



Competition Policy Reform Act 1995

No. 88 of 1995

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Competition Policy Reform Act 1995

No. 88 of 1995

**An Act to amend the *Trade Practices Act 1974* and the
Prices Surveillance Act 1983, and for related purposes**

[Assented to 20 July 1995]

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title etc.

- 1.(1) This Act may be cited as the *Competition Policy Reform Act 1995*.
- (2) In this Act, “**Principal Act**” means the *Trade Practices Act 1974*¹.

Commencement

- 2.(1) The following provisions commence on the 28th day after the day on which this Act receives the Royal Assent:
 - (a) Parts 1, 2 and 7;
 - (b) Division 2 of Part 5.

(2) Part 3 commences on a day to be fixed by Proclamation. However, if Part 3 does not commence by Proclamation within the period of 6 months beginning on the day on which this Act receives the Royal Assent, then it commences on the first day after the end of that period.

(3) Part 4 commences immediately after Part 3 commences.

(4) Division 1 of Part 5 commences on the first day after the end of the period of 12 months after the day on which this Act receives the Royal Assent.

(5) Part 6 commences immediately after the commencement of Division 1 of Part 5.

PART 2—AMENDMENTS COMMENCING AT THE FIRST COMMENCEMENT TIME

Division 1—Amendments

Insertion of new section

3. After section 1 of the Principal Act the following section is inserted:

Object of this Act

“2. 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.”.

Interpretation

4. Section 4 of the Principal Act is amended by inserting in subsection (1):

“ ‘**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;”.

Acquisition, supply and re-supply

5. Section 4C of the Principal Act is amended:

(a) by omitting from paragraph (d) “and”;

(b) by adding at the end:

“; (f) a reference to the re-supply of services (the ‘**original services**’) acquired from a person (the ‘**original supplier**’) includes a reference to:

- (i) a supply of the original services to another person in an altered form or condition; and
- (ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.”.

Extended application of Parts IV, IVA and V

6. Section 6 of the Principal Act is amended by inserting after subsection (2):

“(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.”.

Associate members

7. Section 8A of the Principal Act is amended by inserting in subsection (6) “or (3A)” after “93(3)”.

Insertion of new sections

8. After section 43 of the Principal Act the following sections are inserted:

Counsel assisting Tribunal

“43A.(1) The President may, on behalf of the Commonwealth, appoint a legal practitioner to assist the Tribunal as counsel, either generally or in relation to a particular matter or matters.

“(2) In this section:

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

Consultants

“43B. The Registrar may, on behalf of the Commonwealth, engage persons as consultants to, or to perform services for, the Tribunal.”.

Contracts, arrangements or understandings that restrict dealings or affect competition

9. Section 45 of the Principal Act is amended:

- (a) by omitting paragraph (5)(c) and substituting:
“(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:
- (i) conduct that contravenes section 48; or
 - (ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
 - (iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.”;
- (b) by adding at the end of paragraph (6)(b):
“; or (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.”.

Contracts, arrangements or understandings in relation to prices

- 10.** Section 45A of the Principal Act is amended:
- (a) by omitting from paragraph (2)(a) “the parties” (first occurring) and substituting “2 or more of the parties”;
 - (b) by omitting from paragraph (2)(a) “the parties” (second occurring) and substituting “all the parties”;
 - (c) by omitting from paragraph (2)(a) “those parties” and substituting “all the parties”;
 - (d) by omitting from paragraph (2)(b) “the parties” (first occurring) and substituting “2 or more of the parties”;
 - (e) by omitting from paragraph (2)(b) “the parties” (second occurring) and substituting “all the parties”;
 - (f) by omitting subsection (3);
 - (g) by inserting in paragraph (4)(b) “or services” after “goods”;
 - (h) by inserting in subsection (7) “or services” after “goods” (wherever occurring).

Covenants affecting competition

- 11.** Section 45B of the Principal Act is amended by adding at the end of paragraph (5)(b):
“; or (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.”.

Covenants in relation to prices

- 12.** Section 45C of the Principal Act is amended by inserting in subsection (4) “or services” after “goods” (wherever occurring).

Exclusive dealing

13. Section 47 of the Principal Act is amended:

- (a) by inserting in paragraph (2)(e) “or services” after “goods” (wherever occurring);
- (b) by inserting in paragraph (2)(f) “or services” after “goods” (wherever occurring);
- (c) by inserting in paragraph (3)(e) “or services” after “goods” (wherever occurring);
- (d) by omitting from paragraph (3)(f) “in the case of a refusal in relation to the supply or proposed supply of goods,”;
- (e) by omitting from paragraph (3)(f) “goods, or goods” (wherever occurring) and substituting “goods or services, or goods or services”;
- (f) by omitting from subparagraph (8)(a)(ii) “re-supply goods, or goods” and substituting “re-supply goods or services, or goods or services”;
- (g) by omitting from paragraph (9)(b) “re-supply, goods, or goods” and substituting “re-supply, goods or services, or goods or services”;
- (h) by inserting after subsection (10):

“(10A) Subsection (1) does not apply to a corporation engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:

- (a) the corporation has given the Commission a notice under subsection 93(1) describing the conduct; and
- (b) the notice is in force under section 93.”.

Price discrimination

14. Section 49 of the Principal Act is repealed.

Exceptions

15. Section 51 of the Principal Act is amended by omitting subsection (1) and substituting:

“(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;

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- (c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:
 - (i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988*; or
 - (ii) regulations made under such an enactment;
- (d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:
 - (i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or
 - (ii) regulations made under such an enactment;
- (e) anything done in another Territory, if the thing is specified in, and specifically authorised by:
 - (i) an Ordinance of that Territory; or
 - (ii) regulations made under such an Ordinance.

“(1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:

- (a) a licence or other instrument issued or made under the law specifies one or both of the following:
 - (i) the person authorised to engage in the conduct;
 - (ii) the place where the conduct is to occur; and
- (b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).

For this purpose, ‘law’ means an Act, State Act, enactment or Ordinance.

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

“(1C) The operation of subsection (1) is subject to the following limitations:

- (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;
- (b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;
- (c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;

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- (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 party to both the Competition Principles Agreement and the Conduct Code Agreement; or
 - (ii) all of the following conditions are met:
 - (A) within 12 months before the alleged contravention referred to in subsection (1) the State or Territory ceased to be a party to the Conduct Code Agreement or to the Competition Principles Agreement;
 - (B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the State or Territory ceased to be a party;
 - (C) the law authorising the thing was in force immediately before 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.”.

Power of Commission to grant authorisations

16. Section 88 of the Principal Act is amended:

- (a) by omitting subsections (2), (2A), (3) and (4);
- (b) by omitting from paragraph (5)(a) “(other than a proposed covenant of a kind mentioned in subsection 45C(2) that relates to the supply or acquisition of goods)”;
- (c) by omitting from paragraph (5)(b) “(other than a covenant of a kind mentioned in subsection 45C(1) that relates to the supply or acquisition of goods)”;
- (d) by inserting after subsection (8):

“(8A) Subject to this Part, the Commission may, upon application by a person, grant an authorisation to the person to engage in conduct that constitutes (or may constitute) the practice of resale price

maintenance. While the authorisation remains in force, section 48 does not prevent the person from engaging in that conduct in accordance with the authorisation.”.

Determination of applications for authorisations

17. Section 90 of the Principal Act is amended:

- (a) by adding “or” at the end of subparagraphs (8)(a)(i) and (iii);
- (b) by inserting after subparagraph (8)(a)(iii):
 - “(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;”;
- (c) by omitting from paragraph (10)(a) “or (8)” and substituting “, (8) or (8A)”.

Notification of exclusive dealing

18. Section 93 of the Principal Act is amended:

- (a) by omitting from subsection (1) “or (5) or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c)” and substituting “, (5), (6), (7), (8) or (9)”;
- (b) by inserting in subsection (3) “described in subsection 47(2), (3), (4) or (5) or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c) and” after “kind”;
- (c) by inserting after subsection (3):

“(3A) If:

- (a) a corporation has notified the Commission under subsection (1) of conduct or proposed conduct described in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d); and
- (b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct;

the Commission may give the corporation a written notice stating that the Commission is so satisfied.

“(3B) The Commission must also give the corporation a written statement of its reasons for giving notice when the Commission gives the notice.”;

- (d) by inserting in subsections (4), (5) and (6) “or (3A)” after “(3)”;
- (e) by inserting after subsection (7):

“(7A) A notice under subsection (1) describing conduct or proposed conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) comes into force:

- (a) at the end of a prescribed period that started on the day when the corporation gave the Commission the notice; or

- (b) if the Commission gives notice to the corporation under subsection 93A(2) during that period—when the Commission decides not to give the corporation a notice under subsection (3A) of this section.

“(7B) A notice under subsection (1) describing conduct or proposed conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) does not come into force:

- (a) if the notice is withdrawn, or deemed to be withdrawn, before it would come into force under subsection (7A); or
- (b) if the Commission:
 - (i) gives notice to the corporation under subsection 93A(2) during the period described in paragraph (7A)(a); and
 - (ii) gives notice to the corporation under subsection (3A).

“(7C) A notice under subsection (1) describing conduct referred to in subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d) ceases to be in force:

- (a) when the notice is withdrawn or deemed to be withdrawn; or
- (b) if the Commission gives the corporation a notice under subsection (3A)—on the 31st day after the Commission gave the notice under subsection (3A) or on a later day specified in writing by the Commission.”;
- (f) by inserting in subsection (9) “or (3A)” after “(3)”;
- (g) by omitting from subsection (9) “the reference in subsection (7)” and substituting “a reference in subsection (7) or paragraph (7C)(b)”;
- (h) by inserting in paragraph (10)(a) “or (3A)” after “(3)”.

Commission to afford opportunity for conference before giving notice in relation to exclusive dealing

19. Section 93A of the Principal Act is amended:

- (a) by inserting in subsections (1) and (3) “or (3A)” after “93(3)”;
- (b) by omitting from subsection (4) “may give the notice under subsection 93(3) at any time after the expiration of that period” and substituting “must decide after the end of that period whether or not to give the notice under subsection 93(3) or (3A)”;
- (c) by omitting subsection (10) and substituting:

“(10) The Commission must take account of all matters raised at the conference.

“(10A) After the conference, the Commission must decide whether or not to give a notice under subsection 93(3) or (3A).”.

Register of notifications

20. Section 95 of the Principal Act is amended by inserting after paragraph (1)(g):

“(ga) details of the specification of any day by the Commission under paragraph 93(7C)(b);”.

Insertion of new section

21. After section 96 of the Principal Act the following section is inserted:

Resale price maintenance in relation to services

“96A.(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.”.

Application for review of notice under subsection 93(3) or (3A)

22. Section 101A of the Principal Act is amended by inserting “or (3A)” after “93(3)”.

Functions and powers of Tribunal

23. Section 102 of the Principal Act is amended by inserting after subsection (5):

“(5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.

“(5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).

“(5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:

- (a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and

- (b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.”.

Regulations as to certain matters

24. Section 104 of the Principal Act is amended by inserting after paragraph (a) the following paragraph:

- “(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”.

Participants in proceedings before Tribunal

25. Section 109 of the Principal Act is amended by inserting in subsection (1A) “or (3A)” after “93(3)”.

Insertion of new Part

26. After Part XI of the Principal Act the following Part is inserted:

“PART XIA—THE COMPETITION CODE

Definitions

“150A. In this Part, unless the contrary intention appears:

‘application law’ means:

- (a) a law of a participating jurisdiction that applies the Competition Code, either with or without modifications, as a law of the participating jurisdiction; or
- (b) any regulations or other legislative instrument made under a law described in paragraph (a); or
- (c) the Competition Code, applying as a law of the participating jurisdiction, either with or without modifications;

‘apply’, in relation to the Competition Code, means apply the Competition Code by reference:

- (a) as in force from time to time; or
- (b) as in force at a particular time;

‘Competition Code’ means (according to the context):

- (a) the text described in section 150C; or
- (b) that text, applying as a law of a participating jurisdiction, either with or without modifications;

‘modifications’ includes additions, omissions and substitutions;

‘officer’, in relation to the Commonwealth, includes the following:

- (a) a Minister;
- (b) a person who holds:
 - (i) an office established by or under an Act;
 - (ii) an appointment made under an Act;
 - (iii) an appointment made by the Governor-General or a Minister but not under an Act;
- (c) a person who is a member or officer of an authority of the Commonwealth;
- (d) a person who is in the service or employment of the Commonwealth, or of an authority of the Commonwealth, or is employed or engaged under an Act;

‘participating jurisdiction’ means a participating State or Territory;

‘participating State’ means a State that is a party to the Conduct Code Agreement and applies the Competition Code as a law of the State, either with or without modifications;

‘participating Territory’ means a Territory that is a party to the Conduct Code Agreement and applies the Competition Code as a law of the Territory, either with or without modifications;

‘Schedule version of Part IV’ means the text that is set out in the Schedule to this Act;

‘Territory’ means the Australian Capital Territory or the Northern Territory.

Objects of this Part

“150B. The objects of this Part are:

- (a) to facilitate the application of the Competition Code by participating Territories; and
- (b) to facilitate the application of the Competition Code by participating States.

The Competition Code

“150C.(1) The Competition Code consists of:

- (a) the Schedule version of Part IV;
- (b) the remaining provisions of this Act (except sections 2A, 5, 6 and 172), so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV;
- (c) the regulations under this Act, so far as they relate to any provision covered by paragraph (a) or (b).

“(2) For the purpose of forming part of the Competition Code, the provisions referred to in paragraphs (1)(b) and (c) are to be modified as necessary to fit in with the Schedule version of Part IV. In particular, references to corporations are to include references to persons who are not corporations.

Federal Court may exercise jurisdiction under application laws

“150D. The Federal Court may exercise jurisdiction (whether original or appellate) conferred on that Court by an application law with respect to matters arising under the Competition Code.

Exercise of jurisdiction under cross-vesting provisions

“150E. This Part does not affect the operation of any other law of the Commonwealth, or any law of a State or Territory, relating to cross-vesting of jurisdiction.

Application laws may confer functions on Commonwealth authorities and officers

“150F. An application law may confer functions and powers on authorities and officers of the Commonwealth for the purposes of the Competition Code.

Application laws may operate concurrently with this Act

“150G. This Act is not intended to exclude the operation of any application law, to the extent that the application law is capable of operating concurrently with this Act.

No doubling-up of liabilities

“150H.(1) If:

- (a) an act or omission is an offence against this Act and is also an offence against an application law; and
- (b) the offender has been punished for the offence under the application law;

the offender is not liable to be punished for the offence against this Act.

“(2) If a person has been ordered to pay a pecuniary penalty under an application law, the person is not liable to a pecuniary penalty under this Act in respect of the same conduct.

References in instruments to the Competition Code

“150I.(1) A reference in any instrument to the Competition Code is a reference to the Competition Codes of any or all of the participating jurisdictions.

“(2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

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

“150J. 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.

Gazettal of jurisdictions that excessively modify the Code

“150K.(1) If the Minister is satisfied that the laws of a participating jurisdiction have made significant modifications to the Competition Code in its application to persons within the legislative competence of the participating jurisdiction, the Minister may publish a notice in the *Gazette* stating that the Minister is so satisfied.” 5

“(2) The Minister may, by further notice in the *Gazette*, revoke a notice published under subsection (1).”.

Power to obtain information, documents and evidence

27. Section 155 of the Principal Act is amended by inserting in subsection (1) “or (3A)” after “93(3)”. 10

Protection of members of Tribunal, counsel and witnesses

28. Section 158 of the Principal Act is amended by omitting from subsection (2) “A barrister, solicitor or other person appearing before the Tribunal on behalf of a person” and substituting “A person appearing before the Tribunal on behalf of a person, or assisting the Tribunal as counsel,”. 15

Annual report by Commission

29. Section 171 of the Principal Act is amended by adding at the end:

“(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).”.

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Regulations

30. Section 172 of the Principal Act is amended by omitting from subsection (2) “or of the provisions of this Act specified in the regulations” and substituting “(other than Part IV) or of specified provisions of this Act (other than Part IV)”. 25

Addition of Schedule

31. The Principal Act is amended by adding at the end the Schedule set out in Schedule 1 to this Act. 30

Other amendments

32. The Acts specified in Schedule 2 are amended as set out in that Schedule.

Division 2—Transitional rules

Transitional rule for changes to section 51 exceptions 35

33.(1) This section applies (in addition to subsection 51(1) of the Principal Act) to conduct taking place before the end of 3 years after the date on which this Act received the Royal Assent.

(2) In deciding whether a person has contravened Part IV of the Principal Act, a particular thing is to be disregarded if both the following conditions are met:

- (a) the thing would have been disregarded if the amendments made by section 15 had not been made; and
- (b) the thing would also have been disregarded if it had happened immediately before the commencement of this section.

Existing contracts not affected by amendments

34.(1) Subsections (2) and (3) apply in deciding whether a person has contravened Part IV of the Principal Act at any time after the commencement of the amendments made by Division 1 of this Part.

(2) Existing contracts, and things done to give effect to existing contracts, are to be disregarded to the same extent that they would have been disregarded if the amendments made by Division 1 of this Part (other than section 15) had not been made.

(3) If an existing contract is varied on or after the cut-off date, then things done to give effect to the varied contract are not to be disregarded under subsection (2) unless they would have been disregarded under the contract as in force immediately before the cut-off date.

(4) The amendments made by Division 1 of this Part (other than section 15) do not make unenforceable a provision of an existing contract that was not unenforceable immediately before the commencement of those amendments.

(5) In this section:

“cut-off date” means 19 August 1994;

“existing contract” means a contract that was made before the cut-off date.

PART 3—AMENDMENTS COMMENCING AT THE SECOND COMMENCEMENT TIME

Division 1—Amendments

Application of Act to Commonwealth and Commonwealth authorities

35. Section 2A of the Principal Act is amended by inserting in subsection (1) “and section 44E” after “section”.

Interpretation

36. Section 4 of the Principal Act is amended:

- (a) by omitting from the definition of “Commission” in subsection (1) “Trade Practices” and substituting “Australian Competition and Consumer”;

- (b) by omitting from the definition of “member of the Commission” in subsection (1) “Chairman” and substituting “Chairperson”;
- (c) by omitting from the definition of “Tribunal” in subsection (1) “Trade Practices Tribunal continued in existence by this Act” and substituting “Australian Competition Tribunal”;
- (d) by omitting from subsection (1) the definitions of “Chairman” and “Deputy Chairman”;
- (e) by inserting in subsection (1):
 - “ ‘**Chairperson**’ means the Chairperson of the Commission;
 - ‘**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);
 - ‘**Deputy Chairperson**’ means the Deputy Chairperson of the Commission;”.

Extended application of Parts IV, IVA and V

37. Section 6 of the Principal Act is amended:

- (a) by omitting from subsection (2) “Part X” and substituting “Parts IIIA and X”;
- (b) by omitting from subsections (3) and (4) “Part X” and substituting “Parts IIIA and X”.

Heading to Part II

38. The heading to Part II of the Principal Act is omitted and the following heading is substituted:

“PART II—THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION”.

Establishment of Commission

39. Section 6A of the Principal Act is amended by omitting subsection (1) and substituting:

“(1) The Australian Competition and Consumer Commission is established by this section.”.

Constitution of Commission

40. Section 7 of the Principal Act is amended:

- (a) by omitting from subsection (1) “Chairman” and substituting “Chairperson”;

(b) by omitting subsection (3) and substituting:

“(3) The Governor-General must not appoint a person as a member of the Commission or Chairperson unless the Governor-General is satisfied that:

- (a) the person qualifies for the appointment because of the person’s knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection; and
- (b) a majority of the States and Territories that are parties to the Conduct Code Agreement support the appointment.

“(4) At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection.”.

Terms and conditions of appointment

41. Section 8 of the Principal Act is amended:

- (a) by omitting from subsection (1) “7” and substituting “5”;
- (b) by omitting subsection (2).

Associate members

42. Section 8A of the Principal Act is amended:

(a) by inserting after subsection (1):

“(1A) The Minister must not appoint a person as an associate member unless the Minister is satisfied that a majority of the States and Territories that are parties to the Conduct Code Agreement support the appointment.”;

(b) by omitting from subsections (4) and (6) “Chairman” (wherever occurring) and substituting “Chairperson”.

Deputy Chairperson

43. Section 10 of the Principal Act is amended:

(a) by omitting from subsection (1) “Chairman” and substituting “Chairperson”;

(b) by inserting after subsection (1):

“(1A) The Governor-General must not appoint a person as the Deputy Chairperson unless the Governor-General is satisfied that a majority of the States and Territories that are parties to the Conduct Code Agreement support the appointment.”;

(c) by omitting from subsections (2), (3) and (4) “Chairman” (wherever occurring) and substituting “Chairperson”.

Acting Chairperson

44. Section 11 of the Principal Act is amended by omitting “Chairman” (wherever occurring) and substituting “Chairperson”.

Termination of appointment of members of the Commission

45. Section 13 of the Principal Act is amended by omitting from paragraph (2)(d) “granted by the Minister”.

Arrangement of business

46. Section 16 of the Principal Act is amended by omitting “Chairman” and substituting “Chairperson”.

Disclosure of interests by members

47. Section 17 of the Principal Act is amended by omitting “Chairman” (wherever occurring) and substituting “Chairperson”.

Meetings of Commission

48. Section 18 of the Principal Act is amended by omitting “Chairman” (wherever occurring) and substituting “Chairperson”.

Chairperson may direct Commission to sit in Divisions

49. Section 19 of the Principal Act is amended by omitting “Chairman” (wherever occurring) and substituting “Chairperson”.

Insertion of new section

50. After section 19 of the Principal Act the following section is inserted:

Part XI of the Audit Act not to apply to Commission

“20. Part XI of the *Audit Act 1901* does not apply to the Commission.”.

Staff of Commission

51. Section 27 of the Principal Act is amended:

- (a) by omitting “Chairman” (wherever occurring) and substituting “Chairperson”;
- (b) by omitting “-1973” (wherever occurring).

Insertion of new section

52. After section 27 of the Principal Act the following section is inserted:

Consultants

“27A.(1) On behalf of the Commonwealth, the Commission may engage persons to give advice to, and perform services for, the Commission.

“(2) The terms and conditions of engagement are as determined by the Commission.”.

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

53. Section 28 of the Principal Act is amended:

- (a) by omitting from subsection (1) “by this Act”;

(b) by inserting after paragraph (1)(c):

“(ca) to conduct research and undertake studies on matters that are referred to the Commission by the Council and that relate to the Commission’s other functions;”;

(c) by omitting from paragraph (1)(d) “and”.

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

54. Section 29 of the Principal Act is amended by omitting subsection (1) and substituting:

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

“(1A) The Minister must not give directions under subsection (1) relating to:

(a) Part IIIA, IV or VII; or

(b) section 65J, 65K, 65M or 65N in relation to individual cases.

“(1B) The Commission must comply with a direction.”.

Insertion of new Part

55. After section 29 of the Principal Act the following Part is inserted:

“PART IIA—THE NATIONAL COMPETITION COUNCIL

Establishment of Council

“29A. The National Competition Council is established by this section.

Functions and powers of Council

“29B.(1) The Council’s functions include:

(a) carrying out research into matters referred to the Council by the Minister; and

(b) providing advice on matters referred to the Council by the Minister.

“(2) The Council may carry out a function conferred on it by a law of a State or Territory.

“(3) In carrying out its functions, the Council may co-operate with a department, body or authority of the Commonwealth, of a State or of a Territory.

Membership of Council

“29C.(1) The Council consists of the Council President and up to 4 other Councillors.

“(2) Each Councillor is to be appointed by the Governor-General, for a term of up to 5 years.

“(3) The Governor-General must not appoint a person as a Councillor or Council President unless the Governor-General is satisfied that:

- (a) the person qualifies for the appointment because of the person’s knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration; and
- (b) a majority of the States and Territories that are parties to the Competition Principles Agreement support the appointment.”.

Terms and conditions of office

“29D.(1) A Councillor may be appointed to hold office on either a full-time or a part-time basis.

“(2) A Councillor holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as the Governor-General determines.

Acting Council President

“29E.(1) The Minister may appoint a Councillor to act as the Council President:

- (a) if there is a vacancy in the office of Council President, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Council President is absent from duty or absent from Australia or is, for any reason, unable to perform the duties of the office.

“(2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:

- (a) the occasion for appointment had not arisen;
- (b) there was a defect or irregularity in the appointment;
- (c) the appointment had ceased to have effect;
- (d) the occasion to act had not arisen or had ceased.

Remuneration of Councillors

“29F.(1) A Councillor is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of the Remuneration Tribunal is in operation, the Councillor is to be paid the remuneration that is prescribed.

“(2) A Councillor is to be paid such allowances as are prescribed.

“(3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

Leave of absence

“29G.(1) Subject to section 87E of the *Public Service Act 1922*, a full-time Councillor has such recreation leave entitlements as are determined by the Remuneration Tribunal.

“(2) The Minister may grant a full-time Councillor leave of absence, other than recreation leave, on such terms and conditions as the Minister determines. The terms and conditions may include terms and conditions relating to remuneration.

Termination of appointment of Councillors

“29H.(1) The Governor-General may terminate the appointment of a Councillor for misbehaviour or for physical or mental incapacity.

“(2) The Governor-General must terminate the appointment of a Councillor who:

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

Resignation of Councillors

“29I. A Councillor may resign by giving the Governor-General a signed resignation notice.

Arrangement of Council business

“29J.(1) Subject to subsection (2), the Council President may give directions about the arrangement of the Council’s business.

“(2) The Council must not carry out any work (other than work relating to a function under Part IIIA of this Act or under the *Prices Surveillance Act 1983*) except in accordance with a program agreed to by:

- (a) a majority of the parties to the Competition Principles Agreement;
or
- (b) if the parties to the Agreement are evenly divided on the question of agreeing to a program—the Commonwealth.

Disclosure of interests by Councillors

“29K.(1) If a Councillor (except the Council President) is taking part, or is to take part, in the Council’s consideration of a matter and the Councillor has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions relating to the matter:

- (a) the Councillor must disclose the interest to the Council President; and
- (b) the Councillor must not take part, or continue to take part, in the consideration of the matter if:
 - (i) all of the persons concerned in the matter do not consent to the Councillor taking part in the consideration of the matter; or
 - (ii) the Council President gives a direction to the member under paragraph (2)(b).

“(2) If the Council President becomes aware that a Councillor is taking part, or is to take part, in the Council’s consideration of a matter and that the Councillor has such an interest relating to the matter:

- (a) the Council President must cause the Councillor’s interest to be disclosed to the persons concerned in the matter; or
- (b) if the Council President considers that the Councillor should not take part or continue to take part in the consideration of the matter—the Council President must direct the Councillor accordingly.

“(3) The Council President must give the Minister written notice of all pecuniary interests that the Council President has or acquires in any business carried on in Australia or in any body corporate carrying on such business.

Council meetings

“29L.(1) The Council President must convene the meetings that the Council President thinks are necessary to perform the Council’s functions efficiently.

“(2) The meetings must be held in places determined by the Council President.

“(3) The Council President must preside at any meeting that he or she attends.

“(4) If the Council President is absent from a meeting, a Councillor chosen by the Councillors at the meeting must preside.

“(5) The Councillor presiding at a meeting may give directions on the procedure to be followed in relation to the meeting.

“(6) The quorum for a meeting is 3 Councillors (including the Council President).

“(7) At a meeting, a question must be decided by a majority of votes of the Councillors present and voting. The Councillor presiding has a deliberative vote, and a casting vote if the deliberative votes are equally divided.

Staff to help Council

“29M.(1) The staff needed to help the Council are to be persons appointed or employed under the *Public Service Act 1922*.

“(2) The Council President has all the powers of a Secretary under the *Public Service Act 1922* as they relate to the branch of the Australian Public Service comprising the staff referred to in subsection (1).

Consultants

“29N.(1) On behalf of the Commonwealth, the Council may engage persons to give advice to, and perform services for, the Council.

“(2) The terms and conditions of engagement are as determined by the Council.

Annual report

“29O. 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.”.

Heading to Part III

56. The heading to Part III of the Principal Act is omitted and the following heading substituted:

“PART III—THE AUSTRALIAN COMPETITION TRIBUNAL”.

Constitution of Tribunal

57. Section 30 of the Principal Act is amended:

(a) by omitting subsection (1) and substituting:

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

(b) by omitting from subsection (2) “Trade Practices”.

Staff of Tribunal

58. Section 44 of the Principal Act is amended by omitting from subsection (3) “1922-1973” and substituting “1922”.

Insertion of new Part

59. After Part III of the Principal Act the following Part is inserted:

“PART IIIA—ACCESS TO SERVICES

“Division 1—Preliminary

Definitions

“44B. In this Part, unless the contrary intention appears:

‘access undertaking’ means an undertaking under section 44ZZA;

‘Commonwealth Minister’ means the Minister;

‘constitutional trade or commerce’ means any of the following:

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

‘declaration’ means a declaration made by the designated Minister under Division 2;

‘declaration recommendation’ means a recommendation made by the Council under section 44F;

‘declared service’ means a service for which a declaration is in operation;

‘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 Law;

‘entity’ means a person, partnership or joint venture;

‘modifications’ includes additions, omissions and substitutions;

‘officer’ has the same meaning as in the Corporations Law;

‘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;

‘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 body' means:

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

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

How this Part applies to partnerships and joint ventures

"44C.(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.

Meaning of “designated Minister”

“44D.(1) The Commonwealth Minister is the designated Minister unless subsection (2) or (3) 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.

This Part binds the Crown

“44E.(1) This Part binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.

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

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

“Division 2—Declared services

“Subdivision A—Recommendation by the Council

Person may request recommendation

“44F.(1) The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend under section 44G 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 recommend to the designated Minister:
 - (i) that the service be declared; or
 - (ii) that the service not be declared.

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

“(4) In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.

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

Limits on the Council recommending declaration of a service

“44G.(1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.

“(2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime;
- (f) that access (or increased access) to the service would not be contrary to the public interest.

“(3) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:

- (a) must apply the relevant principles set out in that agreement; and
- (b) must not consider any other matters.

“(4) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister’s

decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

Note: The period for which a decision is in force is determined under subsection 44N(3) and paragraph 44P(a).

“Subdivision B—Declaration by the designated Minister

Designated Minister may declare a service

“44H.(1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.

“(2) In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not.

“(3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under section 44ZZA.

“(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime;
- (f) that access (or increased access) to the service would not be contrary to the public interest.

“(5) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Minister:

- (a) must apply the relevant principles set out in that agreement; and
- (b) must not consider any other matters.

“(6) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the designated Minister must follow that decision, unless the designated Minister believes that, since the Commonwealth Minister’s decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

Note: The period for which a decision is in force is determined under subsection 44N(3) and paragraph 44P(a).

“(7) The designated Minister must publish the declaration or his or her decision not to declare the service. At the same time, the designated Minister must give reasons for the decision and a copy of the declaration recommendation to the provider and to the person who applied for the declaration recommendation.

“(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 subsection (7) within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period, to have decided not to declare the service and to have published that decision not to declare the service.

Duration and effect of declaration

“44I.(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 an application for review of a declaration is made within 21 days after the declaration is published, the declaration does not begin to operate until the Tribunal makes its decision on the review.

“(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.

Revocation of declaration

“44J.(1) The Council may recommend to the designated Minister that a declaration be revoked.

“(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.

“(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.

Review of declaration

“44K.(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.

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

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

“(4) The review by the Tribunal is a re-consideration of the matter.

“(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 information and other assistance and to make reports, as specified by the member for the purposes of the review.

“(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).

Review of decision not to revoke a declaration

“44L.(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.

“(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 information and other assistance and to make reports, as specified by the member for the purposes of the review.

“(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.

“Subdivision C—Miscellaneous

Recommendation for a Ministerial decision on effectiveness of access regime

“44M.(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.

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

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

- (a) must assess whether the access regime is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement; and
- (b) must not consider any other matters.

“(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.

Ministerial decision on effectiveness of access regime

“44N.(1) On receiving a recommendation, the Commonwealth Minister must:

- (a) decide that the access regime is an effective access regime for the service; or
- (b) decide that the access regime is not an effective access regime for the service.

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

- (a) must apply the relevant principles set out in the Competition Principles Agreement; and
- (b) must not consider any other matters.

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

“(4) The Commonwealth Minister must publish his or her decision. At the same time, the Commonwealth Minister must give his or her reasons for the decision, and a copy of the Council’s recommendation, to the responsible Minister for the State or Territory who applied for the recommendation.

Review of Ministerial decision on effectiveness of access regime

“44O.(1) The responsible Minister of the State or Territory who applied for a recommendation that the Commonwealth Minister decide that the access regime is an effective access regime may apply to the Tribunal for review of the Commonwealth Minister’s decision.

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

“(3) The review by the Tribunal is a reconsideration of the matter.

“(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 information and other assistance, and to make reports, as specified by the member for the purposes of the review.

“(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).

State or Territory ceasing to be a party to Competition Principles Agreement

“44P. If a State or Territory that has established a regime for access to a 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.

Register of decisions and declarations

“44Q. 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; and
- (b) each declaration (including a declaration that is no longer in force).

“Division 3—Access to declared services

“Subdivision A—Scope of Division

Constitutional limits on operation of this Division

“44R. 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

Notification of access disputes

“44S.(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.

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.

Withdrawal of notifications

“44T.(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 determination;
 - (ii) the third party may withdraw the provider’s notification at any time after the Commission issues a draft determination, but before it makes its 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 determination, the third party may not withdraw the provider’s notification.

“(3) If the notification is withdrawn, it is taken for the purposes of this Part never to have been given.

“Subdivision C—Arbitration of access disputes

Parties to the arbitration

“44U. 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.

Determination by Commission

“44V.(1) Unless it terminates the arbitration under section 44Y, the Commission must make a written determination on access by the third party to the service.

“(2) The 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;
- (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

“(3) The determination does not have to require the provider to provide access to the service by the third party.

“(4) Before making a determination, the Commission must give a draft determination to the parties.

“(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

Restrictions on access determinations

“44W.(1) The Commission must not make a determination that would have any of the following effects:

- (a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;
- (b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;
- (c) depriving any person of a protected contractual right;
- (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;
- (e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility.

“(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.

“(3) A determination is of no effect if it is made in contravention of subsection (1).

“(4) If the Commission makes a determination that has the effect of depriving a person (the ‘second person’) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:

- (a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and

- (b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference between the total amount of service the person was entitled to under a pre-notification right and the amount that the person actually needs to meet his or her actual requirements.

“(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.

Matters that the Commission must take into account

“44X.(1) The Commission must take the following matters into account in making a determination:

- (a) the legitimate business interests of the provider, and the provider’s investment in the facility;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of all persons who have rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the value to the provider of extensions whose cost is borne by someone else;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (g) the economically efficient operation of the facility.

“(2) The Commission may take into account any other matters that it thinks are relevant.

Commission may terminate arbitration in certain cases

“44Y.(1) The Commission may at any time terminate an arbitration (without making a determination) if it thinks that:

- (a) the notification of the dispute was vexatious; or
- (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
- (c) 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.

“Subdivision D—Procedure in arbitrations

Constitution of Commission for conduct of arbitration

“44Z. 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.

Member of the Commission presiding at an arbitration

“44ZA.(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.

Reconstitution of Commission

“44ZB.(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.

Determination of questions

“44ZC. 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.

Hearing to be in private

“44ZD.(1) Subject to subsection (2), an arbitration hearing for an access dispute is to be in private.

“(2) If the parties agree, an arbitration hearing or part of an arbitration hearing may be conducted in public.

“(3) The member of the Commission who is presiding at an arbitration hearing that is conducted in private may give written directions as to the persons who may be present.

“(4) In giving directions under subsection (3), the member presiding must have regard to the wishes of the parties and the need for commercial confidentiality.

Right to representation

“44ZE. In an arbitration hearing before the Commission under this Part, a party may appear in person or be represented by someone else.

Procedure of Commission

“44ZF.(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.

Particular powers of Commission

“44ZG.(1) The Commission may do any of the following things for the purpose of arbitrating an access dispute:

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

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

Penalty: Imprisonment for 6 months.

“(3) Subsection (1) has effect subject to any other provision of this Part and subject to the regulations.

“(4) The Commission may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration unless the person has the Commission’s permission.

“(5) A person who contravenes an order under subsection (4) is guilty of an offence, punishable on conviction by imprisonment for a term not exceeding 6 months.

Power to take evidence on oath or affirmation

“44ZH.(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.

Failing to attend as a witness

“44ZI. 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.

Failing to answer questions etc.

“44ZJ.(1) A person appearing as a witness before the Commission must not, without reasonable excuse:

- (a) refuse or fail to be sworn or to make an affirmation; or
- (b) refuse or fail to answer a question that the person is required to answer by the Commission; or
- (c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part served on him or her as prescribed.

Penalty: Imprisonment for 6 months.

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

Intimidation etc.

“44ZK. 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.

Party may request Commission to treat material as confidential

“44ZL.(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.

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

“44ZM. Sections 18 and 19 do not apply to the Commission, as constituted for an arbitration.

Parties to pay costs of an arbitration

“44ZN. The regulations may provide for the Commission to:

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

“Subdivision E—Effect of determinations

Operation of determinations

“44ZO.(1) If none of the parties to the arbitration applies to the Tribunal under section 44ZP for a review of the Commission’s 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 determination, the determination is of no effect until the Tribunal makes its determination on the review.

“Subdivision F—Review of determinations

Review by Tribunal

“44ZP.(1) A party to a 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 determination.

“(3) A review by the Tribunal is a re-arbitration of the access dispute.

“(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 information and other assistance and to make reports, as specified by the member for the purposes of the review.

“(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.

Provisions that do not apply in relation to a Tribunal review

“44ZQ. Sections 37, 39 to 43 (inclusive) and 103 to 110 (inclusive) do not apply in relation to a review by the Tribunal of a determination made by the Commission.

Appeals to Federal Court from determinations of the Tribunal

“44ZR.(1) A party to an arbitration may appeal to the Federal Court, on a question of law, from the decision of the Tribunal under section 44ZP.

“(2) An appeal by a person under subsection (1) must be instituted:

- (a) not later than the 28th day after the day on which the decision of the Tribunal is made or within such further period as the Federal Court (whether before or after the end of that day) allows; and
- (b) in accordance with the Rules of Court made under the *Federal Court of Australia Act 1976*.

“(3) The Federal Court must hear and determine the appeal and may make any order that it thinks appropriate.

“(4) The orders that may be made by the Federal Court on appeal include (but are not limited to):

- (a) an order affirming or setting aside the decision of the Tribunal; and
- (b) an order remitting the matter to be decided again by the Tribunal in accordance with the directions of the Federal Court.

Operation and implementation of a determination that is subject to appeal

“44ZS.(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.

Transmission of documents

“44ZT. 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 of determinations

Variation of determinations

“44ZU.(1) The Commission may vary a determination on the application of any party to the determination. However, it cannot vary the determination if any other party objects.

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

- “(2) Sections 44W and 44X apply to a variation under this section as if:
- (a) an access dispute arising out of the 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 determination in the terms of the varied determination.

“Division 4—Registered contracts for access to declared services

Constitutional limits on operation of this Division

“44ZV. 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.

Registration of contract

“44ZW.(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:

- (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.

“(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.

Review of decision not to register contract

“44ZX.(1) If the Commission decides not to register a contract, a party to the contract may apply in writing to the Tribunal for review of the decision.

“(2) An application for review must be made within 21 days after publication of the Commission’s decision.

“(3) The review by the Tribunal is a re-consideration of the matter.

“(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 information and other assistance and to make reports, as specified by the member for the purposes of the review.

“(6) The Tribunal may either:

- (a) affirm the Commission’s decision; or
- (b) register the contract.

Effect of registration of contract

“44ZY. The parties to a contract that has been registered:

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

“Division 5—Hindering access to declared services

Prohibition on hindering access to declared services

“44ZZ.(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 for non-declared services

Access undertakings by providers

“44ZZA.(1) A person who is, or expects to be, the provider of a service may give a written undertaking to the Commission, setting out details of the terms and conditions on which the provider undertakes to provide access to the service.

“(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:

- (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;
- (d) whether access to the service is already the subject of an access regime;
- (e) any other matters that the Commission thinks are relevant.

“(4) The Commission must not accept the undertaking unless the Commission has first:

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

“(5) If the Commission accepts the undertaking:

- (a) the undertaking comes into operation at the time of acceptance; and
- (b) the undertaking continues in operation until its expiry date, unless it is earlier withdrawn.

“(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.

“(7) The provider may withdraw or vary the undertaking at any time, but only with the consent of the Commission.

Undertakings cannot be accepted in certain cases

“44ZZB. The Commission cannot accept an undertaking given under section 44ZZA if the service concerned is a declared service.

Register of access undertakings

“44ZZC.(1) The Commission must maintain a public register that includes all access undertakings that have been accepted by the Commission, including those that are no longer in operation.

“(2) The register must include all variations of access undertakings.

“Division 7—Enforcement and remedies

Enforcement of determinations

“44ZZD.(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.

Enforcement of prohibition on hindering access

“44ZZE.(1) If the Federal Court is satisfied, on the application of any person, that another person (the ‘obstructor’) has engaged, is engaging, or is proposing to engage in conduct constituting a contravention of section 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.

Consent injunctions

“44ZZF. 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.

Interim injunctions

“44ZZG.(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.

Factors relevant to granting a restraining injunction

“44ZZH. The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE restraining a person from engaging in conduct may be exercised whether or not:

- (a) it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
- (b) the person has previously engaged in conduct of that kind; or
- (c) there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

Factors relevant to granting a mandatory injunction

“44ZZI. 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.

Enforcement of access undertakings

“44ZZJ.(1) If the Commission thinks that the provider of an access undertaking in operation under section 44ZZA 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.

“(3) The Federal Court cannot make an order under this section unless:

- (a) the provider is a corporation; or
- (b) the breach relates to access to the service by a third party that is a corporation; or
- (c) the breach involves access to the service in the course of, or for the purposes of, constitutional trade or commerce.

Discharge or variation of injunction or other order

“44ZZK. The Federal Court may discharge or vary an injunction or order granted under this Division.

“Division 8—Miscellaneous

Register of determinations

“44ZZL. 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.

Commission may perform functions under other access regimes

“44ZZM. A State or Territory law that establishes an access regime may confer functions on the Commission for the purposes of that law, in accordance with any relevant agreement between the Commonwealth and the State or Territory concerned.

Compensation for acquisition of property

“44ZZN.(1) If:

(a) a determination would result in an acquisition of property; and
(b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated;
the Commonwealth must pay that person:

- (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
- (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.

“(2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:

- (a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;
- (b) compensation awarded under a determination.

“(3) In this section, ‘**acquisition of property**’ has the same meaning as in paragraph 51(xxxi) of the Constitution.

Conduct by directors, servants or agents

“44ZZO.(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:

- (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.

Regulations about review by the Tribunal

“44ZZP. 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).

Regulations about fees for inspection etc. of registers

“44ZZQ. The regulations may make provision about the inspection of registers maintained under this Part (including provision about fees).”.

Opportunity for conference to be afforded before certain powers exercised

60. Section 65J of the Principal Act is amended by omitting from paragraph (5)(a) “Chairman” and substituting “Chairperson”.

Civil action for recovery of pecuniary penalties

61. Section 77 of the Principal Act is amended by omitting from subsection (1) “Minister or the”.

Injunctions

62. Section 80 of the Principal Act is amended:

- (a) by inserting in subsection (1) “, (1AAA)” after “(1A)”;
- (b) by omitting from subsection (1) “the Minister,”;
- (c) by omitting from subsection (1A) “Subject to subsection (1B), a person other than the Minister or” and substituting “A person other than”;
- (d) by omitting from subsection (1A) “or 50A”;
- (e) by inserting after subsection (1A):

“(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.”;

(f) by inserting after subsection (6):

“(6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.”;

(g) by adding at the end:

“(8) Subsection (7) does not apply in relation to an application for an injunction relating to Part IV.”.

Divestiture

63. Section 81 of the Principal Act is amended:

(a) by omitting from subsection (1) “the Minister,”;

(b) by omitting from subsection (1A) “the Minister or”.

Commission to afford opportunity for conference before determining application for authorisation

64. Section 90A of the Principal Act is amended:

(a) by omitting from paragraph (7)(a) “Chairman;” and substituting “Chairperson; and”;

(b) by adding at the end of paragraphs (7)(b) and (c) “and”;

(c) by omitting paragraph (7)(d);

(d) by omitting from subsection (9) “Chairman” and substituting “Chairperson”.

Notification of exclusive dealing

65. Section 93 of the Principal Act is amended by omitting subsection (2) and substituting:

“(2) A corporation may not give a notice for conduct or proposed conduct if:

(a) the corporation applied for an authorisation for the conduct or proposed conduct; and

(b) the Commission or the Trade Practices Commission made a determination dismissing the application or granting an authorisation (whether or not the authorisation is still in force); 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."

Commission to afford opportunity for conference before giving notice in relation to exclusive dealing

66. Section 93A of the Principal Act is amended:

- (a) by omitting from paragraph (6)(a) "Chairman;" and substituting "Chairperson; and";
- (b) by adding at the end of paragraphs (6)(b) and (c) "and";
- (c) by omitting paragraph (6)(d);
- (d) by omitting from subsection (8) "Chairman" and substituting "Chairperson".

Evidentiary provisions

67. Section 100 of the Principal Act is amended by omitting from subsection (3) "the Minister or".

Functions and powers of Tribunal

68. Section 102 of the Principal Act is amended:

- (a) by omitting subsection (3);
- (b) by omitting from subsection (4) "Subject to subsection (3), upon" and substituting "Upon".

Repeal of Part XI

69. Part XI of the Principal Act is repealed.

Power to obtain information, documents and evidence

70. Section 155 of the Principal Act is amended:

- (a) by omitting from subsections (1) and (2) "Where the Commission, the Chairman or the Deputy Chairman" and substituting "Subject to subsection (2A), if the Commission, the Chairperson or the Deputy Chairperson";
- (b) by inserting after subsection (2):

"(2A) A member of the Commission may not give a notice under subsection (1) or an authorisation under subsection (2) merely because:

- (a) a person has refused or failed to comply with a notice under subsection 32(1) of the Prices Surveillance Act 1983 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 member presiding at an inquiry under that Act, 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 34(2) of that Act, on the ground that production of the document would tend to incriminate the person, or to expose the person to a penalty.”;
- (c) by inserting after subsection (7):
- “(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 or permit inspection of 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 or permit inspection of a document, that would disclose the deliberations of the Cabinet of a State or Territory.”.

Insertion of new section

71. After section 155 of the Principal Act the following section is inserted:

Protection of Part IV information

“155AA.(1) A Commission official must not disclose any protected Part IV 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 by law to disclose the information.

“(2) Paragraph (1)(a) does not allow a Commission official to disclose protected Part IV information when performing a function of the Commission described in section 28.

“(3) In this section:

‘Commission official’ means:

- (a) a member, or associate member, of the Commission;
- (b) a person referred to in subsection 27(1);
- (c) a person engaged under section 27A.

‘disclose’ means divulge or communicate;

‘information’ includes information in a document and information given in evidence;

'protected Part IV information' means information that:

- (a) was obtained by the Commission under section 155; and
- (b) relates to a matter arising under Part IV."

Power to obtain information and documents in New Zealand relating to trans-Tasman markets

72. Section 155A of the Principal Act is amended:

- (a) by omitting from subsection (1) "Chairman or the Deputy Chairman" and substituting "Chairperson or the Deputy Chairperson";
- (b) by omitting from subsection (2) "Trade Practices" and substituting "Australian Competition and Consumer".

Australian Competition and Consumer Commission may receive information and documents on behalf of New Zealand Commerce Commission

73. Section 155B of the Principal Act is amended by omitting from subsections (1) and (2) "Trade Practices" (wherever occurring) and substituting "Australian Competition and Consumer".

Refusal to be sworn or to answer questions

74. Section 161 of the Principal Act is amended by omitting from subsection (2) "a person" and substituting "an individual".

Jurisdiction of Court to make declarations and orders

75. Section 163A of the Principal Act is amended:

- (a) by omitting from subsection (2) "The Minister" and substituting "Subject to subsection (2A), the Minister";
- (b) by inserting after subsection (2):

- "(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."

Judicial notice

76. Section 167 of the Principal Act is amended by omitting from paragraph (1)(a) "Chairman, Deputy Chairman," and substituting "Chairperson, Deputy Chairperson,".

Amendments of other Acts

77. The Acts specified in Schedule 3 are amended as set out in that Schedule.

Division 2—Transitional rules

Government rail transport of coal not covered by access system for first 5 years

78.(1) For the period of 5 years after the commencement of section 59, a government coal-carrying service is not a service for the purposes of Part IIIA of the Principal Act.

(2) In this section:

“government coal-carrying service” means a service of carrying coal by rail, where the provider of the service is a State or a Territory or an authority of a State or a Territory.

PART 4—AMENDMENTS COMMENCING AT THE THIRD COMMENCEMENT TIME

Amendment of Prices Surveillance Act: insertion of feminine pronouns

79. The *Prices Surveillance Act 1983* is amended so that:

- (a)** every occurrence of “he” is followed once by “or she”;
- (b)** every occurrence of “him” is followed once by “or her”;
- (c)** every occurrence of “himself” is followed once by “or herself”;
- (d)** every occurrence of “his” is followed once by “or her”.

PART 5—AMENDMENTS COMMENCING AT THE FOURTH COMMENCEMENT TIME

Division 1—Amendments

Application of Act to Commonwealth and Commonwealth authorities

80. Section 2A of the Principal Act is amended by omitting subsection (3) and substituting:

“(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.”.

Insertion of new sections

81. After section 2A of the Principal Act the following sections are inserted:

Application of Act to States and Territories

“2B.(1) Part IV, and the other provisions of this Act so far as they relate to Part IV, 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.

“(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.”.

Activities that are not business

“2C.(1) For the purposes of sections 2A and 2B, 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;
- (d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:
 - (i) the body chooses to acquire the products; or
 - (ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.

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

“(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.

Exemption of certain activities of local government bodies from Part IV

“2D.(1) Part IV does not apply to:

- (a) the refusal to grant, or the granting, suspension or variation of, licences (whether or not they are subject to conditions) by a local government body; or
- (b) a transaction involving only persons who are acting for the same local government body.

“(2) In this section:

‘licence’ means a licence that allows the licensee to supply goods or services;

‘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.”.

Interpretation

82. Section 4 of the Principal Act is amended by inserting in subsection (1):

“ **‘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;”.

Constitution of Commission

83. Section 7 of the Principal Act is amended by omitting paragraph (3)(b) and substituting:

“(b) if there is at least one fully-participating jurisdiction—a majority of such jurisdictions support the appointment.”.

Associate members

84. Section 8A of the Principal Act is amended by omitting subsection (1A) and substituting:

“(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.”.

Deputy Chairperson

85. Section 10 of the Principal Act is amended by omitting subsection (1A) and substituting:

“(1A) If there is at least one fully-participating jurisdiction, the Governor-General must not appoint a person as the Deputy Chairperson unless the Governor-General is satisfied that a majority of such jurisdictions support the appointment.”.

Exceptions

86. Section 51 of the Principal Act is amended by omitting paragraph (1C)(e) and substituting:

“(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;”.

Insertion of new section

87. After section 51 of the Principal Act the following section is inserted in Part IV:

Concurrent operation of State and Territory laws

“51AAA. 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.”.

Division 2—Transitional rules

Temporary exemption from pecuniary penalties

88. The amendments made by section 81 do not make an authority of a State or Territory liable to a pecuniary penalty under the Principal Act for its conduct that takes place in the 12 months immediately after the commencement of that section.

Existing contracts not affected by amendments

89.(1) Subsections (2) and (3) apply in deciding whether a person has contravened Part IV of the Principal Act at any time after the commencement of the amendments made by Division 1 of this Part.

(2) Existing contracts, and things done to give effect to existing contracts, are to be disregarded to the same extent that they would have been disregarded if the amendments made by Division 1 of this Part (other than section 86) had not been made.

(3) If an existing contract is varied on or after the cut-off date, then things done to give effect to the varied contract are not to be disregarded under subsection (2) unless they would have been disregarded under the contract as in force immediately before the cut-off date.

(4) The amendments made by Division 1 of this Part (other than section 86) do not make unenforceable a provision of an existing contract that was not unenforceable immediately before the commencement of those amendments.

(5) In this section:

“cut-off date” means 19 August 1994;

“existing contract” means a contract that was made before the cut-off date.

Advance authorisations

90. From the commencement of this section:

(a) an authorisation may be applied for and granted under the Principal Act; and

(b) a notice may be given under section 93 of the Principal Act; as if the amendments made by Division 1 of this Part commenced at the same time as this section.

PART 6—AMENDMENTS COMMENCING AT THE FIFTH COMMENCEMENT TIME

Amendment of Trade Practices Act: insertion of feminine pronouns

91. The Principal Act is amended so that:

- (a) every occurrence of “he” is followed once by “or she”;
- (b) every occurrence of “him” is followed once by “or her”;
- (c) every occurrence of “himself” is followed once by “or herself”;
- (d) every occurrence of “his” is followed once by “or her”.

PART 7—MISCELLANEOUS

Regulations

92.(1) The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In particular, the regulations may prescribe matters of a transitional or savings nature that arise out of the amendments made by this Act.

SCHEDULE 1

Section 31

SCHEDULE TO BE ADDED AT THE END OF THE PRINCIPAL ACT

SCHEDULE

Section 150A

SCHEDULE VERSION OF PART IV

Contracts, arrangements or understandings that restrict dealings or affect competition

45.(1) If a provision of a contract made before the commencement of this section:

- (a) is an exclusionary provision; or
- (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a person.

(2) A person shall not:

- (a) make a contract or arrangement, or arrive at an understanding, if:
 - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
 - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
- (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
 - (i) is an exclusionary provision; or
 - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section and section 45A, “**competition**”, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a person who is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a person, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

SCHEDULE 1—continued

(4) For the purposes of the application of this section in relation to a particular person, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

- (a)** the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
- (b)** the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the person or a body corporate related to the person is or would be a party;

together have or are likely to have that effect.

(5) This section does not apply to or in relation to:

- (a)** a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;
- (b)** a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or
- (c)** a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:
 - (i)** conduct that contravenes section 48; or
 - (ii)** conduct that would contravene section 48 but for the operation of subsection 88(8A); or
 - (iii)** conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

- (a)** engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or

SCHEDULE 1—continued

- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
- (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.

(9) The making by a person of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:

- (a) the contract is subject to a condition that the provision will not come into force unless and until the person is granted an authorization to give effect to the provision; and
- (b) the person applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a person to such a provision from constituting a contravention of subsection (2).

Contracts, arrangements or understandings in relation to prices

45A.(1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or

SCHEDULE 1—continued

maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

(2) Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

- (a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;
- (b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or
- (c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):
 - (i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or
 - (ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:
 - (A) a person who is the owner of shares in the capital of the body corporate; or
 - (B) a body corporate that is related to such a person.

(4) Subsection (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:

- (a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or
- (b) for the joint advertising of the price for the re-supply of goods or services so acquired.

SCHEDULE 1—continued

(5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

- (a)** the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or
- (b)** any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.

(6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

(7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

(8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a

SCHEDULE 1—continued

provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

Covenants affecting competition

45B.(1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a first person or on a person associated with a first person if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the first person or any person associated with the first person supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.

- (2) A first person or a person associated with a first person shall not:
- (a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:
 - (i) the first person, or any person associated with the first person by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or
 - (ii) any person associated with the first person by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the first person;
 - (b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or
 - (c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.
- (3) Where a person:
- (a) issues an invitation to another person to enter into a contract containing a covenant;

SCHEDULE 1—continued

(b) makes an offer to another person to enter into a contract containing a covenant; or

(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms;

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

(4) For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which:

(a) a person who is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or

(b) a person associated with the person referred to in paragraph (a); is or would be, or but for subsection (1) would be, entitled.

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

(a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

SCHEDULE 1—continued

(6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.

(7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), the first person and another person (the “**second person**”) shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:

- (a)** the first person is a body corporate and the second person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the first person in relation to the covenant or proposed covenant; or
- (b)** the second person is a body corporate in relation to which the first person is in the position mentioned in subparagraph 4A(1)(a)(ii).

(8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:

- (a)** the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and
 - (b)** the person applies for the grant of such an authorization within 14 days after the covenant is given;
- but nothing in this subsection affects the application of paragraph (2)(b) or (c) in relation to the covenant.

(9) This section does not apply to or in relation to a covenant or proposed covenant if:

- (a)** the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;
 - (b)** the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution;
- or

SCHEDULE 1—continued

- (c) the covenant was or is required to be given in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

Covenants in relation to prices

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

(2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words “require the giving of a covenant, or give a covenant” were omitted.

(3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

- (a) the form of the covenant or proposed covenant; or
- (b) any description given to the covenant by any of the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant or any description given to the proposed

SCHEDULE 1—continued

covenant by any of the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant.

(4) For the purposes of the preceding provisions of this section, but without limiting the generality of those provisions:

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

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

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

SCHEDULE 1—continued

Boycotts

45D.(1) Subject to subsection (2), a person must not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person, or the acquisition of goods or services by a third person from a fourth person, if the conduct 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.

(2) In determining whether a contravention of subsection (1) has been committed, boycott conduct within the meaning of Division 7 of Part VI of the *Industrial Relations Act 1988* is to be disregarded.

(3) This section does not affect the operation of any other provision of this Part.

Misuse of market power

46.(1) A person (the “**first person**”) who has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

- (a) eliminating or substantially damaging a competitor of the first person or of a body corporate that is related to the first person in that or any other market;
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1A) For the purposes of subsection (1):

- (a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
- (b) the reference in paragraphs (1)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(2) If:

- (a) a body corporate that is related to a person (the “**first person**”) has, or 2 or more bodies corporate each of which is related to the one person (the “**first person**”) together have, a substantial degree of power in a market; or
- (b) a person (the “**first person**”) and a body corporate that is, or a person (the “**first person**”) and 2 or more bodies corporate each of which is, related to the first person, together have a substantial degree of power in a market;

SCHEDULE 1—continued

the first person shall be taken for the purposes of this section to have a substantial degree of power in that market.

(3) In determining for the purposes of this section the degree of power that a person (the “**first person**”) or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the first person or of any of those bodies corporate in that market is constrained by the conduct of:

- (a) competitors, or potential competitors, of the first person or of any of those bodies corporate in that market; or
- (b) persons to whom or from whom the first person or any of those bodies corporate supplies or acquires goods or services in that market.

(4) In this section:

- (a) a reference to power is a reference to market power;
- (b) a reference to a market is a reference to a market for goods or services; and
- (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

(5) Without extending by implication the meaning of subsection (1), a person shall not be taken to contravene that subsection by reason only that the person acquires plant or equipment.

(6) This section does not prevent a person from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, by reason that an authorization is in force or by reason of the operation of section 93.

(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a person may be taken to have taken advantage of the person’s power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or of any other person or from other relevant circumstances.

Exclusive dealing

47.(1) Subject to this section, a person shall not, in trade or commerce, engage in the practice of exclusive dealing.

SCHEDULE 1—continued

(2) A person (the “**first person**”) engages in the practice of exclusive dealing if the first person:

- (a) supplies, or offers to supply, goods or services;
- (b) supplies, or offers to supply, goods or services at a particular price; or
- (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the first person;

on the condition that the person (the “**second person**”) to whom the first person supplies, or offers or proposes to supply, the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate:

- (d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
- (e) will not, or will not except to a limited extent, re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; or
- (f) in the case where the first person supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.

(3) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person refuses:

- (a) to supply goods or services to a second person;
- (b) to supply goods or services to a second person at a particular price; or
- (c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a second person;

SCHEDULE 1—continued

for the reason that the second person or, if the second person is a body corporate, a body corporate related to that body corporate:

- (d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
- (e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; or
- (f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the first person to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the first person:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.

(4) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person:

- (a) acquires, or offers to acquire, goods or services; or
- (b) acquires, or offers to acquire, goods or services at a particular price; on the condition that the person (the “**second person**”) from whom the first person acquires or offers to acquire the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
 - (c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (d) in particular places or classes of places or in places other than particular places or classes of places.

(5) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person refuses:

- (a) to acquire goods or services from a second person; or
- (b) to acquire goods or services at a particular price from a second person;

SCHEDULE 1—continued

for the reason that the second person or, if the second person is a body corporate, a body corporate related to that body corporate has supplied, or has not agreed not to supply, goods or services, or goods or services of a particular kind or description:

- (c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
- (d) in particular places or classes of places or in places other than particular places or classes of places.

(6) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person:

- (a) supplies, or offers to supply, goods or services;
- (b) supplies, or offers to supply, goods or services at a particular price; or
- (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the first person;

on the condition that the person (the “**second person**”) to whom the first person supplies or offers or proposes to supply the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person.

(7) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person refuses:

- (a) to supply goods or services to a second person;
- (b) to supply goods or services at a particular price to a second person; or
- (c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a second person;

for the reason that the second person or, if the second person is a body corporate, a body corporate related to that body corporate has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person.

(8) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person grants or renews, or makes it known that the first person will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

SCHEDULE 1—continued

- (a) will not, or will not except to a limited extent:
 - (i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; or
 - (ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
- (b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places; or
- (c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.

(9) A person (the “**first person**”) also engages in the practice of exclusive dealing if the first person refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:

- (a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
- (b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person;
- (c) has supplied goods or services, or goods or services of a particular kind or description:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places; or

SCHEDULE 1—continued

- (d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.

(10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a person engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:

- (a) the engaging by the person in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
- (b) the engaging by the person in that conduct, and the engaging by the person, or by a body corporate related to the person, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

(10A) Subsection (1) does not apply to a person engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:

- (a) the person has given the Commission a notice under subsection 93(1) describing the conduct; and
- (b) the notice is in force under section 93.

(11) Subsections (8) and (9) do not apply with respect to:

- (a) conduct engaged in by, or by a trustee for, a religious, charitable or public benevolent institution, being conduct engaged in for or in accordance with the purposes or objects of that institution; or
- (b) conduct engaged in in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

(12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.

(13) In this section:

- (a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;

SCHEDULE 1—continued

- (b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:
- (i) the person engaging in the conduct or any body corporate related to that person; or
 - (ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;
- supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and
- (c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the person engaging in the conduct or any other person whose business dealings are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those persons, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

Resale price maintenance

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

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

50.(1) A person must not directly or indirectly:

- (a) acquire shares in the capital of a body corporate; or
- (b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(3) Without limiting the matters that may be taken into account for the purposes of subsection (1) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;

SCHEDULE 1—continued

- (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 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 authorization is disposed of; or
 - (e) the contract ceases to be subject to the condition;
- whichever first happens.
- (5) For the purposes of subsection (4), an application for an authorization shall be taken to be disposed of:
- (a) in a case to which paragraph (b) of this subsection does not apply—at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorization; or
 - (b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the authorization—at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.

SCHEDULE 1—continued

(6) In this section:

“**market**” means a substantial market for goods or services in Australia, in a State or in a Territory.

Exceptions

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

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

(1A) Without limiting subsection (1), conduct is taken to be specified in, and authorised by, a law for the purposes of that subsection if:

- (a) a licence or other instrument issued or made under the law specifies one or both of the following:
 - (i) the person authorised to engage in the conduct;
 - (ii) the place where the conduct is to occur; and
- (b) the law specifies the attributes of the conduct except those mentioned in paragraph (a).

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

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

SCHEDULE 1—continued

(1C) The operation of subsection (1) (other than paragraph (1)(a)) is subject to the following limitations:

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

(2) In determining whether a contravention of a provision of this Part other than section 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 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 the Standards Association of Australia or by a prescribed association or body;

SCHEDULE 1—continued

- (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 is, or after he 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 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;

SCHEDULE 1—continued

- (v) the work or other subject matter in which the copyright subsists; or
 - (vi) the eligible layout in which the EL rights subsist;
 - (b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or
 - (c) the inclusion in a contract, arrangement or understanding between:
 - (i) the registered proprietor of a trade mark other than a certification trade mark; and
 - (ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his becoming registered as such a registered user;of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.
- (4) This section applies in determining whether a provision of a contract is unenforceable by reason of subsection 45(1), or whether a covenant is unenforceable by reason of subsection 45B(1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.
-

SCHEDULE 2

**AMENDMENTS RELATING TO CONDUCT RULES AND
COMPETITION CODE**

Australian Postal Corporation Act 1989

After subsection 33A(6):

Insert:

“(6A) The following conduct is authorised for the purposes of subsection 51(1) of the *Trade Practices Act 1974*:

- (a) making and carrying out an agreement described in subsection (2) of this section;
- (b) applying to the Federal Court under subsection (3) of this section.”.

Jurisdiction of Courts (Cross-vesting) Act 1987

Subsection 3(1) (definition of “special federal matter”):

After paragraph (a) insert:

“(aa) a matter arising under the Competition Code (as defined in section 150A of the *Trade Practices Act 1974*);”.

Section 3:

Add at the end:

“(4) Jurisdiction conferred on the Federal Court by an application law (as defined in section 150A of the *Trade Practices Act 1974*) is to be treated for the purposes of this Act as if that jurisdiction were federal jurisdiction.”.

SCHEDULE 3

Section 77

**OTHER AMENDMENTS RELATING TO THE CREATION AND
FUNCTIONS OF THE AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION AND TO ACCESS TO DECLARED
SERVICES**

Agricultural and Veterinary Chemicals Code Act 1994

Schedule, section 100:

Omit “Trade Practices Commission”, substitute “Australian Competition and Consumer Commission”.

Australian Maritime Safety Authority Act 1990

Paragraph 47(4)(a):

Omit “that the Prices Surveillance Authority is to hold”, substitute “about”.

Paragraph 47(7)(a):

Omit “that the Prices Surveillance Authority is to hold”, substitute “about”.

Subparagraph 47(7)(a)(i):

Omit “Prices Surveillance Authority has given to the Authority”, substitute “Authority has received a”.

Subparagraph 47(7)(a)(ii):

Omit “that the Prices Surveillance Authority gave”, substitute “given”.

Subsection 47(10):

Omit “of the Prices Surveillance Authority”.

Australian Postal Corporation Act 1989

Paragraphs 32B(1)(a) and (b):

Omit “Trade Practices Commission”, substitute “Australian Competition and Consumer Commission”.

Paragraph 32B(1)(d):

Omit “the Prices Surveillance Authority or”.

Paragraph 32B(1)(d):

Omit “Trade Practices Commission” (wherever occurring), substitute “Australian Competition and Consumer Commission”.

SCHEDULE 3—continued

After paragraph 32B(1)(d):

Insert:

“(da) for the Australian Competition and Consumer Commission to use for the purposes described in paragraph (a) information obtained under the *Prices Surveillance Act 1983*;”.

Paragraphs 32B(1)(e) and (f):

Omit “Trade Practices Commission”, substitute “Australian Competition and Consumer Commission”.

After section 32C:

Insert:

Exemption from Part IIIA of the Trade Practices Act

“32D. Part IIIA of the *Trade Practices Act 1974* does not apply in relation to the supply of a service (including a bulk interconnection service and an incoming overseas mail service) by Australia Post.”.

Australian Wine and Brandy Corporation Act 1980

Paragraph 39ZJ(1)(a):

Omit “Trade Practices”, substitute “Australian Competition and Consumer”.

Broadcasting Services Act 1992

Subsection 93(7):

Omit “Trade Practices Commission” (wherever occurring), substitute “Australian Competition and Consumer Commission”.

Subsection 96(5):

Omit “Trade Practices Commission” (wherever occurring), substitute “Australian Competition and Consumer Commission”.

Subsection 96A(1):

Omit “Trade Practices”, substitute “Australian Competition and Consumer”.

Section 97:

Omit “Trade Practices Commission” (wherever occurring), substitute “Australian Competition and Consumer Commission”.

SCHEDULE 3—continued

Paragraph 98A(2)(a):

Omit “the Trade Practices Commission’s approval under”.

Paragraph 98B(1)(b):

Omit “the operation of subsection 93(7) in relation to a report of the Trade Practices Commission to the ABA”, substitute “a report described in subsection 93(7)”.

Civil Aviation Act 1988

Paragraph 66(3A)(a):

Omit “that the Prices Surveillance Authority is to hold”, substitute “about”.

Paragraph 66(5A)(a):

Omit “that the Prices Surveillance Authority is to hold”, substitute “about”.

Subparagraph 66(5A)(a)(i):

Omit “of the Prices Surveillance Authority having given the Authority”, substitute “that the Authority has received a”.

Subparagraph 66(5A)(a)(ii):

Omit “that the Prices Surveillance Authority gave”, substitute “given”.

Subsection 66(6A):

Omit “that the Prices Surveillance Authority has”.

Employment Services Act 1994

Section 125:

Omit “Trade Practices” (wherever occurring), substitute “Australian Competition and Consumer”.

Note 1: The heading to section 125 is altered by omitting “Trade Practices” and substituting “Australian Competition and Consumer”.

Note 2: The headings to subsections 125(2), (3) and (4) are altered by omitting “Trade Practices” and substituting “Australian Competition and Consumer”.

Federal Airports Corporation Act 1986

Paragraph 56(4A)(a):

Omit “that the Prices Surveillance Authority is to hold”, substitute “about”.

SCHEDULE 3—continued

Paragraph 56(6A)(a):

Omit “that the Prices Surveillance Authority is to hold”, substitute “about”.

Subparagraph 56(6A)(a)(i):

Omit “of the Prices Surveillance Authority having given the Corporation”, substitute “that the Corporation has received a”.

Subparagraph 56(6A)(a)(ii):

Omit “that the Prices Surveillance Authority gave”, substitute “given”.

Subsection 56(7AA):

Omit “that the Prices Surveillance Authority has”.

Liquefied Petroleum Gas (Grants) Act 1980

Paragraph 6A(4)(c):

Omit “Prices Surveillance Authority”, substitute “Australian Competition and Consumer Commission”.

Moomba-Sydney Pipeline System Sale Act 1994

Subsection 66(1) (definition of “Tribunal”):

Omit “Trade Practices Tribunal established by”, substitute “Australian Competition Tribunal referred to in section 30 of”.

Subsection 66(1) (definitions of “associate member of the PSA”, “member of the PSA”, “member of the staff of the PSA”, “PSA”, “PSA Chairperson”, “TPC”, “TPC Chairperson”, “TPC Deputy Chairperson” and “TPC member”):

Omit the definitions.

Subsection 66(1):

Insert:

“ ‘ACCC’ means the Australian Competition and Consumer Commission established by the *Trade Practices Act 1974*;

‘ACCC Chairperson’ means the Chairperson of the ACCC;

‘ACCC Deputy Chairperson’ means the Deputy Chairperson of the ACCC;

SCHEDULE 3—continued

‘ACCC member’ means:

- (a) the ACCC Chairperson; or
- (b) the ACCC Deputy Chairperson; or
- (c) an ACCC member other than the ACCC Chairperson or the ACCC Deputy Chairperson; or
- (d) an associate member of the ACCC;

‘member of the staff of the ACCC’ means a person referred to in subsection 27(1) of the *Trade Practices Act 1974* or a person engaged under section 27A of that Act;’.

Paragraph 72(3)(a):

Omit “TPC”, substitute “ACCC”.

Paragraph 72(3)(a):

Omit “TPC’s”, substitute “ACCC’s”.

Paragraph 72(3)(b):

Omit “TPC”, substitute “ACCC”.

Subsection 72(5):

Omit “TPC”, substitute “ACCC”.

Sections 74, 75, 76 and 77:

Omit “TPC” (wherever occurring), substitute “ACCC”.

Subdivision A of Division 4 of Part 6 (heading):

Omit “TPC”, substitute “ACCC”.

Sections 78 to 102 (inclusive) and 104:

Omit “TPC” (wherever occurring), substitute “ACCC”.

Division 5 of Part 6 (heading):

Omit “TPC”, substitute “ACCC”.

Sections 105, 106, 107, 109, 110, 113, 114, 122, 123 and 124:

Omit “TPC” (wherever occurring), substitute “ACCC”.

Sections 131 to 133 (inclusive):

Omit “PSA” (wherever occurring), substitute “ACCC”.

Section 134:

Omit “PSA” (first, second and third occurring), substitute “ACCC”.

SCHEDULE 3—continued

Paragraph 134(c):

Omit the paragraph, substitute:
“(c) an ACCC member; or”.

Paragraph 134(d):

Omit “PSA”, substitute “ACCC”.

Section 135:

Omit “PSA” (wherever occurring), substitute “ACCC”.

Sections 136, 139, 141, 142, 143 and 174:

Omit “TPC” (wherever occurring), substitute “ACCC”.

Prices Surveillance Act 1983

Subsection 3(1) (definition of “associate member”):

Omit “Authority”, substitute “Commission”.

Subsection 3(1) (definition of “Commonwealth authority”):

Omit “or of the Australian Capital Territory that is specified in Schedule 3 to the *Australian Capital Territory (Self-Government) Act 1988*”.

Subsection 3(1) (definition of “inquiry”):

Omit “Authority”, substitute “Commission”.

Subsection 3(1) (definition of “person”):

Add at the end “and a State or Territory authority”.

Subsection 3(1) (definition of “member”):

Omit the definition, substitute:

“ ‘member’ means:

(a) the Chairperson; or

(b) a member of the Commission other than the Chairperson;

Note: Under subsection 17(5) (which applies subsection 8A(4) of the *Trade Practices Act 1974*) references to members in provisions conferring powers on the Commission include associate members.”.

Subsection 3(1) (definition of “services”):

Omit the definition, substitute:

“ ‘services’ includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are

SCHEDULE 3—continued

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; or
 - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance; or

(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(d) any contract for or in relation to the lending of moneys; but does not include rights or benefits being the supply of goods or the performance of work under a contract of service;”.

Subsection 3(1) (definition of “supply”):

Omit the definition, substitute:

“ ‘supply’ includes:

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
- (b) in relation to services—provide, grant or confer;”.

Subsection 3(1) (definitions of “appoint”, “Authority”, “Chairman”, “full-time member”, “meeting” and “prescribed authority”):

Omit the definitions.

Subsection 3(1):

Insert:

“ ‘Chairperson’ means the Chairperson of the Commission;

‘Commission’ means the Australian Competition and Consumer Commission established by the *Trade Practices Act 1974*;

‘member of the staff of the Commission’ means a person referred to in subsection 27(1) of the *Trade Practices Act 1974* or a person engaged under section 27A of that Act;

SCHEDULE 3—continued

‘National Competition Council’ means the National Competition Council established by the *Trade Practices Act 1974*;

‘State or Territory authority’ means:

- (a) a State, the Australian Capital Territory or the Northern Territory; or
- (b) an authority, institution or other body (except a society, association or incorporated company) established for a public purpose by or under a law of a State, the Australian Capital Territory or the Northern Territory; or
- (c) a society, association or incorporated company in which a controlling interest is held by:
 - (i) a State, the Australian Capital Territory or the Northern Territory; or
 - (ii) an authority, institution or other body covered by paragraph (b);”.

Subsection 3(4):

Omit the subsection.

Subsection 4(2):

Omit the subsection, substitute:

“(2) This Act does not apply in relation to the supply of goods or services by:

- (a) an authority, institution or other body (except a society, association or incorporated company) established for a public purpose by or under a law of Norfolk Island; or
- (b) a society, association or incorporated company in which a controlling interest is held by Norfolk Island, or an authority, institution or other body covered by paragraph (a).”.

Subsection 5(1):

Omit the subsection, substitute:

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

Subsection 5(2):

After “Commonwealth” insert “, of a State, of the Australian Capital Territory or of the Northern Territory”.

SCHEDULE 3—continued

Section 5:

Add at the end:

“(3) The protection in subsection (2) does not apply to an incorporated Commonwealth authority or an incorporated State or Territory authority.”.

Part II:

Repeal the Part.

Part III (heading):

Omit “AUTHORITY”, substitute “THE COMMISSION”.

Subsection 17(1):

Omit “Authority” (wherever occurring), substitute “Commission”.

Subsection 17(1):

After “services” insert “(except the supply of goods or services by a State or Territory authority)”.

Subsection 17(1):

Add at the end:

“; and (c) to monitor prices, costs and profits in any industry or business that the Minister directs the Commission to monitor, and to report to the Minister the results of the monitoring.”.

Subsection 17(2):

Omit “Authority”, substitute “Commission”.

Subsection 17(3):

Omit “Authority”, substitute “Commission”.

Section 17:

Add at the end:

“(4) Paragraphs 13(2)(b) and 14(2)(b) and section 17, of the *Trade Practices Act 1974* apply in relation to the disclosure of interests in matters before the Commission under this Act.

“(5) Subsections 8A(4) and (5) and sections 16, 18 and 19 of the *Trade Practices Act 1974* apply in relation to the Commission’s powers and functions under this Act in the same way as they apply to the Commission’s powers and functions under that Act.”.

Subsection 18(1):

Omit “Chairman”, substitute “Chairperson”.

SCHEDULE 3—continued

Subsection 18(1):

Omit “Authority” (wherever occurring), substitute “Commission”.

After subsection 18(1):

Insert:

“(1A) The Minister must not require or approve an inquiry into the supply by a State or Territory authority of goods or services.”.

Subsection 18(3):

Omit “Authority”, substitute “Commission”.

Subsection 18(3):

Omit “Chairman”, substitute “Chairperson”.

After subsection 18(3):

Insert:

“(3A) The Commission must not determine a State or Territory authority as a person in relation to whom an inquiry will be held.”.

Subsection 18(5):

Omit “Authority”, substitute “Commission”.

Subsection 18(6):

Omit “Authority” (wherever occurring), substitute “Commission”.

Subsection 18(6):

Omit “Chairman”, substitute “Chairperson”.

Section 19:

Omit “Authority” (wherever occurring), substitute “Commission”.

Section 20:

Omit “Chairman”, substitute “Chairperson”.

Section 20:

Omit “Authority” (wherever occurring), substitute “Commission”.

Subsection 21(1):

Omit “Authority”, substitute “Commission”.

SCHEDULE 3—continued

After subsection 21(1):

Insert:

“(1A) The Minister must not make or approve a declaration of a State or Territory authority unless:

- (a) the appropriate Minister of the State or Territory concerned has agreed to the declaration being made; or
- (b) the National Competition Council has, on the request of an Australian government, recommended the declaration and the Minister has consulted the appropriate Minister of the State or Territory concerned.

“(1B) The National Competition Council must not recommend a declaration of a State or Territory authority in relation to goods or services unless the Council is satisfied that:

- (a) at least one Australian government has notified the State or Territory concerned that the Australian government is not satisfied that there is effective supervision of the prices charged by the authority for the supply of those goods or services; and
- (b) there is not effective supervision of prices charged by the authority for the supply of those goods or services; and
- (c) the supply of those goods or services by the authority has a significant direct or indirect impact on trade or commerce described in paragraph 4(1)(g) or trade and commerce between Australia and another place.

“(1C) The National Competition Council must not recommend a declaration of a State or Territory authority in relation to goods or services if:

- (a) at any time during the period of 5 years before the Council received the request mentioned in paragraph (1A)(b), the Council was satisfied (when considering a previous request) that there was effective supervision of prices charged by the State or Territory authority for the supply of those goods or services; and
- (b) the Council is satisfied that there has not been a substantial change in the mechanism for that supervision since the Council was satisfied as mentioned in paragraph (a).

“(1D) In deciding whether there is effective supervision of prices charged by a State or Territory authority, where the State or Territory concerned is a party to the Competition Principles Agreement made on

SCHEDULE 3—continued

11 April 1995 between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, the National Competition Council must apply the relevant principles set out in the agreement.

“(1E) A declaration under paragraph (1)(b) must specify the time when it is to cease to have effect.”.

Subsection 21(2):

Omit “Authority”, substitute “Commission”.

Section 21:

Add at the end:

“(3) A declaration under paragraph (1)(b) ceases to have effect at the time specified under subsection (1E), unless the declaration is revoked sooner.

“(4) In this section:

‘**Australian government**’ means the Commonwealth, a State, the Australian Capital Territory or the Northern Territory.”.

Subsection 22(1):

Omit “previously” (wherever occurring).

Paragraph 22(1)(a):

After “conditions” (first occurring) insert “in the past 12 months”.

Paragraph 22(1)(a):

After “conditions” (last occurring) insert “in that period”.

Paragraph 22(1)(b):

After “conditions” (first occurring) insert “in the past 12 months”.

Paragraph 22(1)(b):

After “conditions” (second and third occurring) insert “in that period”.

Paragraph 22(1)(c):

After “conditions” insert “in the past 12 months”.

Sections 22 and 23:

Omit “Authority” (wherever occurring), substitute “Commission”.

SCHEDULE 3—continued

Paragraph 23(2)(a):

Add at the end:

“(iii) a statement of the reasons for the outcome of the consideration by the Commission of the relevant notice; and”.

After subsection 23(2):

Insert:

“(2A) A person who gives the Commission a document in relation to a notice under paragraph 22(2)(a) or makes an oral submission to the Commission in relation to a notice may ask the Commission to exclude from a document to be placed in the register any information:

- (a) that was in the person’s document or submission; and
- (b) that the person claims is confidential.

“(2B) The Commission may exclude the information if the Commission is satisfied that the claim is justified and is not of the opinion that disclosure of the information is necessary in the public interest.”.

Subsection 24(1):

Omit “Authority” (wherever occurring), substitute “Commission”.

Subsection 24(1):

Omit “previously” (wherever occurring).

Paragraph 24(1)(a):

After “conditions” (first occurring) insert “in the past 12 months”.

Paragraph 24(1)(a):

After “conditions” (last occurring) insert “in that period”.

Paragraph 24(1)(b):

After “conditions” (first occurring) insert “in the past 12 months”.

Paragraph 24(1)(b):

After “conditions” (second and third occurring) insert “in that period”.

Paragraph 24(1)(c):

After “conditions” insert “in the past 12 months”.

Sections 25 to 27 (inclusive):

Omit “Authority” (wherever occurring), substitute “Commission”.

SCHEDULE 3—continued

After section 27:

Insert:

Directions to monitor prices, costs and profits of an industry or business

“27A.(1) The Minister may give the Commission a written direction:

- (a) to monitor prices, costs and profits relating to the supply of goods or services by persons in a specified industry and to report to the Minister on the monitoring at a specified time or at specified intervals within a specified period; or
- (b) to monitor prices, costs and profits relating to the supply of goods or services by a specified person and to report to the Minister on the monitoring at a specified time or at specified intervals within a specified period.

“(2) The Minister must not direct the Commission to monitor prices, costs and profits of a State or Territory authority that supplies goods or services unless the State or Territory concerned has agreed to the direction being given.

Report on monitoring

“27B.(1) The Commission must make copies of a report under paragraph 27A(1)(a) available for inspection by the public as soon as practicable after the Commission has given the report to the Minister.

“(2) In the case of a report under paragraph 27A(1)(b) relating to a person, the Commission must:

- (a) send the person a copy of the report on the day the Commission gives the report to the Minister; and
- (b) make copies of the report available for inspection by the public as soon as practicable after the person has received a copy of the report.”.

Section 28:

Omit “Authority” (wherever occurring), substitute “Commission”.

Section 29:

Repeal the section, substitute:

Delegation of some of the Commission’s powers and functions under this Act

“29. The Commission may delegate to a member, by written instrument:

SCHEDULE 3—continued

- (a) the Commission's functions described in paragraph 17(1)(a) in relation to specified notices given to the Commission under paragraph 22(2)(a); and
- (b) the Commission's powers under subparagraphs 22(2)(b)(ii) and (iii) in relation to specified notices given to the Commission under paragraph 22(2)(a); and
- (c) the Commission's power under section 28 relating to a notice served by the member exercising (as a delegate) the Commission's power under subparagraph 22(2)(b)(ii) or (iii)."

Section 30:

Repeal the section.

Section 31:

Omit "Authority" (wherever occurring), substitute "Commission".

Paragraph 31(6)(b):

Omit "Chairman" (wherever occurring), substitute "Chairperson".

Subsection 32(1):

Omit "Chairman", substitute "Chairperson".

Subsection 32(1):

Omit "Authority" (wherever occurring), substitute "Commission".

Paragraph 32(1)(e):

Omit "this Act applies", substitute "the Commission is carrying out an inquiry under section 18 or monitoring under a direction under section 27A".

After subsection 32(2):

Insert:

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

Subsection 32(3):

Omit "Authority" (wherever occurring), substitute "Commission".

Section 33:

Omit "Authority" (wherever occurring), substitute "Commission".

Subsection 34(1):

Omit "Authority", substitute "Commission".

SCHEDULE 3—continued

Subsections 34(2) and (3):

Omit “Chairman” (wherever occurring), substitute “Chairperson”.

Section 36:

Add at the end:

“(2) It is a reasonable excuse for the purposes of paragraph (1)(b) for a person to refuse or fail to answer a question on the ground that the answer might tend to incriminate the person or to expose the person to a penalty.”.

“(3) It is a reasonable excuse for the purposes of paragraph (1)(c) for a person to refuse or fail to produce a document on the ground that the production of the document might tend to incriminate the person or to expose the person to a penalty,

“(4) Subsections (2) and (3) do not limit what is a reasonable excuse for the purposes of paragraphs (1)(b) and (c).”.

Subsection 38(1):

Omit “Authority” (wherever occurring), substitute “Commission”.

Paragraph 38(2)(a):

Omit “the inquiry for the purposes of which the associate member was appointed”, substitute “an inquiry for the purposes of which the Chairperson has directed that the associate member be taken to be a member”.

Subsection 38(3):

Omit “Authority” (wherever occurring), substitute “Commission”.

Sections 41 and 42:

Repeal the sections.

Subsection 43(1):

After “Act” (first occurring) insert “or the *Trade Practices Act 1974*”.

Paragraph 43(1)(a):

Omit “by reason of his office or appointment under this Act or”.

Paragraph 43(1)(b):

Omit the paragraph, substitute:

“(b) produce to any person a document supplied to, lodged with or otherwise acquired by the Commission for the purposes of this Act, except a document made available to the public by the Commission under this Act.”.

SCHEDULE 3—continued

Subsection 43(2):

After “Act” insert “or the *Trade Practices Act 1974*”.

Subsection 43(3):

Omit “Authority”, substitute “Commission”.

Subsection 43(4) (definition of “prescribed person”):

Omit the definition, substitute:

“ ‘**prescribed person**’ means a person who:

(a) is or has been:

(i) a member or associate member; or

(ii) a member of the staff of the Commission; or

(iii) an officer or employee as defined in subsection 7(1) of the *Public Service Act 1922*; or

(b) has been a member or associate member of the Prices Surveillance Authority that ceased to exist on the commencement of Part 3 of the *Competition Policy Reform Act 1995*, or an associate member of that Authority; or

(c) has been engaged by that Authority under subsection 42(1) of this Act, as in force at any time before the commencement of section 77 of the *Competition Policy Reform Act 1995*;”.

Section 44:

Repeal the section.

Section 46 (definition of “former Authority”):

Omit the definition.

Sections 47 to 50 (inclusive):

Repeal the sections.

Subsection 51(1):

Omit “Notwithstanding the repeal effected by section 47”, substitute “Despite the repeal of the repealed Act”.

Paragraph 51(2)(a):

Omit “Authority as required by section 50”, substitute “Commission”.

Paragraph 51(2)(b):

Omit “Authority”, substitute “Commission”.

SCHEDULE 3—continued

Paragraph 51(3)(a):

Omit “Authority as required by section 50”, substitute “Commission”.

Paragraph 51(3)(b):

Omit “Authority”, substitute “Commission”.

Remuneration and Allowances Act 1990

Schedule 1, clause 2, Part 3:

Omit “Trade Practices Tribunal”, substitute “Australian Competition Tribunal”.

Schedule 1, clause 3:

Omit “Trade Practices Tribunal”, substitute “Australian Competition Tribunal”.

Schedule 1, clause 5:

Omit “Trade Practices Tribunal”, substitute “Australian Competition Tribunal”.

Schedule 2, clause 3, Part 3:

Omit “Trade Practices Commission”, substitute “Australian Competition and Consumer Commission”.

Telecommunications Act 1991

Paragraph 37(g):

Omit “Trade Practices”, substitute “Australian Competition and Consumer”.

Paragraph 38(2)(d):

Omit “Trade Practices”, substitute “Australian Competition and Consumer”.

Before section 236:

Insert in Division 1 of Part 11:

Part IIIA of Trade Practices Act not to apply to supply of certain services

“235A. Part IIIA of the *Trade Practices Act 1974* does not apply in relation to the supply of a telecommunications service by a carrier or under a class licence.”.

SCHEDULE 3—continued

Section 340:

Omit “Trade Practices” (wherever occurring), substitute “Australian Competition and Consumer”.

NOTE

1. No. 51 of 1974 as amended. For previous amendments, see Nos. 56 and 63, 1975; Nos. 88 and 157, 1976; Nos. 81, 111 and 151, 1977; Nos. 206 and 207, 1978; No. 73, 1980; Nos. 61 and 176, 1981; No. 80, 1982; No. 39, 1983; Nos. 63 and 73, 1984; No. 165, 1984 (as amended by No. 17, 1986); No. 65, 1985; Nos. 8, 17 and 168, 1986; Nos. 23 and 141, 1987; No. 8, 1988 (as amended by No. 120, 1988); No. 20, 1988; No. 87, 1988 (as amended by No. 108, 1990); Nos. 28 and 34, 1989; Nos. 11 and 70, 1990; Nos. 49, 122, 136, 173 and 180, 1991; Nos. 22, 104, 105, 106 and 222, 1992; No. 98, 1993; and Nos. 49 and 141, 1994.

NOTE ABOUT SECTION HEADINGS

1. When Part 3 of this Act commences, the headings to sections of Acts are altered as follows:
 - (a) the headings to sections 31A, 33 and 75AQ of the Principal Act are altered by omitting “Trade Practices”;
 - (b) the heading to section 97 of the *Broadcasting Services Act 1992* is altered by omitting “Trade Practices Commission” and substituting “Australian Competition and Consumer Commission”;
 - (c) the headings to sections 78, 79, 80, 81, 83, 85, 87, 88, 90, 91, 92, 94, 96, 99, 100, 101, 108, 109, 110, 124, 136 and 139 of the *Moomba-Sydney Pipeline System Sale Act 1994* are altered by omitting “TPC” and substituting “ACCC”;
 - (d) the headings to sections 131, 132, 133 and 135 of the *Moomba-Sydney Pipeline System Sale Act 1994* are altered by omitting “PSA” and substituting “ACCC”;
 - (e) the heading to section 17 of the *Prices Surveillance Act 1983* is altered by omitting “Authority” and substituting “the Commission under this Act”;
 - (f) the headings to sections 19, 21, 22, 23, 26, 28 and 38 of the *Prices Surveillance Act 1983* are altered by omitting “Authority” and substituting “Commission”;
 - (g) the heading to section 340 of the *Telecommunications Act 1991* is altered by omitting “Trade Practices” and substituting “Australian Competition and Consumer”.
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[Minister's second reading speech made in—
Senate on 29 March 1995
House of Representatives on 30 June 1995]