# Competition and Consumer Act 2010 (Cth)

**Mark-up version of competition law provisions (and certain related provisions) incorporating amendments proposed by the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (Exposure Draft, Sept 2016)) (implementing the Harper Report recommendations)**

Source
Original consolidated legislation extracts sourced from the Federal Register of Legislation at 6 September 2016. For the latest information on Australian Government law please go to https://www.legislation.gov.au.

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**Mark up prepared by Julie Clarke on 7 September 2016.**

While every endeavour has been made to incorporate all proposed amendments accurately, no guarantee is made that this mark-up version is free from errors or omissions. It is intended to assist in understanding what the proposed changes will look like in the contact of the Act. Certain parts of the Act not relating to competition law or otherwise unaffected by the exposure draft legislation have been omitted; for the full current Act see the Federal Register of Legislation.

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

## Part I—Preliminary

### 1 Short title

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

### 2 Object of this Act

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

### 2A Application of Act to Commonwealth and Commonwealth authorities

(1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

(2) Subject to the succeeding provisions of this section, this Act applies as if:

(a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and

(b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business;

were a corporation.

(3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

(3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.

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

### 2B Application of Act to States and Territories

(1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:

(a) Part IV;

(aa) Part V;

(b) Part XIB;

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

(2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.

(3) The protection in subsection (2) does not apply to an authority of a State or Territory.

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**2BA Application of Part IV to local government bodies**

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

(2) In this section:

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

**2C Activities that are not business**

(1) For the purposes of sections 2A, 2B and 2BA, the following do not amount to carrying on a business:

(a) imposing or collecting:

(i) taxes; or

(ii) levies; or

(iii) fees for licences;

(b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions);

(c) a transaction involving:

(i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of the Commonwealth or an authority of a State or Territory); or

(ii) only persons who are all acting for the same authority of the Commonwealth; or

(iii) only persons who are all acting for the same authority of a State or Territory; or

(iv) only the Crown in right of the Commonwealth and one or more non-commercial authorities of the Commonwealth; or

(v) only the Crown in right of a State or Territory and one or more non-commercial authorities of that State or Territory; or

(vi) only non-commercial authorities of the Commonwealth; or

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

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

(d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:

(i) the body chooses to acquire the products; or

(ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.

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(2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of sections 2A, 2B and 2BA.

(3) In this section:

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

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

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

***primary products*** means:

(a) agricultural or horticultural produce; or
(b) crops, whether on or attached to the land or not; or
(c) animals (whether dead or alive); or
(d) the bodily produce (including natural increase) of animals.

(4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is ***non-commercial*** if:

(a) it is constituted by only one person; and
(b) it is neither a trading corporation nor a financial corporation.

**3 Repeal**

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

**4 Interpretation**

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

***acquire*** includes:

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

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

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

***AER Chair*** means the Chair of the AER.

***AER member*** means a member of the AER.

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

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

***authorisation*** means an authorisation under Division 1 of Part VII granted by the Commission or by the Tribunal on a review of a determination of the Commission.

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

(a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory; or

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

***authority of the Commonwealth*** means:

(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or

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

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

***business*** includes a business not carried on for profit.

***cartel provision*** has the meaning given by section 44ZZRD.

***Chairperson*** means the Chairperson of the Commission.

***collective boycott conduct*** means conduct that has a purpose referred to in subsection 44ZZRD(3) in relation to a contract, arrangement or understanding.

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

***competition*** includes:

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

(b) competition from services that are rendered, or are capable of being rendered, in Australia by persons not resident or not carrying on business in Australia.

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

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

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***contract*** includes a covenant.

***corporation*** means a body corporate that:

(a) is a foreign corporation;

(b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;

(c) is incorporated in a Territory; or

(d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

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

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

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

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

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

***Deputy Chairperson*** means a Deputy Chairperson of the Commission.

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

***Deputy Registrar*** means a Deputy Registrar of the Tribunal.

***designated Commonwealth energy law*** means:

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

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

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

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

***document*** means any record of information, and includes:

(a) anything on which there is writing; and

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

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

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

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

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

(a) whether in the form of text; or
(b) whether in the form of data; or
(c) whether in the form of speech, music or other sounds; or
(d) whether in the form of visual images (animated or otherwise); or
(e) whether in any other form; or
(f) whether in any combination of forms.

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

***financial corporation*** means a financial corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned).

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

***fully-participating jurisdiction*** means a State or Territory that:

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

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

***goods*** includes:

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

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

(a) the instrument is made or has effect under a law of a State or Territory; and
(b) the law of the State or Territory applies a uniform energy law as a law of its own jurisdiction.

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

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

***merger authorisation*** means an authorisation that:

(a) is an authorisation for a person to engage in conduct to which one or both of sections 50 and 50A would or might apply; but

(b) is not authorisation for a person to engage in conduct to which any other provision of Part IV would or might apply.

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

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

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

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

***party***, to a contract that is a covenant, includes a person bound by, or entitled to the benefit of, the covenant.

***personal injury*** includes:

(a) pre-natal injury; or

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

(c) disease;

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

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

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

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

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

***price*** includes a charge of any description.

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

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

***Registrar*** means the Registrar of the Tribunal.

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

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

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

(a) a contract for or in relation to:
  (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
  (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
  (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
(b) a contract of insurance;
(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
(d) any contract for or in relation to the lending of moneys;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

***share*** includes stock.

***South Australian Electricity Legislation*** means:

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

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

***South Australian Energy Retail Legislation*** means:

(a) the National Energy Retail Law set out in the Schedule to the *National Energy Retail Law (South Australia) Act 2011* of South Australia, as amended from time to time; and
(b) any regulations, as amended from time to time, made under Part 11 of the National Energy Retail Law.

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

***South Australian Gas Legislation*** means:

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

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

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

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

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

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

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

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

(i) relate to energy; and

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

being those provisions as in force from time to time.

***supply***, when used as a verb, includes:

(a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and

(b) in relation to services—provide, grant or confer;

and, when used as a noun, has a corresponding meaning, and ***supplied*** and ***supplier*** have corresponding meanings.

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

***Territory*** means:

(a) an internal Territory; or

(b) the Territory of Christmas Island; or

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

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

***the Family Court*** means the Family Court of Australia.

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

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

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

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

***uniform energy law*** means:

(a) the South Australian Electricity Legislation; or

(b) the South Australian Gas Legislation; or

(c) the Western Australian Gas Legislation; or

(ca) the South Australian Energy Retail Legislation; or

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

(i) relate to energy; and

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

being those provisions as in force from time to time.

***Western Australian Gas Legislation*** means:

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

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

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

(2) In this Act:

(a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the engaging in of a concerted practice;

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

(c) a reference to refusing to do an act includes a reference to:

(i) refraining (otherwise than inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

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

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when the provision of the contract has or is likely to have that effect notwithstanding that:

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

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

(4) In this Act:

(a) a reference to the acquisition of shares in the capital of a body corporate shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares; and

(b) a reference to the acquisition of assets of a person shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such assets but does not include a reference to an acquisition by way of charge only or an acquisition in the ordinary course of business.

…

**4E Market**

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

**4F References to purpose or reason**

(1) For the purposes of this Act:

(a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have had, or to have, a particular purpose if:

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

(ii) that purpose was or is a substantial purpose; and

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason.

(2) This section does not apply for the purposes of subsections 45D(1), 45DA(1), 45DB(1), 45E(2) and 45E(3).

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**4G Lessening of competition to include preventing or hindering competition**

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

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

In this Act:

(a) a reference to a contract shall be construed as including a reference to a lease of, or a licence in respect of, land or a building or part of a building and shall be so construed notwithstanding the express references in this Act to such leases or licences;

(b) a reference to making or entering into a contract, in relation to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and

(c) a reference to a party to a contract, in relation to such a lease or licence, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

**4J Joint ventures**

In this Act:

(a) a reference to a joint venture is a reference to an activity in trade or commerce:

(i) carried on jointly by two or more persons, whether or not in partnership; or

(ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate; and

(b) a reference to a contract or arrangement made or understanding arrived at, or to a proposed contract or arrangement to be made or proposed understanding to be arrived at, for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate as mentioned in subparagraph (a)(ii), be read as including a reference to the memorandum and articles of association, rules or other document that constitute or constitutes, or are or is to constitute, that body corporate.

**4K Loss or damage to include injury**

In this Act:

(a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and

(b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.

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

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

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**4L Severability**

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

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

This Act does not affect the operation of:

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

(b) the law relating to breaches of confidence;

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

**4N Extended application of Part IIIA**

(1) Part IIIA, and the other provisions of this Act so far as they relate to Part IIIA, extend to services provided by means of facilities that are, or will be, wholly or partly within:

(a) an external Territory; or

(b) the offshore area in respect of a State, of the Northern Territory, or of an external Territory, as specified in section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

(3) Nothing in subsection (1) affects the operation of section 15B of the *Acts Interpretation Act 1901* in respect of the application of Part IIIA, and of the other provisions of this Act so far as they relate to Part IIIA, in any part of:

(a) the coastal sea of Australia; or

(b) the coastal sea of an external Territory;

that is on the landward side of each of the offshore areas referred to in that subsection.

(4) For the purposes of this section:

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

**5 Extended application of this Act to conduct outside Australia**

(1) Each of the following provisions:

(a) Part IV;

(b) Part XI;

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

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

extends to the engaging in conduct outside Australia by:

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

(h) Australian citizens; or

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(i) persons ordinarily resident within Australia.

(1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:

(a) New Zealand and New Zealand Crown corporations; or

(b) bodies corporate carrying on business within New Zealand; or

(c) persons ordinarily resident within New Zealand.

(2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

(3) Where a claim under section 82, or under section 236 of the Australian Consumer Law, is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(4) A person other than the Minister, the Commission or the Director of Public Prosecutions is not entitled to make an application to the Court for an order under subsection 87(1) or (1A), or under subsection 237(1) or 238(1) of the Australian Consumer Law, in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

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

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

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

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

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

(i) between Australia and places outside Australia; or

(ii) among the States; or

(iii) within a Territory, between a State and a Territory or between two Territories; or

(iv) by way of the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth; and

(b) the following provisions:

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

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

(ii) Part VIII;

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

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

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

(v) trade or commerce among the States; or

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

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

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

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

(ii) in the course of, or in relation to, trade or commerce among the States; or

(iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between two Territories; and

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

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

(ii) in the course of, or in relation to, trade or commerce among the States; or

(iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between two Territories; and

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

(ea) subsections 45D(3), 45D(4) and 45DA(3) were repealed, the words “In the circumstances specified in subsections (3) and (4)” were omitted from subsection 45D(1) and the words “In the circumstances specified in subsection (3)” were omitted from subsection 45DA(1); and

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

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

(h) subject to paragraphs (d), (e), (ea), (eb) and (g), a reference in this Act to a corporation, except a reference in section 4, 48, 49, 50, 50A, 77A, 81, 151AE or 151AJ or in section 229 of the Australian Consumer Law, included a reference to a person not being a corporation.

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(2A) So far as subsection (2) relates to Part IV, that subsection has effect in relation to a participating Territory as if the words "within a Territory," were omitted from subparagraphs (2)(a)(iii) and (2)(b)(iii). For this purpose, ***participating Territory*** means a Territory that is a participating Territory within the meaning of Part XIA but is not named in a notice in operation under section 150K.

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

(a) the reference in paragraph 44ZZRD(2)(c) to goods or services supplied, or likely to be supplied, were, by express provision, confined to goods or services supplied, or likely to be supplied, to corporations or classes of corporations; and

(b) the reference in paragraph 44ZZRD(2)(d) to goods or services acquired, or likely to be acquired, were, by express provision, confined to goods or services acquired, or likely to be acquired, from corporations or classes of corporations; and

(c) the reference in paragraph 44ZZRD(2)(e) to goods or services re-supplied, or likely to be re-supplied, were, by express provision, confined to goods or services re-supplied, or likely to be re-supplied, to corporations or classes of corporations; and

(d) the reference in paragraph 44ZZRD(2)(f) to goods or services likely to be re-supplied were, by express provision, confined to goods or services likely to be re-supplied to corporations or classes of corporations; and

(e) the following paragraphs were added at the end of subsection 44ZZRD(2):

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

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

(f) the reference in subparagraph 44ZZRD(3)(a)(i) to the production, or likely production, of goods were, by express provision, confined to the production, or likely production, of goods for supply to corporations or classes of corporations; and

(g) the reference in subparagraph 44ZZRD(3)(a)(ii) to the supply of services were, by express provision, confined to the supply of services to corporations or classes of corporations; and

(h) each reference in subparagraphs 44ZZRD(3)(a)(iii), (b)(i) and (ii) to persons or classes of persons were, by express provision, confined to corporations or classes of corporations; and

(i) the reference in subparagraph 44ZZRD(3)(b)(iii) to the geographical areas in which goods or services are supplied, or likely to be supplied, were, by express provision, confined to the geographical areas in which goods or services are supplied, or likely to be supplied, to corporations or classes of corporations; and

(j) the reference in subparagraph 44ZZRD(3)(b)(iv) to the geographical areas in which goods or services are acquired, or likely to be acquired, were, by express provision, confined to the geographical areas in which goods or services are

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acquired, or likely to be acquired, from corporations or classes of corporations; and

(k) the reference in paragraph 44ZZRD(3)(c) to the supply or acquisition of goods or services were, by express provision, confined to supply of goods or services to, or the acquisition of goods or services from, corporations or classes of corporations; and

(l) the reference in paragraph 44ZZRD(4)(e) to paragraph (2)(e) or (f) included a reference to paragraph (2)(g) or (h); and

(m) section 44ZZRD also provided that it is immaterial whether the identities of the corporations referred to in subsection (2) or (3) of that section can be ascertained; and

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

(i) Division 1 of Part IV (other than section 44ZZRD);

(ii) any other provision (other than section 4, 44ZZRD, 151AE or 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV;

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

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

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

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

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

(i) Division 1 of Part IV;

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

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

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

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

(i) a Territory; or

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

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

(i) Division 1 of Part IV;

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

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

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

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

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

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

(a) those provisions (other than sections 33 and 155 of the Australian Consumer Law) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and

(b) a reference in the provisions of Part XI to a corporation included a reference to a person not being a corporation.

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

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

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

(ii) radio or television broadcasts; and

(b) a reference in the provisions of Part XI to a corporation included a reference to a person not being a corporation.

(4) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by another subsection of this section, the provisions of Parts 2-2, 3-1 (other than sections 30 and 33), Part 4-1 (other than sections 152, 155 and 164) and 5-3 of the Australian Consumer Law also have, by force of this subsection, the effect they would have if:

(a) those provisions were, by express provision, confined in their operation to engaging in conduct in a Territory; and

(b) a reference in those provisions to a thing done by a corporation in trade or commerce included a reference to a thing done in the course of the promotional activities of a professional person.

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

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

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

(5B) Despite anything in section 45AF or 45AG, if a person other than a body corporate is convicted of an offence against that section (as that section applies because of this section), the offence is taken to be punishable on conviction by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both.

**6AA Application of the *Criminal Code***

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

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

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

…

**Part II—The Australian Competition and Consumer Commission**

**6A Establishment of Commission**

…

**7 Constitution of Commission**

…

**8 Terms and conditions of appointment**

…

**8A Associate members**

(1) The Minister may appoint persons to be associate members of the Commission.

(1A) If there is at least one fully participating jurisdiction, the Minister must not appoint a person as an associate member unless the Minister is satisfied that a majority of such jurisdictions support the appointment.

(2) An associate member of the Commission shall be appointed for such period not exceeding 5 years as is specified in the instrument of his or her appointment, but is eligible for re appointment.

(3) Subject to this Part, an associate member of the Commission holds office on such terms and conditions as the Minister determines.

(4) The Chairperson may, by writing signed by him or her, direct that, for the purposes of the exercise of the powers of the Commission under this Act in relation to a specified matter, not being an exercise of those powers by a Division of the Commission, a specified

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associate member of the Commission or specified associate members of the Commission shall be deemed to be a member or members of the Commission and, in that case, unless the contrary intention appears, a reference in this Act to a member of the Commission shall, for the purposes only of the exercise of the powers of the Commission in relation to that matter, be construed as including a reference to that associate member of the Commission or each of those associate members of the Commission, as the case may be.

(5) Associate members of the Commission shall be deemed to be members of the Commission for the purposes of section 19.

(6) For the purpose of the determination by the Commission of an application for an authorization, or the making by the Commission of any decision for the purposes of subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A), the Chairperson shall consider:

(a) whether he or she should give a direction under subsection (4) of this section; or

(b) in the case of a matter in relation to which the Chairperson proposes to give a direction under subsection 19(1), whether he or she should direct that the Division concerned is to include an associate member of the Commission or associate members of the Commission.

(7) Nothing in subsection (4) or (5) deems an associate member of the Commission to be a member of the Commission for any purpose related to the preparation of a report by the Commission under section 171.

…

**25 Delegation by Commission**

(1) The Commission may, by resolution, delegate to a member of the Commission, either generally or otherwise as provided by the instrument of delegation, any of its powers under this Act (other than Part VIIA or section 152ELA), Procedural Rules under Part XIC, the Telecommunications Act 1997, the Telecommunications (Consumer Protection and Service Standards) Act 1999, the Water Act 2007, Rules of Conduct under Part 20 of the Telecommunications Act 1997, the National Broadband Network Companies Act 2011, regulations under the National Broadband Network Companies Act 2011, or the Australian Postal Corporation Act 1989, other than this power of delegation and its powers to grant, revoke or vary an authorization.

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

(2) A power so delegated may be exercised or performed by the delegate in accordance with the instrument of delegation.

(3) A delegation under this section is revocable at will and does not prevent the exercise of a power by the Commission.

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**Part IIA—The National Competition Council**

**29A Establishment of Council**

The National Competition Council is established by this section.

…

## 29O Annual report

(1) Within 60 days after the end of each financial year, the Councillors must give a report on the Council's operations during that year to the Minister for presentation to the Parliament.

(2) The report must also include details of the following:

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

(b) any court or Tribunal decision interpreting:

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

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

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

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

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

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

…

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## Part III—The Australian Competition Tribunal

### 30 Constitution of Tribunal

(1) The Trade Practices Tribunal that existed immediately before this subsection commenced continues to exist as the Australian Competition Tribunal.

(2) The Tribunal so continued in existence shall consist of a President and such number of Deputy Presidents and other members as are appointed in accordance with this section.

(3) A member of the Tribunal shall be appointed by the Governor General.

…

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## Part IIIA—Access to services

### Division 1—Preliminary

#### 44AA Objects of Part

The objects of this Part are to:

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

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

#### 44B Definitions

In this Part, unless the contrary intention appears:

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

***access code application*** means:

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

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

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

***access code decision*** means:

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

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

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

***access undertaking*** means an undertaking under section 44ZZA.

***access undertaking application*** means:

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

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

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

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

***access undertaking decision*** means:

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

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

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

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

***Commonwealth Minister*** means the Minister.

***constitutional trade or commerce*** means any of the following:

(a) trade or commerce among the States;

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

(c) trade or commerce between a State and a Territory, or between 2 Territories.

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

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

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

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

***designated Minister*** has the meaning given by section 44D.

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

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

***entity*** means a person, partnership or joint venture.

***final determination*** means a determination other than an interim determination.

***fixed principle*** has the meaning given by section 44ZZAAB.

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

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

***modifications*** includes additions, omissions and substitutions.

***National Gas Law*** means:

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

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

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(c) the Western Australian Gas Legislation; or

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

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

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

***party*** means:

(a) in relation to an arbitration of an access dispute—a party to the arbitration, as mentioned in section 44U;

(b) in relation to a determination—a party to the arbitration in which the Commission made the determination.

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

(a) structurally separate from any existing facility; or

(b) a major extension of an existing facility.

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

***responsible Minister*** means:

(a) the Premier, in the case of a State;

(b) the Chief Minister, in the case of a Territory.

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

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

(a) the use of an infrastructure facility such as a road or railway line;

(b) handling or transporting things such as goods or people;

(c) a communications service or similar service;

but does not include:

(d) the supply of goods; or

(e) the use of intellectual property; or

(f) the use of a production process;

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

***State or Territory access regime law*** means:

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

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

(c) a State/Territory energy law.

***State or Territory body*** means:

(a) a State or Territory;

(b) an authority of a State or Territory.

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

**44C How this Part applies to partnerships and joint ventures**

(1) This section applies if the provider of a service is a partnership or joint venture that consists of 2 or more corporations. Those corporations are referred to in this section as the ***participants***.

(2) If this Part requires or permits something to be done by the provider, the thing may be done by one or more of the participants on behalf of the provider.

(3) If a provision of this Part refers to the provider bearing any costs, the provision applies as if the provision referred to any of the participants bearing any costs.

(4) If a provision of this Part refers to the provider doing something, the provision applies as if the provision referred to one or more of the participants doing that thing on behalf of the provider.

(5) If:

(a) a provision of this Part requires the provider to do something, or prohibits the provider from doing something; and

(b) a contravention of the provision is an offence;

the provision applies as if a reference to the provider were a reference to any person responsible for the day-to-day management and control of the provider.

(6) If:

(a) a provision of this Part requires a provider to do something, or prohibits a provider doing something; and

(b) a contravention of the provision is not an offence;

the provision applies as if the reference to provider were a reference to each participant and to any other person responsible for the day-to-day management and control of the provider.

**44CA Meaning of *declaration criteria***

(1) The declaration criteria for a service are:

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

Note: Market is defined in section 4E.

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market at the least cost; and

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

(i) the size of the facility; or

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(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy; and

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

(2) For the purposes of paragraph (1)(b), the cost referred to in that paragraph is to take into account the costs, to the provider of the service, of co-ordinating multiple users of the facility.

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

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

(i) infrastructure services; and

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

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

**44D Meaning of *designated Minister***

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

(2) In relation to declaring a service in a case where:
(a) the provider is a State or Territory body; and
(b) the State or Territory concerned is a party to the Competition Principles Agreement;
the responsible Minister of the State or Territory is the designated Minister.

(3) In relation to revoking a declaration that was made by the responsible Minister of a State or Territory, the responsible Minister of that State or Territory is the designated Minister.

(4) In relation to deciding whether a service is ineligible to be a declared service in a case where:
(a) a person who is, or expects to be, the provider of the service is a State or Territory body; and
(b) the State or Territory concerned is a party to the Competition Principles Agreement;
the responsible Minister of the State or Territory is the designated Minister.

(5) In relation to revoking a decision:
(a) that a service is ineligible to be a declared service; and

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(b) that was made by the responsible Minister of a State or Territory;

the responsible Minister of that State or Territory is the designated Minister.

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

(1) For the avoidance of doubt:

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

(d) the requirement, under subsection 44N(2), that the Commonwealth Minister, in making a decision on a recommendation received from the Council, apply the relevant principles set out in the Agreement;

are obligations that the Council and the relevant Ministers must treat each individual relevant principle as having the status of a guideline rather than a binding rule.

(2) An effective access regime may contain additional matters that are not inconsistent with Competition Principles Agreement principles.

**44E This Part binds the Crown**

(1) This Part binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.

(2) Nothing in this Part makes the Crown liable to be prosecuted for an offence.

(3) The protection in subsection (2) does not apply to an authority of the Commonwealth or an authority of a State or Territory.

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**Division 2—Declared services**

**Subdivision A—Recommendation by the Council**

### 44F Person may request recommendation

(1) The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend that a particular service be declared.

(2) After receiving the application, the Council:

(a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and

(b) must, after having regard to the objects of this Part, recommend to the designated Minister:

(i) that the service be declared, with the expiry date specified in the recommendation; or

(ii) that the service not be declared.

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

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

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

(3) If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.

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

(6) The applicant may request, in writing, the Council to vary the application at any time before the Council makes a recommendation relating to it.

(7) If a request is made under subsection (6), the Council must decide to:

(a) make the variation; or

(b) reject the variation.

(8) An instrument making a decision under subsection (7) is not a legislative instrument.

(9) The Council may reject the variation if it is satisfied that the requested variation is of a kind, or the request for the variation is made at a time or in a manner, that:

(a) would unduly prejudice the provider (if the provider is not the applicant) or anyone else the Council considers has a material interest in the application; or

(b) would unduly delay the process for considering the application.

### 44FA Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that

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the Council considers may be relevant to deciding what recommendation to make on an application under section 44F.

(2) The Council must:

(a) give a copy of the notice to:

(i) if the person is not the applicant—the applicant; and

(ii) if the person is not the provider of the service—the provider; and

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

(3) In deciding what recommendation to make on the application, the Council:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

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

### 44G Limits on the Council recommending declaration of a service

(1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under Division 6.

(1B) The Council cannot recommend declaration of a service that is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB).

(1A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the Council cannot recommend declaration of any service provided by means of the facility that was specified under paragraph 44PA(2)(a).

(2) The Council cannot recommend that a service be declared unless it is satisfied of all of the declaration criteria for the service.

(6) The Council cannot recommend declaration of a service provided by means of a pipeline (within the meaning of a National Gas Law) if:

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

(b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.

(7) The Council cannot recommend that a service be declared if there is in force a decision of the designated Minister under section 44LG that the service is ineligible to be a declared service.

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**44GA Time limit for Council recommendations**

*Council to make recommendation within the consideration period*

(1) The Council must make a recommendation on an application under section 44F within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

*Stopping the clock*

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

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

**Stopping the clock**

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

(4) Despite subsection (3):

(a) do not disregard any day more than once; and

(b) the total period that is disregarded under that subsection must not exceed 60 days.

*Stopping the clock by agreement*

(5) The Council, the applicant and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.

(6) The Council must publish, by electronic or other means, the agreement.

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*Council may extend time for making recommendation*

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:
  (a) specify when the Council must now make a recommendation on the application; and
  (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:
  (a) the applicant; and
  (b) if the applicant is not the provider of the service—the provider.

*Publication*

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

*Failure to comply with time limit does not affect validity*

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

**44GB Council may invite public submissions on the application**

*Invitation*

(1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44F if it considers that it is appropriate and practicable to do so.

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

*Consideration of submissions*

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

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*Council may make submissions publicly available*

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

*Confidentiality*

(5) A person may, at the time of making a submission, request that the Council:
   (a) not make the whole or a part of the submission available under subsection (4); and
   (b) not publish or make available the whole or a part of the submission under section 44GC;

because of the confidential commercial information contained in the submission.

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

**44GC Council must publish its recommendation**

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

(2) The Council must give a copy of the publication to:
   (a) the applicant under section 44F; and
   (b) if the applicant is not the provider of the service—the provider.

*Timing*

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

*Consultation*

(4) Before publishing under subsection (1), the Council may give any one or more of the following persons:
   (a) the applicant under section 44F;

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

(c) any other person the Council considers appropriate;

a notice in writing:

(d) specifying what the Council is proposing to publish; and

(e) inviting the person to make a written submission to the Council within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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

**Subdivision B—Declaration by the designated Minister**

**44H Designated Minister may declare a service**

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

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

(1A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under Division 6.

(3A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph 44PA(2)(a).

(3B) The designated Minister cannot declare a service that is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB).

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the declaration criteria for the service.

(6B) The designated Minister cannot declare a service provided by means of a pipeline (within the meaning of a National Gas Law) if:

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

(b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.

(6C) The designated Minister cannot declare a service if there is in force a decision of the designated Minister under section 44LG that the service is ineligible to be a declared service.

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(8) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.

(9) If the designated Minister does not publish under section 44HA his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period:

(a) to have made a decision under this section in accordance with the declaration recommendation; and

(b) to have published that decision under section 44HA.

**44HA Designated Minister must publish his or her decision**

(1) The designated Minister must publish, by electronic or other means, his or her decision on a declaration recommendation and his or her reasons for the decision.

(2) The designated Minister must give a copy of the publication to:

(a) the applicant under section 44F; and

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

*Consultation*

(3) Before publishing under subsection (1), the designated Minister may give any one or more of the following persons:

(a) the applicant under section 44F;

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

(c) any other person the designated Minister considers appropriate;

a notice in writing:

(d) specifying what the designated Minister is proposing to publish; and

(e) inviting the person to make a written submission to the designated Minister within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(4) The designated Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

**44I Duration and effect of declaration**

(1) Subject to this section, a declaration begins to operate at a time specified in the declaration. The time cannot be earlier than 21 days after the declaration is published.

(2) If:

(a) an application for review of a declaration is made within 21 days after the day the declaration is published; and

(b) the Tribunal makes an order under section 44KA staying the operation of the declaration;

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the declaration does not begin to operate until the order is no longer of effect under subsection 44KA(6) or the Tribunal makes a decision on the review to affirm the declaration, whichever is the earlier.

(3) A declaration continues in operation until its expiry date, unless it is earlier revoked.

(4) The expiry or revocation of a declaration does not affect:

(a) the arbitration of an access dispute that was notified before the expiry or revocation; or

(b) the operation or enforcement of any determination made in the arbitration of an access dispute that was notified before the expiry or revocation.

**44J Revocation of declaration**

(1) The Council may recommend to the designated Minister that a declaration be revoked. The Council must have regard to the objects of this Part in making its decision.

(2) The Council cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation, subsection 44H(4) would prevent the designated Minister from declaring the service concerned.

(3) On receiving a revocation recommendation, the designated Minister must either revoke the declaration or decide not to revoke the declaration.

(3A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(4) The designated Minister must publish the decision to revoke or not to revoke.

(5) If the designated Minister decides not to revoke, the designated Minister must give reasons for the decision to the provider of the declared service when the designated Minister publishes the decision.

(6) The designated Minister cannot revoke a declaration without receiving a revocation recommendation.

(7) If the designated Minister does not publish under subsection (4) his or her decision on the revocation recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:

(a) to have made a decision that the declaration be revoked; and

(b) to have published that decision in accordance with this section.

**44K Review of declaration**

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

(2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister's decision may be made by the person who applied for the declaration recommendation.

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(3) An application for review must be made within 21 days after publication of the designated Minister's decision.

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

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

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

(6) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review (including for the purposes of deciding whether to make an order under section 44KA).

(6A) Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(6B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) the person who applied for the declaration recommendation; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:

(a) affirm the designated Minister's decision; or

(b) set aside the designated Minister's decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).

**44KA Tribunal may stay operation of declaration**

(1) Subject to this section, an application for review of a declaration under subsection 44K(1) does not:

(a) affect the operation of the declaration; or

(b) prevent the taking of steps in reliance on the declaration.

(2) On application by a person who has been made a party to the proceedings for review of a declaration, the Tribunal may:

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(a) make an order staying, or otherwise affecting the operation or the taking of steps in reliance on, the declaration if the Tribunal considers that:

(i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and

(ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or

(b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).

(3) Subject to subsection (4), the Tribunal must not:

(a) make an order under subsection (2) unless the Council has been given a reasonable opportunity to make a submission to the Tribunal in relation to the matter; or

(b) make an order varying or revoking an order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)) unless:

(i) the Council; and

(ii) the person who requested the making of the order under paragraph (2)(a); and

(iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who requested the making of the last-mentioned order or orders;

have been given a reasonable opportunity to make submissions to the Tribunal in relation to the matter.

(4) Subsection (3) does not prohibit the Tribunal from making an order without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Tribunal in relation to a matter if the Tribunal is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity.

(5) If an order is made under subsection (3) without giving the Council a reasonable opportunity to make a submission to the Tribunal in relation to a matter, the order does not come into operation until a notice setting out the terms of the order is given to the Council.

(6) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):

(a) is subject to such conditions as are specified in the order; and

(b) has effect until:

(i) if a period for the operation of the order is specified in the order—the expiration of that period or, if the application for review is decided by the Tribunal before the expiration of that period, the decision of the Tribunal on the application for review comes into operation; or

(ii) if no period is so specified—the decision of the Tribunal on the application for review comes into operation.

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**44KB Tribunal may order costs be awarded**

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

(2) However, the Tribunal must not make an order requiring the designated Minister to pay some or all of the costs of another party to proceedings unless the Tribunal considers that the designated Minister's conduct in the proceedings was engaged in without due regard to:

(a) the costs that would be incurred by the other party to the proceedings as a result of that conduct; or

(b) the time required by the Tribunal to make a decision on the review as a result of that conduct; or

(c) the time required by the other party to prepare their case for the purposes of the review as a result of that conduct; or

(d) the submissions or arguments made during the proceedings to the Tribunal by the other party or parties to the proceedings or by the Council.

(3) If the Tribunal makes an order under subsection (1), it may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.

(4) The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.

(5) If a party (the ***first party***) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.

**44L Review of decision not to revoke a declaration**

(1) If the designated Minister decides not to revoke a declaration, the provider may apply in writing to the Tribunal for review of the decision.

(2) An application for review must be made within 21 days after publication of the designated Minister's decision.

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

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

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

(5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

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(5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

(6) The Tribunal may either:

(a) affirm the designated Minister's decision; or

(b) set aside the designated Minister's decision and revoke the declaration.

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**Division 2AA—Services that are ineligible to be declared**

**Subdivision A—Scope of Division**

**44LA Constitutional limits on operation of this Division**

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

(a) the person who is, or expects to be, the provider of the service is a corporation (or a partnership or joint venture consisting wholly of corporations); or

(b) access to the service is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

**Subdivision B—Ineligibility recommendation by Council**

**44LB Ineligibility recommendation**

*Person may request recommendation*

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

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

*Council must make recommendation*

(2) After receiving the application, the Council must, after having regard to the objects of this Part:

(a) recommend to the designated Minister:

(i) that he or she decide that the service is ineligible to be a declared service; and

(ii) the period for which the decision should be in force (which must be at least 20 years); or

(b) recommend to the designated Minister that he or she decide that the service is not ineligible to be a declared service.

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

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

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

*Limits on recommendation*

(3) The Council cannot recommend that the designated Minister decide that the service is ineligible to be a declared service unless it is satisfied of both of the following matters:

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(a) that the service will be provided by means of the proposed facility when constructed;
(b) that it is not satisfied of at least one of the declaration criteria for the service in relation to the service to be provided by means of the proposed facility.

(4) If the applicant is a person other than the designated Minister, the Council may recommend that the designated Minister decide that the service is not ineligible to be a declared service if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the designated Minister decide that the service is not ineligible to be a declared service.

*Relationship between ineligibility recommendations, access undertakings and competitive tender processes*

(5) The Council may recommend that the designated Minister decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.

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

*Applicant may withdraw application*

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

**44LC Council may request information**

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

(2) The Council must:
(a) give a copy of the notice to:
(i) if the person is not the applicant—the applicant; and
(ii) if the person is not the provider, or the person who expects to be the provider—that person; and
(b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:
(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

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

**44LD Time limit for Council recommendations**

*Council to make recommendation within the consideration period*

(1) The Council must make a recommendation on an application under section 44LB within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

*Stopping the clock*

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

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

**Stopping the clock**

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

(4) Despite subsection (3):

(a) do not disregard any day more than once; and

(b) the total period that is disregarded under that subsection must not exceed 60 days.

*Stopping the clock by agreement*

(5) The Council and the applicant may agree in writing that a specified period is to be disregarded in working out the expected period.

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(6) The Council must publish, by electronic or other means, the agreement.

*Extension of time for making decision*

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or it has been previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:
   (a) specify when the Council must now make a recommendation on the application; and
   (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:
   (a) the applicant; and
   (b) if the applicant is not the person who is, or expects to be, the provider—that person.

*Publication*

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

*Failure to comply with time limit does not affect validity*

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

**44LE Council may invite public submissions on the application**

*Invitation*

(1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44LB if it considers that it is appropriate and practicable to do so.

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

*Consideration of submissions*

(3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:

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(a) must have regard to any submission made on or before the day specified in the notice; and

(b) may disregard any submission made after the day specified in the notice.

*Council may make submissions publicly available*

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

*Confidentiality*

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

(a) not make the whole or a part of the submission available under subsection (4); and

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

because of the confidential commercial information contained in the submission.

(6) If the Council refuses such a request:

(a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and

(c) if the Council returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Council must not:

(i) make the whole or the part of the submission available under subsection (4); and

(ii) publish or make available the whole or the part of the submission under section 44LF; and

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

**44LF Council must publish its recommendation**

*Council must publish its recommendation*

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

(2) The Council must give a copy of the publication to:

(a) the person who made the application under section 44LB; and

(b) if the applicant is not the person who is, or expects to be, the provider—that person.

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*Timing*

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

*Consultation*

(4) Before publishing under subsection (1), the Council may give any one or more of the following persons:
   (a) the person who made the application under section 44LB;
   (b) any other person the Council considers appropriate;

   a notice in writing:
   (c) specifying what the Council is proposing to publish; and
   (d) inviting the person to make a written submission to the Council within 14 days after the day the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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

**Subdivision C—Designated Minister's decision on ineligibility**

**44LG Designated Minister's decision on ineligibility**

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

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

(2) The designated Minister must have regard to the objects of this Part in making his or her decision.

(3) The designated Minister may decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.

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

(5) The designated Minister must not decide that the service is ineligible to be a declared service unless he or she is satisfied of both of the following matters:

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(a) that the service is to be provided by means of the proposed facility when constructed;
(b) that he or she is not satisfied of at least one of the declaration criteria for the service in relation to the service to be provided by means of the proposed facility.

(6) If the designated Minister does not publish under section 44LH his or her decision on the ineligibility recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:
(a) the designated Minister is taken, immediately after the end of that 60-day period, to have made a decision under subsection (1) in accordance with the ineligibility recommendation and to have published that decision under section 44LH; and
(b) if the Council recommended that the designated Minister decide that the service be ineligible to be a declared service—the period for which the decision is in force is taken to be the period recommended by the Council.

(7) A decision of the designated Minister under subsection (1) is not a legislative instrument.

**44LH Designated Minister must publish his or her decision**

(1) The designated Minister must publish, by electronic or other means, his or her decision on an ineligibility recommendation and his or her reasons for the decision.

(2) The designated Minister must give a copy of the publication to the person who made the application under section 44LB.

*Consultation*

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

(4) The designated Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

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**Subdivision D—Revocation of ineligibility decision**

**44LI Revocation of ineligibility decision**

*Council may recommend revocation if facility materially different or upon request*

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

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

*Minister must decide whether to revoke*

(3) On receiving a recommendation that the designated Minister revoke the ineligibility decision, the designated Minister must either revoke the ineligibility decision or decide not to revoke the ineligibility decision.

(4) The designated Minister must have regard to the objects of this Part in making his or her decision.

*Minister must publish decision*

(5) The designated Minister must publish, by electronic or other means, the decision to revoke or not to revoke the ineligibility decision.

(6) If the designated Minister decides not to revoke the ineligibility decision, the designated Minister must give reasons for the decision to the person who is, or expects to be, the provider of the service concerned when the designated Minister publishes the decision.

*Deemed decision of Minister*

(7) If the designated Minister does not publish his or her decision to revoke or not to revoke the ineligibility decision within the period starting at the start of the day the recommendation to revoke the ineligibility decision is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:
   (a) to have made a decision (the ***deemed decision***) under subsection (3) that the ineligibility decision be revoked; and
   (b) to have published the deemed decision under subsection (5).

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*Limits on when a revocation can be made*

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

*When a revocation comes into operation*

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

*Decision is not a legislative instrument*

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

**Subdivision E—Review of decisions**

**44LJ Review of ineligibility decisions**

*Application for review*

(1) A person whose interests are affected by a decision of the designated Minister under subsection 44LG(1) may apply in writing to the Tribunal for a review of the decision.

(2) An application for review must be made within 21 days after publication of the designated Minister's decision.

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

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

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

*Council to provide assistance*

(5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

(6) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(7) The Tribunal must:

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(a) give a copy of the notice to:
  (i) the person who applied for review; and
  (ii) the person who is, or expects to be, the provider of the service; and
  (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
(b) publish, by electronic or other means, the notice.

*Tribunal's decision*

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

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

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

*Effect of Tribunal's decision*

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

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

*Application for review*

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

(2) An application for review must be made within 21 days after publication of the designated Minister's decision.

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

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

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

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*Council to give assistance*

(5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

(6) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(7) The Tribunal must:
  (a) give a copy of the notice to:
    (i) the person who applied for review; and
    (ii) the person who is, or expects to be, the provider of the service; and
    (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
  (b) publish, by electronic or other means, the notice.

*Tribunal's decision*

(8) If the designated Minister decided to revoke his or her decision (the ***ineligibility decision***) that the service is ineligible to be a declared service, the Tribunal may either:
  (a) affirm the designated Minister's decision; or
  (b) set aside the designated Minister's decision to revoke the ineligibility decision.

(9) If the designated Minister decided not to revoke his or her ineligibility decision, the Tribunal may either:
  (a) affirm the designated Minister's decision; or
  (b) set aside the designated Minister's decision and revoke the ineligibility decision.

*Effect of Tribunal's decision*

(10) If the Tribunal sets aside the designated Minister's decision to revoke his or her ineligibility decision, the ineligibility decision is taken never to have been revoked.

(11) If the Tribunal sets aside the designated Minister's decision and revokes the ineligibility decision, the Tribunal's decision is, for the purposes of this Part other than this section, taken to be a decision by the Minister to revoke his or her decision that the service is ineligible to be a declared service.

**Subdivision F—Other matters**

**44LL Ineligibility decisions subject to alteration, cancellation etc.**

(1) A decision of the designated Minister under section 44LG that a service is ineligible to be a declared service is made on the basis that:
  (a) the decision may be revoked under section 44LI; and
  (b) the decision may be cancelled, revoked, terminated or varied by or under later legislation; and

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(c) no compensation is payable if the decision is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

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

**Division 2A—Effective access regimes**

**Subdivision A—Recommendation by Council**

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

(1) This section applies if a State or Territory that is a party to the Competition Principles Agreement has established at any time a regime for access to a service or a proposed service.

(2) The responsible Minister for the State or Territory may make a written application to the Council asking the Council to recommend that the Commonwealth Minister decide that the regime for access to the service or proposed service is an effective access regime.

(3) The Council must recommend to the Commonwealth Minister:

(a) that he or she decide that the access regime is an effective access regime for the service, or proposed service; or

(b) that he or she decide that the access regime is not an effective access regime for the service, or proposed service.

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

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

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

(4) In deciding what recommendation it should make, the Council:

(a) must, subject to subsection (4A), assess whether the access regime is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement; and

(aa) must have regard to the objects of this Part; and

(b) must, subject to section 44DA, not consider any other matters.

(4A) In deciding what recommendation it should make, the Council must disregard Chapter 5 of a National Gas Law.

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

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**44MA Council may request information**

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

(2) The Council must:
  (a) give a copy of the notice to:
    (i) if the person is not the applicant—the applicant; and
    (ii) if the person is not the provider of the service—the provider; and
  (b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:
  (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
  (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

**Subdivision B—Decision by Commonwealth Minister**

**44N Ministerial decision on effectiveness of access regime**

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

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

(2) In making a decision, the Commonwealth Minister:
  (a) must, subject to subsection (2A), apply the relevant principles set out in the Competition Principles Agreement; and
  (aa) must have regard to the objects of this Part; and
  (b) must, subject to section 44DA, not consider any other matters.

(2A) In making a decision, the Commonwealth Minister must disregard Chapter 5 of a National Gas Law.

(3) The decision must specify the period for which it is in force.

  Note: The period for which the decision is in force may be extended: see section 44NB.

(4) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44M within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:

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(a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:

(i) to have made a decision under subsection (1) in accordance with the recommendation made by the Council under section 44M; and

(ii) to have published that decision under section 44NG; and

(b) if the Council recommended that the Commonwealth Minister decide that the access regime is an effective access regime for the service, or proposed service—the decision is taken to be in force for the period recommended by the Council under subsection 44M(5).

**Subdivision C—Extensions of Commonwealth Minister's decision**

**44NA Recommendation by Council**

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

*Application to Council*

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

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

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

*Assessment by Council*

(4) The Council must assess whether the access regime (including any proposed variations) is an effective access regime. It must do this in accordance with subsection 44M(4).

(5) If the Council is satisfied that it is an effective access regime, the Council must, in writing, recommend to the Commonwealth Minister that he or she extend the period for which the decision under section 44N is in force. The Council must also recommend an extension period.

(6) If the Council is satisfied that it is not an effective access regime, the Council must, in writing, recommend to the Commonwealth Minister that he or she not extend the period for which the decision under section 44N is in force.

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

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

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

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**44NAA Council may request information**

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

(2) The Council must:
  (a) give a copy of the notice to:
    (i) if the person is not the applicant—the applicant; and
    (ii) if the person is not the provider of the service—the provider; and
  (b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:
  (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
  (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

**44NB Decision by the Commonwealth Minister**

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

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

(2) If the Commonwealth Minister is satisfied that it is, he or she must, by notice in writing, decide to extend the period for which the decision under section 44N is in force. The notice must specify the extension period.

(3) If the Commonwealth Minister is satisfied that it is not, he or she must, by notice in writing, decide not to extend the period for which the decision under section 44N is in force.

(3A) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44NA within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:
  (a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:
    (i) to have made a decision under this section in accordance with the recommendation made by the Council under section 44NA; and
    (ii) to have published that decision under section 44NG; and
  (b) if the Council recommended that the Commonwealth Minister extend the period for which the decision under section 44N is in force—the extension period is taken to be the extension period recommended by the Council under subsection 44NA(5).

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*Multiple extensions*

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

**Subdivision CA—Revocation of Commonwealth Minister's decision**

**44NBA Recommendation by Council**

(1) If a decision of the Commonwealth Minister is in force under section 44N (including as a result of an extension under section 44NB) that a regime established by a State or Territory for access to a service is an effective access regime, the Council:

(a) may, on its own initiative; and

(b) must, on an application made under subsection (3);

consider whether to recommend that the Commonwealth Minister should revoke the decision.

(2) Before considering on its own initiative whether to recommend that the Commonwealth Minister should revoke the decision, the Council must publish, by electronic or other means, a notice to that effect.

(3) Any of the following may make a written application to the Council asking it to recommend that the Commonwealth Minister revoke the decision:

(a) a person who is seeking access to the service;

(b) the responsible Minister for the State or Territory;

(c) the provider of the service.

(4) In considering whether to make the recommendation, the Council must consider whether it is satisfied that the regime no longer meets the relevant principles, set out in the Competition Principles Agreement, relating to whether access regimes are effective access regimes, because of either or both of the following:

(a) substantial changes to the regime;

(b) substantial amendments of those principles.

(5) If the Council is so satisfied, the Council must, in writing, recommend to the Commonwealth Minister that he or she revoke the decision.

(6) If the Council is not so satisfied, the Council must, in writing, recommend to the Commonwealth Minister that he or she not revoke the decision.

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

Note 2: The Council may request information and invite public submissions: see sections 44NBB and 44NE.

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

**44NBB Council may request information**

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make under section 44NBA.

(2) The Council must:

(a) give a copy of the notice to:

(i) if an application was made under subsection 44NBA(3) and the person is not the applicant—the applicant; and

(ii) if the person is not the provider of the service—the provider; and

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

(3) In deciding what recommendation to make, the Council:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

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

**44NBC Decision by the Commonwealth Minister**

(1) On receiving a recommendation under section 44NBA, the Commonwealth Minister must assess whether he or she should revoke the decision. Subject to subsection (2) of this section, he or she must do this in accordance with subsection 44N(2).

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

(2) In making his or her assessment, the Commonwealth Minister must consider whether he or she is satisfied as to the matter set out in subsection 44NBA(4).

(3) If the Commonwealth Minister is so satisfied, he or she must, by notice in writing, revoke the decision. The notice must specify the day on which the decision is to cease to be in force.

(4) If the Commonwealth Minister is not so satisfied, he or she must, by notice in writing, decide not to revoke the decision.

(5) If the Commonwealth Minister does not publish under section 44NG his or her decision on the recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, he or she is taken, immediately after the end of that 60-day period:

(a) to have made a decision under this section in accordance with the recommendation made by the Council under section 44NBA; and

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(b) to have published that decision under section 44NG.

**Subdivision D—Procedural provisions**

**44NC Time limit for Council recommendations**

*Council to make recommendation within the consideration period*

(1) The Council must make a recommendation on an application under section 44M, 44NA or 44NBA within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, or the consideration is notified under subsection 44NBA(2), unless the consideration period is extended under subsection (7).

*Stopping the clock*

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

**Stopping the clock**

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

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| **Stopping the clock** | | | |
|---|---|---|---|
| **Item** | **Column 1**<br>**Situation** | **Column 2**<br>**Start day** | **Column 3**<br>**End day** |
| 4 | A notice is given under subsection 44NBB(1) requesting information in relation to the application or consideration | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information |

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

*Stopping the clock by agreement*

(5) The Council, the applicant (if the Commission is not acting on its own initiative under paragraph 44NBA(1)(a)) and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.

(6) The Council must publish, by electronic or other means, the agreement.

*Council may extend time for making recommendation*

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the Commonwealth Minister, extend the consideration period by a specified period.

(8) The notice must:
   (a) specify when the Council must now make its recommendation; and
   (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:
   (a) if the Commission is not acting on its own initiative under paragraph 44NBA(1)(a)—the applicant; and
   (b) if the applicant is not the provider of the service—the provider.

*Publication*

(10) If the Council extends the consideration period under subsection (7), it must publish a notice in a national newspaper:

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(a) stating that it has done so; and

(b) specifying the day by which it must now make a recommendation on the application.

*Failure to comply with time limit does not affect validity*

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

**44NE Council may invite public submissions**

*Invitation*

(1) The Council may publish, by electronic or other means, a notice inviting public submissions on an application under section 44M, 44NA or 44NBA, or on a consideration by the Council on its own initiative under section 44NBA, if it considers that it is appropriate and practicable to do so.

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

*Consideration of submissions*

(3) Subject to subsection (6), in deciding what recommendation to make, the Council:

(a) must have regard to any submission made on or before the day specified in the notice; and

(b) may disregard any submission made after the day specified in the notice.

*Council may make submissions publicly available*

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

*Confidentiality*

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

(a) not make the whole or a part of the submission available under subsection (4); and

(b) not publish or make available the whole or a part of the submission under section 44NF;

because of the confidential commercial information contained in the submission.

(6) If the Council refuses such a request:

(a) for a written submission—the Council must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Council that the person withdraws the whole or the part of it; and

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

**44NF Publication—Council**

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

(2) The Council must give a copy of the publication to:
  (a) the applicant under section 44M, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative); and
  (b) the provider of the service.

*Timing*

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

*Consultation*

(4) Before publishing under subsection (1), the Council may give any one or more of the following persons:
  (a) the applicant under section 44M, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative);
  (b) the provider of the service;
  (c) any other person the Council considers appropriate;

a notice in writing:
  (d) specifying what the Council is proposing to publish; and
  (e) inviting the person to make a written submission to the Council within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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

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**44NG Publication—Commonwealth Minister**

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

(2) The Commonwealth Minister must give a copy of the publication to:
   (a) the applicant under section 44M, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative); and
   (b) the provider of the service.

*Consultation*

(3) Before publishing under subsection (1), the Commonwealth Minister may give any one or more of the following persons:
   (a) the applicant under section 44M, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative);
   (b) the provider of the service;
   (c) any other person the Minister considers appropriate;

a notice in writing:
   (d) specifying what the Minister is proposing to publish; and
   (e) inviting the person to make a written submission to the Minister within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

(4) The Commonwealth Minister must have regard to any submission so made in deciding what to publish. He or she may have regard to any other matter he or she considers relevant.

**Subdivision E—Review of decisions**

**44O Review of Ministerial decision on effectiveness of access regime**

(1) The responsible Minister of the State or Territory:
   (a) who applied for a recommendation under section 44M that the Commonwealth Minister decide that the access regime is an effective access regime; or
   (b) who applied for a recommendation under section 44NA that the Commonwealth Minister decide to extend the period for which the decision under section 44N is in force;

may apply to the Tribunal for review of the Commonwealth Minister's decision.

(1A) If, on receiving a recommendation under section 44NBA relating to a decision under section 44N, the Commonwealth Minister has made a decision under section 44NBC:

   (a) the person who applied under subsection 44NBA(3) for the Council to make a recommendation relating to that decision under section 44N; or

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(b) any other person who could have applied under subsection 44NBA(3) for the Council to make such a recommendation;

may apply to the Tribunal for review of the Commonwealth Minister's decision under section 44NBC.

(2) An application for review must be made within 21 days after publication of the Commonwealth Minister's decision.

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

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

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

(5) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for the review; and

(ii) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

(6) The Tribunal may affirm, vary or reverse the Commonwealth Minister's decision.

(7) A decision made by the Tribunal is to be taken to be a decision of the Commonwealth Minister for all purposes of this Part (except this section).

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

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

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

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

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

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**Division 2B—Competitive tender processes for government owned facilities**

**44PA Approval of competitive tender process**

*Application to Commission*

(1) The Commonwealth Minister, or the responsible Minister of a State or Territory, may make a written application to the Commission asking it to approve a tender process, for the construction and operation of a facility that is to be owned by the Commonwealth, State or Territory, as a competitive tender process.

(2) The application must:
  (a) specify the service or services proposed to be provided by means of the facility; and
  (b) be in accordance with the regulations.

*Decision of Commission*

(3) The Commission must, by notice in writing, approve or refuse to approve the tender process as a competitive tender process.

  Note 1: While a decision is in force approving a tender process as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph (2)(a): see subsection 44H(3A).

  Note 2: There are time limits that apply to the Commission's decision: see section 44PD.

  Note 3: The Commission may request information and invite public submissions on the application: see sections 44PAA and 44PE.

  Note 4: The Commission must publish its decision: see section 44PF.

(4) The Commission must not approve a tender process as a competitive tender process unless:
  (a) it is satisfied that reasonable terms and conditions of access to any service specified under paragraph (2)(a) will be the result of the process; and
  (b) it is satisfied that the tender process meets the requirements prescribed by the regulations.

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

*Period for which decision in force*

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

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

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

*Legislation Act 2003*

(7) A notice under subsection (3) is not a legislative instrument.

**44PAA Commission may request information**

(1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of the kind specified in the notice that the Commission considers may be relevant to deciding whether to approve or refuse to approve a tender process under section 44PA.

(2) The Commission must:
   (a) if the person is not the applicant—give a copy of the notice to the applicant; and
   (b) publish, by electronic or other means, the notice.

(3) In deciding whether to approve or refuse to approve the tender process, the Commission:
   (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
   (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

**44PB Report on conduct of tender process**

*Report*

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

(2) The report must be in accordance with the regulations.

*Commission may ask for further information*

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

*Legislation Act 2003*

(4) A report under subsection (1) is not a legislative instrument.

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**44PC Revocation of approval decision**

*Discretionary revocation*

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

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

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

(2) The Commission may, by writing, revoke a decision to approve a tender process as a competitive tender process if it is satisfied that the provider of a service:

(a) specified under paragraph 44PA(2)(a); and

(b) being provided by means of the facility concerned;

is not complying with the terms and conditions of access to the service.

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

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

(3) Before making a decision under subsection (2), the Commission must give the applicant under subsection 44PA(1), and the provider of the service, a written notice:

(a) stating that the Commission is proposing to make such a decision and the reasons for it; and

(b) inviting the person to make a written submission to the Commission on the proposal; and

(c) stating that any submission must be made within the period of 40 business days after the notice is given.

(4) The Commission must consider any written submission received within that period.

*Mandatory revocation*

(5) If:

(a) the Commission approves a tender process as a competitive tender process; and

(b) the Commission gives the applicant a notice under subsection 44PB(1) or (3); and

(c) the applicant does not comply with the notice within the period of 40 business days beginning on the day on which the notice is given;

the Commission must, by writing, revoke the approval decision at the end of that period. The Commission must give notice of the revocation to the applicant.

*Definition*

(6) In this section:

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

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**44PD Time limit for Commission decisions**

*Commission to make decision within 90 days*

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

*Stopping the clock*

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

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

**Stopping the clock**

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

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

*Stopping the clock by agreement*

(4) The Commission and the applicant may agree in writing that a specified period is to be disregarded in working out the expected period.

(5) The Commission must publish, by electronic or other means, the agreement.

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*Deemed approval as a competitive tender process*

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

**44PE Commission may invite public submissions**

*Invitation*

(1) The Commission may publish, by electronic or other means, a notice inviting public submissions:
   (a) on an application under subsection 44PA(1); or
   (b) on any proposed decision under subsection 44PC(1) or (2) to revoke a decision under subsection 44PA(3) to approve a tender process as a competitive tender process;

   if it considers that it is appropriate and practicable to do so.

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

*Consideration of submissions*

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

*Commission may make submissions publicly available*

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

*Confidentiality*

(5) A person may, at the time of making a submission, request that the Commission:
   (a) not make the whole or a part of the submission available under subsection (4); and
   (b) not publish or make available the whole or a part of the submission under section 44PF;

   because of the confidential commercial information contained in the submission.

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(6) If the Commission refuses such a request:

(a) for a written submission—the Commission must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Commission that the person withdraws the whole or the part of it; and

(c) if the Commission returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Commission must not:

(i) make the whole or the part of the submission available under subsection (4); and

(ii) publish or make available the whole or the part of the submission under section 44PF; and

(iii) have regard to the whole or the part of the submission in making its decision.

**44PF Commission must publish its decisions**

(1) The Commission must publish, by electronic or other means, a decision under subsection 44PA(3) or 44PC(1) or (2) and its reasons for the decision.

(2) The Commission must give a copy of the publication to:

(a) for any decision—the applicant under subsection 44PA(1); and

(b) for a decision under subsection 44PC(2)—the provider of the service.

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

*Consultation*

(3) Before publishing under subsection (1), the Commission may give the following persons:

(a) for any decision—the applicant under subsection 44PA(1) or any other person the Commission considers appropriate;

(b) for a decision under subsection 44PC(2)—the provider of the service;

a notice in writing:

(c) specifying what the Commission is proposing to publish; and

(d) inviting the person to make a written submission to the Commission within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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

**44PG Review of Commission's initial decision**

*Application*

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

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

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*Review*

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

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

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

*Tribunal's decision*

(6) If the Commission refused to approve a tender process as a competitive tender process, the Tribunal must, by writing:

(a) affirm the Commission's decision; or

(b) set aside the Commission's decision and approve the process as a competitive tender process.

(7) A decision of the Tribunal to approve a process as a competitive tender process is taken to be a decision by the Commission for all purposes of this Part (except this section).

(8) If the Commission approved a tender process as a competitive tender process, the Tribunal must, by writing, affirm or set aside the Commission's decision.

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

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**44PH Review of decision to revoke an approval**

*Application*

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

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

*Review*

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

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

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:
  (a) give a copy of the notice to:
    (i) the person who applied for review; and
    (ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and
    (iii) for a review of a decision under subsection 44PC(2)—the provider of the service; and
    (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
  (b) publish, by electronic or other means, the notice.

*Tribunal's decision*

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

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**Division 2C—Register of decisions and declarations**

**44Q Register of decisions, declarations and ineligibility decisions**

The Commission must maintain a public register that includes:

(a) each decision of the Commonwealth Minister that a regime established by a State or Territory for access to a service is an effective access regime for the service or proposed service; and

(aa) each decision of the Commonwealth Minister to extend the period for which a decision under section 44N is in force; and

(b) each declaration (including a declaration that is no longer in force); and

(ba) each decision of a designated Minister under section 44LG that a service is ineligible to be a declared service; and

(bb) each decision of a designated Minister under section 44LI to revoke his or her decision that a service is ineligible to be a declared service; and

(c) each decision of the Commission under subsection 44PA(3) to approve a tender process as a competitive tender process; and

(d) each decision of the Commission under section 44PC to revoke a decision under subsection 44PA(3).

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**Division 3—Access to declared services**

**Subdivision A—Scope of Division**

**44R Constitutional limits on operation of this Division**

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

(a) the provider is a corporation (or a partnership or joint venture consisting wholly of corporations); or

(b) the third party is a corporation; or

(c) the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

**Subdivision B—Notification of access disputes**

**44S Notification of access disputes**

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

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

(2) On receiving the notification, the Commission must give notice in writing of the access dispute to:

(a) the provider, if the third party notified the access dispute;

(b) the third party, if the provider notified the access dispute;

(c) any other person whom the Commission thinks might want to become a party to the arbitration.

**44T Withdrawal of notifications**

(1) A notification may be withdrawn as follows (and not otherwise):

(a) if the provider notified the dispute:

(i) the provider may withdraw the notification at any time before the Commission makes its final determination;

(ii) the third party may withdraw the provider's notification at any time after the Commission issues a draft final determination, but before it makes its final determination;

(b) if the third party notified the dispute, the third party may withdraw the notification at any time before the Commission makes its determination.

(2) Despite subparagraph (1)(a)(ii), if the provider notified a dispute over variation of a final determination, the third party may not withdraw the provider's notification.

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(3) If the notification is withdrawn, it is taken for the purposes of this Part never to have been given.

**Subdivision C—Arbitration of access disputes**

**44U Parties to the arbitration**

The parties to the arbitration of an access dispute are:

(a) the provider;

(b) the third party;

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

**44V Determination by Commission**

(1) Unless it terminates the arbitration under section 44Y, 44YA, 44ZZCB or 44ZZCBA, the Commission:

(a) must make a written final determination; and

(b) may make a written interim determination;

on access by the third party to the service.

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

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

(2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:

(a) require the provider to provide access to the service by the third party;

(b) require the third party to accept, and pay for, access to the service;

(c) specify the terms and conditions of the third party's access to the service;

(d) require the provider to extend the facility;

(da) require the provider to permit interconnection to the facility by the third party;

(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(2A) Without limiting paragraph (2)(d), a requirement referred to in that paragraph may do either or both of the following:

(a) require the provider to expand the capacity of the facility;

(b) require the provider to expand the geographical reach of the facility.

(3) A determination does not have to require the provider to provide access to the service by the third party.

(4) Before making a determination, the Commission must give a draft determination to the parties.

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(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

(6) A determination is not a legislative instrument.

**44W Restrictions on access determinations**

(1) The Commission must not make a determination that would have any of the following effects:

(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;

(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;

(c) depriving any person of a protected contractual right;

(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility), without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the facility (including expanding the capacity of the facility and expanding the geographical reach of the facility);

(ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility);

(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.

(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.

(3) A determination is of no effect if it is made in contravention of subsection (1).

(4) If the Commission makes a determination that has the effect of depriving a person (the ***second person***) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:

(a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and

(b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference between the total amount of service the person was entitled to

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under a pre-notification right and the amount that the person actually needs to meet his or her actual requirements.

(4A) If an application for review of a declaration of a service has been made under subsection 44K(1), the Commission must not make a determination in relation to the service until the Tribunal has made its decision on the review.

(5) In this section:

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

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

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

**44X Matters that the Commission must take into account**

*Final determinations*

(1) The Commission must take the following matters into account in making a final determination:

(aa) the objects of this Part;

(a) the legitimate business interests of the provider, and the provider's investment in the facility;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else;

(ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility;

(h) the pricing principles specified in section 44ZZCA.

(2) The Commission may take into account any other matters that it thinks are relevant.

*Interim determinations*

(3) The Commission may take the following matters into account in making an interim determination:

(a) a matter referred to in subsection (1);

(b) any other matter it considers relevant.

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

**44XA Time limit for Commission's final determination**

*Commission to make final determination within 180 days*

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

*Stopping the clock*

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

**Stopping the clock**

| Item | Column 1<br>Situation | Column 2<br>Start day | Column 3<br>End day |
|---|---|---|---|
| 1 | An agreement is made in relation to the arbitration under subsection (4) | The first day of the period specified in the agreement | The last day of the period specified in the agreement |
| 2 | A direction is given under subsection 44ZG(1) to give information or make a submission within a specified period | The first day of the period specified for the giving of the information or the making of the submission | The last day of the period specified for the giving of the information or the making of the submission |
| 3 | A decision is published under subsection 44ZZCB(4) deferring consideration of the dispute while the Commission considers an access undertaking | The day on which the decision is published | The day on which the Commission makes its decision on the access undertaking under subsection 44ZZA(3) |
| 4 | The Commission, under subsection 44ZZCBA(1) or (2), defers arbitrating the dispute | The day on which the Commission gives the notice to defer | The day the Tribunal makes its decision under section 44K on the review |

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| Stopping the clock | | | |
|---|---|---|---|
| **Item** | **Column 1**<br>**Situation** | **Column 2**<br>**Start day** | **Column 3**<br>**End day** |
| | while a declaration is under review by the Tribunal | arbitrating the dispute | |

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

*Stopping the clock by agreement*

(4) The Commission and the parties to the access dispute may agree in writing that a specified period is to be disregarded in working out the expected period.

(5) The Commission must publish, by electronic or other means, the agreement.

*Deemed final determination*

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

(a) made a final determination that does not impose any obligations on the parties or alter any obligations (if any) that exist at that time between the parties; and

(b) published a written report about the final determination under section 44ZNB.

**44Y Commission may terminate arbitration in certain cases**

(1) The Commission may at any time terminate an arbitration (without making a final determination) if it thinks that:

(a) the notification of the dispute was vexatious; or

(b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or

(c) the party who notified the dispute has not engaged in negotiations in good faith; or

(d) access to the service should continue to be governed by an existing contract between the provider and the third party.

(2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

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

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

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**Subdivision D—Procedure in arbitrations**

**44Z Constitution of Commission for conduct of arbitration**

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

**44ZA Member of the Commission presiding at an arbitration**

(1) Subject to subsection (2), the Chairperson is to preside at an arbitration.

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

**44ZB Reconstitution of Commission**

(1) This section applies if a member of the Commission who is one of the members who constitute the Commission for the purposes of a particular arbitration:
   (a) stops being a member of the Commission; or
   (b) for any reason, is not available for the purpose of the arbitration.

(2) The Chairperson must either:
   (a) direct that the Commission is to be constituted for the purposes of finishing the arbitration by the remaining member or members; or
   (b) direct that the Commission is to be constituted for that purpose by the remaining member or members together with one or more other members of the Commission.

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

**44ZC Determination of questions**

If the Commission is constituted for an arbitration by 2 or more members of the Commission, any question before the Commission is to be decided:
   (a) unless paragraph (b) applies—according to the opinion of the majority of those members; or
   (b) if the members are evenly divided on the question—according to the opinion of the member who is presiding.

**44ZD Hearing to be in private**

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

(2) If the parties agree, an arbitration hearing or part of an arbitration hearing may be conducted in public.

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(3) The member of the Commission who is presiding at an arbitration hearing that is conducted in private may give written directions as to the persons who may be present.

(4) In giving directions under subsection (3), the member presiding must have regard to the wishes of the parties and the need for commercial confidentiality.

**44ZE Right to representation**

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

**44ZF Procedure of Commission**

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

(2) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods.

(3) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.

(4) The Commission may determine that an arbitration hearing is to be conducted by:
   (a) telephone; or
   (b) closed circuit television; or
   (c) any other means of communication.

**44ZG Particular powers of Commission**

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

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

Penalty: Imprisonment for 6 months.

(3) Subsection (1) has effect subject to any other provision of this Part and subject to the regulations.

(4) The Commission may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration unless the person has the Commission's permission.

(5) A person who contravenes an order under subsection (4) is guilty of an offence, punishable on conviction by imprisonment for a term not exceeding 6 months.

**44ZH Power to take evidence on oath or affirmation**

(1) The Commission may take evidence on oath or affirmation and for that purpose a member of the Commission may administer an oath or affirmation.

(2) The member of the Commission who is presiding may summon a person to appear before the Commission to give evidence and to produce such documents (if any) as are referred to in the summons.

(3) The powers in this section may be exercised only for the purposes of arbitrating an access dispute.

**44ZI Failing to attend as a witness**

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

(a) fail to attend as required by the summons; or

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

Penalty: Imprisonment for 6 months.

**44ZJ Failing to answer questions etc.**

(1) A person appearing as a witness before the Commission must not, without reasonable excuse:

(a) refuse or fail to be sworn or to make an affirmation; or

(b) refuse or fail to answer a question that the person is required to answer by the Commission; or

(c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part served on him or her as prescribed.

Penalty: Imprisonment for 6 months.

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

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production of the document might tend to incriminate the individual or to expose the individual to a penalty. This subsection does not limit what is a reasonable excuse for the purposes of subsection (1).

**44ZK Intimidation etc.**

A person must not:

(a) threaten, intimidate or coerce another person; or

(b) cause or procure damage, loss or disadvantage to another person;

because that other person:

(c) proposes to produce, or has produced, documents to the Commission; or

(d) proposes to appear or has appeared as a witness before the Commission.

Penalty: Imprisonment for 12 months.

**44ZL Party may request Commission to treat material as confidential**

(1) A party to an arbitration hearing may:

(a) inform the Commission that, in the party's opinion, a specified part of a document contains confidential commercial information; and

(b) request the Commission not to give a copy of that part to another party.

(2) On receiving a request, the Commission must:

(a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and

(b) ask the other party or parties whether there is any objection to the Commission complying with the request.

(3) If there is an objection to the Commission complying with a request, the party objecting may inform the Commission of its objection and of the reasons for it.

(4) After considering:

(a) a request; and

(b) any objection; and

(c) any further submissions that any party has made in relation to the request;

the Commission may decide not to give to the other party or parties a copy of so much of the document as contains confidential commercial information that the Commission thinks should not be so given.

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

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

**44ZN Parties to pay costs of an arbitration**

The regulations may provide for the Commission to:

(a) charge the parties to an arbitration for its costs in conducting the arbitration; and

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(b) apportion the charge between the parties.

**44ZNA Joint arbitration hearings**

*Joint arbitration hearing*

(1) If:

(a) the Commission is arbitrating 2 or more access disputes at a particular time; and

(b) one or more matters are common to those disputes;

the Chairperson may, by notice in writing, decide that the Commission must hold a joint arbitration hearing in respect of such of those disputes (the ***nominated disputes***) as are specified in the notice.

(2) The Chairperson may do so only if he or she considers this would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.

*Consulting the parties*

(3) Before doing so, the Chairperson must give each party to the arbitration of each nominated dispute a notice in writing:

(a) specifying what the Chairperson is proposing to do; and

(b) inviting the party to make a written submission on the proposal to the Chairperson within 14 days after the notice is given.

(4) The Chairperson must have regard to any submission so made in deciding whether to do so. He or she may have regard to any other matter he or she considers relevant.

*Directions to presiding member*

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

*Constitution and procedure of Commission*

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

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

*Record of proceedings etc.*

(7) The Commission as constituted for the purposes of the joint arbitration hearing may have regard to any record of the proceedings of the arbitration of any nominated dispute.

(8) The Commission as constituted for the purposes of the arbitration of each nominated dispute may, for the purposes of making a determination in relation to that arbitration:

(a) have regard to any record of the proceedings of the joint arbitration hearing; and

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(b) adopt any findings of fact made by the Commission as constituted for the purposes of the joint arbitration hearing.

*Legislation Act 2003*

(9) The following are not legislative instruments:
(a) a notice made under subsection (1);
(b) a direction given under subsection (5).

**Subdivision DA—Arbitration reports**

**44ZNB Arbitration reports**

(1) The Commission must prepare a written report about a final determination it makes. It must publish, by electronic or other means, the report.

(2) The report may include the whole or a part of the determination and the reasons for the determination or the part of the determination.

*Report must include certain matters*

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

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

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

*Report may include other matters*

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

*Confidentiality*

(5) The Commission must not include in the report any information the Commission decided not to give to a party to the arbitration under section 44ZL.

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(6) Before publishing the report, the Commission must give each party to the arbitration a notice in writing:

(a) specifying what the Commission is proposing to publish; and

(b) inviting the party to make a written submission to the Commission within 14 days after the notice is given identifying any information the party considers should not be published because of its confidential commercial nature.

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

*Legislation Act 2003*

(8) A report prepared under subsection (1) is not a legislative instrument.

**Subdivision E—Effect of determinations**

**44ZO Operation of final determinations**

(1) If none of the parties to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's final determination, the determination has effect 21 days after the determination is made.

(2) If a party to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission's final determination, the determination is of no effect until the Tribunal makes its determination on the review.

*Backdating*

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

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

(4) The specified day must not be earlier than the following day:

(a) if the third party and provider commenced negotiations on access to the service after the service became a declared service—the day on which the negotiations commenced;

(b) if the third party and provider commenced negotiations on access to the service before the service became a declared service—the day on which the declaration began to operate.

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

*Operation of interim determination*

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

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*Interest*

(6) If:

(a) a provision of a final determination is covered by subsection (3); and

(b) the provision requires a party to the determination (the ***first party***) to pay money to another party;

the determination may require the first party to pay interest to the other party, at the rate specified in the determination, on the whole or a part of the money, for the whole or a part of the period:

(c) beginning on the day specified under subsection (3); and

(d) ending on the day on which the determination takes effect under subsection (1) or (2).

*Guidelines*

(7) In exercising the power conferred by subsection (3) or (6), the Commission must have regard to any guidelines in force under subsection (8). It may have regard to any other matter it considers relevant.

(8) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (7).

(9) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (8) is made within 6 months after the commencement of this subsection.

**44ZOA Effect and duration of interim determinations**

(1) An interim determination takes effect on the day specified in the determination.

(2) Unless sooner revoked, an interim determination continues in effect until the earliest of the following:

(a) the notification of the access dispute is withdrawn under section 44T;

(b) a final determination relating to the access dispute takes effect;

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

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

**Subdivision F—Review of final determinations**

**44ZP Review by Tribunal**

(1) A party to a final determination may apply in writing to the Tribunal for a review of the determination.

(2) The application must be made within 21 days after the Commission made the final determination.

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

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

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the other party or parties to the final determination; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

(6) The Tribunal may either affirm or vary the Commission's determination.

(7) The determination, as affirmed or varied by the Tribunal, is to be taken to be a determination of the Commission for all purposes of this Part (except this section).

(8) The decision of the Tribunal takes effect from when it is made.

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

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

**44ZR Appeals to Federal Court from determinations of the Tribunal**

(1) A party to an arbitration may appeal to the Federal Court, on a question of law, from the decision of the Tribunal under section 44ZP.

(2) An appeal by a person under subsection (1) must be instituted:

(a) not later than the 28th day after the day on which the decision of the Tribunal is made or within such further period as the Federal Court (whether before or after the end of that day) allows; and

(b) in accordance with the Rules of Court made under the *Federal Court of Australia Act 1976*.

(3) The Federal Court must hear and determine the appeal and may make any order that it thinks appropriate.

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(4) The orders that may be made by the Federal Court on appeal include (but are not limited to):

(a) an order affirming or setting aside the decision of the Tribunal; and

(b) an order remitting the matter to be decided again by the Tribunal in accordance with the directions of the Federal Court.

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

(1) Subject to this section, the fact that an appeal is instituted in the Federal Court from a decision of the Tribunal does not affect the operation of the decision or prevent action being taken to implement the decision.

(2) If an appeal is instituted in the Federal Court from a decision of the Tribunal, the Federal Court or a judge of the Federal Court may make any orders staying or otherwise affecting the operation or implementation of the decision of the Tribunal that the Federal Court or judge thinks appropriate to secure the effectiveness of the hearing and determination of the appeal.

(3) If an order is in force under subsection (2) (including an order previously varied under this subsection), the Federal Court or a judge of the Federal Court may make an order varying or revoking the first-mentioned order.

(4) An order in force under subsection (2) (including an order previously varied under subsection (3)):

(a) is subject to any conditions that are specified in the order; and

(b) has effect until:

(i) the end of any period for the operation of the order that is specified in the order; or

(ii) the giving of a decision on the appeal;

whichever is earlier.

**44ZT Transmission of documents**

If an appeal is instituted in the Federal Court:

(a) the Tribunal must send to the Federal Court all documents that were before the Tribunal in connection with the matter to which the appeal relates; and

(b) at the conclusion of the proceedings before the Federal Court in relation to the appeal, the Federal Court must return the documents to the Tribunal.

**Subdivision G—Variation and revocation of determinations**

**44ZU Variation of final determinations**

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

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

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(2) Sections 44W and 44X apply to a variation under this section as if:

(a) an access dispute arising out of the final determination had been notified when the application was made to the Commission for the variation of the determination; and

(b) the variation were the making of a final determination in the terms of the varied determination.

**44ZUA Variation and revocation of interim determinations**

(1) The Commission may, by writing, vary or revoke an interim determination.

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

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**Division 4—Registered contracts for access to declared services**

**44ZV Constitutional limits on operation of this Division**

This Division does not apply to a contract unless:

(a) the contract provides for access to a declared service; and

(b) the contract was made after the service was declared; and

(c) the parties to the contract are the provider of the service and a third party; and

(d) at least one of the following conditions is met:

(i) the provider is a corporation (or a partnership or joint venture consisting wholly of corporations);

(ii) the third party is a corporation;

(iii) the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

**44ZW Registration of contract**

(1) On application by all the parties to a contract, the Commission must:

(a) register the contract by entering the following details on a public register:

(i) the names of the parties to the contract;

(ii) the service to which the contract relates;

(iii) the date on which the contract was made; or

(b) decide not to register the contract.

(2) In deciding whether to register a contract, the Commission must take into account:

(aa) the objects of this Part; and

(a) the public interest, including the public interest in having competition in markets (whether or not in Australia); and

(b) the interests of all persons who have rights to use the service to which the contract relates.

(2A) The Commission must not register a contract if it deals with a matter or matters relating to access to the service that are dealt with in an access undertaking that is in operation.

(3) The Commission must publish a decision not to register a contract.

(4) If the Commission publishes a decision not to register a contract, it must give the parties to the contract reasons for the decision when it publishes the decision.

**44ZX Review of decision not to register contract**

(1) If the Commission decides not to register a contract, a party to the contract may apply in writing to the Tribunal for review of the decision.

(2) An application for review must be made within 21 days after publication of the Commission's decision.

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

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

(4) For the purposes of the review, the Tribunal has the same powers as the Commission.

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the other party or parties to the contract; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice; and

(6) The Tribunal may either:

(a) affirm the Commission's decision; or

(b) register the contract.

**44ZY Effect of registration of contract**

The parties to a contract that has been registered:

(a) may enforce the contract under Division 7 as if the contract were a determination of the Commission under section 44V and they were parties to the determination; and

(b) cannot enforce the contract by any other means.

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**Division 5—Hindering access to declared services**

**44ZZ Prohibition on hindering access to declared services**

(1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.

(2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).

(3) In this section, a ***user*** of a service includes a person who has a right to use the service.

**Division 6—Access undertakings and access codes for services**

**Subdivision A—Giving of access undertakings and access codes**

**44ZZA Access undertakings by providers**

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

Note: The following are examples of the kinds of things that might be dealt with in the undertaking:
(a) terms and conditions of access to the service;
(b) procedures for determining terms and conditions of access to the service;
(c) an obligation on the provider not to hinder access to the service;
(d) an obligation on the provider to implement a particular business structure;
(e) an obligation on the provider to provide information to the Commission or to another person;
(f) an obligation on the provider to comply with decisions of the Commission or another person in relation to matters specified in the undertaking;
(g) an obligation on the provider to seek a variation of the undertaking in specified circumstances.

(2) The undertaking must specify the expiry date of the undertaking.

(3) The Commission may accept the undertaking, if it thinks it appropriate to do so having regard to the following matters:
(aa) the objects of this Part;
(ab) the pricing principles specified in section 44ZZCA;
(a) the legitimate business interests of the provider;
(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(c) the interests of persons who might want access to the service;

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(da) whether the undertaking is in accordance with an access code that applies to the service;

(e) any other matters that the Commission thinks are relevant.

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

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

(3AA) The Commission must not accept the undertaking if a decision of the Commonwealth Minister is in force under section 44N that a regime established by a State or Territory for access to the service is an effective access regime.

(3AB) The Commission may reject the undertaking if it incorporates one or more amendments (see subsection 44ZZAAA(5)) and the Commission is satisfied that the amendment or amendments are of a kind, are made at a time, or are made in a manner that:

(a) unduly prejudices anyone the Commission considers has a material interest in the undertaking; or

(b) unduly delays the process for considering the undertaking.

(3A) The Commission must not accept the undertaking unless:

(a) the provider, or proposed provider, is a corporation (or a partnership or joint venture consisting wholly of corporations); or

(b) the undertaking provides for access only to third parties that are corporations; or

(c) the undertaking provides for access that is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

(6) If the undertaking provides for disputes about the undertaking to be resolved by the Commission, then the Commission may resolve the disputes in accordance with the undertaking.

(6A) If the undertaking provides for the Commission to perform functions or exercise powers in relation to the undertaking, the Commission may perform those functions and exercise those powers. If the Commission decides to do so, it must do so in accordance with the undertaking.

(6B) The Commission may accept the undertaking even if the service is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be a declared service.

(7) The provider may:

(a) withdraw the application given under subsection (1) at any time before the Commission makes a decision on whether to accept the application; and

(b) withdraw or vary the undertaking at any time after it has been accepted by the Commission, but only with the consent of the Commission.

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

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

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

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

**44ZZAAA Proposed amendments to access undertakings**

*Commission may give an amendment notice in relation to an undertaking*

(1) Before deciding whether to accept an undertaking given to it under subsection 44ZZA(1) by a person who is, or expects to be, the provider of a service, the Commission may give the person an amendment notice in relation to the undertaking.

(2) An ***amendment notice*** is a notice in writing that specifies:
   (a) the nature of the amendment or amendments (the ***proposed amendment or amendments***) that the Commission proposes be made to the undertaking; and
   (b) the Commission's reasons for the proposed amendment or amendments; and
   (c) the period (the ***response period***) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person.

(3) The Commission may publish, by electronic or other means, the amendment notice.

(4) The Commission may give more than one amendment notice in relation to an undertaking.

*Person may give a revised undertaking in response to notice*

(5) If a person receives an amendment notice, the person may, within the response period, respond to the notice by giving a revised undertaking to the Commission that incorporates one or more amendments.

(6) If the revised undertaking incorporates one or more amendments that the Commission considers are not of the nature proposed in the amendment notice and do not address the reasons for the proposed amendments given in the amendment notice, the Commission must not accept the revised undertaking and must return it to the person within 21 days of receiving it.

(7) If the person gives a revised undertaking under subsection (5) and the revised undertaking is not returned to the person under subsection (6), the revised undertaking is taken, after the time it is given to the Commission, to be the undertaking given under section 44ZZA for the purposes of this Part.

(8) The person is taken to have not agreed to the proposed amendment or amendments if the person does not respond within the response period.

*Commission not required to accept revised undertaking*

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

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*No duty to propose amendments*

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

*Notice of proposed amendment is not a legislative instrument*

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

**44ZZAAB Access undertakings containing fixed principles**

*Access undertakings may contain fixed principles*

(1) An access undertaking given to the Commission under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period.

(2) Each of the terms is a ***fixed principle*** and the specified period is a ***fixed period***. Different periods may be specified for different fixed principles.

(3) The fixed period must:
  (a) start:
    (i) when the access undertaking comes into operation; or
    (ii) at a later time ascertained in accordance with the undertaking; and
  (b) extend beyond the expiry date of the undertaking.

*Consideration of fixed principles*

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

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

*Fixed principles must be carried over to later undertakings*

(5) Subsection (6) applies if:
  (a) the Commission accepts an undertaking (the ***earlier undertaking***) in connection with the provision of access to a service that includes a fixed principle; and
  (b) an undertaking (the ***later undertaking***) is given to the Commission in connection with the provision of access to the service within the fixed period for the fixed principle; and
  (c) at the time the later undertaking is given:
    (i) the fixed principle has not been revoked under subsection (7); and

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(ii) the earlier undertaking has not been varied under subsection 44ZZA(7) so that the fixed principle is no longer a term of the earlier undertaking.

(6) The Commission must not accept the later undertaking under section 44ZZA unless the undertaking includes a term that is the same as the fixed principle.

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

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

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

*Alteration of fixed principles*

(8) If an undertaking that is accepted by the Commission contains one or more fixed principles, the undertaking is accepted on the basis that:

(a) the principle may be varied or revoked under subsection (7) or 44ZZA(7); and

(b) the principle may be cancelled, revoked, terminated or varied by or under later legislation; and

(c) no compensation is payable if the principle is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

(9) Subsection (8) does not, by implication, affect the interpretation of any other provision of this Act.

**44ZZAA Access codes prepared by industry bodies**

(1) An industry body may give a written code to the Commission setting out rules for access to a service.

(2) The code must specify the expiry date of the code.

(3) The Commission may accept the code, if it thinks it appropriate to do so having regard to the following matters:

(aa) the objects of this Part;

(ab) the pricing principles specified in section 44ZZCA;

(a) the legitimate business interests of providers who might give undertakings in accordance with the code;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of persons who might want access to the service covered by the code;

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(e) any matters specified in regulations made for the purposes of this subsection;

(f) any other matters that the Commission thinks are relevant.

(3A) The Commission must not accept the code if a decision of the Commonwealth Minister is in force under section 44N that a regime established by a State or Territory for access to the service is an effective access regime.

(6) The industry body may:

(a) withdraw the code given under subsection (1) at any time before the Commission makes a decision whether to accept the code; and

(b) withdraw or vary the code at any time after it has been accepted by the Commission, but only with the consent of the Commission.

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

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

(7) If the industry body that gave the code to the Commission has ceased to exist, a withdrawal or variation under subsection (6) may be made by a body or association prescribed by the regulations as a replacement for the original industry body.

(8) In this section:

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

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

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

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

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

**44ZZAB Commission may rely on industry body consultations**

(1) The Commission may accept a code if the industry body has done the following before giving the code to the Commission under subsection 44ZZAA(1):

(a) published the code or a draft of the code and invited people to make submissions to the industry body on the code or draft;

(b) specified the effect of this subsection and subsection (2) when it published the code or draft;

(c) considered any submissions that were received within the time limit specified by the industry body when it published the code or draft.

(2) In deciding whether to accept the code, the Commission may consider any submission referred to in paragraph (1)(c).

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(3) Before consenting to a variation or withdrawal of a code under subsection 44ZZAA(6), the Commission may rely on:

(a) publication of the variation or notice of the withdrawal by the industry body, including specification of the effect of this subsection and subsection (4); and

(b) consideration by the industry body of any submissions that were received within the time limit specified by the industry body when it published the variation or notice.

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

(5) In this section:

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

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

**Subdivision B—Effect of access undertakings and access codes**

**44ZZBA When access undertakings and access codes come into operation**

*Acceptance of access undertakings or access codes*

(1) If the Commission accepts an access undertaking or an access code, it comes into operation at:

(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

(2) If the Tribunal decides under paragraph 44ZZBF(7)(e) to accept an access undertaking or access code, it comes into operation at the time of the Tribunal's decision.

(3) An access undertaking or access code continues in operation until its expiry date, unless it is earlier withdrawn.

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

*Withdrawal or variation of access undertakings or access codes*

(4) If the Commission consents to the withdrawal or variation of an access undertaking or an access code, the withdrawal or variation comes into operation at:

(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

(5) If the Tribunal decides under paragraph 44ZZBF(7)(e) to consent to the withdrawal or variation of an access undertaking or access code, the withdrawal or variation comes into operation at the time of the Tribunal's decision.

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*Revocation or variation of fixed principles in access undertakings*

(6) If the Commission consents to the revocation or variation of a fixed principle that is included as a term of an access undertaking under subsection 44ZZAAB(7), the revocation or variation comes into operation at:

(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or

(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

(7) If the Tribunal decides under paragraph 44ZZBF(7)(e) to consent to the revocation or variation of a fixed principle that is included as term of an access undertaking, the revocation or variation comes into operation at the time of the Tribunal's decision.

**Subdivision C—Extensions of access undertakings and access codes**

**44ZZBB Extensions of access undertakings and access codes**

*Access undertakings*

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

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

(2) The provider of the service must specify in the application a proposed extension period.

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

*Access codes*

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

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

(5) The industry body must specify in the application a proposed extension period.

(6) The Commission may, by notice in writing, extend the period for which the code is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZAA(3). The notice must specify the extension period.

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(7) If the industry body that gave the code to the Commission has ceased to exist, an application under subsection (4) may be made by a body or association referred to in subsection 44ZZAA(7).

*Multiple extensions*

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

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

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

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

**Subdivision D—Procedural provisions**

**44ZZBC Time limit for Commission decisions**

*Commission to make decision on application within 180 days*

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

*Stopping the clock*

(2) In working out the expected period in relation to an access undertaking application or an access code application, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

**Stopping the clock**

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

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

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

*Stopping the clock by agreement*

(4) The Commission and:

(a) for an access undertaking application—the provider of the service; and

(b) for an access code application—the industry body or its replacement;

may agree in writing that a specified period is to be disregarded in working out the expected period.

(5) The Commission must publish, by electronic or other means, the agreement.

*Deemed final determination*

(6) If the Commission does not publish under section 44ZZBE an access undertaking decision or an access code decision within the expected period, it is taken, immediately after the end of the expected period, to have:

(a) made a decision to not accept the application; and

(b) published its decision under section 44ZZBE and its reasons for that decision.

**44ZZBCA Commission may request information**

(1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of a kind specified in the notice that

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the Commission considers may be relevant to making a decision on an access undertaking application or an access code application.

(2) The Commission must:

(a) give a copy of the notice to:

(i) in the case of an access undertaking application—the provider of the service (unless the provider is the person); and

(ii) in the case of an access code application—the industry body that gave the application to the Commission (unless the body is the person); and

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

(3) In making a determination, the Commission:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

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

**44ZZBD Commission may invite public submissions**

*Invitation*

(1) The Commission may publish, by electronic or other means, a notice inviting public submissions on an access undertaking application or an access code application if it considers that it is appropriate and practicable to do so.

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

*Consideration of submissions*

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

(a) must have regard to any submission made on or before the day specified in the notice; and

(b) may disregard any submission made after the day specified in the notice.

*Commission may make submissions publicly available*

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

*Confidentiality*

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

(a) not make the whole or a part of the submission available under subsection (4); and

(b) not publish or make available the whole or a part of the submission under section 44ZZBE;

because of the confidential commercial information contained in the submission.

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(6) If the Commission refuses such a request:

(a) for a written submission—the Commission must, if the person who made it so requires, return the whole or the part of it to the person; and

(b) for an oral submission—the person who made it may inform the Commission that the person withdraws the whole or the part of it; and

(c) if the Commission returns the whole or the part of the submission, or the person withdraws the whole or the part of the submission, the Commission must not:

(i) make the whole or the part of the submission available under subsection (4); and

(ii) publish or make available the whole or the part of the submission under section 44ZZBE; and

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

**44ZZBE Commission must publish its decisions**

(1) The Commission must publish, by electronic or other means, an access undertaking decision or an access code decision and its reasons for the decision.

(2) The Commission must give a copy of the publication to:

(a) for an access undertaking decision—the provider of the service; or

(b) for an access code decision—the industry body or its replacement.

*Consultation*

(3) Before publishing under subsection (1), the Commission may give any one or more of the following persons:

(a) for an access undertaking decision—the provider of the service;

(b) for an access code decision—the industry body or its replacement;

(c) in any case—any other person the Commission considers appropriate;

a notice in writing:

(d) specifying what the Commission is proposing to publish; and

(e) inviting the person to make a written submission to the Commission within 14 days after the notice is given identifying any information the person considers should not be published because of its confidential commercial nature.

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

**Subdivision E—Review of decisions**

**44ZZBF Review of decisions**

*Application*

(1) A person whose interests are affected by an access undertaking decision or an access code decision may apply in writing to the Tribunal for review of the decision.

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

*Review*

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

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

(4) For the purposes of the review, the Tribunal has the same powers as the Commission (other than the power to propose amendments under section 44ZZAAA).

(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.

(5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(5B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

*Tribunal's decision*

(6) If the Commission:

(a) accepted an access undertaking or access code; or

(b) consented to the withdrawal or variation of an access undertaking or access code; or

(ba) consented to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or

(c) extended the period for which an access undertaking or access code is in operation;

the Tribunal must, by writing, affirm or set aside the Commission's decision.

(7) If the Commission:

(a) rejected an access undertaking or access code; or

(b) refused to consent to the withdrawal or variation of an access undertaking or access code; or

(ba) refused to consent to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or

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(c) refused to extend the period for which an access undertaking or access code is in operation;

the Tribunal must, by writing:

(d) affirm the Commission's decision; or

(e) set aside the Commission's decision and accept the undertaking or code, consent to the withdrawal or variation of the undertaking or code, consent to the revocation or variation of the fixed principle or extend the period for which the undertaking or code is in operation.

**Subdivision F—Register of access undertakings and access codes**

**44ZZC Register of access undertakings and access codes**

(1) The Commission must maintain a public register that includes all access undertakings and access codes that have been accepted by the Commission, including those that are no longer in operation.

(1A) For the purposes of subsection (1), if an access undertaking includes one or more fixed principles, the register must also include details of the fixed principles, including their fixed periods.

(2) The register must include all variations of access undertakings and access codes.

(3) The register must also include details of all extensions of the period for which an access undertaking or an access code is in operation.

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**Division 6A—Pricing principles for access disputes and access undertakings or codes**

**44ZZCA Pricing principles for access disputes and access undertakings or codes**

The pricing principles relating to the price of access to a service are:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.

**Division 6B—Overlap among determinations, registered contracts, access undertakings and Tribunal review**

**44ZZCB Deferring access disputes or access undertakings**

(1) If, at a particular time, the Commission is:

(a) arbitrating an access dispute under Division 3 relating to one or more matters of access to a declared service; and

(b) considering whether to accept an access undertaking relating to the service and to one or more of those matters;

then the Commission may, by notice in writing, decide to:

(c) defer arbitrating the access dispute, in whole or in part, while it considers the access undertaking; or

(d) defer considering whether to accept the access undertaking, in whole or in part, while it arbitrates the access dispute.

*Deferral of arbitration of access dispute*

(2) If:

(a) the Commission defers arbitrating the access dispute; and

(b) the Commission then accepts the access undertaking and it comes into operation;

then the Commission must terminate the arbitration when the undertaking comes into operation, but only to the extent of the matters relating to access to the service that are dealt with in the undertaking.

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Note: The third party's access to the service is determined under the access undertaking to the extent of the matters it deals with. If the access dispute deals with other matters, the third party's access to the service in relation to those other matters is determined under any determination the Commission makes.

*Deferral of consideration of access undertaking*

(3) If:

(a) the Commission defers considering whether to accept the access undertaking; and

(b) the Commission then makes a final determination in relation to the arbitration of the access dispute;

then the Commission must resume considering whether to accept the access undertaking.

*Publication*

(4) The Commission must publish, by electronic or other means, any decision it makes under subsection (1) and its reasons for the decision. The Commission must give a copy of the decision (including the reasons for the decision) to each party to the arbitration.

*Guidelines*

(5) In exercising the power conferred by subsection (1), the Commission must have regard to:

(a) the fact that the access undertaking will, if accepted, apply generally to access seekers and a final determination relating to the access dispute will only apply to the parties to the arbitration; and

(b) any guidelines in force under subsection (6).

It may have regard to any other matter it considers relevant.

(6) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (5).

(7) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (6) is made within 6 months after the commencement of this subsection.

*Legislation Act 2003*

(8) A notice made under subsection (1) is not a legislative instrument.

**44ZZCBA Deferral of arbitration if review is underway**

*Commission may defer arbitration if declaration not stayed*

(1) If:

(a) the Commission is arbitrating an access dispute relating to one or more matters of access to a declared service; and

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(b) an application for review of the declaration of the service has been made under subsection 44K(1); and

(c) the Tribunal does not make an order under section 44KA staying the operation of the declaration;

then the Commission may, by notice in writing to each party to the arbitration, decide to defer arbitrating the access dispute until the Tribunal has made its decision on the review if it considers it appropriate to do so.

*Commission must defer arbitration if declaration stayed*

(2) If:

(a) the Commission is arbitrating an access dispute relating to one or more matters of access to a declared service; and

(b) an application for review of the declaration of the service has been made under subsection 44K(1); and

(c) the Tribunal makes an order under section 44KA staying the operation of the declaration;

then the Commission must, by notice in writing to each party to the arbitration, defer arbitrating the access dispute until the Tribunal has made its decision on the review.

*Resumption of arbitration if declaration affirmed*

(3) If the Commission defers arbitrating the access dispute and the Tribunal affirms the declaration, the Commission must resume arbitrating the dispute.

*Termination of arbitration if declaration varied or set aside*

(4) If the Commission defers arbitrating the access dispute and the Tribunal sets aside or varies the declaration, the Commission must terminate the arbitration.

(5) If:

(a) an arbitration is terminated under subsection (4) or section 44YA; and

(b) an access dispute is notified under section 44S in relation to access to the same declared service; and

(c) the parties to the dispute are the same parties to the terminated arbitration;

then the Commission may have regard to any record made in the course of the terminated arbitration if it considers it appropriate to do so.

*Notices are not legislative instruments*

(6) A notice given under subsection (1) or (2) is not a legislative instrument.

**44ZZCC Overlap between determinations and access undertakings**

If, at a particular time:

(a) a final determination is in operation in relation to a declared service; and

(b) an access undertaking is in operation in relation to the service;

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the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with a matter or matters relating to access to the service that are not dealt with in the determination.

**44ZZCD Overlap between registered contracts and access undertakings**

If, at a particular time:

(a) a contract is registered under Division 4 in relation to a declared service; and

(b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with a matter or matters relating to access to the service that are not dealt with in the contract.

**Division 7—Enforcement and remedies**

**44ZZD Enforcement of determinations**

(1) If the Federal Court is satisfied, on the application of a party to a determination, that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination, the Court may make all or any of the following orders:

(a) an order granting an injunction on such terms as the Court thinks appropriate:

(i) restraining the other party from engaging in the conduct; or

(ii) if the conduct involves refusing or failing to do something—requiring the other party to do that thing;

(b) an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;

(c) any other order that the Court thinks appropriate.

(2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.

(3) A reference in this section to a person involved in the contravention is a reference to a person who has:

(a) aided, abetted, counselled or procured the contravention; or

(b) induced the contravention, whether through threats or promises or otherwise; or

(c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or

(d) conspired with others to effect the contravention.

**44ZZE Enforcement of prohibition on hindering access**

(1) If the Federal Court is satisfied, on the application of any person, that another person (the ***obstructor***) has engaged, is engaging, or is proposing to engage in conduct

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constituting a contravention of section 44ZZ, the Court may make all or any of the following orders:

(a) an order granting an injunction on such terms as the Court thinks appropriate:

(i) restraining the obstructor from engaging in the conduct; or

(ii) if the conduct involves refusing or failing to do something—requiring the obstructor to do that thing;

(b) an order directing the obstructor to compensate a person who has suffered loss or damage as a result of the contravention;

(c) any other order that the Court thinks appropriate.

(2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.

(3) The grounds on which the Court may decide not to make an order under this section include the ground that Divisions 2 and 3 provide a more appropriate way of dealing with the issue of the applicant's access to the service concerned.

(4) A reference in this section to a person involved in the contravention is a reference to a person who has:

(a) aided, abetted, counselled or procured the contravention; or

(b) induced the contravention, whether through threats or promises or otherwise; or

(c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or

(d) conspired with others to effect the contravention.

**44ZZF Consent injunctions**

On an application for an injunction under section 44ZZD or 44ZZE, the Federal Court may grant an injunction by consent of all of the parties to the proceedings, whether or not the Court is satisfied that the section applies.

**44ZZG Interim injunctions**

(1) The Federal Court may grant an interim injunction pending determination of an application under section 44ZZD or 44ZZE.

(2) If the Commission makes an application under section 44ZZE to the Federal Court for an injunction, the Court must not require the Commission or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

**44ZZH Factors relevant to granting a restraining injunction**

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE restraining a person from engaging in conduct may be exercised whether or not:

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(a) it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or

(b) the person has previously engaged in conduct of that kind; or

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

**44ZZI Factors relevant to granting a mandatory injunction**

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE requiring a person to do a thing may be exercised whether or not:

(a) it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing; or

(b) the person has previously refused or failed to do that thing; or

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

**44ZZJ Enforcement of access undertakings**

(1) If the Commission thinks that the provider of an access undertaking in operation under Division 6 has breached any of its terms, the Commission may apply to the Federal Court for an order under subsection (2).

(2) If the Federal Court is satisfied that the provider has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the provider to comply with that term of the undertaking;

(b) an order directing the provider to compensate any other person who has suffered loss or damage as a result of the breach;

(c) any other order that the Court thinks appropriate.

**44ZZK Discharge or variation of injunction or other order**

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

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**Division 8—Miscellaneous**

**44ZZL Register of determinations**

The Commission must maintain a public register that specifies the following information for each determination:

(a) the names of the parties to the determination;

(b) the service to which the determination relates;

(c) the date on which the determination was made.

**44ZZM Commonwealth consent to conferral of functions etc. on the Commission or Tribunal by State or Territory laws**

(1) A State or Territory access regime law may confer functions or powers, or impose duties, on the Commission or Tribunal.

Note: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

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

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

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

(3) The Commission or Tribunal cannot perform a duty or function, or exercise a power, under a State or Territory access regime law unless the conferral of the function or power, or the imposition of the duty, is in accordance with an agreement between the Commonwealth and the State or Territory concerned.

**44ZZMA How duty is imposed**

*Application*

(1) This section applies if a State or Territory access regime law purports to impose a duty on the Commission or Tribunal.

Note 1: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

Note 2: Section 320 of the South Australian Energy Retail Legislation, as it applies as a law of a State or Territory, deals with the case where a duty purportedly imposed on a Commonwealth body under that applied law cannot be imposed by the State or Territory or the Commonwealth due to constitutional doctrines restricting such duties.

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*State or Territory legislative power sufficient to support duty*

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

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

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

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

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

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

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

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

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

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

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

**44ZZMB When a law of a State or Territory imposes a duty**

For the purposes of sections 44ZZM and 44ZZMA, a State or Territory access regime law ***imposes a duty*** on the Commission or Tribunal if:

(a) the law confers a function or power on the Commission or Tribunal; and

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

**44ZZN Compensation for acquisition of property**

(1) If:

(a) a determination would result in an acquisition of property; and

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(b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated;

the Commonwealth must pay that person:

(c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or

(d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.

(2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:

(a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;

(b) compensation awarded under a determination.

(3) In this section, ***acquisition of property*** has the same meaning as in paragraph 51(xxxi) of the Constitution.

**44ZZNA Operation of Parts IV and VII not affected by this Part**

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

**44ZZO Conduct by directors, servants or agents**

(1) If, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and

(b) that the director, servant or agent had the state of mind.

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

(a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

is taken for the purposes of this Part to have been engaged in also by the body corporate, unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

(3) If, in a proceeding under this Part in respect of conduct engaged in by an individual, it is necessary to establish the state of mind of the individual, it is sufficient to show:

(a) that the conduct was engaged in by a servant or agent of the individual within the scope of his or her actual or apparent authority; and

(b) that the servant or agent had the relevant state of mind.

(4) Conduct engaged in on behalf of an individual:

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(a) by a servant or agent of the individual within the scope of the actual or apparent authority of the servant or agent; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the individual, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;

is taken, for the purposes of this Part, to have been engaged in also by that individual, unless that individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

(5) If:

(a) an individual is convicted of an offence; and

(b) the individual would not have been convicted of the offence if subsections (3) and (4) had not been enacted;

the individual is not liable to be punished by imprisonment for that offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

**44ZZOAAA Information to be given to Tribunal**

*Tribunal to notify decision maker*

(1) If an application for review of a decision (however described) is made under this Part, the Tribunal must notify the decision maker of the application.

(2) If the application is made under section 44K, 44L, 44LJ, 44LK or 44O, the Tribunal must also notify the Council of the application.

*Decision maker to give material to Tribunal*

(3) The decision maker must give the following information to the Tribunal within the period specified by the Tribunal:

(a) if the decision is taken to have been made because of the operation of subsection 44H(9), 44J(7), 44LG(6), 44LI(7), 44N(4) , 44NB(3A) or 44NBC(5)—all of the information that the Council took into account in connection with making the recommendation to which the decision under review relates;

(b) if the decision is taken to have been made because of the operation of subsection 44PD(6), 44XA(6) or 44ZZBC(6)—any information or documents given to the Commission in connection with the decision to which the review relates, other than information or documents in relation to which the Commission could not have regard because of subparagraph 44PE(6)(c)(iii) or 44ZZBD(6)(c)(iii);

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(c) otherwise—all of the information that the decision maker took into account in connection with the making of the decision to which the review relates.

*Tribunal may request further information*

(4) The Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part.

(5) A request under subsection (4) must be made by written notice given to a person specifying the information requested and the period within which the information must be given to the Tribunal.

(6) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and

(iii) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

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

(7) Without limiting the information that may be given in accordance with the notice, information may include information that could not have reasonably been made available to the decision maker at the time the decision under review was made.

*Certain material before the Tribunal not to be disclosed*

(8) The Tribunal may, on the application of a person, prohibit or restrict the disclosure of the contents of a document or other information given to the Tribunal under this section if the Tribunal is satisfied that it is desirable to do so because of the confidential nature of the document or other information, or for any other reason.

(9) In this section:

***decision maker***, in relation to an application for review under this Part, means:

(a) if the application was made under section 44K, 44L, 44LJ or 44LK—the designated Minister; or

(b) if the application was made under section 44O—the Commonwealth Minister; or

(c) if the application was made under section 44PG, 44PH, 44ZP, 44ZX, or 44ZZBF—the Commission.

**44ZZOAA Tribunal only to consider particular material**

For the purposes of a review under this Part, the Tribunal:

(a) subject to paragraph (b), must have regard to:

(i) information that was given to the Tribunal under subsection 44ZZOAAA(3); and

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(ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and

(iii) any thing done as mentioned in subsection 44K(6), 44L(5), 44LJ(5), 44LK(5), 44O(5), 44PG(5), 44PH(5), 44ZP(5), 44ZX(5) or 44ZZBF(5); and

(iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) within the specified period; and

(b) may disregard:

(i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and

(ii) any information or report of the kind specified in a notice under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) that is given to the Tribunal after the specified period has ended.

**44ZZOA Time limit for Tribunal decisions**

(1) The Tribunal must make a decision on a review under this Part within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application for review is received, unless the consideration period is extended under subsection (7).

*Stopping the clock*

(3) In working out the expected period in relation to an application for review, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

**Stopping the clock**

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

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| **Stopping the clock** | | | |
|---|---|---|---|
| **Item** | **Column 1**<br>**Situation** | **Column 2**<br>**Start day** | **Column 3**<br>**End day** |
| 3 | A notice is given under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) requiring information or a report to be given in relation to the review | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information or the report |

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

*Stopping the clock by agreement*

(5) The following may agree in writing that a specified period is to be disregarded in working out the expected period:
  (a) the Tribunal;
  (b) the person who applied for review;
  (c) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council;
  (d) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission;
  (e) any other person who has been made a party to the proceedings for review by the Tribunal.

(6) The Tribunal must publish, by electronic or other means, the agreement.

*Extension of time for making decision*

(7) If the Tribunal is unable to make a decision on an application for review within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:
  (a) specify when the Tribunal must now make its decision on the application for review; and
  (b) include a statement explaining why the Tribunal has been unable to make a decision on the review within the consideration period.

(9) The Tribunal must give a copy of the notice to:
  (a) the person who applied for review; and
  (b) if the application for review is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and

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(c) if the application for review is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and

(d) any other person who has been made a party to the proceedings for review by the Tribunal.

*Publication*

(10) If the Tribunal extends the consideration period under subsection (7), it must publish a notice in a national newspaper:

(a) stating that it has done so; and

(b) specifying the day by which it must now make a decision on the application for review.

*Failure to comply with time limit does not affect validity*

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

**44ZZP Regulations about review by the Tribunal**

(1) The regulations may make provision about the following matters in relation to the functions of the Tribunal under this Part:

(a) the constitution of the Tribunal;

(b) the arrangement of the business of the Tribunal;

(c) the disclosure of interests by members of the Tribunal;

(d) determining questions before the Tribunal and questions that arise during a review;

(e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report).

(2) Regulations made for the purposes of subsection (1) do not apply in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law.

Note: See section 44ZZR.

**44ZZQ Regulations about fees for inspection etc. of registers**

The regulations may make provision about the inspection of registers maintained under this Part (including provision about fees).

**44ZZR Procedure of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law**

(1) Sections 103, 105, 106, 107, 108 and 110 of this Act apply to the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law.

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(2) The regulations may make provision about the following matters in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law:

(a) the constitution of the Tribunal;

(b) the arrangement of the business of the Tribunal;

(c) the disclosure of interests by members of the Tribunal;

(d) determining questions before the Tribunal and questions that arise during a review;

(e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report);

(f) the fees and expenses of witnesses in proceedings before the Tribunal.

(3) Subsection (1), and regulations made for the purposes of subsection (2), have no effect to the extent (if any) to which they are inconsistent with the State/Territory energy law, or the designated Commonwealth energy law, concerned.

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**Part IV—Restrictive trade practices**

**Division 1—Cartel conduct**

**Subdivision A—Introduction**

**45AA Simplified outline**

The following is a simplified outline of this Division:

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

  by parties that are, or would otherwise be, in competition with each other.

**45AB Definitions**

In this Division:

***annual turnover***, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

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

(b) supplies that are input taxed; or

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

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

(e) supplies that are not connected with Australia.

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

***benefit*** includes any advantage and is not limited to property.

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***bid*** includes:

(a) tender; and

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

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

***obtaining*** includes:

(a) obtaining for another person; and

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

***party*** has a meaning affected by section 45AC.

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

**45AC Extended meaning of *party***

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

**45AD Cartel provisions**

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a ***cartel provision*** if:

(a) either of the following conditions is satisfied in relation to the provision:

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

(ii) the purpose condition set out in subsection (3); and

(b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

*Purpose/effect condition*

(2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:

(a) fixing, controlling or maintaining; or

(b) providing for the fixing, controlling or maintaining of;

the price for, or a discount, allowance, rebate or credit in relation to:

(c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

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

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

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

Note 2: ***Party*** has an extended meaning—see section 45AC.

*Purpose condition*

(3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:

(a) preventing, restricting or limiting:

(i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or

(ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or

(iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or

(iv) the acquisition, or likely acquisition, of goods or services from persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or

(b) allocating between any or all of the parties to the contract, arrangement or understanding:

(i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or

(ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or

(iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

(i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or

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(ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or

(iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or

(iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

(v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

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

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

Note 3: ***Party*** has an extended meaning—see section 45AC.

*Competition condition*

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

(c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services—the supply of those goods or services in trade or commerce; or

(d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or

(e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or likely re-supply, of goods or services—the supply of those goods or services in trade or commerce to that re-supplier; or

(f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods; or

(g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services in trade or commerce; or

(h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services in trade or commerce; or

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(i) if subparagraph (3)(a)(iv) applies in relation to preventing, restricting or limiting the acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or

(j) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services in trade or commerce; or

(k) if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services in trade or commerce.

Note 1: ***Party*** has an extended meaning—see section 45AC.

Note 2: ***Trade or commerce*** is defined in section 4 to mean trade or commerce within Australia or between Australia and places outside Australia.

*Immaterial whether identities of persons can be ascertained*

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

*Recommending prices etc.*

(6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:

(a) to have the purpose mentioned in subsection (2); or

(b) to have, or be likely to have, the effect mentioned in subsection (2);

by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

*Immaterial whether particular circumstances or particular conditions*

(7) It is immaterial whether:

(a) for the purposes of subsection (2), subparagraphs (3)(a)(iii) and (iv) and paragraphs (3)(b) and (c)—a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and

(b) for the purposes of subparagraph (3)(a)(i)—the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and

(c) for the purposes of subparagraph (3)(a)(ii)—the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

*Considering related provisions—purpose/effect condition*

(8) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:

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

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(b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose, or has or is likely to have that effect.

*Considering related provisions—purpose condition*

(9) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:

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

(b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose.

*Purpose/effect of a provision*

(10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

(a) the form of the provision; or

(b) the form of the contract, arrangement or understanding; or

(c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

*Purpose of a provision*

(11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:

(a) the form of the provision; or

(b) the form of the contract, arrangement or understanding; or

(c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

**45AE Meaning of expressions in other provisions of this Act**

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

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**Subdivision B—Offences etc.**

**45AF Making a contract etc. containing a cartel provision**

*Offence*

(1) A corporation commits an offence if:
   (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
   (b) the contract, arrangement or understanding contains a cartel provision.

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

(2) The fault element for paragraph (1)(b) is knowledge or belief.

*Penalty*

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

*Indictable offence*

(4) An offence against subsection (1) is an indictable offence.

**45AG Giving effect to a cartel provision**

*Offence*

(1) A corporation commits an offence if:
   (a) a contract, arrangement or understanding contains a cartel provision; and
   (b) the corporation gives effect to the cartel provision.

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

(2) The fault element for paragraph (1)(a) is knowledge or belief.

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*Penalty*

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

*Pre-commencement contracts etc.*

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

*Indictable offence*

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

**45AH Determining guilt**

(1) A corporation may be found guilty of an offence against section 45AF or 45AG even if:
  (a) each other party to the contract, arrangement or understanding is a person who is not criminally responsible; or
  (b) subject to subsection (2), all other parties to the contract, arrangement or understanding have been acquitted of the offence.

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

(2) A corporation cannot be found guilty of an offence against section 45AF or 45AG if:
  (a) all other parties to the contract, arrangement or understanding have been acquitted of such an offence; and
  (b) a finding of guilt would be inconsistent with their acquittal.

**45AI Court may make related civil orders**

If a prosecution against a person for an offence against section 45AF or 45AG is being, or has been, heard by a court, the court may:
  (a) grant an injunction under section 80 against the person in relation to:
    (i) the conduct that constitutes, or is alleged to constitute, the offence; or
    (ii) other conduct of that kind; or
  (b) make an order under section 86C, 86D, 86E or 87 in relation to the offence.

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**Subdivision C—Civil penalty provisions**

**45AJ Making a contract etc. containing a cartel provision**

A corporation contravenes this section if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

Note: For enforcement, see Part VI.

**45AK Giving effect to a cartel provision**

(1) A corporation contravenes this section if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

Note: For enforcement, see Part VI.

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

**Subdivision D—Exceptions**

**45AL Conduct notified**

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply to a corporation in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:

(a) the cartel provision:

(i) has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); or

(ii) has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); and

(b) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) setting out particulars of the contract, arrangement or understanding; and

(c) the notice is in force under section 93AD.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

**45AM Cartel provision subject to grant of authorisation**

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract that contains a cartel provision if:

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(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorisation to give effect to the provision; and

(b) the corporation applies for the grant of such an authorisation within 14 days after the contract is made.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ bears an evidential burden in relation to that matter.

**45AN Contracts, arrangements or understandings between related bodies corporate**

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding if the only parties to the contract, arrangement or understanding are bodies corporate that are related to each other.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

**45AO Joint ventures—prosecution**

(1) Sections 45AF and 45AG do not apply in relation to a contract, arrangement or understanding containing a cartel provision if:

(a) the cartel provision is

(i) for the purposes of a joint venture; or

(ii) reasonably necessary for undertaking a joint venture; and

(b) the joint venture is for any one or more of the following:

(i) production of goods;

(ii) supply of goods or services;

(iii) acquisition of goods or services; and

(c) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and

(d) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:

(i) their joint control; or

(ii) their ownership of shares in the capital;

of that body corporate.

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

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

*Notice to prosecutor*

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

(a) a written notice setting out:

(i) the facts on which the person proposes to rely for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1); and

(ii) the names and address of any witnesses whom the person proposes to call for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1); and

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

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

(a) exempt the person from compliance with subsection (2); or

(b) extend the time within which the person is required to comply with subsection (2).

(4) For the purposes of paragraph (2)(b), a ***certified copy*** of a document is a copy of the document certified to be a true copy by:

(a) a Justice of the Peace; or

(b) a commissioner for taking affidavits.

**45AP Joint ventures—civil penalty proceedings**

(1) Sections 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision if:

(a) the cartel provision is

(i) for the purposes of a joint venture; or

(ii) reasonably necessary for undertaking a joint venture; and

(b) the joint venture is for any one or more of the following:

(i) production of goods;

(ii) supply of goods or services;

(iii) acquisition of goods or services; and

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(c) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and

(d) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:

(i) their joint control; or

(ii) their ownership of shares in the capital;

of that body corporate.

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

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

**45AQ Resale price maintenance**

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 but for the operation of subsection 88; or

(c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

**45AR Restrictions on supplies and acquisitions**

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision to the extent that the cartel provision:

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(a) imposes, on a party to the contract, arrangement or understanding (the ***acquirer***) acquiring goods or services from another party to the contract, arrangement or understanding, an obligation that relates to:

(i) the acquisition by the acquirer of the goods or services;

(ii) the acquisition by the acquirer, from any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or

(iii) the supply by the acquirer of the goods or services or of other goods or services that are substitutable for, or otherwise competitive with, the goods or services; or

(b) imposes, on a party to the contract, arrangement or understanding (the ***supplier***) supplying goods or services to another party to the contract, arrangement or understanding, an obligation that relates to:

(i) the supply by the supplier of the goods or services; or

(ii) the supply by the supplier, to any person, of other goods or services that are substitutable for, or otherwise competitive with, the goods or services.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the Criminal Code and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

(3) This section does not affect the operation of section 45 or 47.

**45AS Dual listed company arrangement**

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as:
   (a) the contract, arrangement or understanding is a dual listed company arrangement; and
   (b) the making of the contract, arrangement or understanding would, or would apart from subsection 88, contravene section 49.

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

(2) Sections 45AG or 45AK do not apply in relation to the giving effect to a cartel provision, in so far as:
   (a) the cartel provision is a provision of a dual listed company arrangement; and
   (b) the giving effect to the cartel provision would, or would apart from subsection 88(8B), contravene section 49.

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

(3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

**45AT Acquisition of shares or assets**

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of:

(a) any shares in the capital of a body corporate; or

(b) any assets of a person.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

**45AU Collective acquisition of goods or services by the parties to a contract, arrangement or understanding**

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:

(a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in subsection 45AD(2); and

(b) either:

(i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or

(ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

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**Division 2—Other provisions**

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

(1) A corporation must not:

(a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

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

(3) For the purposes of this section, ***competition*** means:

(a) in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding—competition in any market in which:

(i) a corporation that is a party to the contract, arrangement or understanding, or would be a party to the proposed contract, arrangement or understanding; or

(ii) any body corporate related to such a corporation;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services; or

(b) in relation to a concerted practice—competition in any market in which:

(i) a corporation that is a party to the practice; or

(ii) any body corporate related to such a corporation;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire or be likely to supply or acquire, goods or services.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

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(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

(5A) The making of a contract, arrangement or understanding does not constitute a contravention of this section because the contract, arrangement or understanding contains a provision the giving effect to which would, or would apart from subsection 47(10) or 20 section 88 or 93, constitute a contravention of section 47.

(5) This section does not apply to or 1 in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or to or in relation to a concerted practice, in so far as the provision or practice relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 if subsection 48(2) did not apply; or

(c) conduct that would contravene section 48 if it were not authorised under section 88; or

(d) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) This section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding, or to or in relation to engaging in a concerted practice, by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or section 88 or 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under section 88 is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6A) The following conduct:

(a) the making of a dual listed company arrangement;

(b) the giving effect to a provision of a dual listed company arrangement;

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does not contravene this section if the conduct would, or would apart from section 88, contravene section 49.

(7) This section does not apply to or in relation to:

(a) a contract, arrangement or understanding to the extent that the contract, arrangement or understanding directly or indirectly provides for; or

(b) a proposed contract, arrangement or understanding to the extent that the proposed contract, arrangement or understanding would directly or indirectly provide for; or

(c) a concerted practice to the extent that the practice directly or indirectly involves;

the acquisition of any shares in the capital of a body corporate or 6 any assets of a person.

(8) This section does not apply to or in relation to: 8

(a) a contract, arrangement or understanding, or 9

(b) a proposed contract, arrangement or understanding; or 10

(c) a concerted practice; 11

the only parties to which are or would be bodies corporate that are 12 related to each other.

(8A) Subsection (1) does not apply to a corporation engaging in conduct described in that subsection if:

(a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and

(b) the notice is in force under section 93AD.

(9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (1) of this section if:

(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and

(b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (1).

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

(1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

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(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

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

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

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

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

(3) Subsection (1) applies if the fourth person is a corporation.

(4) Subsection (1) also applies if:

(a) the third person is a corporation and the fourth person is not a corporation; and

(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

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

(1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

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

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

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

(3) Subsection (1) applies if:

(a) the third person or the fourth person is a corporation, or both of them are corporations; and

(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

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**45DB Boycotts affecting trade or commerce**

(1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

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

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

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

**45DC Involvement and liability of employee organisations**

*Certain organisations taken to be acting in concert*

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

(a) to engage in that conduct in concert with the participants; and

(b) to have engaged in that conduct for the purposes for which the participants engaged in it.

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

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

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

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

*Taking proceedings if organisation is a body corporate*

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

*Taking proceedings if organisation is not a body corporate*

(5) If the organisation is not a body corporate:

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(a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all the persons who were members of the organisation at the time when the conduct was engaged in; and

(b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and

(c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and

(d) except as provided by paragraph (a), a proceeding in respect of the conduct must not be brought under section 77 or 82 against any of the members or officers of the organisation; and

(e) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in paragraph (a) that was brought under section 77 or 82, process may be issued and executed against the following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:

(i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or however otherwise held;

(ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or however otherwise held;

(iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity as members, whether vested in trustees or however otherwise held; and

(f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

**45DD Situations in which boycotts permitted**

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

(1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

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

(2) If:

(a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:

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(i) an organisation of employees; or

(ii) an officer of an organisation of employees; and

(b) the conduct is only engaged in by the persons covered by paragraph (a); and

(c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a);

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

*Dominant purpose of conduct relates to environmental protection or consumer protection*

(3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and

(b) engaging in the conduct is not industrial action.

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

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

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

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

(a) it is not a "person" and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but

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

*Meaning of **industrial action**—basic definition*

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

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:

(i) the terms and conditions of the work are prescribed, wholly or partly, by a workplace instrument or an order of an industrial body; or

(ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or

(b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by a workplace instrument or by an order of an industrial body; or

(c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or

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(d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

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

*Meaning of **industrial action**—further clarification*

(5) For the purposes of subsection (3):

(a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and

(b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

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

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

*Defences to contravention of subsection 45DB(1)*

(7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:

(a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or

(b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

*Each person to prove defence*

(8) If:

(a) a person engages in conduct in concert with another person; and

(b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct;

in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

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

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

*Situations to which section applies*

(1) This section applies in the following situations:

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(a) a ***supply situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to supply goods or services to another person (the ***second person***); or

(b) an ***acquisition situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to acquire goods or services from another person (the ***second person***).

Despite paragraphs (a) and (b), this section does not apply unless the first or second person is a corporation or both of them are corporations.

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

*Prohibition in a supply situation*

(2) In a supply situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or

(b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:

(i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

*Prohibition in an acquisition situation*

(3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or

(b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:

(i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

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

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

*Meaning of **accustomed to supply***

(5) In this section, a reference to a person who has been ***accustomed to supply*** goods or services to a second person includes (subject to subsection (6)):

(a) a regular supplier of such goods or services to the second person; or

(b) the latest supplier of such goods or services to the second person; or

(c) a person who, at any time during the immediately preceding 3 months, supplied such goods or services to the second person.

*Exception to subsection (5)*

(6) If:

(a) goods or services have been supplied by a person to a second person under a contract between them that required the first person to supply such goods or services over a period; and

(b) the period has ended; and

(c) after the end of the period, the second person has been supplied with such goods or services by another person and has not also been supplied with such goods or services by the first person;

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

*Meaning of **accustomed to acquire***

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

(a) a regular acquirer of such goods or services from the second person; or

(b) a person who, when last acquiring such goods or services, acquired them from the second person; or

(c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

*Exception to subsection (7)*

(8) If:

(a) goods or services have been acquired by a person from a second person under a contract between them that required the first person to acquire such goods or services over a period; and

(b) the period has ended; and

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(c) after the end of the period, the second person has refused to supply such goods or services to the first person;

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

Note: Conduct that would otherwise contravene this section can be authorised under section 88.

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

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

(a) contravened subsection 45E(2) or (3); or

(b) would have contravened subsection 45E(2) or (3) if:

(i) section 45E had been in force when the contract or arrangement was made, or the understanding was arrived at; and

(ii) the words "is in writing and" and "written" were not included in subsection 45E(4).

Note: Conduct that would otherwise contravene this section can be authorised under section 88.

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

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

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**46 Misuse of market power**

(1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.

(2) Without limiting the matters to which regard may be had in determining for the purposes of subsection (1) whether conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, regard must be had to the extent to which:

(a) the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competiveness in that market; and

(b) the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring the potential for competitive conduct or new entry into that market.

(3) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:

(a) a body corporate that is related to that corporation has, or 2 or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or

(b) that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in that market.

(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market:

(a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

(i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and

(b) regard may be had to the power the body corporate or bodies corporate has or have in that market that results from:

(i) any contracts, arrangements or understandings that the body corporate or bodies corporate has or have with another party or other parties; or

(ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

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(5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control that market; or

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

(8) In this section:

(a) a reference to power is a reference to market power; and

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

**46A Misuse of market power—corporation with substantial degree of power in trans-Tasman market**

(1) In this section:

***conduct***, in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market.

***impact market*** means a market in Australia that is not a market exclusively for services.

***market power***, in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market.

***trans-Tasman market*** means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

(2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or

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(b) preventing the entry of a person into an impact market; or

(c) deterring or preventing a person from engaging in competitive conduct in an impact market.

(2A) For the purposes of subsection (2):

(a) the reference in paragraph (2)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

(b) the reference in paragraphs (2)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(3) If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of market power in a trans-Tasman market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to the corporation, together have a substantial degree of market power in a trans-Tasman market;

the corporation is taken, for the purposes of this section, to have a substantial degree of market power in the trans-Tasman market.

(4) In determining for the purposes of this section the degree of market power that a body corporate or bodies corporate has or have in a trans-Tasman market, the Federal Court is to have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate, or of any of those bodies corporate, in the trans-Tasman market; or

(b) persons to whom or from whom the body corporate, or any of those bodies corporate, supplies or acquires goods or services in the trans-Tasman market.

(5) Without extending by implication the meaning of subsection (2), a corporation is not taken to contravene that subsection merely because it acquires plant or equipment.

(6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 47, 49 and 50, because an authorisation is in force or because of the operation of subsection 45(8A) or section 93.

(7) Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its market power for a purpose referred to in subsection (2) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

(8) It is the intention of the Parliament that this section, and the provisions of Parts VI and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the Commonwealth and authorities of the Commonwealth.

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(9) Subsection (8) has effect despite section 9 of the *Foreign States Immunities Act 1985*.

**46B No immunity from jurisdiction in relation to certain New Zealand laws**

(1) It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 36A, 98H and 99A of the Commerce Act 1986 of New Zealand.

(2) This section applies in and outside Australia.

**47 Exclusive dealing**

(1) Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.

(2) A corporation engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;

on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:

(d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) will not, or will not except to a limited extent, re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) in the case where the corporation supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services to a person at a particular price; or

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(c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a person;

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate:

(d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(4) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) acquires, or offers to acquire, goods or services; or

(b) acquires, or offers to acquire, goods or services at a particular price;

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(5) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to acquire goods or services from a person; or

(b) to acquire goods or services at a particular price from a person;

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has supplied, or has not agreed not to supply, goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

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(6) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;

on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(7) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services at a particular price to a person; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a person;

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(8) A corporation also engages in the practice of exclusive dealing if the corporation grants or renews, or makes it known that it will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

(a) will not, or will not except to a limited extent:

(i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

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(9) A corporation also engages in the practice of exclusive dealing if the corporation refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

(a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(c) has supplied goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(10) Subsection (1) does not apply to the practice of exclusive dealing by a corporation unless:

(a) the engaging by the corporation in the conduct that constitutes the practice of exclusive dealing has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

(11) Subsections (8) and (9) do not apply with respect to:

(a) conduct engaged in:

(i) by a registered charity; and

(ii) for or in accordance with the purposes or objects of that registered charity; or

(b) conduct engaged in in pursuance of a legally enforceable requirement made by a registered charity, being a requirement made for or in accordance with the purposes or objects of that registered charity.

(12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.

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(13) In this section:

(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;

(b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and

(c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

**48 Resale price maintenance**

(1) A corporation or other person shall not engage in the practice of resale price maintenance.

(2) Subsection (1) does not apply to a corporation or other person engaging in conduct that constitutes the practice of resale price maintenance if:

(a) the corporation or other person has given the Commission a notice under subsection 93(1) describing the conduct; and

(b) the notice is in force under section 93.

**49 Dual listed company arrangements that affect competition**

(1) A corporation must not:

(a) make a dual listed company arrangement if a provision of the proposed arrangement has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a dual listed company arrangement if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition.

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Note: Conduct that would otherwise contravene this section can be authorised under section 88.

*Exception*

(2) The making by a corporation of a dual listed company arrangement that contains a provision that has the purpose, or would have or be likely to have the effect, of substantially lessening competition does not contravene this section if:

(a) the arrangement is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorisation to give effect to the provision; and

(b) the corporation applies for the grant of such an authorisation within 14 days after the arrangement is made.

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

*Meaning of **competition***

(3) For the purposes of this section, ***competition***, in relation to a provision of a dual listed company arrangement or of a proposed dual listed company arrangement, means competition in any market in which:

(a) a corporation that is a party to the arrangement or would be a party to the proposed arrangement; or

(b) any body corporate related to such a corporation;

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

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a dual listed company arrangement or of a proposed dual listed company arrangement is taken to have, or to be likely to have, the effect of substantially lessening competition if that provision and any one or more of the following provisions:

(a) the other provisions of that arrangement or proposed arrangement;

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

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

(1) A corporation must not directly or indirectly:

(a) acquire shares in the capital of a body corporate; or

(b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Note: The corporation will not be prevented from making the acquisition if the corporation is granted an authorisation for the acquisition under section 88.

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(2) A person must not directly or indirectly:

(a) acquire shares in the capital of a corporation; or

(b) acquire any assets of a corporation;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

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

(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

(4) Where:

(a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;

(b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorization to acquire the shares or assets; and

(c) the person applied for the grant of such a clearance or an authorization before the expiration of 14 days after the contract was entered into;

the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:

(d) the application for the clearance or authorization is disposed of; or

(e) the contract ceases to be subject to the condition;

whichever first happens.

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

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(6) In this section:

***market*** means a market for goods or services in:

(a) Australia; or

(b) a State; or

(c) a Territory; or

(d) a region of Australia.

**50A Acquisitions that occur outside Australia**

(1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the ***first controlling interest***) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest (the ***second controlling interest***) in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:

(a) the person's obtaining the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and

(b) the person's obtaining the second controlling interest would not, in all the circumstances, result, or be likely to result, in such a benefit to the public that the obtaining should be disregarded for the purposes of this section;

make a declaration accordingly.

(1A) Without limiting the matters that may be taken into account in determining whether the obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the matters mentioned in subsection 50(3) must be taken into account for that purpose.

(1B) In determining whether the obtaining of the second controlling interest would result, or be likely to result, in such a benefit to the public that it should be disregarded for the purposes of this section:

(a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(2) Where an application under subsection (1) is made:

(a) the Tribunal shall give to:

(i) each corporation in relation to which the application relates; and

(ii) the Minister and the Commission;

a notice in writing stating that the application has been made; and

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(b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person are entitled to appear, or be represented, at the proceedings following the application.

(3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.

(4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under subsection (1).

(5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).

(6) After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market to which the declaration relates.

(7) Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.

(8) For the purposes of this section:

(a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and

(b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate:

(i) controls the composition of the board of directors of another body corporate;

(ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or

(iii) holds shares in the capital of another body corporate;

the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.

(9) In this section:

***market*** means a substantial market for goods or services in Australia, in a State or in a Territory.

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**51 Exceptions**

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

(a) anything specified in, and specifically authorised by:

(i) an Act (not including an Act relating to patents, trade marks, designs or copyrights); or

(ii) regulations made under such an Act;

(b) anything done in a State, if the thing is specified in, and specifically authorised by:

(i) an Act passed by the Parliament of that State; or

(ii) regulations made under such an Act;

(c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:

(i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988*; or

(ii) regulations made under such an enactment;

(d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:

(i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or

(ii) regulations made under such an enactment;

(e) anything done in another Territory, if the thing is specified in, and specifically authorised by:

(i) an Ordinance of that Territory; or

(ii) regulations made under such an Ordinance.

(1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:

(a) a licence or other instrument issued or made under the law specifies one or both of the following:

(i) the person authorised to engage in the conduct;

(ii) the place where the conduct is to occur; and

(b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).

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

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

(1C) The operation of subsection (1) is subject to the following limitations:

(a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;

(b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;

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(c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;

(d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations:

(i) referred to in the subparagraph concerned; and

(ii) that came into operation more than 2 years before the particular thing happened;

(e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:

(i) at the time of the alleged contravention referred to in subsection (1) the State or Territory was a fully-participating jurisdiction and a party to the Competition Principles Agreement; or

(ii) all of the following conditions are met:

(A) the Minister published a notice in the *Gazette* under subsection 150K(1) in relation to the State or Territory, or the State or Territory ceased to be a party to the Competition Principles Agreement, within 12 months before the alleged contravention referred to in subsection (1);

(B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the Minister published the notice or the State or Territory ceased to be a party;

(C) the law authorising the thing was in force immediately before the Minister published the notice or the State or Territory ceased to be a party;

(f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things are prescribed by regulations made under this Act for the purposes of this paragraph.

(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia or by a prescribed association or body;

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(d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he or she is, or after he or she ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business—to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

(2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

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

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

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

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

to the extent that the condition relates to:

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

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

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

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

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

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

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

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

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

(5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

**51AAA Concurrent operation of State and Territory laws**

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.

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**Part VI—Enforcement and remedies**

**75B Interpretation**

(1) A reference in this Part to a person involved in a contravention of a provision of Part IV or IVB, or of section 55B, 60C or 60K, shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

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

(a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;

(b) a reference to the Federal Court is a reference to the Federal Court of Australia; and

(c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

**76 Pecuniary penalties**

(1) If the Court is satisfied that a person:

(a) has contravened any of the following provisions:

(i) a provision of Part IV (other than section 45AF or 45AG);

(ia) section 55B;

(ii) section 60C;

(iii) section 95AZN;

(iv) a civil penalty provision of an industry code; or

(b) has attempted to contravene such a provision; or

(c) has aided, abetted, counselled or procured a person to contravene such a provision; or

(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

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Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (***Boycott conduct*** is defined in subsection 87AA(2).)

(1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

(aa) for each act or omission to which this section applies that relates to section 45AJ or 45AK—the greatest of the following:

(i) $10,000,000;

(ii) if the court can determine the total value of the benefits that have been obtained (within the meaning of Division 1 of Part IV) by one or more persons and that are reasonably attributable to the act or omission—3 times that total value;

(iii) if the Court cannot determine the total value of those benefits—10% of the annual turnover (within the meaning of Division 1 of Part IV) of the body corporate during the period (the ***turnover period***) of 12 months ending at the end of the month in which the act or omission occurred; and

(a) for each act or omission to which this section applies that relates to section 45E or 45EA—$750,000; and

(b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:

(i) $10,000,000;

(ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;

(iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the ***turnover period***) of 12 months ending at the end of the month in which the act or omission occurred; and

(ba) for each act or omission to which this section applies that relates to section 55B, 60C or 60K—6,471 penalty units; and

(ca) for each act or omission to which this section applies that relates to a civil penalty provision of an industry code—the amount set out in the civil penalty provision of the industry code; and

(d) for each other act or omission to which this section applies—$10,000,000.

Note: For ***annual turnover***, see subsection (5).

(1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:

(a) for each act or omission to which this section applies that relates to section 95AZN—$6,600; and

(aaa) for each act or omission to which this section applies that relates to a civil penalty provision of an industry code—the amount set out in the civil penalty provision of the industry code; and

(b) for each other act or omission to which this section applies—$500,000.

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(2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of, section 45D, 45DA, 45DB, 45E or 45EA.

(3) If conduct constitutes a contravention of two or more provisions of Part IV (other than section 45AF or 45AG), a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

(4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which 2 or more of the limits in paragraphs (1A)(aa), (a) and (b) apply is an amount up to the highest of those limits.

*Annual turnover*

(5) For the purposes of this section, the ***annual turnover*** of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than:

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

(b) supplies that are input taxed; or

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

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

(e) supplies that are not connected with Australia.

(6) Expressions used in subsection (5) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

**76B What happens if substantially the same conduct is a contravention of Part IV and an offence?**

(1) In this section:

***contravention***, in relation to a section or Part, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section or Part.

***pecuniary penalty order*** means an order under section 76 for the payment of a pecuniary penalty.

(2) The Court must not make a pecuniary penalty order against a person in relation to a contravention of Part IV if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

(3) Proceedings for a pecuniary penalty order against a person in relation to a contravention of Part IV are stayed if:

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(a) criminal proceedings are started or have already been started against the person for an offence; and

(b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.

The proceedings for the pecuniary penalty order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings are dismissed.

(4) Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of Part IV regardless of whether a pecuniary penalty order has been made against the person in respect of the contravention.

(5) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:

(a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of Part IV (whether or not the order was made); and

(b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

(6) In this section:

***offence*** means an offence against a law of the Commonwealth, a State or a Territory.

**77 Civil action for recovery of pecuniary penalties**

(1) The Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

**77A Indemnification of officers**

(1) A body corporate (the ***first body***), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:

(a) a civil liability;

(b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Penalty: 25 penalty units.

(2) For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

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*Definitions*

(3) In this section:

***civil liability*** means a liability to pay a pecuniary penalty under section 76 for a contravention of a provision of Part IV or Part V.

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

**77B Certain indemnities not authorised and certain documents void**

(1) Section 77A does not authorise anything that would otherwise be unlawful.

(2) Anything that purports to indemnify a person against a liability is void to the extent that it contravenes section 77A.

**77C Application of section 77A to a person other than a body corporate**

If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:

(a) convicted of an offence (the ***relevant offence***) against subsection 77A(1) of this Act; or

(b) convicted of an offence (the ***relevant offence***) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection 77A(1) of this Act;

the relevant offence is taken to be punishable on conviction by a fine not exceeding 5 penalty units.

**78 Criminal proceedings not to be brought for contraventions of Part IV**

Criminal proceedings do not lie against a person by reason only that the person:

(a) has contravened a provision of Part IV (other than section 45AF or 45AG); or

(b) has attempted to contravene such a provision;

(c) has aided, abetted, counselled or procured a person to contravene such a provision;

(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision.

**79 Offences against section 45AF or 45AG**

(1) A person who:

(aa) attempts to contravene; or

(a) aids, abets, counsels or procures a person to contravene; or

(b) induces, or attempts to induce, a person (whether by threats or promises or otherwise) to contravene; or

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(c) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or

(d) conspires with others to contravene;

a cartel offence provision is taken to have contravened that provision and is punishable:

(e) in a case where:

(i) the provision is a cartel offence provision; and

(ii) the person is not a body corporate;

by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both; or

(f) in any other case—accordingly.

(1AA) For the purposes of the application of subsection (1) to a case where:

(a) the provision is a cartel offence provision; and

(b) the person is a body corporate other than a corporation;

assume that each reference in paragraph 45AF(3)(c) or 45AG(3)(c) to a corporation were read as a reference to a body corporate.

(1AB) Subsections 11.1(2) to (6) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(aa) in the same way that they apply in relation to the offence of attempt under subsection 11.1(1) of the *Criminal Code*.

(1A) Subsections 11.2(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(a) in the same way that they apply in relation to subsection 11.2(1) of the *Criminal Code*.

(1B) Subsections 11.5(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(d) in the same way that they apply in relation to the offence of conspiracy under subsection 11.5(1) of the *Criminal Code*.

(5) Subsections 11.1(1), 11.2(1), 11.2A(1), and 11.4(1) of the *Criminal Code* do not apply in relation to an offence against a cartel offence provision.

(7) In this section:

***cartel offence provision*** means section 45AF or 45AG.

**79A Enforcement and recovery of certain fines**

(1) If:

(a) a fine has been imposed on a person for:

(i) an offence against section 45AF, 45AG, 154Q or 155; or

(ii) an offence against section 149.1 of the *Criminal Code* that relates to Part XID; and

(b) the person defaults in payment of the fine;

a Court may:

(c) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or

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(d) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

(2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

(3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

(a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and

(b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.

(4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:

(a) on payment of the fine; or

(b) if the fine is not paid—on full compliance with the order.

(5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* (including an order described in subsection 15A(1AA) of that Act) in respect of a fine shall be calculated at the rate of one day's imprisonment for each $25 of the amount of the fine that is from time to time unpaid.

(6) Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.

(7) Subject to subsection (8), where:

(a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and

(b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

(8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those

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periods, being whichever period would give the person the maximum benefit from the application of that subsection.

(9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).

(11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

**79B Preference must be given to compensation for victims**

If the Court considers that:

(a) it is appropriate to order a person (the ***defendant***):

(i) to pay a pecuniary penalty under section 76; or

(ii) to impose a fine under section 45AF or 45AG;

in respect of a contravention, or an involvement in a contravention, of this Act; and

(b) it is appropriate to order the defendant to pay compensation to a person who has suffered loss or damage in respect of the contravention or the involvement; and

(c) the defendant does not have sufficient financial resources to pay both the pecuniary penalty or fine and the compensation;

the Court must give preference to making an order for compensation.

**80 Injunctions**

(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV;

(ii) a provision of Division 2 or 5 of Part IVB;

(iia) section 55B;

(iii) section 60C;

(iv) section 60K; or

(b) attempting to contravene such a provision; or

(c) aiding, abetting, counselling or procuring a person to contravene such a provision; or

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the Court determines to be appropriate.

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Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (***Boycott conduct*** is defined in subsection 87AA(2).)

(1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

(1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50, 60C or 60K.

(1AAA) Subject to subsection (1B), a person other than the Minister or the Commission may not apply for an injunction on the ground of:

(a) a person's actual, attempted or proposed contravention of section 50A; or

(b) a person's actual or proposed involvement in a contravention of section 50A.

(1B) Where the Tribunal has, on the application of a person (in this subsection referred to as the ***applicant***) other than the Minister or the Commission, made a declaration under subsection 50A(1) in relation to the acquisition by a person of a controlling interest in a corporation, the applicant is entitled to make an application under subsection (1) for an injunction by reason that the corporation has contravened or attempted to contravene or is proposing to contravene subsection 50A(6) in relation to that declaration.

(2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

(3) The Court may rescind or vary an injunction granted under subsection (1) or (2).

(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

(a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;

(b) whether or not the person has previously refused or failed to do that act or thing; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

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(6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

(6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.

(7) Where:

(a) in a case to which subsection (6) does not apply the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and

(b) the Minister gives the undertaking;

the Court shall accept the undertaking by the Minister and shall not require a further undertaking from any other person.

(8) Subsection (7) does not apply in relation to an application for an injunction relating to Part IV.

(9) If the Director of Public Prosecutions makes an application to the Court for the grant of an injunction under this section in relation to:

(a) a person's contravention, or proposed contravention, of section 45AF or 45AG; or

(b) a person's involvement, or proposed involvement, in a contravention of section 45AF or 45AG;

the Court must not require the Director of Public Prosecutions or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

**80A Price exploitation in relation to the carbon tax repeal—orders limiting prices or requiring refunds of money**

(1) If, on the application of the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of section 60C, the Court may make either or both of the following orders:

(a) an order requiring that person, or a person involved in the contravention, not to make a regulated supply of a kind specified in the order for a price in excess of the price specified in the order while the order remains in force;

(b) an order requiring that person, or a person involved in the contravention, to refund money to a person specified in the order.

Note: Section 60C is about price exploitation in relation to the carbon tax repeal.

(2) This section does not limit section 80.

(3) In this section:

***price*** has the same meaning as in Part V.

***regulated supply*** has the same meaning as in Part V.

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**80AB Stay of injunctions**

(1) The Court may stay the operation of an injunction granted under section 80 if:

(a) the injunction is in respect of conduct that constitutes or would constitute a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA or an associated contravention; and

(b) there is a proceeding in respect of a dispute relating to the conduct pending before a court, tribunal or authority of a State or Territory under a prescribed provision of a law of the State or Territory; and

(c) the conduct relates to the supply of goods or services to, or the acquisition of goods or services from, a person who is or becomes a party to the proceeding referred to in paragraph (b); and

(d) any of the following has applied for the stay:

(i) a Minister of the Commonwealth;

(ii) if subparagraph (b)(ii) applies—a Minister of the State or Territory concerned;

(iii) a party to the proceeding for the injunction; and

(e) the Court considers that granting the stay:

(i) would be likely to facilitate the settlement of the dispute by conciliation; and

(ii) would, in all the circumstances, be just.

(2) An order staying the operation of the injunction may be expressed to have effect for a specified period and may be varied or rescinded by the Court at any time.

(3) If the proceeding referred to in paragraph (1)(b) is terminated because the State or Territory court, tribunal or authority has settled the dispute to which the conduct relates by conciliation, the Court must not make any order in relation to the costs of the proceedings in respect of the granting of the injunction or in relation to the costs of any proceedings for the rescission of the injunction.

(4) Nothing in this section affects other powers of the Court.

(5) In this section:

***associated contravention*** means:

(a) attempting to contravene subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or

(b) aiding, abetting, counselling or procuring a person to contravene any of those provisions; or

(c) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene any of those provisions; or

(d) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of any of those provisions; or

(e) conspiring with others to contravene any of those provisions.

***injunction*** includes an interim injunction.

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**80AC Injunctions to prevent mergers if authorisation granted on the basis of false or misleading information**

If, on the application of the Commission, the Court is satisfied that:

(a) a person is proposing to acquire shares in the capital of a body corporate or assets of a person; and

(b) the person was granted a merger authorisation for the proposed acquisition on the basis of information that was false or misleading in a material particular; and

(c) that information was given by the person or a body corporate that was related to the person; and

(d) if that information had not been given, the authorisation would not have been granted; and

(e) apart from the authorisation, the acquisition would contravene section 50 if it occurred;

then the Court may grant an injunction in such terms as the Court determines to be appropriate.

**81 Divestiture where merger contravenes section 50 or 50A**

(1) The Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of the shares or assets acquired in contravention of that section.

(1A) Where:

(a) the Court finds, in a proceeding instituted under this Part, that a person (in this subsection referred to as the ***acquirer***) has acquired shares in the capital of a body corporate or any assets of a person in contravention of section 50;

(b) the Court finds, whether in that proceeding or any other proceeding instituted under this Part, that the person (in this section referred to as the ***vendor***) from whom the acquirer acquired those shares or those assets, as the case may be, was involved in the contravention; and

(c) at the time when the finding referred to in paragraph (b) is made, any of those shares or those assets, as the case may be, are vested in the acquirer or, if the acquirer is a body corporate, in any body corporate that is related to the acquirer;

the Court may, on the application of the Commission, declare that the acquisition, in so far as it relates to the shares or assets referred to in paragraph (c), is void as from the day on which it took place and, where the Court makes such a declaration:

(d) the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and

(e) the vendor shall refund to the acquirer any amount paid to the vendor in respect of the acquisition of the shares or assets to which the declaration relates.

(1B) Where a declaration has been made under subsection 50A(1) in relation to the obtaining of a controlling interest in a corporation, or in each of 2 or more corporations,

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the Court may, on the application of the Minister or the Commission, if it finds, or has in a proceeding instituted under section 80 found, that that corporation, or any of those corporations, as the case may be (in this subsection referred to as the ***relevant corporation***), has contravened subsection 50A(6), by order, for the purpose of ensuring that the obtaining of that controlling interest ceases to have the result referred to in paragraph 50A(1)(a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.

(1C) Where an application is made to the Court for an order under subsection (1) or a declaration under subsection (1A), the Court may, instead of making an order under subsection (1) for the purpose of securing the disposal by a person of shares or assets or an order under subsection (1A) that the acquisition by a person of shares or assets is void, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

(2) An application under subsection (1), (1A) or (1B) may be made at any time within 3 years after the date on which the contravention occurred.

(3) Where an application for directions under subsection (1) or for a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsections (1) and (1A).

**81A Divestiture where merger done under authorisation granted on false et. information**

*Circumstances when this section applies*

(1) This section applies if the Court is satisfied that:
- (a) a person (the ***acquirer***) has acquired shares in the capital of a body corporate or assets of another person; and
- (b) before the acquisition, the acquirer was granted a merger authorisation the acquisition on the basis of information that was false or misleading in a material particular; and
- (c) that information was provided by the acquirer or a body corporate that was related to the acquirer; and
- (d) the Court or another court has found that the acquirer or related body corporate has contravened Part 7.4 of the *Criminal Code* by giving that information; and
- (e) if that information had not been given, the authorisation would not have been granted; and
- (f) apart from the authorisation, the acquisition would have contravened section 50; and
- (g) any or all of those shares or assets are vested in the acquirer, the related body corporate or any other body corporate that is related to the acquirer.

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*Divestiture by the acquirer and related bodies corporate*

(2) The Court may, on the application of the Commission, by order, give directions for the purpose of securing the disposal of all or any of those shares or assets by the acquirer, the related body corporate or any other body corporate that is related to the acquirer.

*Declaration that acquisition void—when vendor involved*

(4) In addition to being satisfied of the matters in subsection (1), if the Court, or another court, has found that the person (the ***vendor***) from whom the acquirer acquired the shares or assets was involved in the contravention referred to in paragraph (1)(d), then the Court may, on the application of the Commission, by order, declare that the acquisition, in so far as it relates to those shares or assets, is void as from the day on which it occurred.

(5) If the Court makes an order under subsection (4), then:
   (a) the shares or assets to which the declaration relates are taken not to have been disposed of by the vendor; and
   (b) the vendor must refund to the acquirer any amount paid to the vendor for acquiring the shares or assets.

*Alternative to orders under subsections (2) and (4)*

(7) If an application is made to the Court for an order under subsection (2) or (4) against a person, the Court may, instead of making an order of the kind mentioned in that subsection, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

*When application for orders under this section must be made*

(8) An application under subsection (2) or (4) may be made at any time within 3 years after the day on which the acquisition occurred.

*Court may make orders even if not satisfied of all matters*

(9) If an application for an order under subsection (2) or (4) is made, the Court may, if the Court determines it to be appropriate, make an order by consent of all the parties to the proceedings, whether or not the Court is satisfied of:
   (a) for an order under subsection (2)—the matters in subsection (1); and
   (b) for an order under subsection (4)—the matters in subsections (1) and (4).

**82 Actions for damages**

(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or IVB, or of section 55B, 60C or 60K, may

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recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

**83 Findings and admissions of fact in proceedings to be evidence**

(1) In a proceeding against a person under section 82 or in an application under subsection 51ADB(1) or 87(1A) for an order against a person, a finding of any fact made by a court, or an admission of any fact made by the person, is prima facie evidence of that fact if the finding or admission is made in proceedings:

(a) that are proceedings:

(i) under section 77, 80, 81, 86C, 86D or 86E; or

(ii) for an offence against section 44ZZRF or 44ZZRG; and

(b) in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part IV or IVB, or of section 55B, 60C or 60K.

(2) The finding or admission may be proved by production of:

(a) in any case—a document under the seal of the court from which the finding or admission appears; or

(b) in the case of an admission—a document in which the admission was made.

**84 Conduct by directors, employees or agents**

(1) If, in:

(a) a prosecution for an offence against section 45AF or 45AG in respect of conduct engaged in by a body corporate; or

(b) a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 45AJ or 45AK, section 46 or 46A Part IVB, section 55B or Part V applies;

it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:

(c) a director, employee or agent of the body corporate engaged in that conduct; and

(d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and

(e) the director, employee or agent had that state of mind.

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

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(a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

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

(3) If, in:

(a) a prosecution for an offence against section 45AF or 45AG in respect of conduct engaged in by a person other than a body corporate; or

(b) a proceeding under this Part in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which section 45AJ or 45AK, Part IVB, section 55B or Part V applies;

it is necessary to establish the state of mind of the person, it is sufficient to show that:

(c) an employee or agent of the person engaged in that conduct; and

(d) the employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and

(e) the employee or agent had that state of mind.

(4) Conduct engaged in on behalf of a person other than a body corporate:

(a) by an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

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

(4A) If:

(a) a person other than a body corporate is convicted of an offence; and

(b) subsection (3) or (4) applied in relation to the conviction on the basis that the person was the person first mentioned in that subsection; and

(c) the person would not have been convicted of the offence if that subsection had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

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

**85 Defences**

If, in any proceedings under this Part against a person other than a body corporate, it appears to the Court that the person has or may have:

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(a) engaged in conduct in contravention of a provision of Part IV; or

(aa) engaged in conduct in contravention of section 60C or 60K; or

(b) engaged in conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f);

but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit.

**86 Jurisdiction of courts**

(1AA) A reference in this section to this Act, or to a Part, Division or section of this Act, is a reference to this Act, or to that Part, Division or section, as it has effect as a law of the Commonwealth.

(1) Jurisdiction is conferred on the Federal Court in any matter arising under this Act in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part.

(1A) Jurisdiction is conferred on the Federal Circuit Court in any matter arising under section 46, Part IVB or section 55B in respect of which a civil proceeding is instituted by a person other than the Minister.

(2) The several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise, and, subject to the Constitution, jurisdiction is conferred on the several courts of the Territories, with respect to any matter arising under Part IVB or section 55B in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.

(3) Nothing in subsection (2) shall be taken to enable an inferior court of a State or Territory to grant a remedy other than a remedy of a kind that the court is able to grant under the law of that State or Territory.

(3A) The Supreme Court of a State is invested with federal jurisdiction with respect to any matter in respect of which a civil proceeding covered by section 44ZZRI is instituted in that Court.

(3B) Subject to the Constitution, the Supreme Court of a Territory is conferred with jurisdiction with respect to any matter in respect of which a civil proceeding covered by section 44ZZRI is instituted in that Court.

(4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:

(a) the jurisdiction of the Federal Circuit Court under subsection (1A); and

(b) the jurisdiction of the several courts of the States and Territories under subsection (2); and

(ba) the jurisdiction of the Supreme Courts of the States under subsection (3A); and

(bb) the jurisdiction of the Supreme Courts of the Territories under subsection (3B); and

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(c) the jurisdiction of the High Court under section 75 of the Constitution.

**86AA Limit on jurisdiction of Federal Circuit Court**

If proceedings under section 82 are instituted in, or transferred to, the Federal Circuit Court, the Federal Circuit Court does not have jurisdiction to award an amount for loss or damage that exceeds:

(a) $750,000; or

(b) if another amount is specified in the regulations—that other amount.

Note: For transfers from the Federal Court to the Federal Circuit Court, see section 32AB of the *Federal Court of Australia Act 1976*. For transfers from the Federal Circuit Court to the Federal Court, see section 39 of the *Federal Circuit Court of Australia Act 1999*.

**86A Transfer of matters**

(1) Where:

(a) a civil proceeding instituted (whether before or after the commencement of this section) by a person other than the Minister or the Commission is pending in the Federal Court; and

(b) a matter for determination in the proceeding arose under Part IVB or section 55B;

the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Court's own motion, transfer to a court of a State or Territory the matter referred to in paragraph (b) and may also transfer to that court any other matter for determination in the proceeding.

(2) The Federal Court shall not transfer a matter to another court under subsection (1) unless the other court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:

(a) the matter arises out of or is related to a proceeding that is pending in the other court; or

(b) it is otherwise in the interests of justice that the matter be determined by the other court.

(3) Where the Federal Court transfers a matter to another court under subsection (1):

(a) further proceedings in the matter shall be as directed by the other court; and

(b) the judgment of the other court in the matter is enforceable throughout Australia and the external Territories as if it were a judgment of the Federal Court.

**86C Non-punitive orders**

(1) The Court may, on application by the Commission, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.

(1A) The Court may, on application by the Director of Public Prosecutions, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct that is:

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(a) a contravention of section 45AF or 45AG; or

(b) an involvement in a contravention of section 45AF or 45AG.

(2) The orders that the Court may make in relation to the person are:

(a) except in the case of contravening conduct that relates to section 60C or 60K—a community service order; and

(b) except in the case of contravening conduct that relates to section 60C or 60K—a probation order for a period of no longer than 3 years; and

(c) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and

(d) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

(3) This section does not limit the Court's powers under any other provision of this Act.

(4) In this section:

***community service order***, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:

(a) is specified in the order; and

(b) relates to the conduct;

for the benefit of the community or a section of the community.

Example: The following are examples of community service orders:

(a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and

(b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.

***contravening conduct*** means conduct that:

(a) contravenes Part IV or IVB or section 55B, 60C or 60K; or

(b) constitutes an involvement in a contravention of any of those provisions.

***probation order***, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:

(a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

(b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

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(c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

**86D Punitive orders—adverse publicity**

(1) The Court may, on application by the Commission, make an adverse publicity order in relation to a person who:
   (a) has been ordered to pay a pecuniary penalty under section 76; or
   (b) is guilty of an offence against section 45AF or 45AG.

(1A) The Court may, on application by the Director of Public Prosecutions, make an adverse publicity order in relation to a person who is guilty of an offence against section 45AF or 45AG.

(2) In this section, an ***adverse publicity order***, in relation to a person, means an order that:
   (a) requires the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
   (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

(3) This section does not limit the Court's powers under any other provision of this Act.

**86E Order disqualifying a person from managing corporations**

(1) On application by the Commission, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
   (a) the Court is satisfied that the person has contravened, has attempted to contravene or has been involved in a contravention of Part IV; and
   (b) the Court is satisfied that the disqualification is justified.

   Note: Section 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

(1A) On application by the Director of Public Prosecutions, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
   (a) the Court is satisfied that the person has contravened or has been involved in a contravention of section 45AF or 45AG; and
   (b) the Court is satisfied that the disqualification is justified.

   Note: Section 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

(2) In determining under subsection (1) or (1A) whether the disqualification is justified, the Court may have regard to:

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(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

(3) The Commission must notify ASIC if the Court makes an order under subsection (1). The Commission must give ASIC a copy of the order.

Note: ASIC must keep a register of persons who have been disqualified from managing corporations: see section 1274AA of the *Corporations Act 2001*.

(3A) The Director of Public Prosecutions must notify ASIC if the Court makes an order under subsection (1A). The Director of Public Prosecutions must give ASIC a copy of the order.

Note: ASIC must keep a register of persons who have been disqualified from managing corporations—see section 1274AA of the *Corporations Act 2001*.

(3B) For the purposes of this Act (other than this section or section 86F), an order under this section is not a penalty.

(4) In this section:

***ASIC*** means the Australian Securities and Investments Commission.

**86F Privilege against exposure to penalty—disqualification from managing corporations**

*Court proceeding*

(1) In a civil or criminal proceeding under, or arising out of, this Act, a person is not entitled to refuse or fail to comply with a requirement:

(a) to answer a question or give information; or

(b) to produce a document or any other thing; or

(c) to do any other act;

on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

(2) Subsection (1) applies whether or not the person is a defendant in the proceeding or in any other proceeding.

*Statutory requirement*

(3) A person is not entitled to refuse or fail to comply with a requirement under this Act:

(a) to answer a question or give information; or

(b) to produce a document or any other thing; or

(c) to do any other act;

on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

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*Definition*

(4) In this section:

***penalty*** includes forfeiture.

**87 Other orders**

(1) Without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against section 45AF or 45AG, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV or Division 2 of Part IVB, or of section 55B, 60C or 60K, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 82, 86C, 86D or 86E, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of sections 51ADB and 80, the Court may:

(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Division 2 of Part IVB or section 60C or 60K; or

(b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), Division 2 of Part IVB or section 60C or 60K; or

(baa) on the application of the Commission in accordance with subsection (1BAA) on behalf of a class of persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 55B; or

(ba) on the application of the Director of Public Prosecutions in accordance with subsection (1BA) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 45AF or 45AG;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:

(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

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(1B) The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), Division 2 of Part IVB or section 60C or 60K; and

(b) have, before the application is made, consented in writing to the making of the application.

(1BAA) The Commission may make an application under paragraph (1A)(b) on behalf of a class of persons identified in the application who have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 55B.

(1BA) The Director of Public Prosecutions may make an application under paragraph (1A)(ba) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 45AF or 45AG; and

(b) have, before the application is made, consented in writing to the making of the application.

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IV, Division 2 of Part IVB or section 60C or 60K even if a proceeding has not been instituted under another provision in relation to that contravention.

(1CA) An application under subsection (1A) may be made at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

(2) The orders referred to in subsection (1) and (1A) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions of such a contract;

(c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own

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expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

(3) Where:

(a) a provision of a contract made, whether before or after the commencement of the *Trade Practices Amendment Act 1977*, is unenforceable because of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or

(b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47;

the Court may, on the application of a party to the contract make an order:

(c) varying the contract, or a collateral arrangement relating to the contract, in such manner as the Court considers just and equitable; or

(d) directing another party to the contract to do any act in relation to the first-mentioned party that the Court considers just and equitable.

(4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.

(5) The powers conferred on the Court under this section in relation to a contract do not affect any powers that any other court may have in relation to the contract in proceedings instituted in that other court in respect of the contract.

(6) In subsection (2), ***interest***, in relation to land, means:

(a) a legal or equitable estate or interest in the land; or

(b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or

(c) a right, power or privilege over, or in connection with, the land.

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**87AA Special provision relating to Court's exercise of powers under this Part in relation to boycott conduct**

(1) In exercising its powers in proceedings under this Part in relation to boycott conduct, the Court is to have regard to any action the applicant in the proceedings has taken, or could take, before an industrial authority in relation to the boycott conduct. In particular, the Court is to have regard to any application for conciliation that the applicant has made or could make.

(2) In this section:

***boycott conduct*** means conduct that constitutes or would constitute:

(a) a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or

(b) attempting to contravene one of those provisions; or

(c) aiding, abetting, counselling or procuring a person to contravene one of those provisions; or

(d) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene one of those provisions; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of one of those provisions; or

(f) conspiring with others to contravene one of those provisions.

***industrial authority*** means:

(a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a law of a State to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or

(b) a special board constituted under a law of a State relating to factories; or

(c) any other State board, court, tribunal, body or official prescribed by the regulations for the purposes of this definition.

**87B Enforcement of undertakings**

(1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).

(1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a merger authorisation.

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.

(3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

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(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

**87C Enforcement of undertakings—Secretary of the Department**

(1) The Secretary of the Department may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Secretary has a power or function under this Act.

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Secretary of the Department.

(3) If the Secretary of the Department considers that the person who gave the undertaking has breached any of its terms, the Secretary may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

**87CA Intervention by Commission**

(1) The Commission may, with the leave of the Court and subject to any conditions imposed by the Court, intervene in any proceeding instituted under this Act.

(2) If the Commission intervenes in a proceeding, the Commission is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

…

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**Part VII—Authorisations and notifications**

**Division 1—Authorisations**

**87ZP Definitions**

(1) In this Division:

***authorisation*** means an authorisation under this Division.

***industry code of practice*** means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

***minor variation***, in relation to an authorization, is a single variation that does not involve a material change in the effect of the authorization.

(2) A reference in this Division to a proposal of the Commission is a reference to a notice of the Commission:

(a) so far as the revocation of an authorization is concerned—under subsection 91B(3); and

(b) so far as the revocation of an authorization and the substitution of another—under subsection 91C(3).

**88 Commission may grant authorisations**

*Granting an authorisation*

(1) Subject to this Part, the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

Note: For an extended meaning of engaging in conduct, see subsection 4(2).

*Effect of an authorisation*

(2) While the authorisation remains in force, the provisions of Part IV specified in the authorisation do not apply in relation to the conduct to the extent that it is engaged in by:

(a) the applicant; and

(b) any other person named or referred to in the application as a person who is engaged in, or who is proposed to be engaged in, the conduct; and

(c) any particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct.

*Conditions*

(3) The Commission may specify conditions in the authorisation. Subsection (2) does not apply if any of the conditions are contravened.

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*Single authorisation may deal with several types of conduct*

(4) The Commission may grant a single authorisation for all the conduct specified in an application for authorisation, or may grant separate authorisations for any of the conduct.

*Past conduct*

(5) The Commission does not have power to grant an authorisation for conduct engaged in before the Commission decides the application for the authorisation.

*Withdrawing an application*

(6) An applicant for authorisation may at any time, by writing to the Commission, withdraw the application.

**89 Procedure for applications and the keeping of a register**

(1) To be valid, an application for an authorisation, a minor variation of an authorisation, a revocation of an authorisation, or a revocation of an authorisation and the substitution of another authorisation, must:
   (a) be in a form approved by the Commission and contain the information required by the form; and
   (b) be accompanied by any other information or documents prescribed by the regulations; and
   (c) be accompanied by the fee (if any) prescribed by the regulations.

(1A) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
   (a) stating that the person has not made a valid application; and
   (b) giving reasons why the purported application does not comply with this Division.

(1B) For the purposes of subsection (1A), ***business day*** means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

(2) If the Commission receives an application referred to in subsection (1), the Commission must cause notice of the receipt of that application to be made public in such manner as it thinks fit.

(3) The Commission must keep a register of:
   (a) applications for authorizations; and
   (b) applications for minor variations of authorizations; and
   (c) applications for, or the Commission's proposals for, the revocation of authorizations; and
   (d) applications for, or the Commission's proposals for, the revocation of authorizations and the substitution of other authorizations;

including applications that have been withdrawn or proposals that have been abandoned.

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(4) Subject to this section, the register kept under subsection (3) shall include:

(a) any document furnished to the Commission in relation to an application or proposal referred to in subsection (3);

(aa) any draft determination, and any summary of reasons, by the Commission that is furnished to a person under section 90A, or under that section as applied by section 91C;

(ab) any record of a conference made in accordance with subsection 90A(8), or with that subsection as applied by section 91C, and any certificate in relation to a conference given under subsection 90A(9), or under that subsection as so applied;

(b) particulars of any oral submission made to the Commission in relation to such an application or proposal; and

(c) the determination of the Commission on such an application or proposal and the statement of the reasons given by the Commission for that determination.

(5) Where a person furnishes a document to the Commission in relation to an application or proposal referred to in subsection (3) or makes an oral submission to the Commission in relation to such an application or proposal, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (3) by reason of the confidential nature of any of the matters contained in the document or submission.

(5A) Where such a request is made:

(a) if the document or the part of the document, or the submission or the part of the submission, to which the request relates contains particulars of:

(i) a secret formula or process;

(ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or

(iii) the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (3); and

(b) in any other case—the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(5B) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (3), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (4)(a) does not apply in relation to the document or part of the document.

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(5C) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (3), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (4)(b) does not apply in relation to the submission or that part of the submission, as the case may be.

(5D) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (4)(a) or particulars referred to in paragraph (4)(b) from the register kept under subsection (3).

(5E) If a person requests, in accordance with subsection (5) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (3), the document or part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

(6) A document shall not be included in the register kept under subsection (3) if a direction in relation to that document was in force under paragraph 22(1)(b) of this Act immediately before the commencement of the *Trade Practices Amendment Act 1977*.

**90 Determination of applications for authorisations**

(1) The Commission shall, in respect of an application for an authorization:

(a) make a determination in writing granting such authorization as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

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

(5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(6) The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless the Commission is satisfied in all the circumstances:

(a) that the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition; or

(b) that:

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(i) the conduct would result, or be likely to result, in a benefit to the public; and

(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

(7) Paragraph (6)(a) does not apply to the extent (if any) that any of the following provisions, and no other provisions of Part IV, would (apart from an authorisation under section 88) apply to the conduct:

(a) one or more provisions of Division 1 of Part IV (cartel conduct);

(b) one or more of sections 45D to 45DB (secondary boycotts);

(c) section 48 (resale price maintenance).

(9A) In relation to the Commission's consideration of an application for an authorisation to engage in conduct to which section 49 would or might apply or for a merger authorisation, in determining what amounts to a benefit to the public for the purposes of paragraph (6)(b):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(10) If the Commission does not determine an application for an authorisation (other than an application for a merger authorisation) within the relevant period, then it is taken to have granted the application at the end of that period.

(10A) For the purposes of subsection (10), the ***relevant period*** is the period of 6 months beginning on the day the Commission received the application. However, if, before the end of that 6 month period:

(a) the Commission has prepared a draft determination under subsection 90A(1) in relation to the application; and

(b) the Commission determines in writing that that period is extended by a specified period of not more than 6 months; and

(c) the applicant agrees to that period being so extended;

the ***relevant period*** is that period as so extended.

(10B) Subject to subsections (12) and (13), if:

(a) the Commission does not determine an application for a merger authorisation within 90 days from the day on which the Commission received the application; and

(b) the application is not an application for an overseas merger authorisation;

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the Commission is taken to have refused, at the end of that period, to grant the authorisation applied for.

(11) Subject to subsections (12) and (13), if the Commission does not determine an application for an overseas merger authorisation within:

(a) 30 days from the day on which the application is received by the Commission; or

(b) if the Commission, before the end of that period of 30 days, gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application—the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide;

the Commission shall be deemed to have granted, at the end of that period, the authorisation applied for.

(11A) The Commission may, within the 30 day period mentioned in subsection (11), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (11) to 30 days are to be treated as references to 45 days.

(12) If the applicant for an authorization informs the Commission in writing before the expiration of the period referred to in subsection (10B) or (11) (the ***base period***) that the applicant agrees to the Commission taking a specified longer period for the determination of the application, a reference to that longer period shall be deemed for the purposes of that application to be substituted in that subsection for the reference in that subsection to the base period.

(13) For the purposes of any application of subsection (12), a reference in that subsection to the base period shall, if a reference to another period is deemed by any other application or applications of that subsection to have been substituted in subsection (10B) or (11) for the reference in subsection (10B) or (11) to the base period, be construed as a reference to that other period.

(14) If a person to whom a notice has been sent under subsection 90A(2) in relation to a draft determination in respect of an application for an authorization notifies the Commission in accordance with subsection 90A(6) that he or she wishes the Commission to hold a conference in relation to the draft determination, the relevant period (worked out under subsection (10A) of this section) shall be deemed to be increased by a period equal to the period commencing on the day on which the first notification in relation to the draft determination was received by the Commission and ending on the seventh day after the day specified in the certificate given by a member of the Commission in pursuance of subsection 90A(9) as the day on which the conference terminated.

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(15) Where a party to a joint venture makes at the one time two or more applications for authorizations (other than an application for a merger authorisation), being applications each of which deals with a matter relating to the joint venture:

(a) the Commission shall not make a determination in respect of any one of those applications unless it also makes a determination or determinations at the same time in respect of the other application or other applications; and

(b) if the Commission does not make a determination in respect of any one of the applications within the relevant period (worked out under subsection (10A)) in relation to that application, the Commission shall be deemed to have granted, at the expiration of that period, all the authorizations applied for.

**90A Commission to afford opportunity for conference before determining application for authorisation**

(1) Before determining an application for an authorization (other than an application for an overseas merger authorisation), the Commission shall prepare a draft determination in relation to the application.

(2) The Commission shall, by notice in writing sent to the applicant and to each other interested person, invite the applicant or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.

(3) If:

(a) the draft determination provides for the granting of the application unconditionally; and

(b) no person has made a written submission to the Commission opposing the application;

each notice by the Commission under subsection (2) shall inform the person to whom the notice is sent that the draft determination so provides.

(4) If:

(a) the draft determination does not provide for the granting of the application or provides for the granting of the application subject to conditions; or

(b) the draft determination provides for the granting of the application unconditionally but a written submission has, or written submissions have, been made to the Commission opposing the application;

the Commission shall send with each notice under subsection (2) a copy of the draft determination and:

(c) in a case to which paragraph (a) applies—a summary of the reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or

(d) in a case to which paragraph (b) applies—a summary of the reasons why it is satisfied that the application should be granted unconditionally.

(5) If each of the persons to whom a notice was sent under subsection (2):

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(a) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the Commission to hold a conference in relation to the draft determination; or

(b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference;

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

(6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(7) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft determination) nominated by the Chairperson; and

(b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and

(e) no other person is entitled to be present.

(8) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(9) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

(a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;

(b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

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(c) shall give a certificate certifying the day on which the first notification under subsection (6) in relation to the draft determination was received by the Commission and the day on which the conference terminated;

and any such certificate shall be received in all courts as evidence of the matters certified.

(10) A document purporting to be a certificate referred to in subsection (9) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(11) The Commission shall take account of all matters raised at the conference and may at any time after the termination of the conference make a determination in respect of the application.

(12) For the purposes of this section, ***interested person*** means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that, in the opinion of the Commission, is real and substantial.

(13) Where the Commission is of the opinion that two or more applications for authorizations that are made by the same person, or by persons being bodies corporate that are related to each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application and may prepare one draft determination in relation to the applications and hold one conference in relation to that draft determination.

**90B Commission may rely on consultations undertaken by the AEMC**

(1) This section applies if:

(a) an application under section 88, 91A, 91B or 91C is made in relation to the National Electricity Rules or a provision of the Rules; and

(b) the AEMC has done the following:

(i) published the Rules or the provision and invited people to make submissions to it on the Rules or the provision;

(ii) specified the effect of subsection (2) when it published the Rules or the provision;

(iii) considered any submissions that were received within the time limit specified by it when it published the Rules or the provision.

(2) In making a determination under section 90, 91A, 91B or 91C:

(a) the Commission may rely on the process mentioned in paragraph (1)(b), instead of undertaking the process mentioned in section 90A, subsection 91A(2), 91B(2) or 91C(2) or (5); and

(b) the Commission may take into account:

(i) any submissions mentioned in subparagraph (1)(b)(iii); and

(ii) any submissions, in respect of the application, made by the AEMC; and

(c) despite subsection 90(2), the Commission may disregard any submissions, in relation to the application, made by the Commonwealth, by a State, or by any other person (other than the AEMC).

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(3) In this section:

***National Electricity Rules*** means:

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

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

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

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

**91 Grant and variation of authorisations**

(1) An authorization may be expressed to be in force for a period specified in the authorization and, if so expressed, remains in force for that period only.

(1A) An authorisation, other than an authorisation deemed to have been granted under subsection 90(10) or (11), comes into force on the day specified for the purpose in the authorisation, not being a day earlier than, and an authorisation deemed to have been granted under subsection 90(10) or (11) comes into force on:

(a) where paragraph (b) or (c) does not apply—the end of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation;

(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review;

(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(1B) A minor variation of an authorization comes into force on a day specified by the Commission in the determination making the variation, not being a day earlier than:

(a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of the determination of the Commission in respect of the application for the minor variation; or

(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or

(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(1C) If an authorization (the ***prior authorization***) is revoked and another authorization is made in substitution for it, that other authorization comes into force on the day specified for the purpose in that other authorization, not being a day earlier than:

(a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of an application, or the Commission's proposal, for the revocation of the prior authorization and the substitution of that other authorization; or

(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or

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(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(2) If the Commission considers that it is appropriate to do so:

(a) for the purpose of enabling due consideration to be given to:

(i) an application for an authorization; or

(ii) an application for a minor variation of an authorization; or

(iii) an application for the revocation of an authorization and the substitution of a new one; or

(b) pending the expiration of the time allowed for the making of an application to the Tribunal for review of a determination by the Commission of an application referred to in paragraph (a) and, if such an application for a review is made, pending the making of a determination by the Tribunal on the review; or

(c) for any other reason;

the Commission may at any time:

(d) in the case of an application for an authorization—grant an authorization that is expressed to be an interim authorization; and

(e) in the case of an application for a minor variation of an authorization—grant an authorization that is expressed to be an interim authorization dealing only with the matter the subject of the application for a variation; and

(f) in the case of an application for the revocation of an authorization and the substitution of another—suspend the operation of the authorization sought to be revoked and grant an authorization that is expressed to be an interim authorization in substitution for the authorization suspended.

(2AA) An authorization granted under paragraph 91(2)(d), (e) or (f) and expressed to be an interim authorization comes into force on such a date, not being a date before the grant of the interim authorization, as is specified by the Commission in the interim authorization.

(2AB) The Commission may, at any time, revoke an authorization that is expressed to be an interim authorization and, where that interim authorization is in substitution for an authorization the operation of which has been suspended, the revocation of the interim authorization has the effect of reviving the operation of the suspended authorization.

(2A) Subsections 90(4) to (6), inclusive, do not apply in relation to an authorization that is expressed to be an interim authorization.

(3) An authorization may be expressed to be subject to such conditions as are specified in the authorization.

**91A Minor variations of authorizations**

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a minor variation of the authorization.

(2) On receipt of an application, the Commission must, if it is satisfied that the variation sought in the application is a minor variation, by notice in writing given to any persons who appear to the Commission to be interested:

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(a) indicate the nature of the variation applied for; and

(b) invite submissions in respect of the variation within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(3) After considering the application and any submissions received within the period specified, the Commission may make a determination in writing varying the authorization or dismissing the application.

(4) The Commission must not make a determination varying an authorisation unless the Commission is satisfied in all the circumstances:

(a) that the variation would not have the effect, or would be likely not to have the effect, of substantially lessening competition; or

(b) that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the conduct to which the authorisation relates outweighs any detriment to the public caused by the conduct.

(6) Nothing in this section prevents a person from applying for 2 or more variations in the same application.

(7) If:

(a) a person applies for 2 or more variations:

(i) at the same time; or

(ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and

(b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorization;

the Commission may deal with all of those variations together as if they were a single minor variation.

(8) An application for a minor variation may be withdrawn by notice in writing to the Commission at any time.

**91B Revocation of an authorization**

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization.

(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorization has been applied for; and

(b) indicate the basis on which the revocation has been applied for; and

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(c) invite submissions in respect of the revocation within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(3) If, at any time after granting an authorization, it appears to the Commission that:

(a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or

(b) a condition to which the authorization was expressed to be subject has not been complied with; or

(c) there has been a material change of circumstances since the authorization was granted;

the Commission may, by notice in writing given to any persons who appear to the Commission to be interested:

(d) inform those persons that it is considering the revocation of the authorization; and

(e) indicate the basis on which the revocation is being proposed; and

(f) invite submissions in respect of the revocation within a period specified by the Commission.

(4) After considering any submissions invited under subsection (2) or (3) that are received within the period specified by the Commission under that subsection, the Commission may make a determination in writing:

(a) revoking the authorization; or

(b) deciding not to revoke the authorization.

(5) If an objection to the revocation is included in any submission

(a) that was invited under subsection (2) or (3); and

(b) that is received within the period specified by the Commission under that subsection;

the Commission must not make a determination revoking the authorization unless the Commission is satisfied that it would, if the authorization had not already been granted, be prevented under subsection 90(6) from making a determination granting the authorization in respect of which the revocation is sought.

(6) An application for revocation may be withdrawn by notice in writing to the Commission at any time.

(7) The Commission may disregard any objection that, in its opinion, is either vexatious or frivolous.

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**91C Revocation of an authorization and substitution of a replacement**

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization and the substitution of a new authorization for the one revoked.

(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorization, and the substitution of another authorization for it, has been applied for; and

(b) indicate the basis upon which the revocation and substitution has been applied for and the nature of the substituted authorization so applied for; and

(c) invite submissions in respect of the revocation and substitution within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(3) If, at any time after granting an authorization, it appears to the Commission that:

(a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or

(b) a condition to which the authorization was expressed to be subject has not been complied with; or

(c) there has been a material change of circumstances since the authorization was granted;

the Commission may, by notice in writing given to any persons who appear to be interested:

(d) inform those persons that it is considering the revocation of the authorization and the substitution of a new authorization; and

(e) indicate the basis on which the revocation and substitution is being proposed and the nature of the substituted authorization proposed; and

(f) invite submissions in respect of the proposed action within a period specified by the Commission.

(4) After considering any submissions invited under subsection (2) or (3) in relation to an authorization that are received within the period specified by the Commission under that subsection and after compliance with the requirements of section 90A in accordance with subsection (5), the Commission may make a determination in writing:

(a) revoking the authorization and granting another such authorization that it considers appropriate, in substitution for it; or

(b) deciding not to revoke the authorization.

(5) Before making a determination under subsection (4) in relation to an application, or a proposal, for the revocation of an authorization and the substitution of another, the Commission must comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

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(6) For the purposes of complying with section 90A in accordance with subsection (5), section 90A has effect:

(a) as if the reference in subsection (1) to an application for an authorization (other than an application for an overseas merger authorisation) were a reference to an application, or to a proposal, for the revocation of an authorization (other than an overseas merger authorisation) and the substitution of another authorization; and

(b) as if references in other provisions of that section to an application, or to an application for an authorization, were references either to an application, or to a proposal, for the revocation of an authorization and the substitution of another; and

(c) as if subsection 90A(2) had provided, in its operation in relation to a proposal for the revocation of an authorization and the substitution of another, that:

(i) the reference to the applicant and to each other interested person were a reference only to each interested person; and

(ii) each reference to the applicant or other person were a reference only to the other person.

(7) The Commission must not make a determination revoking an authorization and substituting another authorization unless the Commission is satisfied that it would not be prevented under subsection 90(6) from making a determination granting the substituted authorization, if it were a new authorization sought under section 88.

(8) An application for the revocation of an authorization and the substitution of another authorization may be withdrawn by notice in writing to the Commission at any time.

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**Division 2—Notifications**

**Subdivision A—Exclusive dealing and resale price maintenance**

**93 Notification of exclusive dealing or resale price maintenance**

(1) Subject to subsection (2):

(a) a corporation that engages, or proposes to engage, in conduct of a kind referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9); or

(b) a corporation or other person who engages, or proposes to engage, in conduct of a kind referred to in section 48;

may give to the Commission a notice setting out particulars of the conduct or proposed conduct.

(1A) To be valid, a notice under subsection (1) must:

(a) be in a form prescribed by the regulations and contain the information required by the form; and

(b) be accompanied by any other information or documents prescribed by the regulations; and

(c) be accompanied by the fee (if any) prescribed by the regulations.

(2) A corporation or other person may not give a notice under subsection (1) for conduct or proposed conduct if:

(a) the corporation or other person applied for an authorisation for the conduct or proposed conduct; and

(b) the Commission or the Trade Practices Commission made a determination dismissing the application; and

(c) either:

(i) the Tribunal or the Trade Practices Tribunal made a determination on an application for a review of a determination described in paragraph (b); or

(ii) the time for making such an application for review has ended without the making of an application.

(2A) In subsection (2):

***Trade Practices Commission*** means the Trade Practices Commission established by section 6A of this Act as in force immediately before this subsection commenced.

***Trade Practices Tribunal*** means the Trade Practices Tribunal continued in existence by section 30 of this Act as in force immediately before this subsection commenced.

(2B) If the Commission receives a purported notice under subsection (1) that it considers is not a valid notice, it must, within 5 business days of receiving the purported notice, give the person who made the purported notice a written notice:

(a) stating that the person has not given a valid notice; and

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(b) giving reasons why the purported notice does not comply with this Division.

*Definition*

(2C) In subsection (2B):

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

(3) If the Commission is satisfied in all the circumstances that the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9) and referred to in a notice given by the corporation under subsection (1):

(a) has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47; or

(b) has not resulted or is not likely to result, or would not result or be likely to result, in a benefit to the public; or

(c) has resulted or is likely to result, or would result or be likely to result, in a benefit to the public that has not or would not outweigh the detriment to the public constituted by any lessening of competition that:

(i) has resulted or is likely to result from the conduct; or

(ii) would result or be likely to result from the proposed conduct;

the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(3A) If:

(a) a corporation or other person has notified the Commission under subsection (1) of conduct or proposed conduct described in section 48; and

(b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct;

the Commission may give the corporation or other person a written notice stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(3B) If:

(a) a corporation or 1 other person has notified the Commission under subsection (1) of conduct or proposed conduct; and

(b) the Commission has given the corporation or other person a notice under subsection 93AAA(1) imposing conditions relating to the conduct or proposed conduct; and

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(c) the Commission is satisfied that the corporation or other person has failed to comply with those conditions;

the Commission may at any time give notice in writing to the corporation or other person stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(4) Before giving a notice under subsection (3), (3A) or (3B) the Commission shall comply with the requirements of section 93A.

(5) In satisfying itself for the purposes of subsection (3), (3A) or (3B) in relation to any conduct or proposed conduct referred to in a notice given to the Commission by a corporation or other person under subsection (1), the Commission shall seek such relevant information as it considers reasonable and appropriate and may make a decision on the basis of any information so obtained and any other information furnished to it by the corporation or other person or any other person or otherwise in its possession.

(6) A corporation or other person that has given a notice to the Commission under this section in relation to any conduct or proposed conduct may, at any time before the Commission has given to the corporation or other person a notice under subsection (3), (3A) or (3B) in relation to the conduct or proposed conduct, by notice in writing to the Commission, withdraw the first-mentioned notice.

(7) Where a corporation has given notice to the Commission under subsection (1) describing conduct or proposed conduct referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9):

(a) in the case of a notice given before the expiration of the period of 3 months commencing on the date of commencement of the *Trade Practices Amendment Act 1977*, the engaging by the corporation in the conduct referred to in the notice on or after that date and before the giving of the notice shall not be taken, for the purposes of section 47, to have had the effect of substantially lessening competition within the meaning of that section; and

(b) in any case, the engaging by the corporation in the conduct referred to in the notice after the giving of the notice shall not be taken, for the purposes of section 47, to have the purpose, or to have or be likely to have the effect, of substantially lessening competition within the meaning of that section unless:

(i) the Commission has given notice to the corporation under subsection (3) of this section in relation to the conduct and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or

(ii) the notice has been, or is deemed to have been, withdrawn and the conduct takes place after the day on which the notice was, or is deemed to have been, withdrawn.

(7A) A notice under subsection (1) describing conduct or proposed conduct referred to in section 48 comes into force:

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(a) at the end of the period of 60 days, or such other period as is prescribed by the regulations, starting on the day when the corporation or other person gave the Commission the notice; or

(b) if the Commission gives 1 notice to the corporation or other person under subsection 93A(2) during that period—when the Commission decides not to give the corporation or other person a notice under subsection (3A) or (3B) of this section.

(7B) A notice under subsection (1) describing conduct or proposed conduct referred to in section 48 does not come into force:

(a) if the notice is withdrawn, or deemed to be withdrawn, before it would come into force under subsection (7A); or

(b) if the Commission:

(i) gives notice to the corporation or other person under subsection 93A(2) during the period described in paragraph (7A)(a); and

(ii) gives notice to the corporation or other person under subsection (3A) or (3B).

(7C) A notice under subsection (1) describing conduct referred to in section 48 ceases to be in force:

(a) when the notice is withdrawn or deemed to be withdrawn; or

(b) if the Commission gives the corporation or other person a notice under subsection (3A)—on the 31st day after the Commission gave the notice under subsection (3A) or on a later day specified in writing by the Commission; or

(c) if the Commission gives the corporation or other person a notice under subsection (3B)—on the 31st day after the Commission gave the notice under subsection (3B) or on a later day specified in writing by the Commission..

(8) Where:

(a) a corporation gives a notice to the Commission under subsection (1) in relation to any conduct or proposed conduct;

(b) before or after the notice is given the corporation makes an application to the Commission for an authorization to engage in that conduct;

(c) the Commission:

(i) makes a determination dismissing the application; or

(ii) makes a determination granting an authorization in respect of the application; and

(d) the Tribunal makes a determination on an application for a review of the determination of the Commission or the time for making such an application for review expires without an application for review having been made;

the notice shall thereupon be deemed to be withdrawn.

(9) If an application is made to the Tribunal for a review of the giving of a notice by the Commission under subsection (3), (3A) or (3B), a reference in subsection (7) or paragraph (7C)(b) or (7C)(c) to the day on which the Commission gave the notice shall be read as a reference to:

(a) if the application is withdrawn—the day on which the application is withdrawn;

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(b) if the Tribunal, on the application of the Commission or of any other person who the Tribunal is satisfied has an interest in the subject matter of the review, declares that the application for the review is not being proceeded with by the applicant with due diligence—the day on which the Tribunal makes the declaration; or

(c) in any other case—the day on which the Tribunal makes a determination on the review.

(10) Where:

(a) a corporation or other person has given a notice to the Commission under subsection (1) in relation to conduct or proposed conduct and the Commission has given notice to the corporation or other person in writing under subsection (3) or (3A) or (3B) in relation to the conduct or the proposed conduct; or

(b) a notice given by a corporation or other person to the Commission under subsection (1) in relation to conduct or proposed conduct is withdrawn or deemed to be withdrawn;

the corporation or other person is not entitled to give a further notice under subsection (1) to the Commission in relation to the same conduct or proposed conduct or in relation to conduct or proposed conduct to the like effect.

**93AAA Imposing conditions relating to notifications**

(1) If:

(a) a corporation or other person gives the Commission a notice under subsection 93(1) relating to particular conduct, or proposed conduct, of a kind referred to in section 48; and

(b) the Commission reasonably believes that:

(i) apart from this section, the Commission would have grounds to give the corporation or other person a notice under subsection 93(3A) relating to that notice; and

(ii) those grounds would not exist if particular conditions relating to the conduct or proposed conduct were complied with;

the Commission may give the corporation or other person a written notice imposing those conditions.

(2) The Commission must, at the time it gives the corporation or other person the notice under subsection (1), give the corporation or other person a written statement of its reasons for giving the notice.

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**Subdivision B—Collective bargaining**

**93AA Definitions**

In this Subdivision:

***collective bargaining notice*** means a notice under subsection 93AB(1A) or (1).

***conference notice*** means a notice under subsection 93A(2).

***contract*** means a contract, arrangement or understanding.

***objection notice*** means a notice under subsection 93AC(1), (2) or (2A).

**93AB Notification of collective bargaining**

*Notice to Commission—competition provisions*

(1A) A corporation that:

(a) has made, or proposes to make, a contract (the ***initial contract***) that contains a cartel provision that:

(i) has the purpose; or

(ii) has or is likely to have the effect;

mentioned in subsection 44ZZRD(2); or

(b) has made, or proposes to make, a contract (the ***initial contract***) that contains a cartel provision that has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); or

(c) proposes to give effect to a provision of a contract (the ***initial contract***) where the provision is a cartel provision that:

(i) has the purpose; or

(ii) has or is likely to have the effect;

mentioned in subsection 44ZZRD(2); or

(d) proposes to give effect to a provision of a contract (the ***initial contract***) where the provision is a cartel provision that has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c);

may give the Commission a notice (the ***collective bargaining notice***) setting out particulars of the contract or proposed contract, but only if the 3 requirements set out in subsections (2), (3) and (4) are satisfied.

Note 1: Subsection (6) deals with the form etc. of a collective bargaining notice.

Note 2: Section 93AD sets out when a collective bargaining notice comes into force.

*Notice to Commission—per se and competition provisions*

(1) A corporation that:

(a) has made, or proposes to make, a contract (the ***initial contract***) containing a provision of the kind referred to in paragraph 45(1)(a); or

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(b) proposes to give effect to a provision of a contract (the ***initial contract***) where the provision is of the kind referred to in paragraph 45(1)(b);

may give the Commission a notice (the ***collective bargaining notice***) setting out particulars of the contract or proposed contract, but only if the 3 requirements set out in subsections (2), (3) and (4) are satisfied.

Note 1: Subsection (6) deals with the form etc. of a collective bargaining notice.

Note 2: Section 93AD sets out when a collective bargaining notice comes into force.

*First—making of initial contract*

(2) First, the corporation must have made, or propose to make, the initial contract with 1 or more persons (the ***contracting parties***) about:

(a) the supply of particular goods or services to; or

(b) the acquisition of particular goods or services from;

one of more other persons (the ***target*** or ***targets***) by the corporation and the contracting parties.

*Second—making of contracts*

(3) Second, the corporation must reasonably expect that it will make 1 or more contracts with the target or with one or more of those targets, about:

(a) the supply of 1 or more of those goods or services to; or

(b) the acquisition of 1 or more of those goods or services from;

the that target or those targets by the corporation.

*Third—price of contracts*

(4) Third, the corporation must reasonably expect that:

(a) in the case where the corporation reasonably expects to make only 1 contract with the target or targets—the price for the supply or acquisition of those goods or services under that contract; or

(b) in the case where the corporation reasonably expects to make 2 or more contracts with the target or targets—the sum of the prices for the supply or acquisition of those goods or services under those contracts;

will not exceed $3,000,000, or such other amount as is prescribed by the regulations, in any 12 month period. The regulations may prescribe different amounts in relation to different industries.

*Timing of reasonable expectation*

(5) The corporation must have the reasonable expectation referred to in subsections (3) and (4):

(a) at the time of giving the collective bargaining notice; and

(b) if the initial contract has been made—at the time it was made.

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*Form of notice etc.*

(6) To be valid, a collective bargaining notice must:
  (a) be in a form prescribed by the regulations and contain the information required by the form; and
  (b) be accompanied by any other information or documents prescribed by the regulations; and
  (c) be accompanied by the fee (if any) prescribed by the regulations.

*Notice given by, or on behalf of, contracting persons*

(7) A collective bargaining notice may be expressed to be given on behalf of one or more of the contracting parties, but only if those parties could have given the notice on their own behalf. If the notice is so expressed, then it is also taken to have been given by those parties.

(7A) If the corporation is a member of a group of contracting parties, a collective bargaining notice may be expressed to be given on behalf of persons who become members of the group after the notice is given. If the notice is so expressed, then it is also taken to have been given by those persons.

*When a notice may not be given*

(8) A corporation may not give a collective bargaining notice in relation to a contract or proposed contract if:
  (a) it has applied for an authorisation in relation to the contract or proposed contract; and
  (b) the Commission has made a determination dismissing the application; and
  (c) either:
    (i) the Tribunal has made a determination on an application for a review of the Commission's determination; or
    (ii) the time for making such an application for review has ended without the making of an application.

*Notice is invalid if given by union etc. on behalf of the corporation*

(9) A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:
  (a) a trade union; or
  (b) an officer of a trade union; or
  (c) a person acting on the direction of a trade union.

*Invalid collective bargaining notice*

(10) If the Commission receives a purported collective bargaining notice that it considers is not a valid collective bargaining notice, it must, within 5 business days of receiving the purported notice, give the person who made the purported notice a written notice:
  (a) stating that the person has not given a valid collective bargaining notice; and

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(b) giving reasons why the purported collective bargaining notice does not comply with this Division.

(10A) The Commission must, as soon as practicable after receiving a valid collective bargaining notice, give a copy of the notice to the target.

*Purpose/effect of a provision*

(10B) Subsections 44ZZRD(6), (7), (8) and (10) apply for the purposes of paragraphs (1A)(a) and (c) in a corresponding way to the way in which they apply for the purposes of Division 1 of Part IV.

*Purpose of a provision*

(10C) Subsections 44ZZRD(7), (9) and (11) apply for the purposes of paragraphs (1A)(b) and (d) in a corresponding way to the way in which they apply for the purposes of Division 1 of Part IV.

*Definition*

(11) In this section:

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

***trade union*** means the following:

(a) an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009*;

(b) an association of employees that is registered or recognised as a trade union (however described) under the law of a State or Territory;

(c) an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

**93AC Commission's objection notice**

*Commission's objection notice—cartel provisions*

(1) If:

(a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a contract, or proposed contract, containing a cartel provision of the kind referred to in that subsection; and

(b) the Commission is satisfied that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision does not or would not outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision;

the Commission may give the corporation a written notice (the ***objection notice***) stating that it is so satisfied.

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*Commission's objection notice—competition provisions*

(2) If a corporation gives the Commission a collective bargaining notice under subsection 93AB(1) in relation to a contract, or proposed contract, containing a provision of the kind referred to in paragraph 45(1)(a) or (b), then the Commission may, if it is satisfied that:

(a) the provision has or would have the purpose, or has or is likely to have or would have or be likely to have the effect, of substantially lessening competition (within the meaning of section 45); and

(b) in all the circumstances, either:

(i) the provision has not resulted or is not likely to result, or would not result or be likely to result, in a benefit to the public; or

(ii) any benefit to the public that has resulted or is likely to result, or would result or be likely to result, from the provision does not or would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;

give the corporation a written notice (the ***objection notice***) stating that it is so satisfied.

*Commission's objection notice – non-compliance with conditions*

(2A) If:

(a) a corporation gives the Commission a collective bargaining notice that relates (wholly or partly) to collective boycott conduct or proposed collective boycott conduct; and

(b) the Commission has given the corporation a notice under subsection 93ACA(1) imposing conditions relating to the conduct or proposed conduct; and

(c) the Commission is satisfied that the corporation has failed to comply with those conditions;

the Commission may give the corporation a written notice (the ***objection notice***) stating that the Commission is so satisfied.

*Reasons for objection notice*

(3) The Commission must, at the time it gives a corporation an objection notice, give the corporation a written statement of its reasons for giving the notice.

*Conference before objection notice*

(4) The Commission must comply with section 93A (conferences about draft objection notices) before giving an objection notice.

*Commission to seek additional information*

(5) For the purposes of deciding whether or not to give an objection notice:

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(a) the Commission must seek such relevant information as it considers reasonable and appropriate; and

(b) the Commission may make a decision on the basis of:

(i) any information so obtained; or

(ii) any other information given to it by the corporation or any other person; or

(iii) any other information in its possession.

**93ACA Imposing conditions relating to collective boycott conduct**

(1) If:

(a) a corporation gives the Commission a collective bargaining notice that relates (wholly or partly) to collective boycott conduct or proposed collective boycott conduct; and

(b) the Commission reasonably believes that:

(i) apart from this section, the Commission would have grounds to give the corporation an objection notice relating to the collective bargaining notice; and

(ii) those grounds would not exist if particular conditions relating to the conduct or proposed conduct were complied with;

the Commission may give the corporation a written notice imposing those conditions.

(4) The Commission must, at the time it gives the corporation the notice under subsection (1), give the corporation a written statement of its reasons for giving the notice.

**93AD When collective bargaining notice comes into force and ceases to be in force**

*When collective bargaining notice comes into force*

(1) A collective bargaining notice comes into force:

(a) at the end of the period which is:

(i) if the notice relates (1 wholly or partly) to collective boycott conduct or proposed collective boycott conduct—60 days or such other period as is prescribed by the regulations; or

(ii) otherwise—14 days or such other period as is prescribed by the regulations;

starting on the day the corporation gave the Commission the notice; or

(b) if the Commission gives the corporation a conference notice during the period referred to in paragraph (a) and then decides not to give the corporation an objection notice—when the Commission makes that decision.

(2) However, a collective bargaining notice does not come into force if:

(a) it is withdrawn, or taken to be withdrawn, before it would come into force under subsection (1); or

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(b) the Commission gives the corporation a conference notice during the period referred to in paragraph (1)(a) and then gives the corporation an objection notice.

Note: Section 93AE deals with the withdrawal of a collective bargaining notice.

*When collective bargaining notice ceases to be in force*

(3) A collective bargaining notice ceases to be in force at the earliest of the following times:

(a) when it is withdrawn or taken to be withdrawn;

(b) if the Commission gives the corporation an objection notice—on the 31st day after the relevant day or on a later day specified in writing by the Commission;

(c) at the end of

(i) if subparagraph (ii) does not apply—the period of 3 years beginning on the day the corporation gave the collective bargaining notice; or

(ii) the period determined under subsection (5).

Note 1: A collective bargaining notice is not in force, to the extent that it relates to collective boycott conduct, while a stop notice is in force in relation to the collective bargaining notice: see section 93AG.

Note 2: Section 93AE deals with the withdrawal of a collective bargaining notice.

(4) For the purposes of subsection (3), the ***relevant day*** is worked out in accordance with this table:

| ***Relevant day*** | | |
|---|---|---|
| | **In this situation:** | **the *relevant day* is:** |
| 1 | If an application is not made to the Tribunal for a review of the Commission's decision to give the objection notice | the day the Commission gave the notice. |
| 2 | If an application is made to the Tribunal for a review of the Commission's decision to give the objection notice | (a) if the review application is withdrawn—the day of the withdrawal; or<br>(b) if, on the application of the Commission or any other person who the Tribunal is satisfied has an interest in the subject matter of the review, the Tribunal declares that the applicant is not proceeding with the review application with due diligence—the day of the declaration; or<br>(c) in any other case—the day on which the Tribunal makes a determination on the review. |

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*Commission may determine expiry of collective bargaining notice*

(5) If the Commission is satisfied that:

(a) the period provided for in subparagraph (3)(c)(i) is not appropriate in all the circumstances; and

(b) another period, ending no later than the end of the period of 10 years beginning on the day the corporation gave the collective bargaining notice, is appropriate in all the circumstances;

the Commission may give to the corporation a written notice determining that other period for the purposes of subparagraph (3)(c)(ii).

(6) The Commission must, at the time it gives the corporation the notice under subsection (5), give the corporation a written statement of its reasons for giving the notice.

**93AE Withdrawal of collective bargaining notice**

*Withdrawal by corporation*

(1) A corporation may, by written notice given to the Commission, withdraw a collective bargaining notice it has given the Commission.

(2) The corporation may do so at any time before the Commission gives it an objection notice in relation to the collective bargaining notice.

*Deemed withdrawal*

(3) If:

(a) a corporation gives the Commission a collective bargaining notice in relation to a contract or proposed contract; and

(b) before or after the corporation gave the notice, it applies to the Commission for an authorisation for that contract or proposed contract; and

(c) the Commission makes a determination either dismissing the application or granting an authorisation in respect of the application; and

(d) either:

(i) the Tribunal makes a determination on an application for a review of the Commission's determination; or

(ii) the time for making such an application for review ends without the making of an application;

then the collective bargaining notice is taken to be withdrawn.

**93AEA Only 1 collective bargaining notice under subsection 93AB(1A) may be given**

If:

(a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a contract or proposed contract; and

(b) either:

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(i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or

(ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then a further collective bargaining notice under subsection 93AB(1A) cannot be given by any person in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

**93AF Only 1 collective bargaining notice under subsection 93AB(1) may be given**

If:

(a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1) in relation to a contract or proposed contract; and

(b) either:

(i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or

(ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then the corporation may not give the Commission a further collective bargaining notice under subsection 93AB(1) in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

**93AG Stop notice for collective boycott conduct**

(1) The Commission may give a corporation a written notice (a ***stop notice***) if:

(a) the corporation has given the Commission a collective bargaining notice that relates (wholly or partly) to collective boycott conduct; and

(b) the collective bargaining notice is in force under section 93AD; and

(c) the Commission reasonably believes that:

(i) the collective boycott conduct has resulted in serious detriment to the public; or

(ii) serious detriment to the public is imminent as a result of the collective boycott conduct.

(2) The Commission must, at the time it gives the corporation the stop notice, give the corporation a written statement of its reasons for giving the stop notice.

(3) While the stop notice is in force, the collective bargaining notice is taken, for the purposes of this Act, not to be in force under section 93AD to the extent that the collective bargaining notice relates to collective boycott conduct.

(4) The stop notice comes into force at the time the Commission gives the corporation the stop notice.

(5) The stop notice ceases to be in force at the earliest of the following times:

(a) at the end of the period 1 provided under subsection (6);

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(b) if, before the end of that period, the Commission gives the corporation an objection notice under subsection 93AC(1) or (2) that relates to the collective bargaining notice—when that objection notice is given;

(c) if, before the end of that period, the Commission gives the corporation a notice under subsection 93ACA(1) imposing conditions relating to conduct or proposed conduct that relates to the collective bargaining notice—when that notice under subsection 93ACA(1) is given;

(d) if the Commission withdraws the stop notice—when it is withdrawn.

(6) For the purposes of paragraph (5)(a), the period is:

(a) the period of 90 days beginning on the day the Commission gives the corporation the stop notice; or

(b) if the Commission extends it under subsection (7)—that period as so extended.

(7) The Commission may, before the end of the period referred to in paragraph (6)(a), extend the period by giving the corporation a written notice extending that period by a further period of up to 90 days.

**Subdivision C—Conferences**

**93A Commission to afford opportunity for conference before giving notice**

(1) Before giving a notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A) in relation to any conduct or proposed conduct, the Commission shall prepare a draft notice in relation to that conduct or proposed conduct.

(2) The Commission shall, by notice in writing sent to the corporation to the conduct or proposed conduct of which the draft notice relates and to each other interested person, invite the corporation or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the corporation or other person wishes the Commission to hold a conference in relation to the draft notice.

(3) The Commission shall send with each notice under subsection (2) a copy of the draft notice and a summary of the reasons why it proposes to give the notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A).

(4) If each of the persons to whom a notice was sent under subsection (2):

(a) notifies the Commission in writing within the period of 14 days mentioned in that subsection that the person does not wish the Commission to hold a conference in relation to the draft notice; or

(b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference;

the Commission must decide after the end of that period whether or not to give the notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A).

(5) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that

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he or she wishes the Commission to hold a conference in relation to the draft notice, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(6) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft notice) nominated by the Chairperson; and

(b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and

(e) no other person is entitled to be present.

(7) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(8) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

(a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;

(b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

(c) shall give a certificate certifying the day on which the first notification under subsection (5) in relation to the draft notice was received by the Commission and the day on which the conference terminated;

and any such certificate shall be received in all courts as evidence of the matters certified.

(9) A document purporting to be a certificate referred to in subsection (8) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(10) The Commission must take account of all matters raised at the conference.

(10A) After the conference, the Commission must decide whether or not to give a notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A).

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(11) For the purposes of this section, ***interested person*** means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the matter, being an interest that, in the opinion of the Commission, is real and substantial.

(12) Where the Commission is of the opinion that two or more notices given to the Commission under subsection 93(1) or 93AB(1A) or (1) by the same person, or by persons being bodies corporate that are related to each other, deal with substantially similar conduct or proposed conduct, the Commission may treat the notices as if they constituted a single notice and may prepare one draft notice in relation to the notices so given to the Commission and hold one conference in relation to that draft notice.

**Subdivision D—Register of notifications**

**95 Register of notifications**

(1) The Commission shall keep a register containing:

(aa) notices relating to voluntary industry codes given to the Commission pursuant to regulations made under section 51AE (including notices that have been withdrawn pursuant to those regulations); and

(a) draft notices, and summaries of reasons, by the Commission furnished to any person under section 93A; and

(b) records of conferences made in accordance with subsection 93A(7) and certificates in relation to conferences given under subsection 93A(8); and

(c) notices (including notices that have been withdrawn) given to the Commission under section 93 or 93AB; and

(d) documents furnished to the Commission in relation to such notices; and

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

(f) particulars of notices given by the Commission to corporations in relation to notices given by corporations under section 93 or 93AB; and

(g) particulars of any permits given by the Commission under subparagraph 93(7)(b)(i); and

(ga) details of the specification of any day by the Commission under paragraph 93(7C)(b); and

(gb) details of the specification of any day by the Commission under paragraph 93AD(3)(b); and

(h) records of proceedings at conferences held under section 65J or 65M; and

(j) particulars of recommendations made to the Minister by the Commission under section 65K or 65N.

(2) Where a person furnishes a document to the Commission:

(a) in relation to a notice given to the Commission under section 93 or 93AB; or

(b) in relation to a conference held under Division 3 of Part XI;

or makes an oral submission to the Commission in relation to the notice or the conference, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that

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particulars of the submission or of part of the submission, be excluded from the register kept under subsection (1) by reason of the confidential nature of any of the matters contained in the document or submission.

(3) Where such a request is made:

(a) if the document or part of the document, or the submission or part of the submission, to which the request relates contains particulars of:

(i) a secret formula or process;

(ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or of assets of a person; or

(iii) the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (1); and

(b) in any other case—the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(4) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (1), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (1)(d) does not apply in relation to the document or part of the document.

(5) Subsection (4) does not apply in relation to a document that was produced to the Minister or the Commission in pursuance of a notice under section 65Q or 155.

(6) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (1), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (1)(e) does not apply in relation to the submission or that part of the submission, as the case may be.

(7) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (1)(d) or particulars referred to in paragraph (1)(e) from the register kept under subsection (1).

(8) If a person requests in accordance with subsection (2) that a document or part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (1), the document or the part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

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Division 3 – Class exemptions(1) The Commission may, by legislative instrument, determine that one or more specified provisions of Part IV do not apply to a kind of conduct specified in the determination, if the Commission is satisfied in all the circumstances:

(a) that conduct of that kind would not have the effect, or would be likely not to have the effect, of substantially lessening competition; or

(b) that conduct of that kind would 1 result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from conduct of that kind.

(2) The Commission may specify in the determination any one or more of the following limitations:

(a) a limitation to persons of a specified kind;

(b) a limitation to circumstances of a specified kind;

(c) a limitation to conduct that complies with specified conditions.

(3) The determination must specify the period, ending no later than the end of the period of 10 years beginning on the day it is made, for which it is to be in force.

(4) The determination:

(a) enters into force on the day it is made; and

(b) ceases to be in force at the earlier of the following times:

(i) if the Tribunal sets it aside under subsection 102(5F)— at the end of the day on which the Tribunal sets it aside;

(ii) at the end of the period specified under subsection (3) of this section.

(5) While the determination remains in force but subject to any limitations specified under subsection (2), the provisions of Part IV specified in the determination do not apply in relation to conduct of the kind specified in the determination.

…

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## Part VIII—Resale price maintenance

### 96 Acts constituting engaging in resale price maintenance

(1) Subject to this Part, a corporation (in this section called ***the supplier***) engages in the practice of resale price maintenance if that corporation does an act referred to in any of the paragraphs of subsection (3).

(2) Subject to this Part, a person (not being a corporation and also in this section called ***the supplier***) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.

(3) The acts referred to in subsections (1) and (2) are the following:

(a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;

(b) the supplier inducing, or attempting to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier;

(c) the supplier entering into an agreement, or offering to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;

(d) the supplier withholding the supply of goods to a second person for the reason that the second person:

(i) has not agreed as mentioned in paragraph (a); or

(ii) has sold, or is likely to sell, goods supplied to him or her by the supplier, or goods supplied to him or her by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold;

(e) the supplier withholding the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the second person:

(i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or

(ii) has sold, or is likely to sell, goods supplied to him or her, or to be supplied to him or her, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; and

(f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold.

(4) For the purposes of subsection (3):

(a) where a price is specified by another person on behalf of the supplier, it shall be deemed to have been specified by the supplier;

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(b) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier;

(c) where a formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that formula, that price shall be deemed to have been specified by the supplier; and

(d) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price ascertained by calculation from, or by reference to, a formula specified by another person in respect of those goods or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier.

(5) In subsection (4), ***formula*** includes a set form or method.

(6) For the purposes of subsection (3), anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.

(7) A reference in any of paragraphs (3)(a) to (e), inclusive, including a reference in negative form, to the selling of goods at a price less than a price specified by the supplier shall be construed as including references to:

(a) the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale;

(b) the displaying of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be displayed for sale; and

(c) the offering of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be offered for sale;

and a reference in paragraph (3)(d), (e) or (f) to a price below which the goods are not to be sold shall be construed as including a reference to the price below which the goods are not to be advertised for sale, to the price below which the goods are not to be displayed for sale and to the price below which the goods are not to be offered for sale.

(8) Subsection (1) does not apply with respect to any act referred to in a paragraph of subsection (3) if the supplier and the second person referred to in that paragraph are bodies corporate that are related to each other.

**96A Resale price maintenance in relation to services**

(1) This Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods.

(2) For the purposes of subsection (1), this Part is to be read with appropriate modifications, including the following modifications:

(a) references in this Part to goods are to be read as references to services;

(b) references to the sale of goods are to be read as references to the re-supply of services.

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**97 Recommended prices**

For the purposes of paragraph 96(3)(b), the supplier is not to be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods:

(a) by reason only of a statement of a price being applied to the goods as mentioned in paragraph 99(1)(a) or being applied to a covering, label, reel or thing as mentioned in paragraph 99(1)(b), provided that the statement is preceded by the words "recommended price"; or

(b) by reason only of his or her having given notification in writing to the second person (not being a notification by way of a statement being applied as mentioned in paragraph (a)) of the price that he or she recommends as appropriate for the sale of those goods, provided that there is included in the notification, and in each writing that refers, whether expressly or by implication, to the notification, a statement to the following effect:

"The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation.".

**98 Withholding the supply of goods**

(1) For the purposes of paragraph 96(3)(d) or (e), the supplier shall be deemed to withhold the supply of goods to another person if:

(a) the supplier refuses or fails to supply those goods to, or as requested by, the other person;

(b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;

(c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, method or place of delivery or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or

(d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this subsection.

(2) Paragraph 96(3)(d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person:

(a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods; or

(b) otherwise for the purpose of promoting the business of that other person.

(3) For the purposes of subsection (2), there shall be disregarded:

(a) a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale; or

(b) a sale of goods that took place with the consent of the supplier.

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**99 Statements as to the minimum price of goods**

(1) For the purposes of paragraph 96(3)(f), if:

(a) a statement is applied to goods, whether by being woven in, impressed on, worked into or annexed or affixed to the goods or otherwise;

(b) a statement is applied to a covering, label, reel or thing in or with which goods are supplied; or

(c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to lead to the belief that it refers to goods;

the statement shall be deemed to have been used in relation to those goods.

(2) For the purposes of subsection (1), ***covering*** includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and ***label*** includes a band or ticket.

**100 Evidentiary provisions**

(1) Where, in proceedings under this Act by a person (in this section referred to as ***the plaintiff***) against another person (in this section referred to as ***the defendant***), it is claimed that the defendant has engaged in the practice of resale price maintenance and it is established that:

(a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 98(1)(a), (b), (c) or (d);

(b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and

(c) during the period of 6 months immediately before the time when the defendant so acted, the defendant became aware of a matter or circumstance capable of constituting a reason referred to in paragraph 96(3)(d) or (e) for the defendant's so acting;

then, subject to subsection (2), it shall be presumed, unless the contrary is established, that that matter or circumstance was the reason for the defendant's so acting.

(2) Subsection (1) does not apply where the plaintiff establishes the matter mentioned in paragraph 98(1)(b) or (c) but the terms disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

(3) In the application of this section in proceedings by the Commission for an injunction, references to the plaintiff shall be construed as references to a person specified in the application for the injunction as the person in relation to whom the defendant is claimed to have acted as mentioned in paragraph (1)(a).

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## Part IX—Review by Tribunal of Determinations of Commission

### Division 1—Applications for review

#### 101 Applications for review

(1) A person dissatisfied with a determination by the Commission under Division 1 of Part VII:

(a) in relation to an application for an authorization or a minor variation of an authorization; or

(b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

(1AAA) Subsection (1) does not apply to a determination under subsection 89(1A).

(1AA) If:

(a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for the minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and the substitution of another authorization; or

(b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

(1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(6).

(1B) A presidential member may, on the application of a person concerned:

(a) in an application for an overseas merger authorisation; or

(b) in an application for a minor variation or a revocation of such an authorization; or

(c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

(1C) The regulations may make it a requirement that a person applying under subsection (1) for review of a determination relating to a merger authorisation give an undertaking under section 87B that the person will not make the acquisition to which the authorisation relates while the Tribunal is considering the application.

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(2) A review by the Tribunal is a re-hearing of the matter, unless it is a review of a determination by the Commission:

(a) in relation to an application for a merger authorisation or a minor variation of a merger authorisation; or

(b) in relation to the revocation 1 of a merger authorisation, or the revocation of a merger authorisation and the substitution of another merger authorisation.

(3) Subsections 90(6), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

**101A Application for review of notice under Division 2 of Part VII**

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3), (3A) or (3B), 93AAA(1), 93AC(1), (2) or (2A), 93ACA(1) or 93AD(5) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

**101B Application for review of notice under subsection 93(3) or (3A) or 93AC(1) or (2)**

(1) A person dissatisfied with the making of a determination under section 95AA may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the making of the determination.

(2) The Tribunal must review the making of the determination if the Tribunal is satisfied that the person has a sufficient interest.

**102 Functions and powers of Tribunal**

(1) On a review of a determination of the Commission under Division 1 of Part VII in relation to:

(a) an application for an authorization; or

(b) an application for a minor variation of an authorization; or

(c) an application for, or the Commission's proposal for, the revocation of an authorization; or

(d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

(1AA) If a person applies to the Tribunal for review of a determination of the Commission relating to:

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(a) the grant of a merger authorisation (a ***domestic merger authorisation***) that is not an overseas merger authorisation; or

(b) the minor variation, or the revocation, of a domestic merger authorisation; or

(c) the revocation of a domestic merger authorisation and the substitution of another domestic merger authorisation;

the Tribunal must make its determination on the review within 90 days after receiving the application for review.

(1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:

(a) the grant of an overseas merger authorisation; or

(b) the minor variation, or the revocation, of an overseas merger authorisation; or

(c) the revocation of an overseas merger authorisation and the substitution of another overseas merger authorisation;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

(1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.

(1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.

(2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission under Division 1 of Part VII in relation to:

(a) an application for an authorization; or

(b) an application for a minor variation of an authorization; or

(c) an application for, or the Commission's proposal for, the revocation of an authorization; or

(d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

(4) Upon a review of the giving of a notice by the Commission under subsection 93(3):

(a) if the person who applied for the review satisfies the Tribunal that:

(i) the conduct or proposed conduct does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 47); or

(ii) in all the circumstances:

(A) the conduct or proposed conduct has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and

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(B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the conduct or proposed conduct;

the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.

(5AAA) Upon a review of the giving of a notice by the Commission under subsection 93(3B):

(a) if the person who applied for the review satisfies the Tribunal that the corporation or other person on whom the conditions relating to the conduct or proposed conduct have been imposed has not failed to comply with those conditions—the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AAB) Upon a review of the giving of a notice by the Commission under subsection 93AAA(1):

(a) if the person who applied for the review satisfies the Tribunal that:

(i) apart from section 93AAA, the Commission would not have had grounds referred to in subparagraph 93AAA(1)(b)(i); or

(ii) compliance with the conditions imposed by the notice would not ensure those grounds would not exist;

the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice

(5AA)Upon a review of the giving of a notice by the Commission under subsection 93AC(1):

(a) if the person who applied for the review satisfies the Tribunal that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision outweighs or would outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision—the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AB) Upon a review of the giving of a notice by the Commission under subsection 93AC(2):

(a) if the person who applied for the review satisfies the Tribunal that:

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(i) the provision does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 45); or

(ii) in all the circumstances:

(A) the provision has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and

(B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;

the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5ABA) Upon a review of the giving of a notice by the Commission under subsection 93AC(2A):

(a) if the person who applied for the r 1 eview satisfies the Tribunal that the corporation on whom the conditions relating to the conduct or proposed conduct have been imposed has not failed to comply with those conditions—the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AC) If the Tribunal sets aside a notice (the ***objection notice***) given by the Commission under subsection 93AC(1), (2) or (2A), then:

(a) if the Commission gave the objection notice as part of a process starting when the Commission gave a notice under subsection 93A(2) (conference notice) during the period described in paragraph 93AD(1)(a)—the Commission is taken for the purposes of paragraph 93AD(1)(b) to have decided not to give the objection notice at the time the Tribunal set it aside; and

(b) for the purposes of subsections 93AD(2) and (3), the objection notice is taken not to have been given.

(5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.

(5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).

(5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:

(a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of

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paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and

(b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.

(5D) Upon a review of the giving of a notice by the Commission under subsection 93ACA(1):

(a) if the person who applied for the review satisfies the Tribunal that:

(i) apart from section 93ACA, the Commission would not have had grounds referred to in subparagraph 93ACA(1)(b)(i); or

(ii) compliance with the conditions imposed by the notice would not ensure those grounds would not exist;

the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5E) Upon a review of the giving of a notice by the Commission under subsection 93AD(5):

(a) if the person who applied for the review satisfies the Tribunal that:

(i) the period provided for in subparagraph 93AD(3)(c)(i) in relation to the relevant collective bargaining notice is appropriate in all the circumstances; or

(ii) the other period determined by the Commission under subsection 93AD(5) is not appropriate in all the circumstances;

the Tribunal must make a 1 determination setting aside the notice under subsection 93AD(5); or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5F) Upon a review of the making of a determination under section 95AA:

(a) if the person who applied for the review satisfies the Tribunal that:

(i) conduct of the kind specified in the determination would have the effect, or would be likely to have the effect, of substantially lessening competition; or

(ii) conduct of that kind would not result, or would be unlikely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from conduct of that kind;

the Tribunal must make a determination setting aside the determination under section 95AA; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the determination under section 95AA.

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

(7) For the purposes of a review under this Division, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

(8) If the review is a review of a determination of the Commission in relation to:

(a) an application for a merger authorisation; or

(b) an application for a minor variation of a merger authorisation; or

(c) an application for, or the Commission's proposal for, the revocation of a merger authorisation; or

(d) an application for, or the Commission's proposal for, the revocation of a merger authorisation and the substitution of another merger authorisation;

the Tribunal must not, for the purposes of the review, have regard to any information, documents or evidence other than:

(e) information that was referred to in the Commission's reasons for making the determination; and

(f) the information, documents or evidence referred to in subsection (7); and

(g) information given to the Tribunal as a result of the Tribunal seeking such relevant information, and consulting with such persons, as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence referred to in subsection (7); and

(h) any information or 1 report given to the Tribunal under subsection (6).

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**Division 2—Procedure and Evidence**

**103 Procedure generally**

(1) In proceedings before the Tribunal:

(a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;

(b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence.

(2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by a presidential member.

(3) The powers mentioned in subsection (2) may be exercised by a presidential member:

(a) whether or not the Tribunal has been constituted under section 37 in relation to the proceedings; and

(b) once the Tribunal is so constituted—whether or not that member is part of the Division of the Tribunal so constituted.

**104 Regulations as to certain matters**

The regulations may make provision:

(a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and

(aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and

(b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

**105 Power to take evidence on oath**

(1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation.

(2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

**106 Hearings to be in public except in special circumstances**

(1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.

(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may:

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(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or

(b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.

(3) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

**107 Evidence in form of written statement**

The Tribunal may permit a person appearing as a witness before the Tribunal to give evidence by tendering, and, if the Tribunal thinks fit, verifying by oath or affirmation, a written statement, which shall be filed with the Registrar.

**108 Taking of evidence by single member**

The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on its behalf, with such limitations (if any) as the Tribunal so constituted directs, and, where such an authority is given:

(a) that member may take evidence accordingly; and

(b) for the purposes of this Act, that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

**109 Participants in proceedings before Tribunal**

(1) A person to whom an authorization under Division 1 of Part VII was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorization.

(1A) A person to whom a notice was given by the Commission under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.

(2) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

**110 Representation**

In proceedings before the Tribunal:

(a) a natural person may appear in person;

(aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;

(b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;

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(c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by a member or officer of the association approved by the Tribunal; and

(d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.

…

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# Part X—International liner cargo shipping

…

## Division 3 - Minimum standards for conference agreements

### 10.08 Conference agreements may include only certain restrictive trade practice provisions

(1) If a conference agreement includes a provision:

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

(i) the purpose/effect condition set out in subsection 44ZZRD(2);

(ii) the competition condition set out in subsection 44ZZRD(4); or

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

(i) the purpose condition set out in subsection 44ZZRD(3);

(ii) the competition condition set out in subsection 44ZZRD(4); or

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

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

(c) deal only with the following matters:

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

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

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

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

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

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

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

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# Part XIA—The Competition Code

…

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

The validity of an authorisation, notification or any other thing given or done for the purposes of this Act is not affected only because it was given or done also for the purposes of the Competition Code.

…

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

## Division 1—Introduction

### 151AA Simplified outline

…

## Division 2—Anti-competitive conduct

### 151AJ Anti-competitive conduct

(1) This section sets out the 2 circumstances in which:
  (a) a carrier; or
  (b) a carriage service provider;
is said to ***engage in anti-competitive conduct*** for the purposes of this Part.

(2) A carrier or carriage service provider ***engages in anti-competitive conduct*** if the carrier or carriage service provider:
  (a) has a substantial degree of power in a telecommunications market; and
  (b) either:
    (i) takes advantage of that power in that or any other market with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or
    (ii) takes advantage of that power in that or any other market, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.

(2A) Without limiting the matters to which regard may be had for the purpose of determining whether a carrier or carriage service provider has engaged in anti-competitive conduct as defined in subsection (2), regard may be had to:
  (a) any conduct of the carrier or carriage service provider that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the carrier or carriage service provider of supplying such goods or services; and
  (b) the reasons for that conduct.

(3) A carrier or carriage service provider ***engages in anti-competitive conduct*** if the carrier or carriage service provider:
  (a) engages in conduct in contravention of section 45AJ, 45AK, 45, 46, 47 or 48; and
  (b) the conduct relates to a telecommunications market.

(4) For the purposes of the application of subsection (3) to a carrier, or a carriage service provider, that is not a corporation, in determining whether conduct of the carrier or

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provider is in contravention of section 45AJ, 45AK, 45, 46, 47 or 48, the following assumptions are to be made:

(a) the assumption that each reference to a corporation in:

(i) those sections; and

(ii) sections 45AL and 45AM;

included a reference to a carrier, or a carriage service provider, that is not a corporation;

(b) the assumption that subsections 45(8) and 47(12) and section 45AN had not been enacted.

(5) For the purposes of the application of subsection (3) to a carrier, or a carriage service provider, that is not a corporation or a partnership, in determining whether conduct of the carrier or provider is in contravention of section 45, 46, 47 or 48, the following assumptions are to be made:

(a) the assumption that the expression "or any body corporate related to such a corporation" were omitted from subsection 45(3);

(b) the assumption that the expression "or a body corporate related to the corporation" were omitted from paragraph 45(4)(b);

(d) the assumption that subsection 46(3) had not been enacted;

(e) the assumption that the expression "or from a competitor of a body corporate related to the corporation" were omitted from each of the following provisions:

(i) paragraphs 47(2)(d) and (e);

(ii) paragraphs 47(3)(d) and (e);

(iii) subparagraphs 47(8)(a)(i) and (ii);

(f) the assumption that the expression "not being a body corporate related to the corporation" were omitted from subsections 47(6) and (7) and paragraphs 47(8)(c) and 47(9)(d);

(g) the assumption that the expression "or from a competitor of a body corporate related to the corporation" were omitted from paragraphs 47(9)(a) and (b);

(h) the assumption that the expression ", or by a body corporate related to the corporation," were omitted from paragraph 47(10)(b);

(i) the assumption that the expression "or any body corporate related to that corporation" were omitted from subparagraph 47(13)(b)(i);

(j) the assumption that the expression "or any body corporate related to either of those corporations" were omitted from paragraph 47(13)(c) and the expression "any body corporate related to the last-mentioned corporation" were substituted;

(k) the assumption that the expression "where the second person mentioned in that paragraph is a corporation" were omitted from subsection 96(2).

(6) A person may be taken to have engaged in anti-competitive conduct even if the conduct involves the exercise, or proposed exercise, of an existing legal or equitable right (whether under a contract or otherwise).

(7) Despite anything in this section, a carrier or carriage service provider does not engage in anti-competitive conduct if that conduct does not constitute a contravention of section 45AJ, 45AK, 45, 46, 47 or 48:

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(a) because an authorisation is in force; or

(b) because of the operation of subsection 45AL(1) or 45(8A) or section 93; or

(c) because of the operation of subsection 45(9); or

(e) because of the operation of section 44ZZRM.

(8) A carrier or carriage service provider does not engage in anti-competitive conduct if that conduct occurred before 1 July 1997.

(9) Despite anything in this section, a person does not engage in anti-competitive conduct if, under section 577BA of the *Telecommunications Act 1997*, the conduct is authorised for the purposes of subsection 51(1) of this Act.

(10) Despite anything in this section, a person does not engage in anti-competitive conduct if, under section 151DA, the conduct is authorised for the purposes of subsection 51(1).

### 151AK The competition rule

(1) A carrier or carriage service provider must not engage in anti-competitive conduct.

(2) For the purposes of this Part, the rule set out in subsection (1) is to be known as the ***competition rule***.

Note: For enforcement of the competition rule, see Division 7.

## Division 3—Competition notices and exemption orders

## Subdivision A—Competition notices

…

## Subdivision B—Exemption orders

### 151AS Exemption orders

(1) A person may apply to the Commission for an order exempting specified conduct of the person from the scope of section 151AJ (which deals with anti-competitive conduct). The order is called an ***exemption order***.

(2) An exemption order is not invalid only because the conduct specified in the order is conduct of a kind that, apart from the order, is outside the scope of section 151AJ (which deals with anti-competitive conduct).

### 151AT Form of application

An application for an exemption order must be:

(a) in writing; and

(b) in a form approved in writing by the Commission; and

(c) accompanied by the prescribed fee.

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### 151AU Further information

(1) The Commission may request an applicant for an exemption order to give the Commission further information about the application.

(2) The Commission may refuse to consider the application until the applicant gives the Commission the information.

(3) The Commission may withdraw its request for further information, in whole or in part.

### 151AV Withdrawal of application

An applicant for an exemption order may withdraw the application by written notice given to the Commission.

### 151AW Commission must publicise receipt of applications

If the Commission receives an application for an exemption order, the Commission must publicise the receipt of the application in such manner as it thinks fit.

### 151AX Commission may refuse to consider application if it relates to the same conduct as an authorisation application

(1) This section applies if:

(a) the Commission receives, or has received, an application for an exemption order; and

(b) the Commission receives, or has received, an application for an authorisation under Division 1 of Part VII; and

(c) the application for the exemption order and the application for the authorisation relate to the same conduct.

(2) The Commission may refuse to:

(a) consider the application for the exemption order; or

(b) convene a conference under section 151AZ to discuss the application for the exemption order;

until:

(c) the Commission has made a determination under section 90 in relation to the application for the authorisation; or

(d) if the Commission makes such a determination—the expiry of the time limit allowed for a person to apply to the Tribunal for a review of the determination; or

(e) if a person applies to the Tribunal for a review of the determination—the review (including any court proceedings arising out of the review) is finalised.

### 151AY Commission may refuse to consider application if it relates to the same conduct as a Part VII notification

(1) This section applies if:

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(a) the Commission receives, or has received, an application for an exemption order; and

(b) the Commission receives, or has received, a notice under subsection 93(1) or 93AB(1A) or (1); and

(c) the application for the exemption order and the notice relate to the same conduct.

(2) The Commission may refuse to:

(a) consider the application for the exemption order; or

(b) convene a conference under section 151AZ to discuss the application for the exemption order;

until:

(c) the Commission decides whether or not to give a notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A); or

(d) if the Commission gives such a notice—the expiry of the time limit allowed for a person to apply to the Tribunal for review of the decision; or

(e) if a person applies to the Tribunal for a review of the decision—the review (including any court proceedings arising out of the review) is finalised.

### 151AZ Commission may convene conference to discuss application

(1) If the Commission receives an application for an exemption order, the Commission may convene a conference to discuss the application.

(2) If the Commission decides to convene a conference, the Commission must give:

(a) the applicant (or a representative of the applicant); and

(b) any other persons whom the Commission considers interested;

a reasonable opportunity to attend and take part in the conference.

(3) This Act does not prevent a conference under this section from being combined with a conference under section 90A or 93A if the combined conference relates to the same conduct.

### 151BA Commission must grant or reject application

If the Commission receives an application for an exemption order, the Commission must either:

(a) make the order; or

(b) refuse to make the order.

### 151BB Commission to give opportunity for submissions

Before making an exemption order, the Commission must give:

(a) the applicant; and

(b) any other person whom the Commission considers interested;

a reasonable opportunity to make submissions to the Commission about the order.

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### 151BC Criteria for making exemption order

(1) The Commission must not make an exemption order in relation to particular conduct of a person unless it is satisfied that:

(a) both:

(i) the conduct will result, or is likely to result, in a benefit to the public; and

(ii) that benefit outweighs, or will outweigh, the detriment to the public constituted by any lessening of competition that will result, or is likely to result, from engaging in the conduct; or

(b) the conduct is not anti-competitive conduct.

(2) In determining whether the Commission is satisfied about the matters referred to in paragraph (1)(a), the Commission may have regard to the following matters:

(a) the extent to which the conduct relates to the supply of goods or services on favourable terms and conditions to:

(i) a financially disadvantaged individual; or

(ii) an individual who is disadvantaged on health grounds; or

(iii) a registered charity; or

(iiia) a community organisation that is a not-for-profit entity and is not a charity; or

(iv) an educational institution; or

(v) a health facility;

(b) the extent to which the conduct relates to the supply of goods or services for:

(i) community, charitable or educational purposes; or

(ii) the promotion of health or safety;

on favourable terms and conditions;

(c) the need to satisfy any applicable universal service obligation;

(d) the extent to which the conduct prevents or reduces, or is likely to prevent or reduce, pollution or other forms of degradation of environmental amenity;

(e) the extent to which the conduct contributes, or is likely to contribute, to technical innovation, or the development of new goods or services, by Australian industry.

(3) Subsection (2) does not, by implication, limit the matters to which the Commission may have regard.

(4) The Commission must not make an exemption order in relation to particular conduct of a person if the conduct is in contravention of section 46.

(5) Subsections 151AJ(4) and (5) apply for the purposes of subsection (4) of this section in a corresponding way to the way in which they apply for the purposes of subsection 151AJ(3).

(6) In this section:

***environment*** includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings.

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### 151BD Notification of decision

(1) If the Commission makes an exemption order, the Commission must give the applicant a written notice setting out the order and the reasons for the order.

(2) If the Commission refuses to make an exemption order, the Commission must give the applicant a written notice stating that the order has been refused and setting out the reasons for the refusal.

### 151BE Duration of exemption order may be limited

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

### 151BF Conditions of exemption order

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

### 151BG Revocation of exemption order

(1) If:
  (a) an exemption order is in force in relation to a person; and
  (b) the Commission is satisfied that:
    (i) the order was made on the basis of information that was false or misleading in a material particular; or
    (ii) a condition to which the order is subject has been contravened; or
    (iii) there has been a material change of circumstances since the order was made;

  the Commission may revoke the order.

(2) The Commission must not revoke an exemption order unless the Commission has first:
  (a) published a draft notice of revocation and invited people to make submissions to the Commission on the draft notice; and
  (b) considered any submissions that were received within the time limit specified by the Commission when it published the draft notice.

(3) The Commission may make a further exemption order under section 151BA in substitution for the revoked order.

(4) If the Commission revokes an exemption order relating to a person, the Commission must give the person a written notice stating that the order has been revoked and setting out the reasons for the revocation.

(5) A revocation of an exemption order takes effect:
  (a) at the time when notice of the revocation is given; or
  (b) if a later time is specified in the notice of the revocation—at that later time.

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### 151BH Register of exemption orders

(1) The Commission must keep a Register in relation to exemption orders.

(2) The Register must include the following:
  (a) particulars of all exemption orders (including orders that have expired);
  (b) applications for exemption orders received by the Commission (including applications that have been withdrawn);
  (c) particulars of decisions refusing to make exemption orders;
  (d) particulars of decisions revoking, or refusing to revoke, exemption orders;
  (e) particulars of the Commission's reasons for making exemption orders.

(3) Despite subsection (2), the Register must not set out information covered by subsection (2) if the disclosure of the information could reasonably be expected to prejudice substantially the commercial interests of the person, or any of the persons, to whom the information relates.

(4) The Register may be maintained by electronic means.

(5) A person may, on payment of the fee (if any) specified in the regulations:
  (a) inspect the Register; and
  (b) make a copy of, or take extracts from, the Register.

(6) For the purposes of this section, if the Register is maintained by electronic means, a person is taken to have made a copy of, or taken an extract from, the Register if the Commission gives the person a printout of, or of the relevant parts of, the Register.

(7) If a person requests that a copy be provided in an electronic form, the Commission may provide the relevant information:
  (a) on a data processing device; or
  (b) by way of electronic transmission.

…

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# Part XID—Search and seizure

## Division 1 – Preliminary

…

# Part XII—Miscellaneous

…

**155 Power to obtain information, documents and evidence**

(1) Subject to subsection (2A), if the Commission, the Chairperson or a Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a referred to in subsection (2), a member of the Commission may, by notice in writing served on that person, require that person:

(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or

(c) to appear before the Commission, or before a member of the staff assisting the Commission who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) For the purposes of subsection (1), the matter must be a matter that:

(a) constitutes, or may constitute, a contravention of:

(i) this Act; or

(ii) Division 4A or 4B of Part 3.3 of the *Radiocommunications Act 1992*; or

(iii) any of the terms of an undertaking under section 87B of this Act or under section 218 of the Australian Consumer Law; or

(b) is relevant to:

(i) a designated communications matter (as defined by subsection (9) of this section); or

(ii) a designated water matter (as defined by subsection (9A) of this section); or

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(iii) the making of a decision by the Commission under subsection 90(1) in relation to an application for a merger authorisation; or

(iv) the making of a decision by the Commission under subsection 91B(4), 91C(4), 93(3), (3A) or (3B) or 93AC(1), (2) or (2A).

(2A) A member of the Commission may not give a notice under subsection (1) merely because:

(a) a person has refused or failed to comply with a notice under subsection 95ZK(1) or (2) on the ground that complying with the notice would tend to incriminate the person, or to expose the person to a penalty; or

(b) a person has refused or failed to answer a question that the person was required to answer by the person presiding at an inquiry under Part VIIA, on the ground that the answer would tend to incriminate the person, or to expose the person to a penalty; or

(c) a person has refused or failed to produce a document referred to in a summons under subsection 95S(3), on the ground that production of the document would tend to incriminate the person, or to expose the person to a penalty.

(3) If a notice under subsection (1) requires a person to appear before the Commission to give evidence, the Commission may require the evidence to be given on oath or affirmation. For that purpose, any member of the Commission may administer an oath or affirmation.

(3A) If a notice under subsection (1) requires a person to appear before a member of the staff assisting the Commission to give evidence, the staff member may require the evidence to be given on oath or affirmation and may administer an oath or affirmation.

(4) A member of the Commission may exercise, or continue to exercise, a power under subsection (1) in relation to a matter referred to in that subsection until:

(a) the Commission commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or

(b) the close of pleadings in relation to an application by the Commission for a final injunction in relation to the matter.

(5) A person shall not:

(a) refuse or fail to comply with a notice under this section;

(b) in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading.

(5A) Paragraph (5)(a) does not apply to the extent that the person is not capable of complying with the notice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5A), see subsection 13.3(3) of the Criminal Code.

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(5B) Paragraph (5)(a) 1 does not apply to the extent that:

(a) the notice relates to producing documents; and

(b) after a reasonable search, the person is not aware of the documents.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5B), see subsection 13.3(3) of the Criminal Code.

(6) For the purposes of paragraph (5B)(b), in making a reasonable search, the person may take into account the following:

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

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document likely to be found;

(e) any other relevant matter.

(6A) A person who contravenes subsection (5) is guilty of an offence punishable on conviction by imprisonment for 2 years or a fine not exceeding 100 penalty units.

Note 1: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Note 2: Part IA of the Crimes Act 1914 contains provisions dealing with penalties.

(7) A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person or expose the person to a penalty, but the answer by an individual to any question asked in a notice under this section or the furnishing by an individual of any information in pursuance of such a notice is not admissible in evidence against the individual in any criminal proceedings, other than:

(a) proceedings for an offence against this section; or

(b) proceedings for an offence against section 137.1, 137.2 or 149.1 of the Criminal Code that relates to this section.

(7A) This section does not require a person:

(a) to give information or evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or

(b) to produce a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or

(c) to give information or evidence, or to produce a document, that would disclose the deliberations of the Cabinet of a State or Territory.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7A), see subsection 13.3(3) of the Criminal Code.

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(7B) This section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.

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

(8) Nothing in this section implies that notices may not be served under this section and section 155A in relation to the same conduct.

(9) A reference in this section to a ***designated communications matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) the Telecommunications Act 1997; or

(b) the Telecommunications (Consumer Protection and Service Standards) Act 1999; or

(ba) the National Broadband Network Companies Act 2011; or

(c) Part XIB or XIC of this Act; or

(d) Division 4A or 4B of Part 3.3 of the Radiocommunications Act 1992.

(9A) A reference in this section to a ***designated water matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) Part 4 or 4A of the Water Act 2007; or

(b) regulations made under that Act for the purposes of Part 4 of that Act; or

(c) water charge rules, or water market rules, made under Part 4 of that Act.

(10) In this section:

***legal professional privilege*** includes privilege under Division 1 of Part 3.10 of the *Evidence Act 1995*.

**155AAA Protection of certain information**

(1) A Commission official must not disclose any protected information to any person except:

(a) when the Commission official is performing duties or functions as a Commission official; or

(b) when the Commission official or the Commission is required or permitted by:

(i) this Act or any other law of the Commonwealth; or

(ii) a prescribed law of a State or internal Territory;

to disclose the information.

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(2) Subsection (1) does not allow a Commission official to disclose protected information when performing a function of the Commission described in section 28.

*Disclosure to Ministers*

(3) A Commission official may disclose protected information to the designated Minister.

(4) If protected information relates to a matter arising under:

(a) a provision of this Act; or

(b) a provision of another Act;

that is administered by a Minister other than the designated Minister, a Commission official may disclose the protected information to the other Minister.

(5) Subsection (4) does not limit subsection (3).

*Disclosure to Secretaries etc.*

(6) A Commission official may disclose protected information to:

(a) the Secretary of the designated Department; or

(b) an officer of the designated Department who is authorised by the Secretary of that Department, in writing, for the purposes of this subsection;

for the purpose of advising the designated Minister.

(7) If protected information relates to a matter arising under:

(a) a provision of this Act; or

(b) a provision of another Act;

that is administered by a Minister other than the designated Minister, a Commission official may disclose the protected information to:

(c) the Secretary of the Department that is administered by the other Minister; or

(d) an officer of that Department who is authorised by the Secretary of that Department, in writing, for the purposes of this subsection;

for the purpose of advising the other Minister.

(8) Subsection (7) does not limit subsection (6).

*Disclosure to a Royal Commission*

(9) A Commission official may disclose protected information to a Royal Commission.

(10) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (9).

(11) An instrument under subsection (10) is not a legislative instrument.

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*Disclosure to certain agencies, bodies and persons*

(12) If the Chairperson is satisfied that particular protected information will enable or assist any of the following agencies, bodies or persons:

(a) the Australian Bureau of Statistics;

(b) the Australian Communications and Media Authority;

(c) the Australian Prudential Regulation Authority;

(d) the Australian Securities and Investments Commission;

(e) the National Competition Council;

(f) the Productivity Commission;

(g) any other agency within the meaning of the *Freedom of Information Act 1982;*

(h) the Australian Statistician;

(i) the Commissioner of Taxation;

(j) the Australian Competition Tribunal;

(k) the Director of Public Prosecutions;

(l) the Reserve Bank of Australia;

(la) the Clean Energy Regulator;

(lb) the Climate Change Authority;

(m) a State/Territory government body;

(n) a foreign government body;

to perform or exercise any of the functions or powers of the agency, body or person, an authorised Commission official may disclose that protected information to the agency, body or person concerned.

(13) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (12).

(14) An instrument under subsection (13) is not a legislative instrument.

*Disclosure with consent*

(15) A Commission official may disclose protected information that relates to the affairs of a person if:

(a) the person has consented to the disclosure; and

(b) the disclosure is in accordance with that consent.

*Disclosure of publicly available information*

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(16) A Commission official may disclose protected information if it is already publicly available.

*Disclosure of summaries or statistics*

(17) A Commission official may disclose:

(a) summaries of protected information; or

(b) statistics derived from protected information;

if those summaries or statistics, as the case may be, are not likely to enable the identification of a person.

*Disclosure authorised by regulations*

(18) The regulations may:

(a) authorise a Commission official to disclose protected information in specified circumstances; and

(b) provide that the Chairperson may, by writing, impose conditions to be complied with in relation to the disclosure of protected information in those circumstances.

(19) An instrument under regulations made for the purposes of paragraph (18)(b) is not a legislative instrument.

*Delegation*

(20) The Chairperson may, by writing, delegate any or all of his or her functions and powers under:

(a) this section; or

(b) regulations made for the purposes of subsection (18);

to a member of the Commission.

*Definitions*

(21) In this section:

***authorised Commission official*** means a Commission official authorised by the Chairperson, in writing, for the purposes of this section.

***Commission official*** means:

(a) a member, or associate member, of the Commission; or

(b) a person referred to in subsection 27(1); or

(c) a person engaged under section 27A.

***core statutory provision*** means:

(a) a provision of Part IV, V, VII, VIII, XI, XIB or XIC; or

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(b) the remaining provisions of this Act so far as they relate to a provision covered by paragraph (a); or

(c) a provision of the regulations made under section 172 so far as it relates to a provision covered by paragraph (a) or (b); or

(d) a provision of the Australian Consumer Law (other than Part 5 3); or

(e) a provision of the regulations made under section 139G so far as it relates to a provision covered by paragraph (d).

***designated Department*** means the Department that is responsible for the administration of this section (other than subsections (4) and (7)).

***designated Minister*** means the Minister who is responsible for the administration of this section (other than subsections (4) and (7)).

***disclose*** means divulge or communicate.

***foreign country*** includes a region where:

(a) the region is a colony, territory or protectorate of a foreign country; or

(b) the region is part of a foreign country; or

(c) the region is under the protection of a foreign country; or

(d) a foreign country exercises jurisdiction or control over the region; or

(e) a foreign country is responsible for the region's international relations.

***foreign government*** body means:

(a) the government of a foreign country; or

(b) an agency or authority of a foreign country; or

(c) the government of part of a foreign country; or

(d) an agency or authority of part of a foreign country.

***information*** includes information in a document and information given in evidence.

***protected information*** means:

(a) information that:

(i) was given in confidence to the Commission; and

(ii) relates to a matter arising under a core statutory provision; or

(b) information that:

(i) was obtained by the Commission under Part XID or section 155; and

(ii) relates to a matter arising under a core statutory provision; or

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(ba) information that was obtained by the Commission under paragraph 60FD(2)(b) or section 60FA or 60H; or

(c) information that:

(i) was obtained by the Commission under section 151AU, 152AU, 152CBB or 152CBH or rules in force under section 151BU; and

(ii) relates to a matter arising under Part XIB or XIC; or

(d) information that was obtained by the Commission under section 118C, 118G, 118NE or 118NI of the *Radiocommunications Act 1992*; or

(e) information that:

(i) was given in confidence to the Commission by a foreign government body; and

(ii) relates to a matter arising under a provision of a law of a foreign country or of a part of a foreign country; or

(f) information that:

(i) was obtained by the Commission under section 155; and

(ii) relates to a designated water matter within the meaning of that section.

For the purposes of this definition, it is immaterial whether the information was given to or obtained by the Commission before, at or after the commencement of this section.

***Royal Commission*** has the same meaning as in the *Royal Commissions Act 1902.*

***State/Territory government body*** means:

(a) the government of a State or Territory; or

(b) an agency or authority of a State or Territory.

**155AA Protection of Part VB information**

**…**

**157 Disclosure of documents by Commission**

(1) Subject to subsection (1A), if:
(a) a corporation makes an application to the Commission under section 88, 91A, 91B or 91C; or
(b) the Commission proposes the revocation of an authorization under subsection 91B(3) or the revocation of an authorization and the substitution of another authorization under subsection 91C(3); or
(c) a proceeding is instituted against a corporation or other person under section 77, 80, 80AC, 81 or 81A; or

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(d) an application is made under, subsection 51ADB(1), section 86C or 86D or subsection 87(1A) for an order against a corporation or other person;

the Commission shall, at the request of the corporation or other person and upon payment of the prescribed fee (if any), furnish to the corporation or other person:

(e) a copy of every document that has been furnished to, or obtained by, the Commission in connexion with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person; and
(f) a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connexion with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person;

not being a document obtained from the corporation or other person or prepared by an officer or professional adviser of the Commission.

(1AA) Subject to subsections (1AB) and (1A), if an application for an order against a person is made under:
(a) section 137F; or
(b) subsection 237(1), or section 246 or 247, of the Australian Consumer Law;

the Commission must, at the request of the person and upon payment of the prescribed fee (if any), give the person:

(c) a copy of every document that has been given to, or obtained by, the Commission in connection with the matter to which the application relates and tends to establish the case of the person; and
(d) a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connection with the matter to which the application relates and tends to establish the case of the person.

(1AB) Subsection (1AA) does not apply to a document obtained from the person, or prepared by an officer or professional adviser of the Commission.

*Protected cartel information—Commission may refuse to comply with request*

(1A) If a request under subsection (1) relates to a document containing protected cartel information, the Commission may refuse to comply with the request.

(1B) In exercising its powers under subsection (1A), the Commission must have regard to the following matters:
(a) the fact that the protected cartel information was given to the Commission in confidence;
(b) Australia's relations with other countries;
(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;

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(d) in a case where the protected cartel information was given by an informant:
  (i) the protection or safety of the informant or of persons associated with the informant; and
  (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
(e) the legitimate interests of the corporation which, or the person who, made the request under subsection (1);
(f) such other matters (if any) as the Commission considers relevant.

*Court order*

(2) If the Commission does not comply with a request under subsection (1) otherwise than because of a refusal under subsection (1A), the Court shall, subject to subsection (3), upon application by the corporation which, or other person who, made the request, make an order directing the Commission to comply with the request.

(3) The Court may refuse to make an order under subsection (2) in respect of a document or part of a document if the Court considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person, or for any other reason.

(4) Before the Court gives a decision on an application under subsection (2), the Court may require any documents to be produced to it for inspection.

(5) An order under this section may be expressed to be subject to conditions specified in the order.

*Definition*

(6) In this section:

***protected cartel information*** has the same meaning as in section 157B.

…

…

## 161 Refusal to be sworn or to answer questions

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

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

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

(2) It is a reasonable excuse for an individual to refuse or fail to answer a question that he or she is required to answer under this section that the answer to the question may tend to incriminate him or her.

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

(3) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

## 162 Contempt

(1) A person shall not:

(a) insult a member of the Tribunal, a member of the Commission or an AER member in the exercise of his or her powers or functions as a member;

(b) interrupt the proceedings of the Tribunal or a conference held by the Commission under section 90, 93A or 151AZ;

(c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the Tribunal is sitting or the Commission is holding such a conference; or

(d) do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

...

## 163 Prosecutions

(1) Prosecutions for offences against this Act may be brought in any court having jurisdiction in the matter.

(2) In so far as this section has effect as a law of the Commonwealth, the Federal Court has jurisdiction in any matter in respect of which a criminal proceeding is instituted for an offence to which subsection (1) applies, and that jurisdiction is exclusive of the jurisdiction of any other court other than:

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(a) the jurisdiction of a Supreme Court of a State or Territory under section 68 of the *Judiciary Act 1903* with respect to any matter in respect of which a criminal proceeding is instituted for an offence against section 44ZZRF or 44ZZRG; and

(b) the jurisdiction of a court under section 68 of the *Judiciary Act 1903* with respect to the examination and commitment for trial on indictment of a person who is charged with an indictable offence; and

(c) the jurisdiction of the High Court under section 75 of the Constitution.

(4) Proceedings under this section, other than proceedings instituted by:

(aa) the Director of Public Prosecutions; or

(a) the Commission; or

(b) a person authorised in writing by the Commission; or

(c) a person authorised in writing by the Secretary of the Department;

shall not be instituted except with the consent in writing of the Minister or of a person authorised by the Minister in writing to give such consents.

(5) A prosecution for an offence against section 154Q, 155 or 155B may be commenced at any time after the commission of the offence.

(6) Despite subsection (2), the Federal Court does not have jurisdiction in any matter in respect of which a criminal proceeding is instituted for an offence against section 44ZZRF or 44ZZRG if the proceeding is instituted before the commencement of Schedule 1 to the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009*.

## 163A Declarations and orders

*Declarations and orders*

(1) Subject to this section, a person may, in relation to a matter arising under this Act, institute a proceeding in a court having jurisdiction to hear and determine proceedings under this section seeking the making of:

(a) a declaration in relation to the operation or effect of any provision of this Act other than the following provisions:

(i) Part V;

(ii) Part XIB;

(iii) Part XIC; or

(aaa) a declaration in relation to the operation or effect of any provision of the Australian Consumer Law other than Division 1 of Part 3-2 or Part 5-4; or

(aa) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act; or

(b) an order by way of, or in the nature of, prohibition, certiorari or mandamus;

or both such a declaration and such an order.

(1A) Subsection (1) does not apply in relation to a matter arising under Part IIIAA.

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*When Minister may institute, or intervene in, proceedings*

(2) Subject to subsection (2A), the Minister may institute a proceeding under this section and may intervene in any proceeding instituted under this section or in a proceeding instituted otherwise than under this section in which a party is seeking the making of a declaration of a kind mentioned in paragraph (1)(a) or (aa) or an order of a kind mentioned in paragraph (1)(b).

(2A) Subsections (1) and (2) do not permit the Minister:

(a) to institute a proceeding seeking a declaration, or an order described in paragraph (1)(b), that relates to Part IV; or

(b) to intervene in a proceeding so far as it relates to a matter that arises under Part IV.

*When Commission may institute proceedings*

(3) The Commission may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of a declaration of the kind that may be made under paragraph (1)(a).

*Jurisdiction of Federal Court*

(3A) Subject to subsections (4B) and (4C), in so far as this section has effect as a law of the Commonwealth, the Federal Court has jurisdiction to hear and determine proceedings under this section.

(4) The jurisdiction of the Federal Court under subsection (3A) to make:

(a) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act by the Tribunal; or

(b) an order of a kind mentioned in paragraph (1)(b) directed to the Tribunal;

shall be exercised by not less than 3 Judges.

*Jurisdiction of State/Territory Supreme Courts etc.*

(4A) In so far as this section has effect as a law of the Commonwealth, the Supreme Court of a State or Territory does not have jurisdiction to hear and determine proceedings under this section otherwise than in accordance with subsection (4B) or (4C). This subsection has effect despite any other law, including section 39 of the *Judiciary Act 1903*.

(4B) If a decision to prosecute a person for an offence against section 44ZZRF or 44ZZRG has been made and the prosecution is proposed to be commenced in the Supreme Court of a State or Territory:

(a) the Federal Court does not have jurisdiction with respect to any matter in which a person seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to that decision; and

(b) if the Supreme Court is the Supreme Court of a State—in so far as this section has effect as a law of the Commonwealth, the Supreme Court is invested with federal jurisdiction with respect to any such matter; and

(c) if the Supreme Court is the Supreme Court of a Territory, then:

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(i) in so far as this section has effect as a law of the Commonwealth; and

(ii) subject to the Constitution;

the Supreme Court is conferred with jurisdiction with respect to any such matter.

(4C) Subject to subsection (4D), at any time when:

(a) a prosecution for an offence against section 44ZZRF or 44ZZRG is before the Supreme Court of a State or Territory; or

(b) an appeal arising out of such a prosecution is before the Supreme Court of a State or Territory;

the following apply:

(c) the Federal Court does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to a related criminal justice process decision;

(d) if the Supreme Court is the Supreme Court of a State—in so far as this section has effect as a law of the Commonwealth, the Supreme Court is invested with federal jurisdiction with respect to any such matter;

(e) if the Supreme Court is the Supreme Court of a Territory, then:

(i) in so far as this section has effect as a law of the Commonwealth; and

(ii) subject to the Constitution;

the Supreme Court is conferred with jurisdiction with respect to any such matter.

(4D) Subsection (4C) does not apply if, before the commencement of a prosecution for an offence against section 44ZZRF or 44ZZRG, a person seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to a related criminal justice process decision.

(4E) If subsection (4D) applies, the prosecutor may apply to the Federal Court for a permanent stay of the paragraph (1)(aa) or (b) proceedings referred to in that subsection, and the Federal Court may grant such a stay if the Federal Court determines that:

(a) the matters the subject of the proceedings are more appropriately dealt with in the criminal justice process; and

(b) a stay of proceedings will not substantially prejudice the person.

*Definitions*

(5) In this section, ***proceeding*** includes a cross-proceeding.

(6) In this section:

***related criminal justice process decision*** has the same meaning as in section 39B of the *Judiciary Act 1903*.

## 165 Inspection of, furnishing of copies of, and evidence of, documents

(1) A person may, on application in accordance with the regulations and on payment of the prescribed fee (if any):

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(a) inspect any document contained in the register kept under subsection 89(3) or 95(1); and

(b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy under the hand of a person authorized by the Commission to certify such copies).

(2) Subject to subsection (3) and to any direction under subsection 106(2), a person may, on application in accordance with the regulations and on payment of the prescribed fee (if any):

(a) inspect the document recording a declaration under section 50A or a determination of the Tribunal or any document furnished to, or recorded in the records of, the Tribunal in pursuance of this Act or the regulations; and

(b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy under the hand of the Registrar or of a Deputy Registrar).

(3) Unless the Tribunal in a particular case otherwise directs, subsection (2) does not apply in relation to a document furnished to the Tribunal if the person by whom the document was furnished claims, as prescribed, that the document contains matter of a confidential nature.

(4) A copy of a determination of the Commission, certified to be a true copy by a person authorized by the Commission to certify copies of determinations of the Commission, shall be received in all courts as evidence of the determination.

(5) A document purporting to be a copy of a determination of the Commission and to be certified to be a true copy in accordance with subsection (4) shall, unless the contrary is established, be deemed to be such a copy and to be so certified.

(6) A copy of a declaration under section 50A or a determination of, or undertaking given to, the Tribunal, certified to be a true copy under the hand of the Registrar or of a Deputy Registrar, shall be received in all courts as evidence of the declaration, determination or undertaking.

### 166 Certificates as to furnishing of particulars to Commission

(1) Where particulars of, or of a provision of, a contract, arrangement or understanding have been furnished to the Commission for the purposes of paragraph 51(2)(g), the Commission shall, on application by a party to the contract or to the arrangement or understanding, cause to be furnished to the party a certificate signed by a member of the Commission specifying the particulars so furnished and the date on which the particulars were furnished.

(2) A certificate referred to in subsection (1) shall be received in all courts as evidence that the particulars specified in the certificate were furnished to the Commission on the date so specified.

(3) A person is not entitled to inspect any particulars of, or of a provision of, a contract, arrangement or understanding that have been furnished to the Commission for the purposes of paragraph 51(2)(g), but the Commission may make those particulars

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available to the Minister or to an officer acting on behalf of, and with the authority of, the Minister or to a court.

### 167 Judicial notice

(1) All courts shall take judicial notice of:

(a) the official signature of any person who holds or has held the office of President, Deputy President, member of the Tribunal, Chairperson, Deputy Chairperson, member of the Commission, Registrar, Deputy Registrar, AER Chair or AER member and of the fact that that person holds or has held that office; and

(b) the official seal of the Tribunal, of the Commission or of the AER;

if the signature or seal purports to be attached or appended to an official document.

(1A) All courts must take judicial notice of:

(a) the official signature of a person who holds or has held the office of Chairman, Deputy Chairman, or member (including associate member) of the New Zealand Commerce Commission and of the fact that the person holds or has held the office; and

(b) the imprint of the common seal of the New Zealand Commerce Commission;

if the signature or imprint purports to be attached or appended to an official document.

(2) In this section, ***court*** includes a Federal Court or a court of a State or Territory and all persons authorized by law or by consent of parties to receive evidence.

### 170 Legal and financial assistance

(1) A person:

(a) who has instituted, or proposes to institute, a proceeding before the Commission or the Tribunal, or a proceeding before the Court under Part IVB, Part VI or section 163A, or under Part 3-5 or Chapter 5 of the Australian Consumer Law;

(b) who is entitled to participate, or has been permitted to intervene, in a proceeding before the Commission or the Tribunal; or

(c) against whom a proceeding before the Court has been instituted under Part IVB, Part VI or section 163A, or under Part 3-5 or Chapter 5 of the Australian Consumer Law;

may apply to the Attorney-General for a grant of assistance under this section in respect of the proceeding.

(2) Where an application is made by a person under subsection (1), the Attorney-General, or a person appointed or engaged under the *Public Service Act 1999* (the ***public servant***) authorized in writing by the Attorney-General, may, if he or she is satisfied that it would involve hardship to that person to refuse the application and that, in all the circumstances, it is reasonable that the application should be granted, authorize the grant by the Commonwealth to the person, either unconditionally or subject to such conditions as the Attorney-General or public servant determines, of such legal or financial assistance in relation to the proceeding as the Attorney-General or public servant determines.

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(3) In this section:

(a) a reference to a proceeding before the Commission is a reference to a proceeding in relation to an application for, or in relation to the revocation of, an authorisation under Division 1 of Part VII; and

(b) a reference to a proceeding before the Tribunal is a reference to:

(i) an application to the Tribunal for a declaration under subsection 50A(1); or

(iii) an application for a review of a determination, or of the giving of a notice, by the Commission.

**171 Annual report by Commission**

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

(2) The report must include a cumulative list of all Commonwealth, State and Territory laws that the Commission knows about that authorise things for the purposes of subsection 51(1) of this Act or subsection 51(1) of the Competition Code (as defined in section 150A).

(3) The report must also include:

(aa) details of the time taken by the Commission to:

(i) make final determinations under section 44V in relation to access disputes; and

(ii) make decisions on access undertaking applications (within the meaning of section 44B) or access code applications (within the meaning of that section); and

(iii) make decisions on applications under subsection 44PA(1) (about government tendering); and

(a) the number of:

(i) notices given by the Commission under section 155; and

(iii) notices given by the Commission under section 155A; and

(b) a general description of the nature of the matters in respect of which the notices were given; and

(c) the number of proceedings brought to challenge the validity of the notices; and

(ca) the number of search warrants issued by a judge under section 135Z or signed by a judge under section 136; and

(d) the number of search warrants issued by a magistrate under section 154X or signed by a magistrate under section 154Y; and

(da) a general description of the nature of the matters in respect of which the search warrants referred to in paragraph (ca) or (d) were issued or signed; and

(db) the number of proceedings brought to challenge the validity of the search warrants referred to in paragraph (ca) or (d); and

(dc) the number of entries onto premises under section 133B or 133C, Division 6 of Part XI or Part XID; and

(e) the number of complaints received by the Commission; and

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(f) a general summary of the kinds of complaints received by the Commission and how it dealt with them; and

(g) a general description of the major matters investigated by the Commission; and

(h) the number of times the Commission has intervened in proceedings and a general description of the reasons for doing so.

### 171A Charges by the Commission

(1) The Commission may make a charge of an amount, or at a rate, determined by the Commission for:

(a) supplying a person with material published by the Commission in the course of carrying out its functions or exercising its powers; or

(b) permitting a person to attend or take part in a prescribed activity arranged by or on behalf of the Commission for the purpose of carrying out any of its functions.

(2) Where:

(a) the Commission provides a discretionary service for a person; and

(b) this Act does not otherwise provide for a charge for the service;

the Commission may make a charge of such amount, or at such a rate, as is agreed between the Commission and the person.

(3) In this section, a reference to the provision by the Commission of a discretionary service for a person is a reference to the doing of an act by the Commission, being a prescribed act that:

(a) the Commission has power to do but is not required to do by or under any law; and

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

### 171B Division 3 of Part IIIA does not confer judicial power on the Commission

(1) Division 3 of Part IIIA has no effect to the extent (if any) to which it purports to confer judicial power on the Commission.

(2) In this section:

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

### 172 Regulations

(1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act (other than Schedule 2) to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act (other than Schedule 2) and, in particular, prescribing:

(a) matters in connexion with the procedure of the Tribunal, the Commission and the AER; and

(b) the fees and expenses of witnesses in proceedings before the Tribunal and the Commission; and

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(c) matters for and in relation to the costs, if any, that may be awarded by the Court in proceedings before the Court under this Act; and

(d) the fees payable to the Commission on making a prescribed application, or giving a prescribed notice, to the Commission under this Act or the regulations.

(1B) Regulations made for the purposes of paragraph (1)(a) or (b) do not apply in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law.

Note: See section 44ZZR.

(2) The regulations may, either unconditionally or subject to such conditions as are specified in the regulations, exempt from the application of this Act (other than Part IV or Schedule 2) or of specified provisions of this Act (other than Part IV or Schedule 2):

(a) conduct engaged in by a specified organization or body that performs functions in relation to the marketing of primary products;

(b) a prescribed contract or proposed contract, contracts included in a prescribed class of contracts, or prescribed conduct, being a contract, proposed contract or class of contracts made, or conduct engaged in, in pursuance of or for the purposes of a specified agreement, arrangement or understanding between the Government of Australia and the Government of a country outside Australia; or

(c) prescribed conduct engaged in in the course of a business carried on by the Commonwealth or by a prescribed authority of the Commonwealth.

(2A) The regulations may prescribe the circumstances in which the Commission may, on behalf of the Commonwealth, wholly or partly waive the fee that would otherwise be payable for an application referred to in subsection 89(1).

(2B) Subsection (2A) does not apply to an application for a merger authorisation, a minor variation of such an authorisation, a revocation of such an authorisation or a revocation of such an authorisation and the substitution of another authorisation.

(3) Strict compliance with a form of application or notice prescribed for the purposes of this Act is not, and shall be deemed never to have been, required and substantial compliance is, and shall be deemed always to have been, sufficient.

## 173 Authorisation for the purposes of subsection 51(1)

(1) In deciding whether a person (including a corporation) has contravened section 50 of this Act, the vesting of ownership of primary products in the person by legislation is to be taken, for the purposes of subparagraph 51(1)(a)(i), to be specified in, and specifically authorised by, this section.

(2) In this section:

***primary products*** means:

(a) agricultural or horticultural produce, including produce that has been subjected to a manufacturing process; or

(b) crops, whether on or attached to the land or not; or

(c) animals (whether dead or alive); or

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(d) the bodily produce (including natural increase) of animals.

Note: An example of agricultural produce that has been subjected to a manufacturing process is sugar cane that has been transformed into raw sugar.

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

## Division 1—Cartel conduct

### 174 Definitions

(1) In this Division:

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

(2) A reference in this Division to subsection 88(1A) or paragraph 88(1A)(b) is a reference to that subsection or paragraph as in force before the commencement of Schedule 10 to the *Competition and Consumer Amendment (Competition Policy Review) Act* 2016.

### 175 Giving effect after the commencement time to a cartel provision in existence before that time

The following provisions of this Act:

(a) paragraph 88(1A)(b);

(b) paragraph 93AB(1A)(c);

(c) paragraph 93AB(1A)(d);

apply in relation to a contract or arrangement made, or an understanding arrived at, before, at or after the commencement time.

### 176 Proceedings relating to price-fixing contraventions taking place before the commencement time

Despite the repeal of section 76D by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*, that section continues to apply, in relation to proceedings (whether instituted before or after the commencement time) in relation to a contravention that took place before the commencement time, as if that repeal had not happened.

### 177 Authorisations in force before the commencement time

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