under this section shall include such provisions, not inconsistent with this Act, as the Commission thinks necessary or desirable for the proper administration of the authorisation or to ensure compliance with its provisions.
- (6) Every such authorisation shall have effect from the date specified in it.
- (7) Every supplier of goods or services in respect of which the Commission proposes to authorise a price under this section, shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as it may specify, such documents and information in relation to those goods or services as may be required by the Commission for the purpose of enabling it to exercise its functions under this section.
- (8) The Commission may consult with any person who in the opinion of the Commission is able to assist it in making a determination under this section.
- (9) The Commission shall have regard to any submissions made to it—
- (a) In the case of an application under subsection (1) of this section, by the applicant; and
- (b) In any case where the Commission authorises a price for controlled goods or services under subsection (3) of this section, by any supplier of those goods or services.
- (10) The Commission may have regard to any advice or information obtained from any person with whom it has consulted pursuant to subsection (8) of this section.
- (11) The Commission shall state in writing its reasons for any determination under this section.
- (12) Any authorisation made under subsection (1) of this section may be amended or revoked at any time by the Commission by notice in writing to the supplier of the goods or services.
- (13) Any authorisation made under subsection (3) of this section may be amended or revoked by the Commission by notice in the *Gazette*.
- (14) For the purpose of informing purchasers and prospective purchasers of the authorised price of any controlled goods or services, the Commission shall publish, or require the supplier of those goods or services to communicate to purchasers, the authorised price for the goods or services in such manner and in such circumstances as it thinks fit.

Cf. 1975, No. 113, s. 89 (1), (2), (3), (4), (5), (6)

As to the fee for an application under subs. (1), see S.R. 1990/356/2 (d)

71. Commission may authorise provisional price—

- [(1) Pending the making of a determination under section 70 of this Act in respect of any controlled goods or services, the Commission may, by notice in writing to the supplier of those goods or services, authorise the supply of those goods or services to any person at a price determined by the Commission and specified in the notice, on the condition that the price fixed and charged by the supplier for those goods or services is only a provisional price.

(1A) For the purposes of subsection (1) of this section, the Commission may conduct such investigations and consult with such persons as the Commission considers may assist it to determine an appropriate provisional price for the supply of the goods or services.]

(2) An authorisation granted by the Commission under this section shall include such provisions, not inconsistent with this Act, as it thinks necessary or desirable for the proper administration of the authorisation or to ensure compliance with its provisions.

(3) Without limiting subsection (2) of this section, an authorisation under subsection (1) of this section may include provision for the making of refunds if the maximum or actual price subsequently determined by the Commission is lower than any provisional price charged to any person

Subss. (1) and (1A) were substituted for the original subs. (1) by s. 24 of the Commerce Amendment Act 1990.

72. Alternative undertakings as to prices of controlled goods or services—

(1) Notwithstanding anything in this Part of this Act, the Commission may, instead of authorising a price for controlled goods or services under section 70 of this Act, obtain or accept a written undertaking from the supplier of those goods or services in relation to the price for those goods or services.

(2) The provisions of subsections (5), (12), and (14) of section 70 of this Act shall apply to every such undertaking as if it were an authorisation under that section.

73. Considerations to be observed by Commission—

In exercising its powers under section 70 and section 72 of this Act, the Commission shall have regard to—

- (a) The extent to which competition is limited or is likely to be lessened in respect of the controlled goods or services:
- (b) The necessity or desirability of safeguarding the interests of users, or consumers or, as the case may be, of suppliers:
- (c) The promotion of efficiency in the production and supply or acquisition of the controlled goods or services.

74. Conferences in relation to authorisation of price for controlled goods or services—

(1) Before authorising a price for any controlled goods or services under section 70 of this Act, or obtaining or accepting any undertaking in relation to the price of any controlled goods or services under section 72 of this Act, the Commission may determine to hold a conference and shall appoint a date, time, and place for the holding of the conference and give notice of the date, time, and place so appointed and of the matters to be considered at the conference to the supplier.

(2) The provisions of section 64 of this Act shall apply to every conference called under this section as if—

- (a) The reference in that section to a conference called under section 62 of this Act were a reference to a conference called under this section; and
- (b) The reference in subsection (1) (b) of that section to a person to whom a draft determination was sent under section 62 (2) of this Act, were a reference to the supplier of the controlled goods or services; and
- (c) The reference in subsection (4) of that section to the making of a determination in respect of an application were a reference to authorising a price for the controlled goods or services or obtaining or accepting an undertaking in relation to the price for the controlled goods or services, as the case may be.

PART VI
ENFORCEMENT, REMEDIES, AND APPEALS

Jurisdiction of Courts

75. Jurisdiction of High Court—

(1) In accordance with this Part of this Act, the High Court shall hear and determine the following matters:

- (a) In the case of contraventions of Part II of this Act,—
 - (i) Proceedings for the recovery of pecuniary penalties under section 80 of this Act:
 - (ii) Applications for injunctions under section 81 of this Act:
 - (iii) Actions for damages under section 82 of this Act:
 - (b) In the case of contraventions of Part III of this Act,—
 - [(i) Proceedings for the recovery of pecuniary penalties under section 83 of this Act:]
 - (ii) Applications for injunctions under section 84 of this Act:
 - (iii) Proceedings under section 85 of this Act:
 - (c) In the case of contraventions of Part IV of this Act, applications for injunctions under section 87 of this Act:
 - (d) Applications for orders under section 89 of this Act:
 - [(e) Appeals against determinations of the Commission.]
- (2) *Repealed by s. 3 (4) of the Judicature Amendment Act 1991.*

In subs. (1) (b), subpara. (i) was substituted for the original subpara. (i) by s. 25 of the Commerce Amendment Act 1990.

In subs. (1), para. (e) was added by s. 3 (4) of the Judicature Amendment Act 1991.

76. Jurisdiction of District Courts—

In accordance with this Part of this Act, the District Court shall hear and determine proceedings for offences against sections 86, 100, and 103 of this Act.

77. Additional lay members of High Court for purposes of appellate jurisdiction in respect of Commission determinations—

(1) For the purposes of the exercise by . . . the Court of its jurisdiction and powers under this Part of this Act, there shall be lay members of . . . the Court who shall be persons appointed from time to time by the Governor-General.

(2) No person shall be appointed as a lay member of the [Court] unless, in the opinion of the Governor-General, that person is qualified for appointment by virtue of that person's knowledge or experience in industry, commerce, economics, law, or accountancy.

(3) A lay member of the [Court] shall hold office for such term, not exceeding 5 years, as the Governor-General shall specify in that member's instrument of appointment, but may from time to time be reappointed.

(4) There shall be paid to such lay members, out of money appropriated by Parliament for the purpose, remuneration by way of fees, salary, or allowances, and travelling allowances and expenses, in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly as if the Court were a statutory Board within the meaning of that Act.

(5) The Governor-General may terminate the appointment of a lay member of the [Court] for disability, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Governor-General.

(6) Any lay member of the [Court] may resign his office by notice in writing to the Minister.

(7) Notwithstanding that the term of office of a lay member of the [Court] has expired or that a lay member has resigned that office, that person shall be deemed to continue as a lay member of the [Court] for the purpose of completing the hearing of any matter before that person, as a lay member of the [Court],

which was commenced before the expiration of the term of office or before the resignation took effect, as the case may be.

(8) Before entering upon the exercise of the duties of their office, the lay members shall take an oath before a Judge of the Court that they will faithfully and impartially perform the duties of their office.

(9) The presence of a Judge of . . . the Court and of at least one lay member shall be necessary to constitute a sitting of the Court.

(10) The decision of a majority (including the Judge or, where more than one Judge sits, including a majority of the Judges) of the members present at a sitting of the Court shall be the decision of the Court.

(11) If the members present are equally divided in opinion, the decision of the Judge, or of a majority of the Judges, shall be the decision of the Court.

(12) If any question before the Court cannot be decided in accordance with subsections (10) and (11) of this section, the question shall be referred to the Court of Appeal for decision in accordance with the practice and procedure of that Court, which for the purpose shall have all the powers of the High Court under this Part of this Act.

(13) The decision of the Court of Appeal in any proceedings under this section shall be final, and shall take effect and be entered as if it were a decision of the High Court under this Act.

(14) Notwithstanding anything in the foregoing provisions of this section, a Judge of . . . the Court sitting alone shall have jurisdiction to make any of the following orders:

- (a) An order on any application made in the course of any proceedings:
- (b) An order that is not opposed:
- (c) An order in any proceedings that the parties agree should be heard and determined by a Judge alone:
- (d) An order in any proceedings where the matter in issue is substantially a question of law only:
- (e) An order made on the application of any party directing that any proceedings should be heard and determined by a Judge alone on the ground that the matter in issue is substantially a question of law only:
- (f) An order granting the leave of the Court to appeal to the Court of Appeal.

Cf. 1975, No. 113, s. 122A; 1983, No. 144, s. 41; 1985, No. 7, s. 2

In this section, as shown by points of omission, the words “the Administrative Division of” were omitted by s. 3 (4) of the Judicature Amendment Act 1991; and the word “Court”, where it appears in square brackets, was substituted for the word “Division” by the said s. 3 (4).

78. Lay members of High Court in certain cases—

(1) For the purposes of the exercise by the High Court of its jurisdiction and powers under sections 80 to [85] of this Act in respect of proceedings which relate to any of sections 27 to 29 [, 36, 36A, or 47] of this Act, a Judge of the Court may, of his own motion or on the application of any party to the proceedings, require any person or persons appointed as a lay member or lay members of . . . the High Court pursuant to section 77 of this Act, to hear and determine the proceedings as an additional lay member or additional lay members of the Court.

(2) Where a lay member of . . . the High Court is required pursuant to subsection (1) of this section to hear and determine any proceedings as an additional lay member of the Court, that person shall for the purposes of those proceedings be a lay member of the Court.

(3) The provisions of subsections (10) to (13) of section 77 of this Act shall apply in respect of any proceedings to which this section applies as if the proceedings to which those provisions refer were proceedings in the High Court under sections 80 to [85] of this Act.

(4) Notwithstanding anything in the foregoing provisions of this section, a Judge of the Court sitting alone shall have jurisdiction—

- (a) To make any of the following orders—
 - (i) An order on any application made in the course of any proceedings:
 - (ii) An order that is not opposed:

- (iii) An order in any proceedings that the parties agree should be heard and determined by a Judge alone:
- (iv) An order in any proceedings where the matter in issue is substantially a question of law only:
- (v) An order made on the application of any party directing that any proceedings should be heard and determined by a Judge alone on the ground that the matter in issue is substantially a question of law only:
- (vi) An order granting the leave of the Court to appeal to the Court of Appeal:
- (b) To determine any question as to the application of section 30 of this Act arising in any proceedings:
- (c) To exercise the power to make an order directing the payment of a pecuniary penalty pursuant to section 80 [or section 83] of this Act:
- (d) To exercise the power to grant an injunction pursuant to section 81 [or section 84] of this Act:
- (e) To exercise the power to make an order for the payment of damages in proceedings under section 82 [or section 84A of this Act]:
- [(f) To exercise the power to make an order directing the disposal of shares or assets under section 85 of this Act.]

In subs. (1) the words “the Administrative Division of” were omitted by s. 3 (4) of the Judicature Amendment Act 1991.

In subs. (1) the expression “85” was substituted for the expression “82” by s. 26 (1) (a) of the Commerce Amendment Act 1990.

In subs. (1) the expression “, 36, 36A, or 47” was substituted for the expression “or 36” by s. 26 (1) (b) of the Commerce Amendment Act 1990.

In subs. (2) the words “the Administrative Division of” were omitted by s. 3 (4) of the Judicature Amendment Act 1991.

In subs. (3) the expression “85” was substituted for the expression “82” by s. 26 (2) of the Commerce Amendment Act 1990.

In subs. (4) (c) the expression in square brackets was inserted by s. 26 (3) (a) of the Commerce Amendment Act 1990.

In subs. (4) (d) the expression in square brackets was inserted by s. 26 (3) (b) of the Commerce Amendment Act 1990.

In subs. (4) (e) the expression in square brackets was substituted for the words “of this Act” by s. 26 (3) (c) of the Commerce Amendment Act 1990.

In subs. (4), para. (f) was added by s. 26 (3) (d) of the Commerce Amendment Act 1990.

79. Evidence not otherwise admissible—

In the exercise of its jurisdiction under this Part of this Act, except in respect of criminal proceedings and proceedings under section 80 [or section 83] of this Act, the Court may receive in evidence any statement, document, or information that would not be otherwise admissible that may in its opinion assist it to deal effectively with the matter.

The expression in square brackets was inserted by s. 27 of the Commerce Amendment Act 1990.

Restrictive Trade Practices

80. Pecuniary penalties—

- (1) If the Court is satisfied on the application of the Commission that a person—
 - (a) Has contravened any of the provisions of Part II of this Act; or
 - (b) Has attempted to contravene such a provision; or
 - (c) Has aided, abetted, counselled, or procured any other person to contravene such a provision; or
 - (d) Has induced, or attempted to induce, any other 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 any other person of such a provision; or
 - (f) Has conspired with any other person to contravene such a provision,—

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate, not exceeding [\$500,000] in the case of a person not being a body corporate, or [\$5,000,000] in the case of a body corporate, in respect of each act or omission.

- (2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including—
- (a) The nature and extent of the act or omission:
 - (b) The nature and extent of any loss or damage suffered by any person as a result of the act or omission:
 - (c) The circumstances in which the act or omission took place:
 - (d) Whether or not the person has previously been found by the Court in proceedings under this Part of this Act to have engaged in any similar conduct.
- (3) The standard of proof in proceedings under this section shall be the standard of proof applying in civil proceedings.
- (4) In any proceedings under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.
- (5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention arose.
- (6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part II of this Act, proceedings may be instituted under this Act against that person in relation to the contravention of any one or more of the provisions; but no person shall be liable to more than one pecuniary penalty under this section in respect of the same conduct.

Cf. Trade Practices Act 1974 (Aust.), ss. 76, 77

In subs. (1) the expressions “\$500,000” and “\$5,000,000” were respectively substituted for the expressions “\$100,000” and “\$300,000” by s. 28 (a) and (b) of the Commerce Amendment Act 1990.

81. Injunctions may be granted by Court for contravention of Part II—

The Court may, on the application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute any of the following—

- (a) A contravention of any of the provisions of Part II of this Act:
- (b) Any attempt to contravene such a provision:
- (c) Aiding, abetting, counselling, or procuring any other person to contravene such a provision:
- (d) Inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision:
- (e) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision:
- (f) Conspiring with any other person to contravene such a provision.

Cf. Trade Practices Act 1974 (Aust.), s. 80 (1), (2)

82. Actions for damages for contravention of Part II—

(1) Every person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following—

- (a) A contravention of any of the provisions of Part II of this Act:
- (b) Aiding, abetting, counselling, or procuring the contravention of such a provision:
- (c) Inducing by threats, promises, or otherwise the contravention of such a provision:
- (d) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of such a provision:
- (e) Conspiring with any other person in the contravention of such a provision.

(2) An action under subsection (1) of this section may be commenced at any time within 3 years from the time when the cause of action arose.

Cf. Trade Practices Act 1974 (Aust.), s. 82

[*Business Acquisitions*]

[83. Pecuniary penalties—

- (1) If the Court is satisfied on the application of the Commission that a person—
 - (a) Has contravened section 47 of this Act:
 - (b) Has attempted to contravene that section:
 - (c) Has aided, abetted, counselled, or procured any other person to contravene that section:
 - (d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene that section:
 - (e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of that section:
 - (f) Has conspired with any other person to contravene that section,—

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate, not exceeding \$500,000 in the case of a person not being a body corporate, or \$5,000,000 in the case of a body corporate, in respect of each such act or omission.

(2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including—

- (a) The nature and extent of the act or omission:
- (b) The nature and extent of any loss or damage suffered by any person as a result of the act or omission:
- (c) The circumstances in which the act or omission took place:
- (d) Whether or not the person has previously been found by the Court in proceedings under this Part of this Act to have engaged in any similar conduct.

(3) The standard of proof in proceedings under this section shall be the standard of proof applying in civil proceedings.

(4) In any proceedings under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

(5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention arose.

(6) A person is not liable to a pecuniary penalty under both section 80 of this Act and this section in respect of the same conduct.]

This section and the heading thereto were substituted for the original s. 83 and heading by s. 29 of the Commerce Amendment Act 1990.

84. Injunctions may be granted by Court for contravention of Part III—

Where it appears to the Court, on the application of the Commission, [or any other person, that a person intends to engage, or is engaging, or has engaged, in conduct that constitutes or would constitute a contravention of section 47] of this Act, the Court, by order, may do all or any of the following things:

- (a) Grant an injunction restraining any person from engaging in conduct that constitutes or would constitute—
 - (i) A contravention of section [47] of this Act:
 - (ii) Any attempt to contravene that provision:
 - (iii) Aiding, abetting, counselling, or procuring any other person to contravene that provision:
 - (iv) Inducing or attempting to induce any other person, whether by threats, promises or otherwise, to contravene that provision:
 - (v) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of that provision:
 - (vi) Conspiring with any other person to contravene that provision:
- (b) Impose on any person obligations to be observed in the carrying on of any business or the safeguarding of any business or any assets of any business:

- (c) Provide for the carrying on of any business or the safeguarding of any business or assets of any business, either by the appointment of a person to conduct or supervise the conduct of any business (on such terms and with such powers as may be specified or described in the order), or in any other manner, as it thinks necessary in the circumstances of the case.

Cf. 1975, No. 113, s. 81H; 1976, No. 67, s. 22; 1983, No. 144, s. 35

The words in the first set of square brackets were substituted for the original words by s. 30 (a) of the Commerce Amendment Act 1990.

In para. (a) (i) the expression "47" was substituted for the expression "50" by s. 30 (b) of the Commerce Amendment Act 1990.

[84A. Actions for damages for contravention of Part III—

(1) Every person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following:

- (a) A contravention of section 47 of this Act:
- (b) Aiding, abetting, counselling, or procuring the contravention of that section:
- (c) Inducing by threats, promises, or otherwise the contravention of that section:
- (d) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of that section:
- (e) Conspiring with any other person in the contravention of that section:

(2) An action under subsection (1) of this section may be commenced at any time within 3 years from the time when the cause of action arose.]

This section was inserted by s. 31 of the Commerce Amendment Act 1990.

[85. Court may order divestiture of assets or shares in respect of contravention of Part III—

(1) In any case where the Court, on the application of the Commission, is satisfied that any person—

- (a) Has contravened section 47 of this Act; or
- (b) Has been found in any other proceedings under this Part of this Act to have contravened section 47 of this Act,—

it may, by order,—

- (c) Give directions for the disposal by that person of such assets or shares as shall be specified in the order; or
- (d) Give directions for the disposal by that person of any assets or shares in accordance with an undertaking given by the person under section 69A of this Act.

(2) An application under subsection (1) of this section may be made at any time within 2 years from the date on which the contravention occurred.]

This section was substituted for the original s. 85 by s. 32 of the Commerce Amendment Act 1990.

Control of Prices

86. Contravention of section 55 an offence—

(1) Every person who contravenes section 55 of this Act commits an offence and is liable on summary conviction—

- (a) In the case of a person other than a body corporate, to a fine not exceeding \$10,000;
- (b) In the case of a body corporate, to a fine not exceeding \$30,000.

(2) On the conviction of any person for an offence against this section, the Court may, on the application of the Commission, make an order for payment by the defendant of an amount not exceeding the difference (to be ascertained and specified by the Court) between the price charged for the controlled goods or services and the authorised price for those goods or services.

(3) All money payable pursuant to an order made under subsection (2) of this section shall be recoverable, in accordance with the Summary Proceedings Act 1957, in the same manner as fines and costs are recoverable.

(4) Where in any such case the Court is satisfied that the whole or any part of the price has been paid to the defendant by any other person, the Court, if it considers it just and equitable, may make an order authorising the payment to that other person of the whole or such part of any amount paid by the defendant under subsection (2) of this section, as the Court thinks fit.

(5) An order made under subsection (4) of this section shall be sufficient authority to the Registrar of the Court to pay the amount so authorised.

(6) An information for an offence against this section may be laid at any time within 3 years from the time when the matter of the information arose.

Cf. 1975, No. 113, s. 117

87. Injunctions may be granted by Court for contravention of Part IV—

Where it appears to the Court, on the application of the Commission or any person, that controlled goods or services are being supplied or are likely to be supplied in contravention of section 55 of this Act, the Court may, by order—

- (a) Grant an injunction restraining any person from supplying those controlled goods or services in contravention of section 55 of this Act:
- (b) Require any person to supply those controlled goods or services in accordance with—
 - (i) Any authorisation made under section 70 of this Act in respect of those controlled goods or services:
 - (ii) Any provisional price authorised under section 71 of this Act in respect of those controlled goods or services:
 - (iii) Any undertaking given under section 72 of this Act in relation to those controlled goods or services.

Injunctions Generally

88. General provisions relating to granting of injunctions—

(1) The Court may at any time rescind or vary an injunction granted under this Part of this Act.

(2) Where an application is made to the Court under this Part of this Act for the grant of an injunction restraining a person from engaging in conduct of a particular kind the Court may,—

- (a) If it is satisfied that the person has engaged in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or
- (b) If in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging 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.

(3) Where an application is made to the Court under this Part of this Act for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the Court may,—

- (a) If it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or
- (b) If in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging 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 first-mentioned person engages in conduct of that kind.

(4) In any proceeding under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

Cf. Trade Practices Act 1974 (Aust.), s. 80 (3), (4), (5)

89. Other orders—

(1) Where, in any proceedings under this Part of this Act, the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of any of the provisions of Part II of this Act, the Court may, whether or not it grants an injunction or makes any other order under this Part of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct, or any other person who in relation to the contravention did any act referred to in section 81 (b) to (f) of this Act.

(2) Where a contract is entered into in contravention of this Act, or, as the case may be, a contract contains a provision which if given effect to would contravene this Act, the Court may, in any proceedings under this Part of this Act, or on application made for the purpose by a party to the contract or any person claiming through or under any party to the contract, make an order—

- (a) Varying the contract, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Act:
- (b) Cancelling the contract:
- (c) Requiring any person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract.

(3) Where a covenant is given in contravention of this Act, or, as the case may be, the enforcement of the terms of a covenant would contravene this Act, the Court may, in any proceedings under this Part of this Act, or on application made for the purpose by a person who, but for section 28 (4) of this Act would be bound by or entitled to the benefit of the covenant or any person claiming through or under any such person, make an order—

- (a) Varying the covenant, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Act:
- (b) Requiring any person who, but for section 28 (4) of this Act would be bound by or entitled to the benefit of the covenant to make restitution or pay compensation to any other person who, but for section 28 (4) of this Act, would be bound by or entitled to the benefit of the covenant.

(4) Nothing in subsection (2) or subsection (3) of this section shall prevent any proceedings being instituted or commenced under this Part of this Act.

(5) Nothing in the Illegal Contracts Act 1970 applies to any contract entered into in contravention of this Act or to any contract which contains a provision the giving effect to of which would constitute a contravention of this Act.

(6) Notwithstanding any enactment or rule of law, where a contract is entered into in contravention of this Act by reason that the contract contains a particular provision, or the contract contains a provision which if given effect to would contravene this Act, the enforceability of any other provision of the contract shall not be affected by the existence of that provision.

Cf. Trade Practices Act 1974 (Aust.), s. 87 (1) (a)

90. Conduct by servants or agents—

(1) Where, in proceedings under this Part of this Act in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of his actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate—

- (a) By a director, servant, or agent of the body corporate, acting within the scope of his 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, given within the scope of the actual or apparent authority of the director, servant or agent—

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

(3) Where, in a proceeding under this Part of this Act in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Act applies, it is

necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, acting within the scope of his actual or apparent authority, had that state of mind.

- (4) Any conduct engaged in on behalf of a person other than a body corporate—
 - (a) By a servant or agent of the person acting within the scope of his 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 servant or agent of the first-mentioned person, given within the scope of the actual or apparent authority of the servant or agent—

shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.

Cf. Trade Practices Act 1974 (Aust.), s. 84

Appeals From Determinations of Commission

91. Appeals in relation to determinations by Commission—

(1) Subject to sections 92 to 95 of this Act, and to subsection (2) of this section, there shall be a right of appeal to . . . the High Court against any determination of the Commission in respect of any matter under this Act.

(2) Every such appeal shall be made by giving notice of appeal within 20 working days after the date of the determination appealed against or within such further time as the Court may allow.

Cf. 1975, No. 113, s. 42

In subs. (1) the words "the Administrative Division of" were omitted by s. 3 (4) of the Judicature Amendment Act 1991.

92. Persons entitled to appeal—

The following persons may exercise the right of appeal pursuant to section 91 of this Act—

- (a) In the case of an appeal against a determination of the Commission in relation to an application for an authorisation under section 58 of this Act, the applicant and any person who participated in any conference held by the Commission under section 62 of this Act in relation to the authorisation:
- (b) In the case of an appeal against a determination of the Commission revoking or amending an authorisation pursuant to section 65 (1) of this Act or revoking an authorisation and substituting a further authorisation pursuant to that subsection, the person to whom the authorisation was granted:
- [(c) In the case of an appeal against a determination of the Commission under section 66 or section 67 of this Act in relation to a notice seeking a clearance or an authorisation, as the case may be,—
 - (i) The person who sought the clearance or the authorisation; and
 - (ii) Any person whose assets, or the shares in which, are proposed to be acquired pursuant to the clearance or authorisation; and
 - (iii) Any person who participated in any conference held by the Commission under section 69B of this Act in relation to the clearance or authorisation:]
 - (d) In the case of an appeal against a determination of the Commission under section 70 of this Act made on the application of any person who is a supplier of controlled goods or services, the applicant and any person who in the opinion of the Court is a substantial consumer or purchaser of the controlled goods or services to which the determination relates or who represents a substantial group of consumers or purchasers of those goods or services:
 - (e) In the case of an appeal against a determination of the Commission under section 70 of this Act made by the Commission on its own motion, any person who is a supplier of controlled goods or services to which the determination relates and any person who in the opinion of the Court is

a substantial consumer or purchaser of the controlled goods or services to which the determination relates or who represents a substantial group of consumers or purchasers of those goods or services.

Para. (c) was substituted for the original para. (c) by s. 33 of the Commerce Amendment Act 1990.

93. Determination of appeals—

In its determination of any appeal, the Court may do any one or more of the following things:

- (a) Confirm, modify, or reverse the determination or any part of it:
- (b) Exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the appeal relates.

Cf. 1975, No. 113, s. 45 (3), (4)

94. Court may refer appeals back for reconsideration—

(1) Notwithstanding anything in section 93 of this Act, the Court may, in any case, instead of determining any appeal under that section, direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(2) In giving any direction under this section, the Court shall—

- (a) Advise the Commission of its reasons for doing so; and
- (b) Give to the Commission such directions as it thinks just concerning the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

(3) In reconsidering the matter so referred back, the Commission shall have regard to the Court's reasons for giving a direction under subsection (1) of this section, and the Court's directions under subsection (2) of this section.

Cf. 1975, No. 113, s. 46

95. Provisions pending determination of appeal—

Where an appeal is brought under any provision of this Part of this Act against any determination of the Commission, the determination to which the appeal relates shall remain in full force pending the determination of the appeal, unless the Court orders to the contrary.

Cf. 1975, No. 113, s. 47; 1979, No. 140, s. 21

96. Court may order proceedings to be heard in private—

(1) The Court may, in its discretion, order that the hearing or any part of the hearing of any proceedings under this Act shall be held in private.

(2) The Court may make an order prohibiting the publication of any report or description of proceedings or any part of proceedings under this Act (whether heard in public or in private); but no order under this subsection shall prohibit the publication of any determination of the Court.

Cf. 1975, No. 113, s. 45 (1), (2)

97. Appeal to Court of Appeal in certain cases—

(1) Notwithstanding anything in any enactment, any party to any appeal before ... the High Court against any determination of the Commission who is dissatisfied with any decision or order of the Court may, with the leave of the Court or of the Court of Appeal, appeal to the Court of Appeal; and section 66 of the Judicature Act 1908 shall apply to any such appeal.

(2) In determining whether to grant leave to appeal under this section, the Court to which the application for leave is made shall have regard to the following matters:

- (a) Whether any question of law or general principle is involved;
- (b) The importance of the issues to the parties;
- (c) The amount of money in issue;
- (d) Such other matters as in the particular circumstances the Court thinks fit.

(3) The Court granting leave under this section may in its discretion impose such conditions as it thinks fit, whether as to costs or otherwise.

(4) The decision of the Court of Appeal on any such appeal shall be final.

In subs. (1) the words “the Administrative Division of” were omitted by s. 3 (4) of the Judicature Amendment Act 1991.

PART VII MISCELLANEOUS PROVISIONS

[98. Commission may require person to supply information or documents or give evidence—

Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—

- (a) To furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
- (b) To produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or
- (c) To appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

[98A. Power to search—

(1) The Commission may, from time to time, authorise an employee of the Commission to search under a warrant issued under subsection (2) of this section any place named in the warrant for the purpose of ascertaining whether a person has engaged in or is engaging in conduct that constitutes or may constitute a contravention of this Act, not being a contravention of section 99A of this Act.

(2) A District Court Judge, or Justice, or a Court Registrar (not being a constable) who is satisfied on application made on oath by a person who is authorised under subsection (1) of this section that there are reasonable grounds to believe that it is necessary for the purpose of ascertaining whether or not a person has engaged in or is engaging in conduct that constitutes or may constitute a contravention of this Act, not being a contravention of section 99A of this Act, for an employee of the Commission to search any place may, by warrant, authorise that employee to search a place specified in the warrant.

(3) A person who applies for a warrant shall, having made reasonable inquiries, disclose—

- (a) Details of every previous application for a warrant to search the place that the person knows has been made within the preceding 28 days; and
- (b) The result of the application.

[98B. Powers conferred by warrant—

(1) A warrant issued under section 98A of this Act authorises the person named in it—

- (a) To enter and search the place specified in the warrant on one occasion within 30 days of the date of issue of the warrant at a time that is reasonable in the circumstances:
- (b) To use such assistance as is reasonable in the circumstances:
- (c) To use such force for gaining entry and for breaking open any article or thing as is reasonable in the circumstances:
- (d) To search for and remove documents or any article or thing that the person executing the warrant believes on reasonable grounds may be relevant:
- (e) Where necessary, to take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant:
- (f) Where necessary, to require a person to reproduce, or assist any person executing the warrant to reproduce, in usable form, information recorded or stored in a document.

(2) A person assisting the person executing the warrant also has the powers referred to in paragraphs (c), (d), and (e) of subsection (1) of this section.

(3) The warrant shall be executed in accordance with such reasonable conditions as may be specified in the warrant when it is issued.

[98C. Warrant to be produced—

A person executing a warrant issued under section 98A of this Act—

- (a) Must have the warrant with him or her; and
- (b) Must produce it on initial entry and, if requested, at any subsequent time; and
- (c) Must identify himself or herself to the owner or occupier or person in charge of the place if that person is present; and
- (d) Must produce evidence of his or her identity.

[98D. Other duties of person who executes a warrant—

(1) A person who executes a warrant issued under section 98A of this Act must, before completing the search, leave in a prominent place at the place searched,—

(a) In the case of a search carried out at a time when the owner or occupier was not present, a written notice stating,—

- (i) The date and time when the warrant was executed; and
- (ii) The name of the person who executed the warrant; and

(b) In the case of a search where a document or article or thing was removed from the place being searched, a schedule of documents or articles or things that were removed during the search.

(2) If it is not practicable to prepare a schedule before completing the search, or if the owner or occupier of the place being searched consents, the person executing the warrant—

(a) May, instead of leaving a schedule, leave a notice stating that documents, or articles, or things have been removed during the search and that, within 7 days of the search, a schedule will be delivered, left, or sent stating what documents, articles, or things have been removed; and

(b) Must, within 7 days of the search,—

- (i) Deliver a schedule to the owner or occupier; or
- (ii) Leave a schedule in a prominent position at the place searched; or
- (iii) Send a schedule by mail to the owner or occupier of the place searched.

(3) Every schedule must state—

- (a) The documents, articles, and things that have been removed; and
- (b) The location from where they were removed; and
- (c) The location where they are being held.

[98E. Duty to assist—

The occupier or person in charge of the place that a person authorised pursuant to a warrant issued under section 98A of this Act enters for the purpose of searching must provide that person with all reasonable facilities and assistance in executing the warrant.

[98F. Power to inspect and take copies of documents, etc.—

The Commission, or any person authorised by the Commission for the purpose, may inspect and take copies of any documents or extracts from them obtained pursuant to a warrant issued under section 98A of this Act.

[98G. Commission may exercise powers notwithstanding other proceedings—

The Commission may exercise any power under sections 98 to 98F of this Act notwithstanding that any proceedings, whether under Part VI of this Act or otherwise, have been instituted in any Court.

[98H. Supply of information and documents in relation to section 36A—

(1) Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act in relation to section 36A of this Act, the Commission may by notice in writing served on any person who is ordinarily resident in Australia or who carries on business in Australia, require that person—

- (a) To furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
- (b) To produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice.

(2) A person who is required to furnish information or a class of information or produce any document or class of documents to the Commission pursuant to this section complies with this section if that person furnishes the information or that class of information or produces the document or that class of documents to the Australian Trade Practices Commission in accordance with the Trade Practices Act 1974.]

Ss. 98–98H were substituted for the original s. 98 by s. 34 of the Commerce Amendment Act 1990.

In s. 98H (2) the Trade Practices Act 1974 is an enactment of the Parliament of the Commonwealth of Australia.

99. Powers of Commission to take evidence—

(1) For the purposes of carrying out its functions and exercising its powers under this Act, the Commission may receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not the same would be otherwise admissible in a Court of law.

(2) The Commission may take evidence on oath and for that purpose a member of the Commission or any officer of the Commission duly appointed for the purpose may administer an oath.

(3) The Commission may require the evidence referred to in section [98 (c)] of this Act to be given on oath, and for that purpose a member of the Commission or any officer of the Commission duly appointed for the purpose may administer an oath.

(4) The Commission may permit a person appearing as a witness before the Commission to give evidence by tendering and, if the Commission thinks fit, verifying by oath, a written statement.

(5) Where any person has appeared as a witness before the Commission pursuant to a notice in that behalf, or has given evidence before the Commission, whether pursuant to a notice or not, the Commission may, if it thinks fit, order any sum to be paid to that witness on account of his expenses, not exceeding the amount that would be payable to him if his attendance had been as a witness for the Crown in a criminal case in accordance with the regulations for the time being in force for the payment of witnesses for the Crown in criminal cases.

Cf. 1975, No. 113, s. 13; 1976, No. 67, s. 8 (8) (d)

In subs. (3) the expression “98 (c)” was substituted for the expression “98 (1) (c)” by s. 35 of the Commerce Act 1990.

[99A. Commission may receive information and documents on behalf of Australian Trade Practices Commission—

(1) Where the Australian Trade Practices Commission requires any person resident or carrying on business in New Zealand to furnish any information or any class of information or produce any document or class of documents to it pursuant to section 155A of the Trade Practices Act 1974, the information or class of information may be furnished or the document or class of documents may be produced to the Commission for transmission to the Australian Trade Practices Commission.

(2) The Commission shall deliver the information or class of information furnished or the document or class of documents produced to it to the Australian Trade Practices Commission as soon as practicable.

(3) Every person who—

- (a) Refuses or fails, without reasonable excuse, to comply with a requirement referred to in subsection (1) of this section; or

- (b) In purported compliance with such a requirement, furnishes information or produces a document knowing it to be false or misleading—

commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.]

This section was inserted by s. 36 of the Commerce Amendment Act 1990.

In subs. (1) the Trade Practices Act 1974 is an enactment of the Parliament of the Commonwealth of Australia.

[100. Powers of Commission to prohibit disclosure of information, documents, and evidence—

(1) Subject to subsection (2) of this section, the Commission may, in relation to any application for, or any notice seeking, any clearance or authorisation under Part V of this Act, or in the course of carrying out any other investigation or inquiry under this Act, make an order prohibiting—

(a) The publication or communication of any information or document or evidence which is furnished or given or tendered to, or obtained by, the Commission in connection with the operations of the Commission:

(b) The giving of any evidence involving any such information, document, or evidence.

(2) Any order made by the Commission under subsection (1) of this section may be expressed to have effect for such period as is specified in the order, but no such order shall have effect,—

(a) Where that order was made in connection with any application for, or any notice seeking, any clearance or authorisation under Part V of this Act, after the expiry of 20 working days from the date on which the Commission makes a final determination in respect of that application or notice, or, where that application or notice is withdrawn before any such determination is made, after the date on which the application or notice is withdrawn:

(b) Where that order was made in connection with any other investigation or inquiry conducted by the Commission, after the conclusion of that investigation or inquiry.

(3) On the expiry of any order made under subsection (1) of this section, the provisions of the Official Information Act 1982 shall apply in respect of any information, document, or evidence that was the subject of that order.

(4) Every person who, contrary to any order made by the Commission under subsection (1) of this section, publishes or communicates any information or document or evidence commits an offence and is liable, on summary conviction, to a fine not exceeding \$4,000 in the case of a person not being a body corporate, and \$12,000 in the case of a body corporate.]

This section was substituted for the former s. 100 by s. 25 (1) of the Official Information Amendment Act 1987.

101. Notices—

(1) Any notice given by the Commission under or for the purposes of this Act shall be sufficiently given if it is in writing under the seal of the Commission or is signed by the Chairman, or by one or more of the members of the Commission, or by any person purporting to act by direction of the Commission, and is served in accordance with section 102 of this Act on the person or persons primarily concerned therewith or on any person or organisation deemed by the Commission to represent the person or persons primarily concerned therewith.

(2) All documents purporting to be signed by or on behalf of the Commission or to be sealed with the seal of the Commission shall, in all Courts and in all proceedings under this Act, be deemed to have been so signed or sealed with due authority unless the contrary is proved.

Cf. 1975, No. 113, s. 120A; 1976, No. 67, s. 37 (1)

102. Service of notices—

(1) Any notice or other document required or authorised to be served on or given to any person for the purposes of this Act may be served or given by delivering it to that person, or by leaving it at his usual or last known place of residence or business or at the address specified by him in any notice, application, or other document made or given or tendered to the Commission under this Act, or by posting it by letter addressed to him at that place of residence or business or at that address.

(2) If any such notice or other document is sent to any person by registered letter, then, unless the contrary is shown, it shall be deemed to have been delivered to him when it would have been delivered in the ordinary course of post; and in proving the delivery it shall be sufficient to prove that the letter was properly addressed and posted.

(3) Where for any purpose under this Act a notice or document is required to be served on an association or body of persons the notice or document may be served on the secretary, executive officer, manager, or other officer holding a similar position in the association or body; and for the purposes of this Act, service on the association or body shall, unless otherwise directed by the Commission, be deemed to be service on all persons who are members of the association or body or who are represented on the association or body by those members.

Cf. 1975, No. 113, s. 121(1)–(3)

[103. Offences—

(1) No person shall—

- (a) Without reasonable excuse, refuse or fail to comply with a notice under section 98 of this Act; or
- (b) In purported compliance with such a notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading; or
- (c) Resist, obstruct, or delay an employee of the Commission acting pursuant to a warrant issued under section 98A of this Act.

(2) No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.

(3) No person, having been required to appear before the Commission pursuant to section 98 (c) of this Act, shall—

- (a) Without reasonable excuse, refuse or fail to appear before the Commission to give evidence; or
- (b) Refuse to take an oath or make an affirmation as a witness; or
- (c) Refuse to answer any question; or
- (d) Refuse to produce to the Commission any book or document that that person is required to produce.

(4) Any person who contravenes subsection (1) or subsection (2) or subsection (3) of this section commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.]

This section was substituted for the original s. 103 by s. 37 of the Commerce Amendment Act 1990.

104. Determinations of Commission—

(1) Any determination, clearance, authorisation, or decision given by the Commission under or for the purposes of this Act shall be sufficiently given if it is in writing under the seal of the Commission or is signed by one or more members of the Commission or by an officer of the Commission authorised for the purpose.

(2) A copy of a determination, clearance, authorisation or decision of the Commission, certified to be a true copy by an officer of the Commission authorised in that behalf to certify copies of determinations, clearances, authorisations or decisions of the Commission, shall be received in all Courts as evidence of the determination, clearance, authorisation or decision.

(3) A document purporting to be a copy of a determination, clearance, authorisation or decision of the Commission and to be certified to be a true copy in accordance with subsection (2) of this section shall, unless the contrary is established, be deemed to be such a copy and to be so certified.

Cf. 1975, No. 113, s. 120A; 1976, No. 67, s. 37 (1)

105. Delegation by Commission—

(1) The Commission may, by resolution, delegate to any member any of its powers under this Act, other than this power of delegation and its powers to . . . grant, revoke, or vary an authorisation.

(2) The Commission may, by resolution, delegate to a specified officer of the Commission or to the holder for the time being of a specified office or to the holders of offices of a specified class any of its powers under sections 70 to 74 of this Act.

(3) Any delegation may be made subject to such conditions and restrictions as the Commission thinks fit, and may be made either generally or in relation to any particular matter or class of matters.

(4) Subject to any general or special directions given or conditions or restrictions imposed by the Commission, any person to whom any powers or functions are delegated may exercise those powers or functions in the same manner and with the same effect as if they had been conferred directly by this Act and not by delegation.

(5) Every person purporting to act pursuant to any delegation shall be presumed to be acting in accordance with the terms of the delegation, in the absence of proof to the contrary.

(6) The delegation of any power or function shall not prevent the exercise of that power or function by the Commission.

(7) Until it is revoked or amended, every delegation shall continue in force according to its tenor, notwithstanding the fact that all or any members of the Commission by whom it was made may have ceased to hold office; and in any such case, the delegation shall continue in force as if made by the successor or successors in office of that member or members, as the case may be.

Cf. 1975, No. 113, s. 120

In subs. (1) the word “grant a clearance or” was omitted by s. 38 of the Commerce Amendment Act 1990.

106. Proceedings privileged—

(1) No proceedings, civil or criminal, shall lie against the Commission for anything it may do or fail to do in the course of the exercise or intended exercise of its functions, unless it is shown that the Commission acted without reasonable care or in bad faith.

(2) No proceedings, civil or criminal, shall lie against any member or associate member of the Commission, or any officer of the Commission, for anything that person may do or say or fail to do or say in the course of the operations of the Commission, unless it is shown that that person acted in bad faith.

(3) Nothing in subsections (1) and (2) of this section applies in respect of proceedings for—

(a) An offence against section 78 or section 78A or section 105 or section 105A of the Crimes Act 1961; or

(b) The offence of conspiring to commit an offence against section 78 or section 78A or section 105 or section 105A of the Crimes Act 1961; or

(c) The offence of attempting to commit an offence against section 78 or section 78A or section 105 or section 105A of the Crimes Act 1961.

[(4) A person shall not be excused from complying with any requirement to furnish information, produce documents, or give evidence under this Act, or, on appearing before the Commission, from answering any question or producing any document, on the ground that to do so might tend to incriminate that person or that person’s spouse.

(5) A statement made by a person in answer to a question put by or before the Commission shall not in criminal proceedings or in proceedings under section 80 or section 83 of this Act, be admissible against that person, or that person’s spouse.]

(6) Nothing in subsection (5) of this section applies in respect of—

(a) Proceedings on a charge of perjury against the maker of the statement; or

(b) Proceedings on a charge of an offence against section 103 (1) (b) of this Act.

(7) No Court or other person shall be entitled to require any member of the Commission, or any officer of the Commission or any other person present at any meeting of the Commission, to divulge or communicate any information furnished or obtained, documents produced, obtained or tendered, or evidence given, in connection with the operations of the Commission.

(8) Nothing in subsection (7) of this section applies in respect of—

(a) Any proceedings referred to in subsection (3) or subsection (6) of this section; or

(b) Any proceedings to which the Commission is a party.

(9) Anything said, or any information furnished, or any document produced or tendered, or any evidence given by any person to the Commission, shall be privileged in the same manner as if that statement, information, document, or evidence were made, furnished, produced, or given in proceedings in a Court.

[(10) For the purposes of clause 3 of Part II of the First Schedule to the Defamation Act 1992, any statement, document, determination, clearance, authorisation, or decision made by the Commission in the exercise or intended exercise of any of its functions or powers shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.]

Cf. 1975, No. 113, s. 17 (1), (3), (4), s. 130 B; 1976, No. 67, ss. 9, 23 (3); 1983, No. 144, s. 45
Subss. (4) and (5) were substituted for the original subss. (4) and (5) by s. 89 of the Commerce Amendment Act 1990.
Subs. (10) was substituted for the original subs. (10) by s. 56 of the Defamation Act 1992.

[106A. Judicial notice—

For the purposes of this Act, judicial notice shall be taken in all Courts and for all purposes of—

- (a) The common seal of the Commission:
- (b) The signature of any person holding, or who has held, office as the Chairman, Deputy Chairman, or a member of the Commission on a document that appears to be a document made on behalf of the Commission:
- (c) The official seal of the Australian Trade Practices Commission:
- (d) The official signature of any person holding, or who has held, office as the Chairman, Deputy Chairman, or a member, of the Australian Trade Practices Commission on a document that appears to be a document made on behalf of that Commission.]

This section was inserted by s. 40 of the Commerce Amendment Act 1990.

107. Annual report—

(1) As soon as practicable after the end of each year ending with the [30th day of June], the Commission shall furnish to the Minister a report of its operations during that year.

[(2) The Minister shall lay a copy of the report before the House of Representatives in accordance with section 44A of the Public Finance Act 1989.]

Cf. 1975, No. 113, s. 131

In subs. (1) the expression “30th day of June” was substituted for the expression “31st day of March” by s. 41 of the Commerce Amendment Act 1990.

Subs. (2) was substituted for the original s. 2 by s. 42 of the Public Finance Amendment Act 1992.

108. Regulations—

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) Prescribing the procedure to be followed under this Act in respect of applications and notices to, and proceedings of, the Commission:
- (b) Prescribing forms of applications, notices, and other documents required for the purposes of this Act, and requiring the use of such forms:
- (c) Prescribing fees to be paid for the purposes of this Act:
- [(ca) Authorising the Commission in its discretion, or on such grounds as may be prescribed, to refund a part of the prescribed fee paid by a person who gives a notice under section 67 (1) of this Act in any case where the Commission gives a clearance under that section:
- (cb) Authorising the Commission to refund a part of the prescribed fee paid by a person on an application under section 70 (1) of this Act in any case where a written undertaking is obtained or accepted from that person in accordance with section 72 of this Act:]
- (d) Providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

Cf. 1975, No. 113, s. 132

Paras. (ca) and (cb) were inserted by s. 42 of the Commerce Amendment Act 1990.
See the Commerce Act (Fees) Regulations 1990 (S.R. 1990/356).

109. Commission may prescribe forms—

For the purposes of this Act the Commission may from time to time prescribe forms of applications, notices, and other documents required for the purposes of this Act.

110. Repeals, revocations, savings, and consequential amendments—

(1) The enactments specified in the Second Schedule to this Act are hereby amended in the manner indicated in that Schedule.

(2) The enactments specified in the Third Schedule to this Act are hereby repealed.

(3) The regulations and orders specified in the Fourth Schedule to this Act are hereby revoked.

(4) Without limiting any provision of this Act, it is hereby expressly declared that every order, approval, authorisation, notice, decision, consent, or any other act of authority that originated under or was deemed to have originated under any enactment, regulations, or order repealed or revoked by this section (not being a consent granted in respect of a merger or takeover proposal under the Commerce Act 1975) and subsisting or in force at the commencement of this Act, shall cease to have effect on that commencement.

(5) The repeal of the enactments, and the revocation of the regulations and orders, by this section shall not affect the liability of any person for any offence that was committed before the commencement of this Act, and any proceedings for any such offence may be taken as if this Act had not been passed.

(6) Unless the context otherwise requires, in any other enactment a reference to the Examiner of Trade Practices and Prices appointed under section 10 of the Trade Practices Act 1958 shall be read as a reference to the Secretary of Trade and Industry.

111. Transitional provisions in respect of certain contracts, arrangements, or understandings—

(1) Nothing in sections 27 and 29 of this Act and sections 80 to 82 of this Act shall have any application before the 1st day of March 1987 to the giving effect to a provision of a contract entered into on or before the 11th day of June 1985.

(2) Nothing in section 28 of this Act and sections 80 to 82 of this Act shall have any application before the 1st day of March 1987 to the carrying out or enforcing of the terms of a covenant given before the 11th day of June 1985.

(3), (4) *Repealed by s. 2 (3) of the Civil Aviation Amendment Act 1987.*

(5) Nothing in sections 27 and 29 of this Act and sections 80 to 82 of this Act shall have any application before the 1st day of March 1987 to the giving effect to a provision of a contract, arrangement, or understanding which immediately before the commencement of this Act—

(a) Constituted a trade practice in respect of which an approval granted by the Commerce Commission under section 29 of the Commerce Act 1975 was in force (being a trade practice to which section 27 (1) of that Act applied); or

(b) Constituted a trade practice deemed to have been approved, or deemed to have been approved subject to conditions, under section 29 of the Commerce Act 1975 pursuant to subsection (10) of that section (being a trade practice to which section 18A of the Trade Practices Act 1958 applied); or

(c) Constituted a collective pricing practice to which section 30 of the Commerce Act 1975 applied.

(6) Nothing in this section limits or affects the application of the provisions of Part V of this Act and the provisions of Part VI of this Act (except sections 80 to 82 of this Act).

112–115. *Repealed by s. 43 (1) of the Commerce Amendment Act 1990. See subs. (2) of that section.*

116. Winding up of Commerce Commission established under Commerce Act 1975—

(1) All real and personal property of every description, rights, obligations, and abilities which immediately before the commencement of this Act were vested in or imposed on the Commerce Commission established under the Commerce Act 1975 shall, after the commencement of this Act, vest in the Commission without conveyance or assignment, subject to all charges, encumbrances, estates, and interests affecting the same.

(2) All funds standing to the credit of any account in the name of, or held on behalf of, the Commerce Commission established under the Commerce Act 1975 shall, without further appropriation than this section, be transferred to and form part of the funds of the Commission.

(3) All documents and records kept by or on behalf of—

(a) The Commerce Commission established under the Commerce Act 1975; or

(b) The Examiner of Commercial Practices appointed pursuant to the Commerce Act 1975; or

(c) The Secretary of Trade and Industry—

for the purposes of the exercise of their respective functions and powers under any of the enactments repealed by section 110 (2) of this Act shall be delivered to the Commission and upon that delivery shall be kept and maintained by the Commission.

(4) Nothing in this section shall limit or affect the rights of any member, officer, or employee of the Commerce Commission established under the Commerce Act 1975 under any superannuation or retiring allowances scheme established under section 17B of the Commerce Act 1975.

117. Members of Commerce Commission established under Commerce Act 1975 deemed to be members of Commission—

(1) Every member of the Commerce Commission established under the Commerce Act 1975 holding office immediately before the commencement of this Act shall be deemed to be a member of the Commission appointed under section 9 of this Act.

(2) Every associate member of the Commerce Commission established under the Commerce Act 1975 and holding office immediately before the commencement of this Act shall be deemed to be an associate member of the Commission appointed under section 11 of this Act.

(3) The Chairman and Deputy Chairman of the Commerce Commission established under the Commerce Act 1975 holding office immediately before the commencement of this Act shall be deemed to be the Chairman and Deputy Chairman of the Commission appointed under section 9 (3) of this Act.

(4) The term of office of every person deemed under this section to have been appointed a member or an associate member of the Commission shall expire on the date on which, but for the passing of this Act, that term would have expired under the provisions of the Commerce Act 1975.

118. Lay members of High Court appointed pursuant to Commerce Act 1975 deemed to be lay members of High Court appointed under this Act—

(1) Every person appointed as a lay member of the High Court pursuant to section 122A of the Commerce Act 1975 and holding office immediately before the commencement of this Act shall be deemed to be a lay member of . . . the High Court appointed under section 77 of this Act.

(2) The term of office of every such lay member shall expire on the date on which, but for the passing of this Act, that term would have expired.

(3) *Repealed by s. 3 (4) of the Judicature Amendment Act 1991.*

In subs. (1) the words “the Administrative Division of” were omitted by s. 3 (4) of the Judicature Amendment Act 1991.

SCHEDULES

FIRST SCHEDULE

Section 50

Repealed by s. 44 of the Commerce Amendment Act 1990.



SECOND SCHEDULE
ENACTMENTS AMENDED

Section 110 (1)

Title of Enactment	Amendment
1962, No. 135—The Transport Act 1962	<i>Repealed by s. 69 (2) (g) of the Transport Services Licensing Act 1989.</i>
1964, No. 136—The Social Security Act 1964	By inserting after section 123, the following section: <p style="text-align: center;">“123A. Control of prices—(1) The Minister shall exercise and perform in relation to the prices of goods specified in subsection (2) of this section, all the powers conferred on [the Minister of Commerce] under sections 53 and 54 of the Commerce Act 1986.</p> <p style="text-align: center;">“(2) This section applies to drugs and any other substances and mixtures of substances specially prepared for use in the treatment, prevention, investigation, or alleviation of any disease, illness, or injury included in any drug tariff or amendment issued pursuant to section 99 of this Act.”</p>
1967, No. 53—The Milk Act 1967 (R.S. Vol. 18, p. 451)	<i>Repealed by s. 26 (1) of the Milk Act 1988.</i>
1946, No. 9—The Real Estate Agents Act 1976	By repealing section 70 (1) (n).
1977, No. 33—The Ministry of Energy Act 1977	<i>Impliedly repealed by s. 6 of the Ministry of Energy (Abolition) Act 1989.</i>
1981, No. 43—The Sharebrokers Amendment Act 1981 (R.S. Vol. 11, p. 344)	By repealing section 7 (2) (i).
1982, No. 156—The Official Information Act 1982	<i>Repealed by s. 23 (2) (d) of the Official Information Amendment Act 1987.</i>
1983, No. 36—The Air Services Licensing Act 1983	<i>Impliedly repealed by s. 101 (1) of the Civil Aviation Act 1990.</i>
1983, No. 116—The Trustee Banks Act 1983	<i>Repealed by s. 40 (1) of the Trustee Banks Restructuring Act 1988. See S.R. 1988/216/2.</i>

In the Amendment to the Social Security Act 1964, in s. 123A, the reference to the Minister of Commerce has been substituted for a reference to the Minister of Trade and Industry pursuant to s. 2 (1) of this Act and s. 4 (1) of the Trade and Industry Act Repeal Act 1988.

THIRD SCHEDULE
ENACTMENTS REPEALED

Section 110 (2)

- 1975, No. 113—The Commerce Act 1975 (R.S. Vol. 7, p. 1).
- 1976, No. 67—The Commerce Amendment Act 1976 (R.S. Vol. 7, p. 148)
- 1979, No. 42—The Commerce Amendment Act 1979 (R.S. Vol. 7, p. 155).
- 1979, No. 140—The Commerce Amendment Act (No. 2) 1979 (R.S. Vol. 7, p. 155).
- 1980, No. 60—The Milk Amendment Act 1980; section 6 (1).



1980, No. 105—The Commerce Amendment Act 1980 (R.S. Vol. 7, p. 159).

1983, No. 144—The Commerce Amendment Act 1988.

1985, No. 7—The Commerce Amendment Act 1985.

1985, No. 67—The Commerce Amendment Act (No. 2) 1985.

A reference to the Ministry of Agriculture and Fisheries Amendment Act 1976 was repealed by s. 2 (4) (k) of the Ministry of Agriculture and Fisheries Amendment Act 1990.

FOURTH SCHEDULE
ORDERS AND NOTICES REVOKED

Section 110 (3)

Title	Statutory Regulation
The Commerce Act Commencement Order 1975	1975/247
The Commerce Regulations 1984	1984/68
The Positive List of Controlled Goods and Services 1981	1981/37
The Positive List of Controlled Goods and Services 1981, Amendment No. 1	1981/156
The Positive List of Controlled Goods and Services 1981, Amendment No. 2	1981/166
The Positive List of Controlled Goods and Services 1981, Amendment No. 3	1981/173
The Natural Gas (Price Restraint) Regulations 1981	1981/335
The Positive List of Controlled Goods and Services 1981, Amendment No. 4	1981/348
The Positive List of Controlled Goods and Services 1981, Amendment No. 5	1982/42
The Positive List of Controlled Goods and Services 1981, Amendment No. 6	1982/121
The Positive List of Controlled Goods and Services 1981, Amendment No. 7	1983/122
The Positive List of Controlled Goods and Services 1981, Amendment No. 8	1984/29
The Positive List of Controlled Goods and Services 1981, Amendment No. 9	1984/327
The Positive List of Controlled Goods and Services 1981, Amendment No. 10	1985/56
The Positive List of Controlled Goods and Services 1981, Amendment No. 11	1985/64
The Positive List of Controlled Goods and Services 1981, Amendment No. 12	1985/165
The Positive List of Controlled Goods and Services 1981, Amendment No. 13	1985/191



Title	Statutory Regulation
The Positive List of Controlled Goods and Services 1981, Amendment No. 14	1985/218
The Positive List of Controlled Goods and Services 1981, Amendment No. 15	1985/303
The Positive List of Controlled Goods and Services 1981, Amendment No. 16	1986/30
The Positive List of Controlled Goods and Services 1981, Amendment No. 17	1986/56

**THE COMMERCE AMENDMENT ACT 1990
1990, No. 41**

An Act to amend the Commerce Act 1986

[29 June 1990

1. Short Title and commencement—

(1) This Act may be cited as the Commerce Amendment Act 1990 and shall be read together with and deemed part of the Commerce Act 1986 (hereinafter referred to as the principal Act).

(2) Except as provided in subsection (3) of this section, this Act shall come into force on the 1st day of July 1990.

(3) Sections 2 (1), (3), (4), (5), and (6), 17, 18, 23, 25, 26 (except subsection (1) (b)), 27, 29, 30, 31, 32, 33, 44, 46, 47, and 48 of this Act shall come into force on the 1st day of January 1991.

2.

(1) *This subsection inserted the definition of the term “assets” in s. 2 (1) of the principal Act.*

(2) *This subsection inserted the definition of the term “place” in s. 2 (1) of the principal Act.*

(3) *This subsection inserted the definition of the term “share” in s. 2 (1) of the principal Act.*

(4) Section 2 (1) of the principal Act is hereby further amended by repealing the definition of the term “substantial”.

(5) *This subsection inserted subs. (1A) in s. 2 of the principal Act.*

(6) *This subsection substituted a new subsection for subs. (7) of s. 2 of the principal Act.*

3.

(1) *This subsection substituted new subss. (1A) to (1C) for subs. (1) of s. 3 of the principal Act.*

(2) *This subsection amended s. 3 (8) of the principal Act.*

(3) *This subsection added subs. (9) to s. 3 of the principal Act.*

4. *This section inserted s. 3A in the principal Act.*

5. *This section substituted a new section for s. 4 of the principal Act.*

6. *This section inserted ss. 6A to 6C in the principal Act.*

7. Establishment of Commission—

Section 8 of the principal Act is hereby amended by repealing subsection (4).

8. *This section substituted a new section for s. 14 of the principal Act.*

9. *This section amended s. 17 of the principal Act.*

10. *This section substituted new ss. 18 to 18D for s. 18 of the principal Act.*

11. *Repealed by s. 42 of the Public Finance Amendment Act 1992.*

12. Commission to have regard to economic policies of Government—

Section 26 (1) of the principal Act is hereby amended by omitting the words “Part V of”.

13. *This section substituted a new subsection for subs. (1) of s. 29 of the principal Act.*

14. *This section substituted a new subsection for subs. (2) of s. 36 of the principal Act.*

15. *This section inserted in s. 36A in the principal Act.*

16.

(1) *This subsection substituted a new section for s. 45 of the principal Act.*

(2) Section 45 of the principal Act, as in force immediately before its repeal by subsection (1) of this section, shall continue in force in relation to any act done to give effect to a provision of a contract or arrangement entered into, or an understanding arrived at, before the commencement of this Act.

(3) Subsection (2) of this section expires with the close of the 30th day of June 1991.

17. Section 46 repealed—

The principal Act is hereby amended by repealing section 46.

18. *This section substituted a new Part III (comprising ss. 47 and 48) for the original Part III (comprising ss. 47 to 51) of the principal Act.*

19. *This section substituted new ss. 58 to 58B for s. 58 of the principal Act.*

20. *This section substituted new paras. (b) to (d) for para. (b) of s. 59 (1) of the principal Act.*

21.

(1) *This subsection amended s. 61 (6) of the principal Act.*

(2) *This subsection amended s. 61 (7) of the principal Act.*

(3) *This subsection added subs. (8) to s. 61 of the principal Act.*

22. Section 63 repealed—

Section 63 of the principal Act is hereby repealed.

23. *This section repealed ss. 66 to 69 of the principal Act, and the heading immediately preceding those sections, and substituted a new heading and ss. 66 to 69B in the principal Act.*

24. *This section substituted new subss. (1) and (1A) for subs. (1) of s. 71 of the principal Act.*

25. *This section substituted a new subparagraph for subpart. (i) of s. 75 (1) (b) of the principal Act.*

26.

(1)

(a) *This paragraph amended s. 78 (1) of the principal Act.*

(b) *This paragraph amended s. 78 (1) of the principal Act.*

(2) This subsection amended s. 78 (3) of the principal Act.

(3)

(a) *This paragraph amended s. 78 (4) (c) of the principal Act.*

- (b) *This paragraph amended s. 78 (4) (d) of the principal Act.*
- (c) *This paragraph amended s. 78 (4) (e) of the principal Act.*
- (d) *This paragraph added para. (f) to s. 78 (4) of the principal Act.*

27. *This section amended s. 79 of the principal Act.*

28. (a), (b) *These paragraphs amended s. 80 (1) of the principal Act.*

29. *This section repealed s. 83 and the heading above that section, and substituted a new heading and section 83 in the principal Act.*

30.

- (a) *This paragraph amended s. 84 of the principal Act.*
- (b) *This paragraph amended s. 84 (a) of the principal Act.*

31. *This section inserted s. 84A in the principal Act.*

32. *This section substituted a new section for s. 85 of the principal Act.*

33. *This section substituted a new paragraph for para. (c) of s. 92 of the principal Act.*

34. *This section substituted new ss. 98–98H for the original s. 98 of the principal Act.*

35. *This section amended s. 99 (3) of the principal Act.*

36. *This section inserted s. 99A in the principal Act.*

37. *This section substituted a new section for s. 103 of the principal Act.*

38. Delegation by Commission—

Section 105 (1) of the principal Act is hereby amended by omitting the words “grant a clearance or”.

39. *This section substituted new subsections for subss. (4) and (5) of s. 106 of the principal Act.*

40. *This section inserted s. 106A in the principal Act.*

41. *This section amended s. 107 (1) of the principal Act.*

42. *This section inserted paras. (ca) and (cb) in s. 108 of the principal Act.*

43. Transitional provisions repealed—

(1) Sections 112 to 115 of the principal Act are hereby repealed.

(2) The repeal of sections 112 to 115 of the principal Act by subsection (1) of this section does not affect the validity of anything done pursuant to, or effected by, the enactments repealed.

Section 115 had been repealed by s. 49 (2) of the Fair Trading Act 1986.

44. First Schedule repealed—

The principal Act is hereby amended by repealing the First Schedule (as amended by section 83 of the Broadcasting Act 1989).

45. Human Rights Commission Act 1977 amended—

Section 69 of the Human Rights Commission Act 1977 is hereby amended by repealing subsections (3) and (4), and substituting the following subsections:

“(3) Nothing in this Part of this Act shall limit or affect the Commerce Act 1986 and where any complaint, in relation to any organisation which exists for the purposes of members who carry on a

particular profession, trade, or calling, or in relation to any officer, agent of, or other person connected with any such organisation, is made under section 68 of this Act with respect to a matter which may, wholly or in part, be investigated under the Commerce Act 1986, the Commission shall refer that complaint to the Commerce Commission pursuant to that Act.

“(4) The Commission shall not investigate or institute any proceedings with respect to a complaint of a kind referred to in subsection (3) of this section except to the extent that the Commerce Commission has certified that the matter or part of the matter is not able to be, or has not been, dealt with, determined, or disposed of in accordance with the Commerce Act 1986.”

46. Consequential amendment to Broadcasting Act 1989—

Section 83 of the Broadcasting Act 1989 is hereby consequentially repealed.

47. Amendment to Radiocommunications Act 1989—

Section 138 of the Radiocommunications Act 1989 is hereby amended by repealing subsection (1), and substituting the following subsection:

“(1) Subject to subsections (2) and (3) of this section, for the purposes of section 47 of the Commerce Act 1986, management rights in relation to radio frequencies and licences created under section 48 of this Act shall be deemed to be assets of a business.”

48. Transitional provisions in relation to mergers and takeovers—

(1) Notwithstanding the repeals and amendments effected by this Act,—

- (a) The provisions of the principal Act that were in force immediately before the 1st day of January 1991 shall apply in relation to every notice given under section 66 or section 67 of that Act as in force immediately before that date and to every clearance given or authorisation granted in relation to the proposal to which the notice relates as if this Act had not been passed;
- (b) Without limiting paragraph (a) of this section, every clearance given and every authorisation granted under section 66 or section 67 of the principal Act as in force immediately before the 1st day of January 1991 or as continued in force by virtue of paragraph (a) of this section is deemed to be a clearance or an authorisation to which section 69 of the principal Act (as inserted by section 23 of this Act) applies.

[(2) Nothing in section 27 or section 47 of the principal Act (as enacted by section 18 of this Act) shall apply in relation to the acquisition of assets or shares if—

- (a) The acquisition results from a proposal that was not a merger or takeover proposal under Part III of the Commerce Act 1986 (as in force immediately before the commencement of this Act) by reason of section 47 (2) of that Act (as so in force); and
- (b) The acquisition gives effect to a written agreement made before the commencement of this Act whether or not the parties to the acquisition and the agreement are the same persons.]

Subs. (2) was added by s. 2 of the Commerce Amendment Act (No. 2) 1990.

THE COMMERCE AMENDMENT ACT (No. 2) 1990 1990, No. 84

An Act to amend the Commerce Act 1986

[1 August 1990

1. Short Title—

This Act may be cited as the Commerce Amendment Act (No. 2) 1990, and shall be read together with and deemed part of the Commerce Act 1986 (hereinafter referred to as the principal Act).

2. This section added subs. (2) to s. 48 of the Commerce Amendment Act 1990.

The Commerce Act 1986 is administered in the Ministry of Commerce.



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