



Trade Practices Legislation Amendment Act (No. 1) 2006

No. 131, 2006

**An Act to amend the *Trade Practices Act 1974*, and
for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 131, 2006

An Act to amend the *Trade Practices Act 1974*, and for other purposes

[Assented to 6 November 2006]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Trade Practices Legislation
Amendment Act (No. 1) 2006*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	6 November 2006
2. Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	1 January 2007 (see F2006L04026)
3. Schedules 2 to 9	At the same time as the provisions covered by table item 2.	1 January 2007
4. Schedule 10	The day after this Act receives the Royal Assent.	7 November 2006
5. Schedule 11	The day on which this Act receives the Royal Assent.	6 November 2006
6. Schedule 12	Immediately after the commencement of Schedule 1 to the <i>Trade Practices Legislation Amendment Act 2003</i> .	1 March 2004

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Merger clearances and authorisations

Trade Practices Act 1974

1 Subsection 4(1)

Insert:

authorisation means:

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

2 Subsection 4(1) (definition of *authorization*)

Repeal the definition.

3 Subsection 4(1)

Insert:

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

4 Subsection 8A(6)

After “authorization”, insert “or a clearance,”.

5 Subsection 25(1)

After “authorization”, insert “or a clearance”.

6 Before section 30

Insert:

29P Definition

In this Part, unless the contrary intention appears:

proceedings includes:

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

7 Section 39

Before "The", insert "(1)".

Note: The heading to section 39 is replaced by the heading "**President may give directions**".

8 At the end of section 39

Add:

- (2) The President may give directions to the Deputy Presidents in relation to the exercise by the Deputy Presidents of powers with respect to matters of procedure in proceedings before the Tribunal.

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

9 Subsections 46(6) and 46A(6)

After "authorization", insert "or clearance".

10 At the end of subsection 50(1)

Add:

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

11 At the end of subsection 50(2)

Add:

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

12 Paragraph 50(4)(b)

After "granted", insert "a clearance or".

13 Paragraph 50(4)(c)

After “such”, insert “a clearance or”.

14 Paragraph 50(4)(d)

After “for the”, insert “clearance or”.

15 Subsection 50(5)

Omit “an authorization”, substitute “a clearance”.

16 Paragraphs 50(5)(a) and (b)

Omit “the authorization”, substitute “the clearance”.

17 After subsection 50(5)

Insert:

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

18 After section 80AB

Insert:

80AC Injunctions to prevent mergers if clearance or authorisation granted on the basis of false or misleading information

- (1) If, on the application of the Commission, the Court is satisfied that:
- (a) a person is proposing to acquire shares in the capital of a body corporate or assets of a person; and
 - (b) the person was granted, under Division 3 of Part VII (mergers), a clearance or an authorisation for the proposed acquisition on the basis of information that was false or misleading in a material particular; and
 - (c) that information was given by the person or a body corporate that was related to the person; and
 - (d) if that information had not been given, the clearance or authorisation would not have been granted; and
 - (e) apart from the clearance or authorisation, the acquisition would contravene section 50 if it occurred;
- then the Court may grant an injunction in such terms as the Court determines to be appropriate.

- (2) However, the Court must not grant the injunction if:
- (a) the person was granted both a clearance and an authorisation for the acquisition under Division 3 of Part VII; and
 - (b) the Court could not grant an injunction under this section in relation to both the clearance and the authorisation.

Example: If a clearance for an acquisition was granted by the Commission on the basis of false or misleading information, and an authorisation for the acquisition was granted by the Tribunal on the basis of true information, then the Court cannot grant an injunction under this section because it would not be able to grant the injunction in relation to the authorisation.

19 After section 81

Insert:

81A Divestiture where merger done under clearance or authorisation granted on false etc. information

Circumstances when this section applies

- (1) This section applies if the Court is satisfied that:
- (a) a person (the **acquirer**) has acquired shares in the capital of a body corporate or assets of another person; and
 - (b) before the acquisition, the acquirer was granted, under Division 3 of Part VII (mergers), a clearance or an authorisation for the acquisition on the basis of information that was false or misleading in a material particular; and
 - (c) that information was provided by the acquirer or a body corporate that was related to the acquirer; and
 - (d) the Court or another court has found that the acquirer or related body corporate has contravened section 95AZN or Part 7.4 of the *Criminal Code* by giving that information; and
 - (e) if that information had not been given, the clearance or authorisation would not have been granted; and
 - (f) apart from the clearance or authorisation, the acquisition would have contravened section 50; and
 - (g) any or all of those shares or assets are vested in the acquirer, the related body corporate or any other body corporate that is related to the acquirer.

Divestiture by the acquirer and related bodies corporate

- (2) The Court may, on the application of the Commission, by order, give directions for the purpose of securing the disposal of all or any of those shares or assets by the acquirer, the related body corporate or any other body corporate that is related to the acquirer.
- (3) However, the Court must not make an order under subsection (2) if:
 - (a) the acquirer was granted, under Division 3 of Part VII, both a clearance and an authorisation for the acquisition; and
 - (b) the matters in subsection (1) are not satisfied in relation to both the clearance and the authorisation.

Example: If a clearance for an acquisition was granted by the Commission on the basis of false or misleading information, and an authorisation for the acquisition was granted by the Tribunal on the basis of true information, then the Court cannot make an order under subsection (2) because subsection (1) would not be satisfied in relation to the authorisation.

Declaration that acquisition void—when vendor involved

- (4) In addition to being satisfied of the matters in subsection (1), if the Court, or another court, has found that the person (the **vendor**) from whom the acquirer acquired the shares or assets was involved in the contravention referred to in paragraph (1)(d), then the Court may, on the application of the Commission, by order, declare that the acquisition, in so far as it relates to those shares or assets, is void as from the day on which it occurred.
- (5) If the Court makes an order under subsection (4), then:
 - (a) the shares or assets to which the declaration relates are taken not to have been disposed of by the vendor; and
 - (b) the vendor must refund to the acquirer any amount paid to the vendor for acquiring the shares or assets.
- (6) However, the Court must not make an order under subsection (4) if:
 - (a) the acquirer was granted, under Division 3 of Part VII, both a clearance and an authorisation for the acquisition; and
 - (b) the matters in subsections (1) and (4) are not satisfied in relation to both the clearance and the authorisation.

Alternative to orders under subsections (2) and (4)

- (7) If an application is made to the Court for an order under subsection (2) or (4) against a person, the Court may, instead of making an order of the kind mentioned in that subsection, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

When application for orders under this section must be made

- (8) An application under subsection (2) or (4) may be made at any time within 3 years after the day on which the acquisition occurred.

Court may make orders even if not satisfied of all matters

- (9) If an application for an order under subsection (2) or (4) is made, the Court may, if the Court determines it to be appropriate, make an order by consent of all the parties to the proceedings, whether or not the Court is satisfied of:
- (a) for an order under subsection (2)—the matters in subsection (1); and
 - (b) for an order under subsection (4)—the matters in subsections (1) and (4).

Note: The heading to section 81 is altered by inserting “**where merger contravenes section 50 or 50A**” after “**Divestiture**”.

20 Subsection 86C(4) (paragraph (a) of the definition of *contravening conduct*)

Omit “or 75AYA”, substitute “, 75AYA or 95AZN”.

21 After subsection 87B(1)

Insert:

- (1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a clearance or an authorisation under Division 3 of Part VII.

22 Part VII (heading)

Repeal the heading, substitute:

Part VII—Authorisations, notifications and clearances in respect of restrictive trade practices

23 Division 1 of Part VII (heading)

Repeal the heading, substitute:

Division 1—Authorisations (other than section 50 merger authorisations)

24 Subsection 87ZD(1)

Insert:

authorisation means an authorisation under this Division.

25 Subsection 88(9)

Repeal the subsection, substitute:

- (9) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person to acquire a controlling interest in a body corporate (within the meaning of section 50A) and, while such an authorisation remains in force, section 50A does not, to the extent specified in the authorisation, apply in relation to the acquisition of that controlling interest.

26 Subsection 90(9)

Omit “in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or”.

27 At the end of Part VII

Add:

Division 3—Merger clearances and authorisations

Subdivision A—Preliminary

95AA Simplified outline of this Division

This Division is about merger clearances and merger authorisations.

It relates to section 50: that section prohibits a person acquiring shares in the capital of a body corporate or assets of another person if the acquisition would have, or be likely to have, the effect of substantially lessening competition in a market. If a person has a clearance or authorisation for the acquisition, section 50 will not prevent the person from making the acquisition.

The main differences between merger clearances and authorisations are:

- different bodies decide whether they should be granted;
- different timeframes apply for when the body must make its decision;
- they have different tests that need to be satisfied for them to be granted;
- merits review is not available for decisions on authorisations.

For merger clearances (see Subdivision B):

- the Commission grants them;
- it must make its decision whether to grant within 40 business days (which can be extended if the applicant agrees or the Commission so decides), and if it does not, the application is taken to be refused;
- it cannot grant the clearance unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in a market;

- if it refuses to grant a clearance, or grants a clearance subject to conditions, then the person who applied for the clearance may apply to the Tribunal under Division 3 of Part IX for review of the Commission's decision.

For merger authorisations (see Subdivision C):

- the Tribunal grants them;
- it must make its decision whether to grant within 3 months (which can be extended to 6 months in special circumstances), and if it does not, the application is taken to be refused;
- it cannot grant the authorisation unless it is satisfied that the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Subdivision D contains a prohibition on providing false or misleading information to the Commission or Tribunal under this Division or Division 3 of Part IX.

95AB Definitions

In this Division:

authorisation means an authorisation granted under this Division.

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

clearance means a clearance granted under this Division.

merger authorisation register means the register kept under section 95AZ.

merger clearance register means the register kept under section 95AH.

minor variation, in relation to a clearance or an authorisation, is a single variation that does not involve a material change in the effect of the clearance or authorisation.

Subdivision B—Merger clearances

95AC Commission may grant clearance for a merger

- (1) The Commission may grant a clearance to a person:
 - (a) to acquire shares in the capital of a body corporate; or
 - (b) to acquire assets of another person.

Note: Section 95AN prohibits the Commission from granting a clearance for an acquisition unless the Commission is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition.

- (2) If the Commission does so, then section 50 does not prevent the person from acquiring the shares or assets in accordance with the clearance.

Note: The acquisition will only be protected from the operation of section 50 if it takes place in accordance with the clearance. If it does not, then section 50 will apply to the acquisition. If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (3) Without limiting subsection (2), an acquisition will not be in accordance with a clearance if any conditions of the clearance are not complied with (whether the conditions are to be complied with before, during or after the acquisition).

95AD Application for clearance

A person who wants a clearance to acquire shares or assets must apply to the Commission for it.

95AE Requirements for valid clearance application

- (1) To be valid, the application must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under

section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.

95AF Commission to notify if clearance application is invalid

If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:

- (a) stating that the person has not made a valid application; and
- (b) giving reasons why the purported application does not comply with this Division.

95AG Application to be published on the Internet

After receiving an application for a clearance, the Commission must:

- (a) subject to section 95AI (confidentiality), put a copy of the application, and accompanying information or documents, on its website; and
- (b) by notice on its website, invite submissions in respect of the application within the period specified by it.

95AH Merger clearance register

- (1) The Commission must keep a register (the *merger clearance register*) of:

- (a) applications for clearances; and
- (b) applications for minor variations of clearances; and
- (c) applications for, or the Commission's proposals under section 95AS for, the revocation of clearances or for the revocation of clearances and the substitution of other clearances;

including applications that have been withdrawn or proposals that have been abandoned.

- (2) The register must include:

- (a) any document given to the Commission in relation to an application or proposal referred to in subsection (1); and
- (b) particulars of any oral submission made to the Commission in relation to such an application or proposal; and

- (c) the determination of the Commission on such an application or proposal and the statement of the reasons given by the Commission for that determination;
unless section 95AI (confidentiality) prevents the inclusion.

95AI Confidentiality claims etc.

Requests for confidential treatment

- (1) If a person gives information to the Commission in relation to an application or proposal referred to in subsection 95AH(1), the person may, at the time of giving the information, request that the information be excluded from the merger clearance register and the Commission's website because of its confidential nature.

Confidentiality claims to be determined first

- (2) If such a request is made, the Commission must exclude the information from the register and its website until it has made a determination on the request.

When Commission must exclude information—request made

- (3) If such a request is made, the Commission must exclude the information from the register and its website if the information contains particulars of:
- (a) a secret formula or process; or
 - (b) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
 - (c) the current costs of manufacturing, producing or marketing goods or services.

When Commission may exclude information—request made

- (4) If such a request is made, the Commission may, if it is satisfied that it is desirable to do so because of the confidential nature of the information, exclude the information from the register and its website.

If request refused, document may be withdrawn

- (5) If the Commission refuses such a request and the information is contained in a document, the Commission must, if the person who

gave the document to it so requires, return the document or part of the document to the person. In that case, it must exclude the document or the part of the document (as the case requires) from the register and its website.

If request refused, oral submission may be withdrawn

- (6) If the Commission refuses such a request and the information was given by way of oral submission, the person who made the submission may withdraw all or part of the submission. In that case, the Commission must exclude the submission or part of the submission (as the case requires) from the register and its website.

When Commission may exclude information—no request made

- (7) The Commission may exclude information from the register and its website if it is satisfied that it is desirable to do so for any reason other than the confidential nature of the information.

95AJ Commission may seek additional information from applicant

The Commission may give the applicant a written notice requesting the applicant to give the Commission, within a specified period, additional information relevant to making its determination on the application.

95AK Commission may seek further information and consult others

- (1) The Commission may give a person a written notice requesting the person to give the Commission, within a specified period, particular information relevant to making its determination on the application.
- (2) The Commission may consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application.

95AL Applicant may withdraw application

The applicant may, by notice in writing to the Commission, withdraw the application at any time.

95AM Commission to make determination on application

- (1) The Commission must make a determination in writing:
 - (a) granting the clearance; or
 - (b) refusing to grant the clearance.

Note: The Commission must make its determination within the time limit set out in section 95AO. If it does not, then it is taken to have refused to grant the clearance.

- (2) In making its determination, the Commission must take into account:
 - (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received within the period specified under paragraph 95AG(b); and
 - (b) any information received under section 95AJ within the period specified in the relevant notice under that section; and
 - (c) any information received under subsection 95AK(1) within the period specified in the relevant notice under that subsection; and
 - (d) any information obtained from consultations under subsection 95AK(2).
- (2A) In making its determination, the Commission may disregard:
 - (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received after the period specified under paragraph 95AG(b); and
 - (b) any information received under section 95AJ after the period specified in the relevant notice under that section; and
 - (c) any information received under subsection 95AK(1) after the period specified in the relevant notice under that subsection.
- (3) The Commission must notify the applicant in writing of its determination and give written reasons for it.

95AN When clearance must not be granted

- (1) The Commission must not grant a clearance in relation to a proposed acquisition of shares or assets unless it is satisfied that the acquisition would not have the effect, or be likely to have the

effect, of substantially lessening competition (within the meaning of section 50).

- (2) To avoid doubt, a clearance cannot be granted for an acquisition that has occurred.

95AO Time limits for determining application

- (1) If the Commission has not made a determination on the application within the period that begins on the day the application was given to the Commission and ends on the 40th business day after that day, the Commission is, subject to subsection (3), taken to have made a determination refusing to grant the clearance.
- (2) The applicant may, before the end of the period referred to in subsection (1) (including any period that is taken to be substituted for that period by any other application or applications of this subsection), agree to the Commission taking a specified longer period to make its determination. If the applicant does, the longer period is taken to be substituted for the period referred to in subsection (1).
- (3) However, if before the end of the period referred to in subsection (1) (including any period that is taken to be substituted for that period by any other application or applications of subsection (2)), the Commission decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, which must be notified in writing by the Commission to the applicant, the period is extended by a further 20 business days and the longer period is taken to be substituted for the period referred to in subsection (1) (or any other period that is taken to be substituted for that period by any other application or applications of subsection (2)).

95AP Clearance subject to conditions

- (1) The Commission may grant a clearance subject to such conditions as are specified in the clearance.

Note 1: Under subsection 95AS(5), the Commission may revoke a clearance if a condition of the clearance has not been complied with.

Note 2: If an acquisition takes place without complying with a condition of the clearance (whether the condition is to be complied with before, during or after the acquisition), the acquisition will not be in accordance with

the clearance and so might contravene section 50 (see subsections 95AC(2) and (3)). If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (2) Without limiting subsection (1), the Commission may grant a clearance subject to the condition that the person to whom the clearance is granted must make, and comply with, an undertaking to the Commission under section 87B.

95AQ When clearance is in force

- (1) A clearance that is not subject to conditions comes into force on the day on which the determination granting the clearance is made.
- (2) A clearance that is subject to conditions comes into force:
- (a) if an application is made to the Tribunal for a review of the Commission's determination and the application is not withdrawn—on the day on which the Tribunal makes a determination on the review; or
 - (b) if an application is made to the Tribunal for a review of the Commission's determination and the application is withdrawn—on the day on which the application is withdrawn; or
 - (c) if the person to whom the clearance was given gives a notice in writing to the Commission stating that the person will not make an application to the Tribunal for review—on the day on which the notice is given; or
 - (d) in any other case—at the end of the period in which an application may be made to the Tribunal for review of the determination.
- (3) A clearance may be expressed to be in force for a period specified in the clearance and, if so expressed, remains in force for that period only.

95AR Minor variations of clearances

Application for variation

- (1) A person to whom a clearance was granted may apply to the Commission for a minor variation of the clearance.

Requirements for valid application

- (2) To be valid, the application must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.

Commission to notify if application is invalid

- (3) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
 - (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Application to be published on the Internet

- (4) The Commission must, if it is satisfied that the variation sought in the application is a minor variation:
 - (a) subject to section 95AI (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application within a period specified by it.

Commission must make a determination on the application

- (5) The Commission must make a determination in writing:
 - (a) varying the clearance; or
 - (b) refusing to vary the clearance.The Commission must notify the applicant in writing of its determination and give written reasons for it.

- (5A) In making its determination, the Commission must take into account:
- (a) any submissions received within the period specified under subsection (4); and
 - (b) any information received under section 95AJ within the period specified in the relevant notice under that section (as that section applies because of subsection (11) of this section); and
 - (c) any information received under subsection 95AK(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (11) of this section); and
 - (d) any information obtained from consultations under subsection 95AK(2) (as that subsection applies because of subsection (11) of this section).
- (5B) In making its determination, the Commission may disregard:
- (a) any submissions received after the period specified under subsection (4); and
 - (b) any information received under section 95AJ after the period specified in the relevant notice under that section (as that section applies because of subsection (11) of this section); and
 - (c) any information received under subsection 95AK(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (11) of this section).

When variation must not be granted

- (6) The Commission must not make a determination varying a clearance unless it is satisfied that the acquisition to which the clearance (as varied) would apply would not have the effect, or be likely to have the effect, of substantially lessening competition (within the meaning of section 50).

Determination varying clearance may also vary clearance conditions

- (6A) A determination varying a clearance may also vary the conditions (if any) of the clearance to take account of the variation of the clearance.

Time limits for determining application

- (7) If the Commission has not made a determination on the application within the period that begins on the day the application was given to the Commission and ends on the 40th business day after that day, the Commission is, subject to subsection (8A), taken to have made a determination refusing to vary the clearance.
- (8) The applicant may, before the end of the period referred to in subsection (7) (including any period that is taken to be substituted for that period by any other application or applications of this subsection), agree to the Commission taking a specified longer period to make its determination. If the applicant does, the longer period is taken to be substituted for the period referred to in subsection (7).
- (8A) However, if before the end of the period referred to in subsection (7) (including any period that is taken to be substituted for that period by any other application or applications of subsection (8)), the Commission decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, which must be notified in writing by the Commission to the applicant, the period is extended by a further 20 business days and the longer period is taken to be substituted for the period referred to in subsection (7) (or any other period that is taken to be substituted for that period by any other application or applications of subsection (8)).

2 or more variations at the same time

- (9) If:
 - (a) a person applies for 2 or more variations:
 - (i) at the same time; or
 - (ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and
 - (b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the clearance;the Commission may deal with all of those variations together as if they were a single minor variation.

Applicant may withdraw application

- (10) The applicant may, by notice in writing to the Commission, withdraw the application at any time.

Powers of Commission

- (11) The following sections apply in relation to an application for a minor variation of a clearance in the same way as they apply in relation to an application for a clearance:
- (a) section 95AJ (Commission may seek additional information from applicant);
 - (b) section 95AK (Commission may seek further information and consult others).

95AS Revocation of clearance or revocation of clearance and substitution of a new clearance

Application for revocation etc.

- (1) The Commission may revoke a clearance, or revoke a clearance and substitute a new clearance, if the person to whom the clearance was granted applies to the Commission for this to occur.

Requirements for valid application

- (2) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.

Commission to notify if application is invalid

- (3) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days

of receiving the purported application, give the person who made the purported application a written notice:

- (a) stating that the person has not made a valid application; and
- (b) giving reasons why the purported application does not comply with this Division.

Application to be published on the Internet

- (4) The Commission must:
 - (a) subject to section 95AI (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application within a period specified by it.

Commission's power to revoke etc. where no application

- (5) The Commission may also revoke a clearance, or revoke a clearance and substitute a new clearance, if it is satisfied that:
 - (a) the clearance was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the clearance has not been complied with; or
 - (c) there has been a material change of circumstances since the clearance was granted.

Commission to give notice

- (6) If the Commission is considering making a determination under subsection (5), it must give a notice to the person to whom the clearance was granted and put a notice on its website:
 - (a) stating that it is considering making the determination; and
 - (b) indicating the basis on which the determination is being proposed; and
 - (c) inviting submissions in respect of the determination within the period specified by it.

Commission must make a determination

- (7) The Commission must make a determination in writing:
 - (a) revoking the clearance, or revoking the clearance and substituting a new clearance for the one revoked; or
 - (b) refusing to revoke the clearance.

The Commission must notify, in writing, the person to whom the clearance was granted of its determination and give written reasons for it.

- (7A) In making its determination, the Commission must take into account:
- (a) any submissions invited under subsection (4) or (6) that are received within the period specified under that subsection; and
 - (b) any information received under section 95AJ within the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
 - (c) any information received under subsection 95AK(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section); and
 - (d) any information obtained from consultations under subsection 95AK(2) (as that subsection applies because of subsection (13) of this section).
- (7B) In making its determination, the Commission may disregard:
- (a) any submissions invited under subsection (4) or (6) that are received after the period specified under that subsection; and
 - (b) any information received under section 95AJ after the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
 - (c) any information received under subsection 95AK(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section).
- When revocation etc. must not be granted*
- (8) If an objection (other than an objection that, in the Commission's opinion, is vexatious or frivolous) to a revocation of a clearance is made in a submission:
- (a) that was invited under subsection (4) or (6); and
 - (b) that is received within the period specified;

the Commission must not make a determination revoking the clearance unless it is satisfied that it would, if the clearance had not already been granted, be prevented under section 95AN from granting the clearance.

- (9) The Commission must not make a determination revoking a clearance and substituting another clearance unless it is satisfied that it would not be prevented under section 95AN from granting the substituted clearance, if it were a new clearance sought under section 95AD.

Time limits for determining application

- (10) If the Commission has not made a determination on an application made under subsection (1) within the period that begins on the day the application was given to the Commission and ends on the 40th business day after that day, the Commission is, subject to subsection (11A), taken to have made a determination refusing to revoke the clearance.
- (11) The applicant may, before the end of the period referred to in subsection (10) (including any period that is taken to be substituted for that period by any other application or applications of this subsection), agree to the Commission taking a specified longer period to make its determination. If the applicant does, the longer period is taken to be substituted for the period referred to in subsection (10).
- (11A) However, if before the end of the period referred to in subsection (10) (including any period that is taken to be substituted for that period by any other application or applications of subsection (11)), the Commission decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, which must be notified in writing by the Commission to the applicant, the period is extended by a further 20 business days and the longer period is taken to be substituted for the period referred to in subsection (10) (or any other period that is taken to be substituted for that period by any other application or applications of subsection (11)).

Withdrawal of application

- (12) The applicant may, by notice in writing to the Commission, withdraw the application at any time.

Powers of Commission

- (13) The following sections apply in relation to an application for a revocation, or a revocation and substitution, of a clearance in the same way as they apply in relation to an application for a clearance:
- (a) section 95AJ (Commission may seek additional information from applicant);
 - (b) section 95AK (Commission may seek further information and consult others).

Substituted clearances

- (14) The following sections apply in relation to a clearance substituted under this section in the same way as they apply in relation to a clearance granted under section 95AM:
- (a) section 95AP (Clearance subject to conditions);
 - (b) section 95AQ (When clearance is in force).

Subdivision C—Merger authorisations

95AT Tribunal may grant authorisation for a merger

- (1) The Tribunal may grant an authorisation to a person:
- (a) to acquire shares in the capital of a body corporate; or
 - (b) to acquire assets of another person.

Note 1: Section 95AZH prohibits the Tribunal from granting an authorisation for an acquisition unless the Tribunal is satisfied the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Note 2: Division 2 of Part IX contains provisions about procedure and evidence that relate to proceedings before the Tribunal.

- (2) If the Tribunal does so, then section 50 does not prevent the person from acquiring the shares or assets in accordance with the authorisation.

Note: The acquisition will only be protected from the operation of section 50 if it takes place in accordance with the authorisation. If it does not, then section 50 will apply to the acquisition. If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (3) Without limiting subsection (2), an acquisition will not be in accordance with an authorisation if any conditions of the authorisation are not complied with (whether the conditions are to be complied with before, during or after the acquisition).

95AU Application for authorisation

A person who wants an authorisation to acquire shares or assets must apply to the Tribunal for it.

95AV Requirements for valid authorisation application

- (1) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

95AW Tribunal to notify if authorisation application is invalid

If the Tribunal receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:

- (a) stating that the person has not made a valid application; and
- (b) giving reasons why the purported application does not comply with this Division.

95AX Tribunal to notify Commission of authorisation application

The Tribunal must, within 3 business days of receiving an application for an authorisation, give a copy of it to the Commission.

95AY Application to be published on the Internet

After receiving a copy of an application for an authorisation, the Commission must:

- (a) subject to section 95AZA (confidentiality), put a copy of the application, and accompanying information or documents, on its website; and
- (b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

95AZ Merger authorisation register

(1) The Tribunal must keep a register (the *merger authorisation register*) of:

- (a) applications for authorisations; and
- (b) applications for minor variations of authorisations; and
- (c) applications for the revocation of authorisations or for the revocation of authorisations and the substitution of other authorisations;

including applications that have been withdrawn.

(2) The register must include:

- (a) any document given to the Tribunal in relation to an application referred to in subsection (1); and
- (b) particulars of any oral submission made to the Tribunal in relation to such an application; and
- (c) the determination of the Tribunal on such an application and the statement of the reasons given by the Tribunal for that determination;

unless section 95AZA (confidentiality) prevents the inclusion.

95AZA Confidentiality claims etc.

Requests for confidential treatment

- (1) If a person gives information to the Tribunal in relation to an application or proposal referred to in subsection 95AZ(1), the person may, at the time of giving the information, request that the information be excluded from the merger authorisation register and the Commission's website because of its confidential nature.

Confidentiality claims to be determined first

- (2) If such a request is made, the information must be excluded from the register and the Commission's website until the Tribunal has made a determination on the request.

When Tribunal must exclude information—request made

- (3) If such a request is made, the Tribunal must exclude the information from the register and the Commission's website if the information contains particulars of:
 - (a) a secret formula or process; or
 - (b) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
 - (c) the current costs of manufacturing, producing or marketing goods or services.

When Tribunal may exclude information—request made

- (4) If such a request is made, the Tribunal may, if it is satisfied that it is desirable to do so because of the confidential nature of the information, exclude the information from the register and the Commission's website.

If request refused, document may be withdrawn

- (5) If the Tribunal refuses such a request and the information is contained in a document, the Tribunal must, if the person who gave the document to it so requires, return the document or part of the document to the person. In that case, it must exclude the document or the part of the document (as the case requires) from the register and the Commission's website.

If request refused, oral submission may be withdrawn

- (6) If the Tribunal refuses such a request and the information was given by way of oral submission, the person who made the submission may withdraw all or part of the submission. In that case, the Tribunal must exclude the submission or part of the submission (as the case requires) from the register and the Commission's website.

When Tribunal may exclude information—no request made

- (7) The Tribunal may exclude information from the register and the Commission's website if it is satisfied that it is desirable to do so for any reason other than the confidential nature of the information.

95AZC Tribunal may seek additional information from applicant

The Tribunal may give the applicant a written notice requesting the applicant to give the Tribunal, within a specified period, additional information relevant to making its determination on the application.

95AZD Tribunal may seek further information and consult others etc.

- (1) The Tribunal may give a person a written notice requesting the person to give the Tribunal, within a specified period, particular information relevant to making its determination on the application.
- (2) The Tribunal may consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application.
- (3) The Tribunal may disclose information excluded from the merger authorisation register under subsection 95AZA(3), (4) or (7) to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application.

95AZE Applicant may withdraw application

The applicant may, by notice in writing to the Tribunal, withdraw the application at any time.

95AZE A Tribunal must require Commission to give report

- (1) For the purposes of determining the application, the member of the Tribunal presiding on the application must require the Commission to give a report to the Tribunal. The report must be:
 - (a) in relation to the matters specified by that member; and
 - (b) given within the period specified by that member.
- (2) The Commission may also include in the report any matter it considers relevant to the application.

95AZF Commission to assist Tribunal

- (1) For the purposes of determining the application:
 - (a) the Commission may call a witness to appear before the Tribunal and to give evidence in relation to the application; and
 - (b) the Commission may report on statements of fact put before the Tribunal in relation to the application; and
 - (c) the Commission may examine or cross-examine any witnesses appearing before the Tribunal in relation to the application; and

Note: The Commission may be represented by a lawyer: see paragraph 110(d).

 - (d) the Commission may make submissions to the Tribunal on any issue the Commission considers relevant to the application.
- (2) For the purposes of determining the application, the member of the Tribunal presiding on the application may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal, as the member specifies.

95AZFA Commission may make enquiries

The Commission may, for the purposes of section 95AZE A or 95AZF, make such enquiries as it considers reasonable and appropriate.

95AZG Tribunal to make determination on application

- (1) The Tribunal must make a determination in writing:
- (a) granting the authorisation; or
 - (b) refusing to grant the authorisation.

Note: The Tribunal must make its determination within the time limit set out in section 95AZI. If it does not, then it is taken to have refused to grant the authorisation.

- (2) In making its determination, the Tribunal must take into account:
- (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received within the period specified under paragraph 95AY(b); and
 - (b) any information received under section 95AZC within the period specified in the relevant notice under that section; and
 - (c) any information received under subsection 95AZD(1) within the period specified in the relevant notice under that subsection; and
 - (d) any information obtained from consultations under subsection 95AZD(2); and
 - (e) the report given to it under section 95AZE A; and
 - (f) any thing done as mentioned in section 95AZF.
- (2A) In making its determination, the Tribunal may disregard:
- (a) any submissions in relation to the application made to it by the applicant, the Commonwealth, a State, a Territory or any other person that are received after the period specified under paragraph 95AY(b); and
 - (b) any information received under section 95AZC after the period specified in the relevant notice under that section; and
 - (c) any information received under subsection 95AZD(1) after the period specified in the relevant notice under that subsection.

- (3) The Tribunal must notify the applicant in writing of its determination and give written reasons for it.

95AZH When authorisation must not be granted

- (1) The Tribunal must not grant an authorisation in relation to a proposed acquisition of shares or assets unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.
- (2) In determining what amounts to a benefit to the public for the purposes of subsection (1):
- (a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.
- (3) To avoid doubt, an authorisation cannot be granted for an acquisition that has occurred.

95AZI Time limits for determining application

- (1) If the Tribunal has not made a determination on the application within the relevant period, the Tribunal is taken to have refused to grant the authorisation.
- (2) The *relevant period* is the period of 3 months beginning on the day the application was given to the Tribunal. However, if before the end of that 3 month period the Tribunal determines in writing that:
- (a) the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances; and
 - (b) that period is extended by a specified period of not more than 3 months;
- the *relevant period* is that period as so extended.

- (3) If the Tribunal makes a determination under subsection (2), it must notify the applicant in writing of its determination before the end of that 3 month period.

95AZJ Authorisation subject to conditions

- (1) The Tribunal may grant an authorisation subject to such conditions as are specified in the authorisation.

Note 1: Under subsection 95AZM(6), the Commission may apply to the Tribunal to revoke an authorisation if a condition of the authorisation has not been complied with.

Note 2: If an acquisition takes place without complying with a condition of the authorisation (whether the condition is to be complied with before, during or after the acquisition), the acquisition will not be in accordance with the authorisation and so might contravene section 50 (see subsections 95AT(2) and (3)). If the acquisition contravenes section 50, then the remedies in Part VI will apply (see, for example, penalties under section 76 and divestiture under section 81).

- (2) Without limiting subsection (1), the Tribunal may grant an authorisation subject to the condition that the person to whom the authorisation is granted must make, and comply with, an undertaking to the Commission under section 87B.

95AZK When authorisation is in force

- (1) An authorisation comes into force on the day on which the determination granting the authorisation is made.
- (2) An authorisation may be expressed to be in force for a period specified in the authorisation and, if so expressed, remains in force for that period only.

95AZL Minor variations of authorisations

Application for variation

- (1) The person to whom an authorisation was granted may apply to the Tribunal for a minor variation of the authorisation.

Requirements for valid application

- (2) To be valid, the application must:

- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

Tribunal to notify if application is invalid

- (3) If the Tribunal receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
- (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Tribunal to give the Commission a copy of the application

- (4) The Tribunal must, if it is satisfied that the variation sought in the application is a minor variation, give a copy of it to the Commission within 3 business days of receiving it.

Application to be published on the Internet

- (5) After receiving a copy of the application, the Commission must:
- (a) subject to section 95AZA (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

Tribunal must make a determination on the application

- (6) The Tribunal must make a determination in writing:
- (a) varying the authorisation; or
 - (b) refusing to vary the authorisation.

The Tribunal must notify the applicant in writing of its determination and give written reasons for it.

- (6A) In making its determination, the Tribunal must take into account:
- (a) any submissions received within the period specified under subsection (5); and
 - (b) any information received under section 95AZC within the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
 - (c) any information received under subsection 95AZD(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section); and
 - (d) any information obtained from consultations under subsection 95AZD(2) (as that subsection applies because of subsection (13) of this section); and
 - (e) the report given to it under section 95AZE (as that section applies because of subsection (13) of this section); and
 - (f) any thing done as mentioned in section 95AZF (as that section applies because of subsection (13) of this section).
- (6B) In making its determination, the Tribunal may disregard:
- (a) any submissions received after the period specified under subsection (5); and
 - (b) any information received under section 95AZC after the period specified in the relevant notice under that section (as that section applies because of subsection (13) of this section); and
 - (c) any information received under subsection 95AZD(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (13) of this section).

When variation must not be granted

- (7) The Tribunal must not make a determination varying an authorisation unless the Tribunal is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.

Determination varying authorisation may also vary authorisation conditions

- (7A) A determination varying an authorisation may also vary the conditions (if any) of the authorisation to take account of the variation of the authorisation.

Time limits for determining application

- (8) If the Tribunal has not made a determination on the application within the relevant period, the Tribunal is taken to have refused to vary the authorisation.
- (9) For the purposes of subsection (8), the **relevant period** is the period of 3 months beginning on the day the application was given to the Tribunal. However, if before the end of that 3 month period the Tribunal determines in writing that:
- (a) the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances; and
 - (b) that period is extended by a specified period of not more than 3 months;
- the **relevant period** is that period as so extended.
- (10) If the Tribunal makes a determination under subsection (9), it must notify the applicant in writing of its determination before the end of that 3 month period.

2 or more variations at the same time

- (11) If:
- (a) a person applies for 2 or more variations:
 - (i) at the same time; or
 - (ii) in such close succession that the variations could conveniently be dealt with by the Tribunal at the same time; and
 - (b) the Tribunal is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation;
- the Tribunal may deal with all of those variations together as if they were a single minor variation.

Applicant may withdraw application

- (12) The applicant may, by notice in writing to the Tribunal, withdraw the application at any time.

Powers and procedures of the Tribunal

- (13) The following sections apply in relation to an application for a minor variation of an authorisation in the same way as they apply in relation to an application for an authorisation:
- (b) section 95AZC (Tribunal may seek additional information from applicant);
 - (c) section 95AZD (Tribunal may seek further information and consult others etc.);
 - (ca) section 95AZE (Tribunal must require Commission to give report);
 - (d) section 95AZF (Commission to assist Tribunal);
 - (e) section 95AZFA (Commission may make enquiries).

95AZM Revocation of authorisation or revocation of authorisation and substitution of a new authorisation

Application for revocation

- (1) The Tribunal may revoke an authorisation, or revoke an authorisation and substitute a new authorisation, if the person to whom the authorisation was granted applies to the Tribunal for this to occur.

Requirements for valid application

- (2) To be valid, the application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2A) The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under

section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

Tribunal to notify if application is invalid

- (3) If the Tribunal receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
- (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.

Tribunal to give the Commission a copy of the application

- (4) The Tribunal must give a copy of the application to the Commission within 3 business days of receiving it.

Application to be published on the Internet

- (5) After receiving a copy of the application, the Commission must:
- (a) subject to section 95AZA (confidentiality), put a copy of the application on its website; and
 - (b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

Commission may apply for revocation

- (6) The Commission may apply to the Tribunal for an authorisation to be revoked, or for an authorisation to be revoked and a new authorisation substituted for it, if the Commission is satisfied that:
- (a) the authorisation was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the authorisation has not been complied with; or
 - (c) there has been a material change of circumstances since the authorisation was granted.

Tribunal to give notice

- (7) If the Tribunal is considering making a determination under subsection (6), the Tribunal must give a notice to the person to whom the authorisation was granted and cause a notice to be put on the Commission's website:
- (a) stating that it is considering making the determination; and
 - (b) indicating the basis on which the determination is being proposed; and
 - (c) inviting submissions in respect of the determination within a period specified by the Tribunal.

Tribunal must make a determination

- (8) The Tribunal must make a determination in writing:
- (a) revoking the authorisation, or revoking the authorisation and substituting a new authorisation; or
 - (b) refusing to revoke the authorisation.

The Tribunal must notify, in writing, the person to whom the authorisation was granted of its determination and give written reasons for it.

- (8A) In making its determination, the Tribunal must take into account:
- (a) any submissions invited under subsection (5) or (7) that are received within the period specified under that subsection; and
 - (b) any information received under section 95AZC within the period specified in the relevant notice under that section (as that section applies because of subsection (15) of this section); and
 - (c) any information received under subsection 95AZD(1) within the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (15) of this section); and
 - (d) any information obtained from consultations under subsection 95AZD(2) (as that subsection applies because of subsection (15) of this section); and
 - (e) the report given to it under section 95AZE (as that section applies because of subsection (15) of this section); and
 - (f) any thing done as mentioned in section 95AZF (as that section applies because of subsection (15) of this section).

- (8B) In making its determination, the Tribunal may disregard:
- (a) any submissions invited under subsection (5) or (7) that are received after the period specified under that subsection; and
 - (b) any information received under section 95AZC after the period specified in the relevant notice under that section (as that section applies because of subsection (15) of this section); and
 - (c) any information received under subsection 95AZD(1) after the period specified in the relevant notice under that subsection (as that subsection applies because of subsection (15) of this section).

When revocation etc. must not be granted

- (9) If an objection (other than an objection that, in the Tribunal's opinion, is vexatious or frivolous) to a revocation of an authorisation is made in a submission:
- (a) that was invited under subsection (5) or (7); and
 - (b) that is received within the period specified;
- the Tribunal must not make a determination revoking the authorisation unless the Tribunal is satisfied that it would, if the authorisation had not already been granted, be prevented under section 95AZH from granting the authorisation.
- (10) The Tribunal must not make a determination revoking an authorisation and substituting another authorisation unless it is satisfied that it would not be prevented under section 95AZH from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 95AU.

Time limits for determining application

- (11) If the Tribunal has not made a determination on an application under subsection (1) or (6) within the relevant period, the Tribunal is taken to have refused to revoke the authorisation.
- (12) For the purposes of subsection (11), the **relevant period** is the period of 3 months beginning on the day the application was given to the Tribunal. However, if before the end of that 3 month period the Tribunal determines in writing that:

- (a) the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances; and
- (b) that period is extended by a specified period of not more than 3 months;

the *relevant period* is that period as so extended.

- (13) If the Tribunal makes a determination under subsection (12), it must notify the applicant in writing of its determination before the end of that 3 month period.

Withdrawal of application

- (14) The applicant may withdraw an application under subsection (1), and the Commission may withdraw an application under subsection (6), by notice in writing to the Tribunal at any time.

Powers and procedures of the Tribunal

- (15) The following sections apply in relation to an application for a revocation, or a revocation and substitution, of an authorisation in the same way as they apply in relation to an application for an authorisation:
 - (b) section 95AZC (Tribunal may seek additional information from applicant);
 - (c) section 95AZD (Tribunal may seek further information and consult others etc.);
 - (ca) section 95AZE (Tribunal must require Commission to give report);
 - (d) section 95AZF (Commission to assist Tribunal);
 - (e) section 95AZFA (Commission may make enquiries).

Substituted authorisations

- (16) The following sections apply in relation to an authorisation substituted under this section in the same way as they apply in relation to an authorisation granted under section 95AZG:
 - (a) section 95AZJ (Authorisation subject to conditions);
 - (b) section 95AZK (When authorisation is in force).

Subdivision D—Miscellaneous

95AZN Providing false or misleading information

- (1) A person must not give information to the Commission or Tribunal under this Division or Division 3 of Part IX if the person is negligent as to whether the information is false or misleading in a material particular.

Note: Under section 76, the Court may order a person who contravenes this section to pay a pecuniary penalty. See also sections 80AC, 81A and 86C for other related remedies.

- (2) For the purposes of subsection (1), proof that the person knew, or was reckless as to whether, the information was false or misleading in a material particular is taken to be proof that the person was negligent as to whether the information was false or misleading in a material particular.

28 Division 1 of Part IX (heading)

Repeal the heading, substitute:

Division 1—Applications for review (other than for merger clearances)

29 Subsection 101(1)

After “the Commission”, insert “under Division 1 of Part VII”.

30 Subsections 102(1) and (2)

After “the Commission” (first occurring), insert “under Division 1 of Part VII”.

31 Subsection 102(6)

After “Tribunal” (first occurring), insert “under this Division”.

32 Subsection 102(7)

After “review” (first occurring), insert “under this Division”.

33 Before section 103

Insert:

102A Definition

In this Part:

proceedings includes:

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

34 Subsection 103(2)

Omit "the Tribunal constituted by a presidential member", substitute "a presidential member".

34A At the end of section 103

Add:

- (3) The powers mentioned in subsection (2) may be exercised by a presidential member:
 - (a) whether or not the Tribunal has been constituted under section 37 in relation to the proceedings; and
 - (b) once the Tribunal is so constituted—whether or not that member is part of the Division of the Tribunal so constituted.

35 Subsection 109(1)

After "authorization" (first occurring), insert "under Division 1 of Part VII".

36 At the end of Part IX

Add:

Division 3—Review of Commission's determinations on merger clearances

111 Applications for review

- (1) A person who applied under Subdivision B of Division 3 of Part VII for:
 - (a) a clearance; or
 - (b) a minor variation of a clearance; or

- (c) a revocation of a clearance; or
- (d) a revocation of a clearance and a substitution of another clearance;

and who is dissatisfied with the determination by the Commission in relation to the application may, as prescribed and within the time allowed by or under the regulations or under subsection (5), apply to the Tribunal for a review of the determination.

- (2) A person who was granted a clearance under Subdivision B of Division 3 of Part VII that was:

- (a) revoked by a determination of the Commission under section 95AS; or
- (b) revoked and substituted with another clearance by a determination of the Commission under section 95AS;

may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the determination.

- (2A) The regulations may make it a requirement that an applicant under subsection (1) or (2) give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

- (3) The Tribunal must review the determination after receiving the application and the prescribed fee.

Note: Division 2 contains provisions about procedure and evidence that relate to proceedings before the Tribunal.

- (4) If a person has made an application under subsection (1) or (2) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant and the Commission, whether or not the Tribunal is satisfied of the matters referred to in section 95AN.

- (5) A presidential member may, on the application by the applicant, shorten the time allowed by or under the regulations within which an application under subsection (1) may be made if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

112 Tribunal to notify Commission

The Tribunal must notify the Commission of the application for review.

113 Commission to give material to Tribunal

- (1) After being notified of the application for review, the Commission must, within 2 business days, give to the Tribunal all the information that the Commission took into account in connection with the making of the determination to which the review relates.
- (1A) The Commission must identify which of that information (if any) the Commission excluded from the merger clearance register under subsection 95AI(3), (4) or (7).
- (2) In this section:

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

merger clearance register means the register kept under section 95AH.

114 Tribunal may consult etc. to clarify information

- (1) The Tribunal may seek such relevant information, and consult with such persons, as it considers reasonable and appropriate for the purposes of clarifying the information given to it under section 113.
- (2) The Tribunal may disclose information identified under subsection 113(1A) to such persons and on such terms as it considers reasonable and appropriate for the purposes of clarifying the information.

115 Commission to assist Tribunal

For the purposes of the review, the member of the Tribunal presiding at the review may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

116 Tribunal only to consider material before the Commission

For the purposes of the review, the Tribunal may have regard only to:

- (a) the information given to the Commission in connection with the making of the determination to which the review relates and that was given to the Tribunal under section 113; and
- (b) any other information that was referred to in the Commission's reasons for making the determination to which the review relates; and
- (c) any information given to the Tribunal under section 114; and
- (d) any information or report given to the Tribunal under section 115.

117 Tribunal to make decision on review

On the review of the Commission's determination, the Tribunal must make a determination affirming, setting aside or varying the Commission's determination.

118 Time limits for making review decision

- (1) The Tribunal must make its decision on the review within 30 business days after receiving the application for review.
- (2) However, if before the end of that period the Tribunal decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, the period is extended by a further 60 business days.
- (3) If the Tribunal makes a decision under subsection (2), the Tribunal must notify the applicant of it before the end of the 30 business day period.
- (3A) If the Tribunal has not made its decision on the review within the period applicable under subsection (1) or (2), the Tribunal is taken to have made a determination affirming the Commission's determination.
- (4) In this section:

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

119 Tribunal's decision taken to be Commission's

The Tribunal's decision affirming, setting aside or varying the Commission's determination is, for the purposes of this Act other than this Part, taken to be the Commission's determination.

37 Section 150J

After "notification", insert ", clearance".

38 Paragraph 157(1)(a)

After "91C", insert "or Subdivision B of Division 3 of Part VII".

39 After paragraph 157(1)(b)

Insert:

- (ba) the Commission proposes to revoke, or to revoke and substitute, a clearance under section 95AS; or

40 Paragraph 157(1)(c)

Omit "or 81", substitute ", 80AC, 81 or 81A".

41 After section 157

Insert:

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

(1) If:

- (a) a corporation makes an application to the Tribunal in relation to an authorisation under Subdivision C of Division 3 of Part VII; or
- (b) the Tribunal proposes to revoke, or to revoke and substitute, an authorisation granted to the corporation under section 95AZM;

the Tribunal must, at the request of the corporation and upon payment of the prescribed fee (if any), give to the corporation:

- (c) a copy of every document that has been given to, or obtained by, the Tribunal in relation to the application or revocation that tends to establish the corporation's case; and
- (d) a copy of any other document in the Tribunal's possession that comes to the Tribunal's attention in relation to the

application or revocation that tends to establish the corporation's case.

- (2) However, subsection (1) does not require the Tribunal to give to the corporation a document that was:
 - (a) obtained from the corporation; or
 - (b) prepared by an officer or professional adviser of the Tribunal.
- (3) If the Tribunal does not comply with a requirement under subsection (1), then, subject to subsection (4), the Court must, upon application by the corporation, make an order directing the Tribunal to comply with the requirement.
- (4) The Court may refuse to make an order under subsection (3) in respect of a document or part of a document if the Court considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person, or for any other reason.
- (5) Before the Court gives a decision on an application under subsection (3), the Court may require any documents to be produced to it for inspection.
- (6) An order under this section may be expressed to be subject to conditions specified in the order.

42 Paragraph 170(3)(a)

Omit "authorization", substitute "authorisation under Division 1 of Part VII or a clearance under Division 3 of Part VII".

43 Paragraph 170(3)(b)

Repeal the paragraph, substitute:

- (b) a reference to a proceeding before the Tribunal is a reference to:
 - (i) an application to the Tribunal for a declaration under subsection 50A(1); or
 - (ii) a proceeding in relation to an application for, or the revocation of, an authorisation under Division 3 of Part VII; or
 - (iii) an application for a review of a determination, or of the giving of a notice, by the Commission.

44 Subsection 46(6) of the Schedule

After “authorization”, insert “or clearance”.

45 At the end of subsection 50(1) of the Schedule

Add:

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

46 Paragraph 50(4)(b) of the Schedule

After “granted”, insert “a clearance or”.

47 Paragraph 50(4)(c) of the Schedule

After “such”, insert “a clearance or”.

48 Paragraph 50(4)(d) of the Schedule

After “for the”, insert “clearance or”.

49 Subsection 50(5) of the Schedule

Omit “an authorization”, substitute “a clearance”.

50 Paragraphs 50(5)(a) and (b) of the Schedule

Omit “the authorization”, substitute “the clearance”.

51 After subsection 50(5) of the Schedule

Insert:

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

52 Application of amendments

The amendments made by this Schedule apply in relation to applications for clearances or authorisations made after the commencement of this item.

53 Transitional

- (1) A person cannot make an application (the *new application*), after the commencement of this item, for an authorisation under Division 3 of Part VII of the *Trade Practices Act 1974* in relation to an acquisition of shares or assets if, before the commencement of this item, the person made an application (the *old application*) under subsection 88(9) of that Act for an authorisation in relation to the acquisition.
- (2) However, the person can make the new application if:
 - (a) the Commission has not made a determination on the old application; and
 - (b) the person withdraws the old application.

Schedule 2—Non-merger authorisations

Trade Practices Act 1974

1 Subsection 89(1)

Repeal the subsection, substitute:

- (1) To be valid, an application for an authorisation, a minor variation of an authorisation, a revocation of an authorisation, or a revocation of an authorisation and the substitution of another authorisation, must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by any other information or documents prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (1A) If the Commission receives a purported application that it considers is not a valid application, it must, within 5 business days of receiving the purported application, give the person who made the purported application a written notice:
 - (a) stating that the person has not made a valid application; and
 - (b) giving reasons why the purported application does not comply with this Division.
- (1B) For the purposes of subsection (1A), ***business day*** means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

2 Subsection 89(2)

Omit “such an application”, substitute “an application referred to in subsection (1)”.

3 Subsections 90(10) and (10A)

Repeal the subsections, substitute:

- (10) If the Commission does not determine an application for an authorisation (other than an application for an authorisation under

subsection 88(9)) within the relevant period, then it is taken to have granted the application at the end of that period.

- (10A) For the purposes of subsection (10), the *relevant period* is the period of 6 months beginning on the day the Commission received the application. However, if, before the end of that 6 month period:
- (a) the Commission has prepared a draft determination under subsection 90A(1) in relation to the application; and
 - (b) the Commission determines in writing that that period is extended by a specified period of not more than 6 months; and
 - (c) the applicant agrees to that period being so extended;
- the *relevant period* is that period as so extended.

4 Subsection 90(11)

Omit “(12), (13) and (15)”, substitute “(12) and (13)”.

5 Subsection 90(12)

Omit “(10) or” (first occurring).

6 Subsection 90(12)

Omit “(10) or (11), as the case may be,”, substitute “(11)”.

7 Subsection 90(13)

Omit “(10) or” (wherever occurring).

8 Subsection 90(14)

Omit “period referred to in subsection (10) of this section”, substitute “relevant period (worked out under subsection (10A) of this section)”.

9 Subsection 90(15)

After “authorizations” (first occurring), insert “(other than an application for an authorisation under subsection 88(9))”.

10 Paragraph 90(15)(b)

Omit “period referred to in whichever of subsections (10) and (11) is applicable”, substitute “relevant period (worked out under subsection (10A))”.

11 After subsection 101(1)

Insert:

- (1AAA) Subsection (1) does not apply to a determination under subsection 89(1A).

12 After subsection 172(2)

Insert:

- (2A) The regulations may prescribe the circumstances in which the Commission may, on behalf of the Commonwealth, wholly or partly waive the fee that would otherwise be payable for an application referred to in subsection 89(1).
- (2B) Subsection (2A) does not apply to an application for an authorisation under subsection 88(9), a minor variation of such an authorisation, a revocation of such an authorisation or a revocation of such an authorisation and the substitution of another authorisation.

13 Application

The amendments made by this Schedule apply in relation to applications made after the commencement of this Schedule.

14 Saving

- (1) Regulations in force for the purposes of subsection 89(1) of the *Trade Practices Act 1974* immediately before the commencement of this Schedule have effect, after that commencement, as if they had been made for the purposes of that subsection after that commencement.
- (2) An application made in accordance with subsection 89(1) of the *Trade Practices Act 1974* before the commencement of this Schedule has effect, after that commencement, as if it had been made in accordance with that subsection after that commencement.

Schedule 3—Collective bargaining

Trade Practices Act 1974

1 Subsection 8A(6)

After “or (3A)”, insert “or 93AC(1) or (2)”.

2 After subsection 45(8)

Insert:

(8A) Subsection (2) does not apply to a corporation engaging in conduct described in that subsection if:

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

3 Subsection 46(6)

After “operation of”, insert “subsection 45(8A) or”.

4 Subsection 46A(6)

After “operation of”, insert “subsection 45(8A) or”.

5 Before section 93

Insert:

Subdivision A—Exclusive dealing

6 Subsection 93(1)

Omit “notice, as prescribed,”, substitute “a notice”.

7 After subsection 93(1)

Insert:

(1A) To be valid, a notice under subsection (1) must:

- (a) be in a form prescribed by the regulations and contain the information required by the form; and

- (b) be accompanied by any other information or documents prescribed by the regulations; and
- (c) be accompanied by the fee (if any) prescribed by the regulations.

8 After subsection 93(2A)

Insert:

- (2B) If the Commission receives a purported notice under subsection (1) that it considers is not a valid notice, it must, within 5 business days of receiving the purported notice, give the person who made the purported notice a written notice:
 - (a) stating that the person has not given a valid notice; and
 - (b) giving reasons why the purported notice does not comply with this Division.

Definition

- (2C) In subsection (2B):

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

9 After section 93

Insert:

Subdivision B—Collective bargaining

93AA Definitions

In this Subdivision:

collective bargaining notice means a notice under subsection 93AB(1).

conference notice means a notice under subsection 93A(2).

contract means a contract, arrangement or understanding.

objection notice means a notice under subsection 93AC(1) or (2).

93AB Notification of collective bargaining

Notice to Commission

- (1) A corporation that:
 - (a) has made, or proposes to make, a contract (the ***initial contract***) containing a provision of the kind referred to in paragraph 45(2)(a); or
 - (b) proposes to give effect to a provision of a contract (the ***initial contract***) where the provision is of the kind referred to in paragraph 45(2)(b);

may give the Commission a notice (the ***collective bargaining notice***) setting out particulars of the contract or proposed contract, but only if the following 3 requirements are satisfied.

Note 1: Subsection (6) deals with the form etc. of a collective bargaining notice.

Note 2: Section 93AD sets out when a collective bargaining notice comes into force.

First—making of initial contract

- (2) First, the corporation must have made, or propose to make, the initial contract with 1 or more persons (the ***contracting parties***) about:
 - (a) the supply of particular goods or services to; or
 - (b) the acquisition of particular goods or services from;another person (the ***target***) by the corporation and the contracting parties.

Second—making of contracts with target

- (3) Second, the corporation must reasonably expect that it will make 1 or more contracts with the target about:
 - (a) the supply of 1 or more of those goods or services to; or
 - (b) the acquisition of 1 or more of those goods or services from;the target by the corporation.

Third—price of contracts with target

- (4) Third, the corporation must reasonably expect that:

-
- (a) in the case where the corporation reasonably expects to make only 1 contract with the target—the price for the supply or acquisition of those goods or services under that contract; or
 - (b) in the case where the corporation reasonably expects to make 2 or more contracts with the target—the sum of the prices for the supply or acquisition of those goods or services under those contracts;

will not exceed \$3,000,000, or such other amount as is prescribed by the regulations, in any 12 month period. The regulations may prescribe different amounts in relation to different industries.

Timing of reasonable expectation

- (5) The corporation must have the reasonable expectation referred to in subsections (3) and (4):
 - (a) at the time of giving the collective bargaining notice; and
 - (b) if the initial contract has been made—at the time it was made.

Form of notice etc.

- (6) To be valid, a collective bargaining notice must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by any other information or documents prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.

Notice given by, or on behalf of, contracting persons

- (7) A collective bargaining notice may be expressed to be given on behalf of one or more of the contracting parties, but only if those parties could have given the notice on their own behalf. If the notice is so expressed, then it is also taken to have been given by those parties.

When a notice may not be given

- (8) A corporation may not give a collective bargaining notice in relation to a contract or proposed contract if:

- (a) it has applied for an authorisation in relation to the contract or proposed contract; and
- (b) the Commission has made a determination dismissing the application; and
- (c) either:
 - (i) the Tribunal has made a determination on an application for a review of the Commission's determination; or
 - (ii) the time for making such an application for review has ended without the making of an application.

Notice is invalid if given by union etc. on behalf of the corporation

- (9) A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:
 - (a) a trade union; or
 - (b) an officer of a trade union; or
 - (c) a person acting on the direction of a trade union.

Invalid collective bargaining notice

- (10) If the Commission receives a purported collective bargaining notice that it considers is not a valid collective bargaining notice, it must, within 5 business days of receiving the purported notice, give the person who made the purported notice a written notice:
 - (a) stating that the person has not given a valid collective bargaining notice; and
 - (b) giving reasons why the purported collective bargaining notice does not comply with this Division.
- (10A) The Commission must, as soon as practicable after receiving a valid collective bargaining notice, give a copy of the notice to the target.

Definition

- (11) In this section:

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

trade union has the meaning given by subsection 4(1) of the *Workplace Relations Act 1996*.

93AC Commission's objection notice

Commission's objection notice—per se provisions

- (1) If a corporation gives the Commission a collective bargaining notice in relation to:
- (a) a contract, or proposed contract, containing a provision of the kind referred to in subparagraph 45(2)(a)(i) or (b)(i) (exclusionary provisions); or
 - (b) a contract, or proposed contract, containing a price fixing provision;

then the Commission may, if it is satisfied that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision does not or would not outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision, give the corporation a written notice (the **objection notice**) stating that it is so satisfied.

Commission's objection notice—competition provisions

- (2) If a corporation gives the Commission a collective bargaining notice in relation to a contract, or proposed contract, containing a provision of the kind referred to in subparagraph 45(2)(a)(ii) or (b)(ii) (other than a price fixing provision), then the Commission may, if it is satisfied that:
- (a) the provision has or would have the purpose, or has or is likely to have or would have or be likely to have the effect, of substantially lessening competition (within the meaning of section 45); and
 - (b) in all the circumstances, either:
 - (i) the provision has not resulted or is not likely to result, or would not result or be likely to result, in a benefit to the public; or
 - (ii) any benefit to the public that has resulted or is likely to result, or would result or be likely to result, from the provision does not or would not outweigh the detriment to the public constituted by any lessening of competition

that has resulted or is likely to result, or would result or be likely to result, from the provision;
give the corporation a written notice (the *objection notice*) stating that it is so satisfied.

Reasons for objection notice

- (3) The Commission must, at the time it gives a corporation an objection notice, give the corporation a written statement of its reasons for giving the notice.

Conference before objection notice

- (4) The Commission must comply with section 93A (conferences about draft objection notices) before giving an objection notice.

Commission to seek additional information

- (5) For the purposes of deciding whether or not to give an objection notice:
- (a) the Commission must seek such relevant information as it considers reasonable and appropriate; and
 - (b) the Commission may make a decision on the basis of:
 - (i) any information so obtained; or
 - (ii) any other information given to it by the corporation or any other person; or
 - (iii) any other information in its possession.

Definition

- (6) In this section:

price fixing provision means a provision of the kind referred to in subsection 45A(1).

93AD When collective bargaining notice comes into force and ceases to be in force

When collective bargaining notice comes into force

- (1) A collective bargaining notice comes into force:
-

- (a) at the end of the period which is 14 days or such longer period as is prescribed by the regulations, starting on the day the corporation gave the Commission the notice; or
 - (b) if the Commission gives the corporation a conference notice during the period referred to in paragraph (a) and then decides not to give the corporation an objection notice—when the Commission makes that decision.
- (2) However, a collective bargaining notice does not come into force if:
- (a) it is withdrawn, or taken to be withdrawn, before it would come into force under subsection (1); or
 - (b) the Commission gives the corporation a conference notice during the period referred to in paragraph (1)(a) and then gives the corporation an objection notice.

Note: Section 93AE deals with the withdrawal of a collective bargaining notice.

When collective bargaining notice ceases to be in force

- (3) A collective bargaining notice ceases to be in force at the earliest of the following times:
- (a) when it is withdrawn or taken to be withdrawn;
 - (b) if the Commission gives the corporation an objection notice—on the 31st day after the relevant day or on a later day specified in writing by the Commission;
 - (c) at the end of the period of 3 years beginning on the day the corporation gave the collective bargaining notice.

Note: Section 93AE deals with the withdrawal of a collective bargaining notice.

- (4) For the purposes of subsection (3), the **relevant day** is worked out in accordance with this table:

Relevant day	
In this situation:	the relevant day is:
1 If an application is not made to the Tribunal for a review of the Commission's decision to give the objection notice	the day the Commission gave the notice.

Relevant day

In this situation:	the <i>relevant day</i> is:
2 If an application is made to the Tribunal for a review of the Commission's decision to give the objection notice	(a) if the review application is withdrawn—the day of the withdrawal; or (b) if, on the application of the Commission or any other person who the Tribunal is satisfied has an interest in the subject matter of the review, the Tribunal declares that the applicant is not proceeding with the review application with due diligence—the day of the declaration; or (c) in any other case—the day on which the Tribunal makes a determination on the review.

93AE Withdrawal of collective bargaining notice

Withdrawal by corporation

- (1) A corporation may, by written notice given to the Commission, withdraw a collective bargaining notice it has given the Commission.
- (2) The corporation may do so at any time before the Commission gives it an objection notice in relation to the collective bargaining notice.

Deemed withdrawal

- (3) If:
 - (a) a corporation gives the Commission a collective bargaining notice in relation to a contract or proposed contract; and
 - (b) before or after the corporation gave the notice, it applies to the Commission for an authorisation for that contract or proposed contract; and
 - (c) the Commission makes a determination either dismissing the application or granting an authorisation in respect of the application; and

(d) either:

- (i) the Tribunal makes a determination on an application for a review of the Commission’s determination; or
- (ii) the time for making such an application for review ends without the making of an application;

then the collective bargaining notice is taken to be withdrawn.

93AF Only 1 collective bargaining notice may be given

If:

(a) a corporation gives the Commission a collective bargaining notice in relation to a contract or proposed contract; and

(b) either:

- (i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or
- (ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then the corporation may not give the Commission a further collective bargaining notice in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

10 Before section 93A

Insert:

Subdivision C—Conferences

11 Subsection 93A(1)

After “or (3A)”, insert “or 93AC(1) or (2)”.

Note: The heading to section 93A is altered by omitting “in relation to exclusive dealing”.

12 Subsections 93A(3), (4) and (10A)

After “or (3A)”, insert “or 93AC(1) or (2)”.

13 Subsection 93A(12)

After “subsection 93(1)”, insert “or 93AB(1)”.

14 Before section 95

Insert:

Subdivision D—Register of notifications

15 Paragraph 95(1)(c)

After “section 93”, insert “or 93AB”.

16 Paragraph 95(1)(f)

Omit “by which notices under section 93 were given”, substitute “in relation to notices given by corporations under section 93 or 93AB”.

17 Before paragraph 95(1)(h)

Insert:

(gb) details of the specification of any day by the Commission under paragraph 93AD(3)(b); and

18 Paragraph 95(2)(a)

After “section 93”, insert “or 93AB”.

19 Section 101A

After “or (3A)”, insert “or 93AC(1) or (2)”.

Note: The heading to section 101A is altered by inserting “**or 93AC(1) or (2)**” after “**or (3A)**”.

20 After subsection 102(5)

Insert:

(5AA) Upon a review of the giving of a notice by the Commission under subsection 93AC(1):

- (a) if the person who applied for the review satisfies the Tribunal that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision outweighs or would outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision—the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AB) Upon a review of the giving of a notice by the Commission under subsection 93AC(2):

-
- (a) if the person who applied for the review satisfies the Tribunal that:
- (i) the provision does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 45); or
 - (ii) in all the circumstances:
 - (A) the provision has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
 - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;
- the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.
- (5AC) If the Tribunal sets aside a notice (the *objection notice*) given by the Commission under subsection 93AC(1) or (2), then:
- (a) if the Commission gave the objection notice as part of a process starting when the Commission gave a notice under subsection 93A(2) (conference notice) during the period described in paragraph 93AD(1)(a)—the Commission is taken for the purposes of paragraph 93AD(1)(b) to have decided not to give the objection notice at the time the Tribunal set it aside; and
 - (b) for the purposes of subsections 93AD(2) and (3), the objection notice is taken not to have been given.

21 Subsection 109(1A)

After “or (3A)”, insert “or 93AC(1) or (2)”.

22 Paragraph 151AJ(7)(b)

After “operation of”, insert “subsection 45(8A) or”.

23 Paragraph 151AY(1)(b)

After “subsection 93(1)”, insert “or 93AB(1)”.

Note: The heading to section 151AY is altered by omitting “**section 93**” and substituting “**Part VII**”.

24 Paragraph 151AY(2)(c)

After “or (3A)”, insert “or 93AC(1) or (2)”.

25 Subsection 155(1)

After “or (3A)”, insert “or 93AC(1) or (2)”.

26 After subsection 45(8) of the Schedule

Insert:

- (8A) Subsection (2) does not apply to a person engaging in conduct described in that subsection if:
- (a) the person has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and
 - (b) the notice is in force under section 93AD.

27 Subsection 46(6) of the Schedule

After “operation of”, insert “subsection 45(8A) or”.

28 Application

The amendments made by this Schedule apply in relation to contracts or arrangements made, or understandings arrived at, after the commencement of this Schedule.

29 Saving

- (1) Regulations in force for the purposes of subsection 93(1) of the *Trade Practices Act 1974* immediately before the commencement of this Schedule have effect, after that commencement, as if they had been made for the purposes of subsection 93(1A) of that Act after that commencement.
- (2) A notice given in accordance with subsection 93(1) of the *Trade Practices Act 1974* before the commencement of this Schedule has effect, after that commencement, as if it had been given in accordance with subsection 93(1A) of that Act after that commencement.

Schedule 4—Exclusionary provisions

Trade Practices Act 1974

1 After section 76B

Insert:

76C Defence to proceedings relating to exclusionary provisions

Defence

- (1) In proceedings against a person in relation to a contravention of subparagraph 45(2)(a)(i) or (b)(i) in relation to an exclusionary provision, it is a defence if the person establishes that the provision:
- (a) is for the purposes of a joint venture; and
 - (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

Application of subsections 45(3) and (4)

- (2) Subsections 45(3) and (4) apply for the purposes of subsection (1) in the same way as they apply for the purposes of section 45.

Definitions

- (3) In this section:

contravention of subparagraph 45(2)(a)(i) or (b)(i) includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of subparagraph 45(2)(a)(i) or (b)(i).

proceedings means proceedings instituted under:

- (a) this Part or section 163A; or
- (b) section 21 or 23 of the *Federal Court of Australia Act 1976*;
or
- (c) section 39B of the *Judiciary Act 1903*.

2 Application

Schedule 4 Exclusionary provisions

The amendment made by this Schedule applies in relation to proceedings instituted after the commencement of this Schedule (whether the contract or arrangement was made, or the understanding was arrived at, before or after that commencement).

Schedule 5—Price fixing provisions

Trade Practices Act 1974

1 Subsection 45A(2)

Repeal the subsection.

2 Before section 77

Insert:

76D Defence to proceedings relating to price fixing provisions

Defence

- (1) In proceedings against a person in relation to a contravention of subparagraph 45(2)(a)(ii) or (b)(ii) in relation to a provision of the kind referred to in subsection 45A(1), it is a defence, despite subsection 45A(1), if the person establishes that the provision:
- (a) is for the purposes of a joint venture; and
 - (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

Application of subsections 45(3) and (4)

- (2) Subsections 45(3) and (4) apply for the purposes of this section in the same way as they apply for the purposes of section 45.

Definitions

- (3) In this section:

contravention of subparagraph 45(2)(a)(ii) or (b)(ii) includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of subparagraph 45(2)(a)(ii) or (b)(ii).

proceedings means proceedings instituted under:

- (a) this Part or section 163A; or
 - (b) section 21 or 23 of the *Federal Court of Australia Act 1976*;
- or

(c) section 39B of the *Judiciary Act 1903*.

3 Subsection 45A(2) of the Schedule

Repeal the subsection.

4 Application

- (1) The amendments made by items 1 and 3 apply in relation to contracts or arrangements made, or understandings arrived at, before or after the commencement of this Schedule.
- (2) The amendment made by item 2 applies in relation to proceedings instituted after the commencement of this Schedule (whether the contract or arrangement was made, or the understanding was arrived at, before or after that commencement).

Schedule 6—Dual listed companies

Trade Practices Act 1974

1 Subsection 4(1)

Insert:

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

2 After subsection 4A(5)

Insert:

(5A) For the purposes of Parts IV, VI and VII:

- (a) a body corporate that is a party to a dual listed company arrangement is taken to be related to the other body corporate that is a party to the arrangement; and
- (b) a body corporate that is related to one of the parties to the arrangement is taken to be related to the other party to the arrangement; and
- (c) a body corporate that is related to one of the parties to the arrangement is taken to be related to each body corporate that is related to the other party to the arrangement.

3 Paragraph 6(2)(h)

After “48,”, insert “49,”.

4 After subsection 45(6)

Insert:

(6A) The following conduct:

- (a) the making of a dual listed company arrangement;
- (b) the giving effect to a provision of a dual listed company arrangement;

does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.

5 Subsection 46(6)

After “47”, insert “, 49”.

6 Subsection 46A(6)

After “47”, insert “, 49”.

7 After section 48

Insert:

49 Dual listed company arrangements that affect competition

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

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

Exception

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

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

Meaning of competition

- (3) For the purposes of this section, **competition**, in relation to a provision of a dual listed company arrangement or of a proposed

dual listed company arrangement, means competition in any market in which:

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

8 After subsection 88(8A)

Insert:

- (8B) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant it an authorisation:
- (a) to make a dual listed company arrangement; or
 - (b) to give effect to a provision of a dual listed company arrangement;
- and, while such an authorisation remains in force:
- (c) for an authorisation to make a dual listed company arrangement—section 49 does not prevent the corporation from:
 - (i) making the arrangement in accordance with the authorisation; and
 - (ii) giving effect, in accordance with the authorisation, to any provision of the arrangement so made; and

- (d) for an authorisation to give effect to a provision of a dual listed company arrangement—section 49 does not prevent the corporation from giving effect to the provision in accordance with the authorisation.
- (8C) An authorisation granted by the Commission to a corporation under subsection (8B) has effect as if it were also an authorisation in the same terms to the other corporation named or referred to in the application for the authorisation as a party to the arrangement or proposed arrangement.
- (8D) Subject to subsection 49(2), the Commission does not have power to grant an authorisation to a corporation to make a dual listed company arrangement if the arrangement has been made before the Commission makes a determination in respect of the application.

9 After subsection 90(8)

Insert:

- (8A) The Commission must not make a determination granting an authorisation under subsection 88(8B) to make a dual listed company arrangement unless it is satisfied in all the circumstances that the making of the arrangement would result, or be likely to result, in such a benefit to the public (see subsection (9A)) that the arrangement should be allowed to be made.
- (8B) The Commission must not make a determination granting an authorisation under subsection 88(8B) to give effect to a provision of a dual listed company arrangement unless it is satisfied in all the circumstances that the giving effect to the provision would result, or be likely to result, in such a benefit to the public (see subsection (9A)) that the provision should be allowed to be given effect to.

10 Subsection 90(9)

After “public”, insert “(see subsection (9A))”.

11 Subsection 90(9A)

Omit “subsection (9)”, substitute “subsections (8A), (8B) and (9)”.

12 Subsection 91A(5)

Omit “subsection 90(8) or (9)”, substitute “subsection 90(8), (8A), (8B) or (9)”.

13 Subsection 91B(5)

Omit “subsection 90(6), (7), (8) or (9)”, substitute “subsection 90(6), (7), (8), (8A), (8B) or (9)”.

14 Subsection 91C(7)

Omit “subsection 90(6), (7), (8) or (9)”, substitute “subsection 90(6), (7), (8), (8A), (8B) or (9)”.

15 Subsection 101(1A)

Omit “subsection 90(6), (7), (8) or (9)”, substitute “subsection 90(6), (7), (8), (8A), (8B) or (9)”.

16 Subsection 101(2)

Omit “subsections 90(6), (7), (8) and (9)”, substitute “subsections 90(6), (7), (8), (8A), (8B) and (9)”.

17 After subsection 45(6) of the Schedule

Insert:

(6A) The following conduct:

- (a) the making of a dual listed company arrangement;
- (b) the giving effect to a provision of a dual listed company arrangement;

does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.

18 Subsection 46(6) of the Schedule

After “47”, insert “, 49”.

19 After section 48 of the Schedule

Insert:

49 Dual listed company arrangements that affect competition

(1) A person must not:

- (a) make a dual listed company arrangement if a provision of the proposed arrangement has the purpose, or would have or be

likely to have the effect, of substantially lessening competition; or

- (b) give effect to a provision of a dual listed company arrangement if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition.

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

Exception

- (2) The making by a person of a dual listed company arrangement that contains a provision that has the purpose, or would have or be likely to have the effect, of substantially lessening competition does not contravene this section if:

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

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

Meaning of competition

- (3) For the purposes of this section, **competition**, in relation to a provision of a dual listed company arrangement or of a proposed dual listed company arrangement, means competition in any market in which:

- (a) a person that is a party to the arrangement or would be a party to the proposed arrangement; or
- (b) any body corporate related to such a person;

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

- (4) For the purposes of the application of this section in relation to a particular person, a provision of a dual listed company arrangement or of a proposed dual listed company arrangement is taken to have, or to be likely to have, the effect of substantially lessening competition if that provision and any one or more of the following provisions:

- (a) the other provisions of that arrangement or proposed arrangement;
 - (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the person or a body corporate related to the person is or would be a party;
- together have or are likely to have that effect.

20 Application

- (1) The amendments made by items 1, 4, 7, 8, 9 and 19 apply in relation to arrangements made after the commencement of those items.
- (2) The amendment made by item 2 applies in relation to conduct engaged in after the commencement of that item.

Schedule 7—Exclusive dealing

Part 1—Tribunal review

Trade Practices Act 1974

17 Subsection 102(4)

Repeal the subsection, substitute:

- (4) Upon a review of the giving of a notice by the Commission under subsection 93(3):
- (a) if the person who applied for the review satisfies the Tribunal that:
 - (i) the conduct or proposed conduct does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 47); or
 - (ii) in all the circumstances:
 - (A) the conduct or proposed conduct has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
 - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the conduct or proposed conduct;
- the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

18 Application

The amendment made by item 17 applies in relation to notifications made after the commencement of that item.

Part 2—Related companies

Trade Practices Act 1974

30 At the end of subsections 47(6) and (7)

Add “not being a body corporate related to the corporation”.

31 Paragraph 151AJ(5)(f)

After “omitted from”, insert “subsections 47(6) and (7) and”.

32 At the end of subsections 47(6) and (7) of the Schedule

Add “not being a body corporate related to the first person”.

33 Application

The amendments made by this Part apply in relation to conduct engaged in after the commencement of this Part.

Part 3—Notification of exclusive dealing

Trade Practices Act 1974

34 Paragraph 93(2)(b)

Omit “or granting an authorisation (whether or not the authorisation is still in force)”.

35 Application

The amendment made by this Part applies in relation to notices given after the commencement of this Part (whether or not the application for authorisation was dismissed before or after that commencement).

Schedule 8—Enforcement

Trade Practices Act 1974

1 Subsection 79A(1)

After “65R”, insert “, 154Q”.

2 Subsection 79A(1)

After “87A(5)”, insert “or section 149.1 of the *Criminal Code* that relates to Part XID”.

3 Section 10.91

Omit “Section 155 applies”, substitute “Part XID and section 155 apply”.

Note: The heading to section 10.91 is altered by inserting “**Part XID and**” after “**Application of**”.

4 After Part XIC

Insert:

Part XID—Search and seizure

Division 1—Preliminary

154 Simplified outline

The following is a simplified outline of this Part:

- | |
|--|
| <ul style="list-style-type: none">• This Part sets out an enforcement regime for the purposes of finding out whether there has been a contravention of this Act, Part 20 of the <i>Telecommunications Act 1997</i> or Part 9 of the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>.• Division 2 provides for the appointment of inspectors and the issue of identity cards. |
|--|

- Division 3 deals with entry to premises with the consent of the occupier of the premises.
- Division 4 deals with entry to premises under a search warrant issued by a magistrate. It sets out the powers available under a search warrant, the obligations of persons entering the premises and the rights and responsibilities of the occupier of the premises.
- Division 5 contains some general provisions relating to the operation of electronic equipment at premises.

Note: See also section 155 (which deals with the obtaining of information, documents and evidence).

154A Definitions

In this Part:

consultant means a person engaged under section 27A.

evidential material means a document or other thing that may afford evidence relating to a contravention of:

- (a) this Act; or
- (b) Part 20 of the *Telecommunications Act 1997*; or
- (c) Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

executing officer, for a search warrant, means the inspector named in the warrant as being responsible for executing the warrant.

inspector means a person appointed as an inspector under section 154B.

occupier, in relation to premises, includes a person present at the premises who apparently represents the occupier.

officer assisting, for a search warrant, means:

- (a) an inspector who is assisting in executing the warrant; or
- (b) a person authorised under section 154K in relation to the warrant.

premises means:

-
- (a) an area of land or any other place (whether or not it is enclosed or built on); or
 - (b) a building or other structure; or
 - (c) a vehicle, vessel or aircraft; or
 - (d) a part of any such premises.

search warrant means a warrant issued by a magistrate under section 154X or signed by a magistrate under section 154Y.

thing includes a thing in electronic or magnetic form.

Division 2—Appointment of inspectors and identity cards

154B Appointment of inspectors

- (1) The Chairperson may, by writing, appoint a member of the staff assisting the Commission to be an inspector.

Staff member to have suitable qualifications and experience

- (2) The Chairperson must not do so unless he or she is satisfied that the staff member has suitable qualifications and experience to properly exercise the powers of an inspector.

Inspector to comply with Chairperson's directions

- (3) An inspector must comply with any directions of the Chairperson in exercising powers or performing functions as an inspector.

154C Identity cards

- (1) The Chairperson must issue an identity card to an inspector.

Form of identity card

- (2) The identity card must:
 - (a) be in the form prescribed by the regulations; and
 - (b) contain a recent photograph of the inspector.

Offence

- (3) A person commits an offence if:
 - (a) the person has been issued with an identity card; and

- (b) the person ceases to be an inspector; and
- (c) the person does not return the identity card to the Chairperson as soon as practicable.

Penalty: 1 penalty unit.

- (4) An offence against subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Card lost or destroyed

- (5) Subsection (3) does not apply if the identity card was lost or destroyed.

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

Inspector must carry card

- (6) An inspector must carry his or her identity card at all times when exercising powers or performing functions as an inspector.

Inspector must produce card on request

- (7) An inspector is not entitled to exercise any powers under this Part in relation to premises if:
- (a) the occupier of the premises has requested the inspector to produce the inspector's identity card for inspection by the occupier; and
 - (b) the inspector fails to comply with the request.

Division 3—Entry to premises with consent

154D Entry with consent

Entry

- (1) An inspector may enter premises if:
- (a) the Commission, the Chairperson or the Deputy Chairperson has reasonable grounds for suspecting that there may be evidential material on the premises; and
 - (b) the inspector obtains the consent of the occupier of the premises to enter the premises.

-
- (2) The inspector may be accompanied by any one or more of the following persons (each of whom is an *assistant*):
- (a) another member of the staff assisting the Commission;
 - (b) a consultant.

Obtaining consent

- (3) Before obtaining the consent of a person to enter premises under this Division, the inspector must inform the person that the person may refuse consent.
- (4) A consent of a person is not effective for the purposes of this section unless it is voluntary.

154E Powers in relation to premises

- (1) The inspector or an assistant may do any of the following after entering premises under this Division:
- (a) search the premises, and any thing on the premises, for the evidential material;
 - (b) make copies of the evidential material found on the premises;
 - (c) operate electronic equipment at the premises to see whether the evidential material is accessible by doing so;
Note: See also Division 5 (which contains provisions relating to the operation of electronic equipment at the premises).
 - (d) remove the evidential material from the premises with the consent of the owner of the material;
Note: See also subsection (2).
 - (e) secure the evidential material, pending the obtaining of a search warrant to seize it;
 - (f) take equipment and material onto the premises, and use it, for any of the above purposes.

Obtaining consent to remove evidential material

- (2) Before obtaining the consent of a person to remove evidential material from premises under paragraph (1)(d), the inspector or an assistant must inform the person of the purpose for which the material is required and that the person may refuse consent. A consent of a person is not effective for the purposes of that paragraph unless the consent is voluntary.

154F Operation of electronic equipment at premises

- (1) The inspector or an assistant may do only 1 of 2 things if he or she finds that the evidential material is accessible by operating electronic equipment at the premises.

Removal of documents

- (2) One thing he or she may do is operate the equipment or other facilities at the premises to put the evidential material in documentary form and remove the documents so produced.

Removal of disk, tape or other storage device

- (3) The other thing he or she may do is operate the equipment or other facilities at the premises to transfer the evidential material to a disk, tape or other storage device that:
- (a) is brought to the premises for the exercise of the power; or
 - (b) is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;
- and remove the disk, tape or other storage device from the premises.

Division 4—Entry to premises under a search warrant

Subdivision A—Powers available under a search warrant

154G The things that are authorised by a search warrant

- (1) A search warrant that is in force in relation to premises authorises the executing officer or an officer assisting to do any of the following:
- (a) enter the premises;
 - (b) search the premises, and any thing on the premises, for the kind of evidential material specified in the warrant, and seize things of that kind found on the premises;
 - (c) make copies of the kind of evidential material specified in the warrant found on the premises;
 - (d) operate electronic equipment at the premises to see whether the kind of evidential material specified in the warrant is accessible by doing so;

Note: See also Division 5 (which contains provisions relating to the operation of electronic equipment at the premises).

- (e) take equipment and material onto the premises, and use it, for any of the above purposes.

Seizing other evidence

- (2) If:
 - (a) the executing officer or an officer assisting, in the course of searching for the kind of evidential material specified in the warrant, finds another thing that he or she believes on reasonable grounds to be evidence of an indictable offence against:
 - (i) this Act; or
 - (ii) Part 20 of the *Telecommunications Act 1997*; or
 - (iii) Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; and
 - (b) he or she believes on reasonable grounds that it is necessary to seize the other thing in order to prevent its concealment, loss or destruction;then he or she may seize that other thing.

154H Operation of electronic equipment at premises

- (1) The executing officer or an officer assisting may do only 1 of 3 things if he or she finds that the kind of evidential material specified in the warrant is accessible by operating electronic equipment at the premises.

Seizure

- (2) One thing he or she may do is seize the equipment and any disk, tape or other associated device.

Note: Subsection (5) sets out limitations on seizure.

Removal of documents

- (3) Another thing he or she may do is operate the equipment or other facilities at the premises to put the evidential material in documentary form and remove the documents so produced.

Removal of disk, tape or other storage device

- (4) The final thing he or she may do is operate the equipment or other facilities at the premises to transfer the evidential material to a disk, tape or other storage device that:
- (a) is brought to the premises; or
 - (b) is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;
- and remove the disk, tape or other storage device from the premises.

Limitation on seizure

- (5) A person may seize a thing under subsection (2) only if:
- (a) it is not practicable to put the evidential material in documentary form as mentioned in subsection (3) or to transfer the evidential material as mentioned in subsection (4); or
 - (b) possession of the thing by the occupier could constitute an offence against a law of the Commonwealth.

154J Securing electronic equipment for use by experts

- (1) If a search warrant in relation to premises is being executed and the executing officer or an officer assisting believes on reasonable grounds that:
- (a) the kind of evidential material specified in the warrant may be accessible by operating electronic equipment at the premises; and
 - (b) expert assistance is required to operate the equipment; and
 - (c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;
- he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.

Notice to occupier

- (2) The executing officer or officer assisting must give notice to the occupier of the premises of his or her intention to secure the

equipment and of the fact that the equipment may be secured for up to 24 hours.

Period equipment may be secured

- (3) The equipment may be secured:
- (a) for a period not exceeding 24 hours; or
 - (b) until the equipment has been operated by the expert; whichever happens first.

Extensions

- (4) If the executing officer or officer assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to a magistrate for an extension of that period.
- (5) The executing officer or officer assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.
- (6) The magistrate may order an extension for a period specified in the order if the magistrate is satisfied that the extension is necessary.

Subdivision B—Availability of assistance and use of force in executing a search warrant

154K Authorisation of officers assisting

The executing officer for a search warrant may, by writing, authorise a member of the staff assisting the Commission, or a consultant, to assist in executing the warrant.

154L Availability of assistance and use of force in executing a search warrant

In executing a search warrant:

- (a) the executing officer may obtain such assistance as is necessary and reasonable in the circumstances; and

- (b) the executing officer, or another inspector who is an officer assisting, may use such force against persons and things as is necessary and reasonable in the circumstances; and
- (c) a person who is not an inspector, but who is an officer assisting, may use such force against things as is necessary and reasonable in the circumstances.

Subdivision C—Obligations of executing officer and officers assisting

154M Announcement before entry

- (1) Before any person enters premises under a search warrant, the executing officer must:
 - (a) announce that he or she is authorised to enter the premises; and
 - (b) give any person at the premises an opportunity to allow entry to the premises.
- (2) However, the executing officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure that the effective execution of the warrant is not frustrated.

154N Details of warrant to be given to occupier

If a search warrant in relation to premises is being executed and the occupier of the premises is present at the premises, the executing officer or an officer assisting must make available to the occupier a copy of the warrant or a copy of the form of warrant.

Subdivision D—Occupier’s rights and responsibilities

154P Occupier entitled to observe search being conducted

- (1) If a search warrant in relation to premises is being executed and the occupier of the premises is present at the premises, the occupier is entitled to observe the search being conducted.
- (2) The occupier’s right to observe the search being conducted ends if the occupier impedes the search.

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- (3) This section does not prevent 2 or more areas of the premises being searched at the same time.

154Q Occupier to provide reasonable facilities and assistance

The occupier of premises in relation to which a search warrant is being executed must provide the executing officer and any officer assisting with all reasonable facilities and assistance for the effective exercise of their powers.

Penalty: 30 penalty units.

154R Answering of questions or producing evidential material

- (1) If a search warrant in relation to premises is being executed, the executing officer or an officer assisting may:
- (a) require a person at the premises to answer questions or produce evidential material to which the warrant relates; and
 - (b) seize that evidential material.
- (2) A person commits an offence if the person fails to comply with a requirement under subsection (1).

Penalty: 30 penalty units.

Self-incrimination is no excuse

- (3) An individual is not excused from answering a question or producing evidential material on the ground that the answer, or the production of the material, might tend to incriminate the individual or make the individual liable to a penalty.
- (4) However, the answer is not admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the person to a penalty, other than:
- (a) proceedings for an offence against subsection (2); or
 - (b) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Part.

Subdivision E—General provisions relating to seizure

154S Copies of seized things to be provided

- (1) If, under a search warrant relating to premises, the executing officer or an officer assisting seizes:
 - (a) a document, film, computer file or other thing that can be readily copied; or
 - (b) a storage device the information in which can be readily copied;then he or she must, if requested to do so by the occupier of the premises, give a copy of the thing or the information to the occupier as soon as practicable after the seizure.
- (2) However, subsection (1) does not apply if possession of the document, film, computer file, thing or information by the occupier could constitute an offence against a law of the Commonwealth.

154T Receipts for things seized under warrant

- (1) If a thing is seized under a search warrant, the executing officer or an officer assisting must provide a receipt for the thing.
- (2) If 2 or more things are seized, they may be covered in the one receipt.

154U Return of seized things

- (1) Subject to any contrary order of a court, if a person (the *seizer*) seizes a thing under this Division, the person must return it if:
 - (a) the reason for its seizure no longer exists or it is decided that it is not to be used in evidence; or
 - (b) the period of 60 days after its seizure ends;whichever first occurs, unless the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.
- (2) At the end of the 60 days specified in subsection (1), the seizer must take reasonable steps to return the thing to the person from whom it was seized (or to the owner if that person is not entitled to possess it), unless:
 - (a) proceedings in respect of which the thing may afford evidence were instituted before the end of the 60 days and

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- have not been completed (including an appeal to a court in relation to those proceedings); or
 - (b) an inspector may retain the thing because of an order under section 154V; or
 - (c) the seizer is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of a State or Territory) to retain, destroy or dispose of the thing.

154V Magistrate may permit a thing to be retained

Application for extension

- (1) An inspector may apply to a magistrate for an order that he or she may retain the thing for a further period if:
 - (a) before the end of 60 days after the seizure; or
 - (b) before the end of a period previously specified in an order of a magistrate under this section;
 proceedings in respect of which the thing may afford evidence have not commenced.

Grant of extension

- (2) If the magistrate is satisfied that it is necessary for the inspector to continue to retain the thing for the purposes of an investigation as to whether there has been a contravention of:
 - (a) this Act; or
 - (b) Part 20 of the *Telecommunications Act 1997*; or
 - (c) Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*;
 the magistrate may order that the inspector may retain the thing for a period (not exceeding 3 years) specified in the order.

Affect on interested parties

- (3) Before making the application, the inspector must:
 - (a) take reasonable steps to discover who has an interest in the retention of the thing; and
 - (b) if it is practicable to do so, notify each person whom the inspector believes to have such an interest of the proposed application.

154W Disposal of things if there is no owner or owner cannot be located

If:

- (a) a thing is seized under this Division; and
- (b) a person would otherwise be required to return the thing to its owner; and
- (c) there is no owner or the person cannot, despite making reasonable efforts, locate the owner;

the person may dispose of the thing in such manner as he or she thinks appropriate.

Subdivision F—Search warrants

154X Issue of search warrants

Application for warrant

- (1) An inspector may apply to a magistrate for a warrant under this section in relation to premises.

Issue of warrant

- (2) The magistrate may issue the warrant if the magistrate is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that:
 - (a) there is evidential material on the premises; or
 - (b) there may be evidential material on the premises within the next 72 hours.
- (3) However, the magistrate must not issue the warrant unless the inspector or some other person has given to the magistrate, either orally or by affidavit, such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought.

Content of warrant

- (4) The warrant must state:
 - (a) a description of the premises to which the warrant relates; and

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- (b) the kind of evidential material that is to be searched for under the warrant (including stating the contraventions to which the warrant relates); and
 - (c) the name of the inspector who is to be responsible for executing the warrant; and
 - (d) whether the warrant may be executed at any time of the day or night or during specified hours of the day or night; and
 - (e) the day (not more than one week after the issue of the warrant) on which the warrant ceases to have effect.

154Y Search warrants by telephone, fax etc.

Application for warrant

- (1) If, in an urgent case, an inspector considers it necessary to do so, the inspector may apply to a magistrate by telephone, fax or other electronic means for a warrant under section 154X in relation to premises.

Voice communication

- (2) The magistrate may require communication by voice to the extent that it is practicable in the circumstances.

Information

- (3) Before applying for the warrant, the inspector must prepare an information of the kind mentioned in subsection 154X(2) in relation to the premises that sets out the grounds on which the warrant is sought. If it is necessary to do so, the inspector may apply for the warrant before the information is sworn or affirmed.

Issue of warrant

- (4) If the magistrate is satisfied:
 - (a) after having considered the terms of the information; and
 - (b) after having received such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought;that there are reasonable grounds for issuing the warrant, the magistrate may complete and sign the same warrant that the

magistrate would issue under section 154X if the application had been made under that section.

Notification

- (5) If the magistrate completes and signs the warrant, the magistrate must inform the applicant, by telephone, fax or other electronic means, of:
- (a) the terms of the warrant; and
 - (b) the day on which and the time at which the warrant was signed; and
 - (c) the day (not more than one week after the magistrate completes and signs the warrant) on which the warrant ceases to have effect.

Form of warrant

- (6) The applicant must then complete a form of warrant in the same terms as the warrant completed and signed by the magistrate, stating on the form the name of the magistrate and the day on which and the time at which the warrant was signed.

Completed form of warrant to be given to magistrate

- (7) The applicant must also, not later than the day after the day of expiry or execution of the warrant, whichever is the earlier, send to the magistrate:
- (a) the form of warrant completed by the applicant; and
 - (b) the information referred to in subsection (3), which must have been duly sworn or affirmed.

Attachment

- (8) The magistrate is to attach to the documents provided under subsection (7) the warrant completed by the magistrate.

Authority of warrant

- (9) A form of warrant duly completed under subsection (6) is authority for the same powers as are authorised by the warrant signed by the magistrate.
- (10) If:

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- (a) it is material, in any proceedings, for a court to be satisfied that an exercise of a power was authorised by this section; and
 - (b) the warrant signed by the magistrate authorising the exercise of the power is not produced in evidence;
- the court must assume, unless the contrary is proved, that the exercise of the power was not authorised by such a warrant.

154Z Offences relating to warrants

- (1) An inspector must not make, in an application for a warrant, a statement that the inspector knows to be false or misleading in a material particular.

Penalty: Imprisonment for 2 years.

- (2) An inspector must not:
 - (a) state in a document that purports to be a form of warrant under section 154Y the name of a magistrate unless that magistrate issued the warrant; or
 - (b) state on a form of warrant under that section a matter that, to the inspector's knowledge, departs in a material particular from the form authorised by the magistrate; or
 - (c) purport to execute, or present to another person, a document that purports to be a form of warrant under that section that the inspector knows:
 - (i) has not been approved by a magistrate under that section; or
 - (ii) departs in a material particular from the terms authorised by a magistrate under that section; or
 - (d) give to a magistrate a form of warrant under that section that is not the form of warrant that the inspector purported to execute.

Penalty: Imprisonment for 2 years.

Subdivision G—Powers of magistrates

154ZA Powers conferred on magistrates

- (1) A power conferred on a magistrate by this Division is conferred on the magistrate in a personal capacity and not as a court or a
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member of a court. The magistrate need not accept the power conferred.

- (2) A magistrate exercising such a power has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.

Division 5—General provisions relating to electronic equipment

154ZB Operation of electronic equipment at premises

A person may operate electronic equipment at premises in order to exercise a power under this Part only if he or she believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

154ZC Compensation for damage to electronic equipment

- (1) This section applies if:
 - (a) as a result of electronic equipment being operated as mentioned in section 154E, 154F, 154G, 154H or 154J:
 - (i) damage is caused to the equipment; or
 - (ii) the data recorded on the equipment is damaged; or
 - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
 - (b) the damage or corruption occurs because:
 - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
 - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.

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- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees and agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):
- damage*, in relation to data, includes damage by erasure of data or addition of other data.

5 Subsection 155(1)

After "under subsection", insert "91B(4), 91C(4),".

5A Subsection 155(1)

Before ", a member of the Commission may", insert "or 95AS(7) or the making of an application under subsection 95AZM(6)".

6 Paragraph 155(1)(c)

After "Commission", insert ", or before a member of the staff assisting the Commission who is an SES employee or an acting SES employee and who is specified in the notice,".

7 Subsection 155(2)

Repeal the subsection.

8 Subsection 155(2A)

Omit "or an authorisation under subsection (2)".

9 Subsection 155(3)

Repeal the subsection, substitute:

- (3) If a notice under subsection (1) requires a person to appear before the Commission to give evidence, the Commission may require the evidence to be given on oath or affirmation. For that purpose, any member of the Commission may administer an oath or affirmation.
- (3A) If a notice under subsection (1) requires a person to appear before a member of the staff assisting the Commission to give evidence, the

staff member may require the evidence to be given on oath or affirmation and may administer an oath or affirmation.

10 Subsection 155(4)

Repeal the subsection.

11 Paragraph 155(5)(b)

Omit “or” (last occurring).

12 Paragraph 155(5)(c)

Repeal the paragraph.

13 Subsection 155(6)

Repeal the subsection.

14 Subsection 155(6A)

Omit “or (6)”.

15 Subsection 155(7)

Omit “or permitting the inspection of”.

16 Subsection 155(7)

Omit “or made available to an authorized officer for inspection”.

17 Paragraphs 155(7A)(b) and (c)

Omit “or permit inspection of”.

18 After subsection 155(7A)

Insert:

(7B) This section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.

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

19 At the end of section 155

Add:

(10) In this section:

legal professional privilege includes privilege under Division 1 of Part 3.10 of the *Evidence Act 1995*.

20 Subsection 155AA(3) (paragraph (a) of the definition of protected Part IV information)

After “under”, insert “Part XID or”.

21 Subsection 155AA(3) (subparagraph (a)(i) of the definition of protected Part VB information)

After “under”, insert “Part XID or”.

22 Subsection 155AB(3) (subparagraph (a)(i) of the definition of protected Part XIB or XIC information)

After “155”, insert “or Part XID”.

23 Subsection 163(5)

After “118,”, insert “154Q,”.

24 Subparagraph 171(3)(a)(ii)

Repeal the subparagraph.

25 Paragraph 171(3)(b)

Omit “or authorisations”.

26 Paragraph 171(3)(c)

Omit “or authorisations”.

27 Paragraph 171(3)(d)

Repeal the paragraph, substitute:

- (d) the number of search warrants issued by a magistrate under section 154X or signed by a magistrate under section 154Y; and
- (da) a general description of the nature of the matters in respect of which the search warrants were issued or signed; and
- (db) the number of proceedings brought to challenge the validity of the search warrants; and
- (dc) the number of entries onto premises under Part XID; and

28 Application

The amendment made by item 4 applies in relation to contraventions occurring either before or after the commencement of that item.

29 Transitional—old authorisations

Subsection 155(2) of the *Trade Practices Act 1974*, as in force immediately before the commencement of this item, continues to apply after that commencement in relation to an authorisation given under that subsection before that commencement, but only in relation to any entry to premises under that authorisation that occurs before the 14th day after that commencement.

Schedule 9—Penalties

Part 1—Civil penalties

Trade Practices Act 1974

1 Subsection 75B(1)

Omit “or 75AYA”, substitute “, 75AYA or 95AZN”.

2 At the end of paragraph 76(1)(a)

Add:

(iii) section 95AZN; or

3 At the end of paragraphs 76(1)(b), (c) and (d)

Add “or”.

4 Subsection 76(1A)

Repeal the subsection, substitute:

(1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

- (a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—\$750,000; and
- (b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;
 - (iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred; and

- (c) for each act or omission to which this section applies that relates to section 95AZN—\$33,000; and
- (d) for each other act or omission to which this section applies—\$10,000,000.

Note: For *annual turnover*, see subsection (5).

5 Subsection 76(1B)

Repeal the subsection, substitute:

- (1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:
 - (a) for each act or omission to which this section applies that relates to section 95AZN—\$6,600; and
 - (b) for each other act or omission to which this section applies—\$500,000.

6 Subsection 76(4)

Omit “subsection (1A)”, substitute “paragraphs (1A)(a) and (b)”.

7 At the end of section 76

Add:

Annual turnover

- (5) For the purposes of this section, the *annual turnover* of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than:
 - (a) supplies made from any of those bodies corporate to any other of those bodies corporate; or
 - (b) supplies that are input taxed; or
 - (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or
 - (d) supplies that are not made in connection with an enterprise that the body corporate carries on; or
 - (e) supplies that are not connected with Australia.

- (6) Expressions used in subsection (5) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

8 Subsection 76A(1)

Insert:

contravention, in relation to a section, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section.

Note: The heading to section 76A is altered by inserting “or 95AZN” after “75AYA”.

9 Subsection 76A(1) (definition of *contravention of section 75AYA*)

Repeal the definition.

10 Subsection 76A(2)

After “75AYA”, insert “or 95AZN”.

11 Subsection 76B(1)

Insert:

contravention, in relation to a section, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section.

Note: The heading to section 76B is altered by inserting “or 95AZN” after “75AYA”.

12 Subsection 76B(1) (definition of *contravention of section 75AYA*)

Repeal the definition.

13 Subsections 76B(2), (3) and (4)

After “75AYA”, insert “or 95AZN”.

14 Paragraph 76B(5)(a)

After “75AYA”, insert “or 95AZN”.

15 Application

The amendments made by this Part apply in relation to contraventions occurring after the commencement of this Part.

Part 2—Disqualification from managing corporations

Corporations Act 2001

16 After section 206E

Insert:

206EA Disqualification under the *Trade Practices Act 1974*

A person is disqualified from managing corporations if a court order disqualifying the person from managing corporations is in force under section 86E of the *Trade Practices Act 1974*.

17 After section 206G

Insert:

206GA Involvement of ACCC—leave orders under section 206G

Scope of section

- (1) This section applies in relation to a person who is disqualified from managing corporations under section 206EA.

Notice lodged with ASIC before leave application

- (2) If the person lodges a notice with ASIC under subsection 206G(2), ASIC must give the ACCC a copy of the notice.

Leave orders

- (3) If the person lodges a copy of an order with ASIC under subsection 206G(4), ASIC must give the ACCC a copy of the order.

Revoking leave

- (4) If ASIC decides to apply for an order under subsection 206G(5) in relation to the person, it must consult the ACCC before making the application.

Definition

(5) In this section:

ACCC means the Australian Competition and Consumer Commission.

18 Paragraph 1274AA(1)(a)

After “206E”, insert “, 206EA”.

19 After paragraph 1274AA(2)(a)

Insert:

(aa) every court order referred to in section 206EA; and

Trade Practices Act 1974

20 After section 86D

Insert:

86E Order disqualifying a person from managing corporations

- (1) On application by the Commission, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
 - (a) the Court is satisfied that the person has contravened, has attempted to contravene or has been involved in a contravention of Part IV; and
 - (b) the Court is satisfied that the disqualification is justified.

Note: Section 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

- (2) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person’s conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.

Schedule 9 Penalties

Part 2 Disqualification from managing corporations

- (3) The Commission must notify ASIC if the Court makes an order under this section. The Commission must give ASIC a copy of the order.

Note: ASIC must keep a register of persons who have been disqualified from managing corporations: see section 1274AA of the *Corporations Act 2001*.

- (4) In this section:

ASIC means the Australian Securities and Investments Commission.

21 Application

The amendments made by this Part apply in relation to contraventions occurring after the commencement of this Part.

Part 3—Indemnities

Trade Practices Act 1974

22 Paragraph 6(2)(h)

After “50A,” insert “77A,”.

23 After section 77

Insert:

77A Indemnification of officers

- (1) A body corporate (the *first body*), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:
 - (a) a civil liability;
 - (b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Penalty: 25 penalty units.

- (2) For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

Definitions

- (3) In this section:

civil liability means a liability to pay a pecuniary penalty under section 76 for a contravention of a provision of Part IV.

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

77B Certain indemnities not authorised and certain documents void

- (1) Section 77A does not authorise anything that would otherwise be unlawful.

- (2) Anything that purports to indemnify a person against a liability is void to the extent that it contravenes section 77A.

77C Application of section 77A to a person other than a body corporate

If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:

- (a) convicted of an offence (the *relevant offence*) against subsection 77A(1) of this Act; or
- (b) convicted of an offence (the *relevant offence*) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection 77A(1) of this Act;

the relevant offence is taken to be punishable on conviction by a fine not exceeding 5 penalty units.

24 Application

The amendments made by this Part apply in relation to contraventions occurring after the commencement of this Part.

Schedule 10—Local government bodies

Trade Practices Act 1974

1 After section 2B

Insert:

2BA Application of Part IV to local government bodies

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

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

2 Subsection 2C(1)

Omit “sections 2A and 2B”, substitute “sections 2A, 2B and 2BA”.

3 At the end of paragraph 2C(1)(c)

Add:

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

4 Subsection 2C(2)

Omit “sections 2A and 2B”, substitute “sections 2A, 2B and 2BA”.

5 Section 2D

Repeal the section.

Schedule 11—Functions and powers etc. under Competition Code

Trade Practices Act 1974

1 Section 150A

Insert:

Commonwealth entity means:

- (a) an authority of the Commonwealth; or
- (b) an officer of the Commonwealth.

2 Section 150F

Repeal the section, substitute:

150F Commonwealth consent to conferral of functions etc. on Commonwealth entities

- (1) An application law may confer functions or powers, or impose duties, on a Commonwealth entity for the purposes of the Competition Code.

Note: Section 150FB sets out when such a law imposes a duty on a Commonwealth entity.

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

150FA How duty is imposed

Application

- (1) This section applies if an application law purports to impose a duty on a Commonwealth entity.

Note: Section 150FB sets out when such a law imposes a duty on a Commonwealth entity.

State or Territory legislative power sufficient to support duty

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

Note: If this subsection applies, the duty will be taken to be imposed by force of the law of the State or Territory (the Commonwealth having consented under section 150F to the imposition of the duty by that law).

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

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Act to the extent necessary to ensure that validity.
- (4) If, because of subsection (3), this Act is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Act.
- (5) The duty is taken to be imposed by this Act in accordance with subsection (3) only to the extent to which imposing the duty:
- (a) is within the legislative powers of the Commonwealth; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the entity.

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

150FB When an application law imposes a duty

For the purposes of sections 150F and 150FA, an application law *imposes a duty* on a Commonwealth entity if:

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

Schedule 12—Technical amendment

Gas Pipelines Access (Commonwealth) Act 1998

1 Section 13 (note)

Omit “sections 44ZZM, 29B and 44ZZOA of the *Trade Practices Act 1974* respectively”, substitute “sections 29B and 44ZZM of the *Trade Practices Act 1974*”.

Note: This item fixes an incorrect cross-reference.

[*Minister’s second reading speech made in—
House of Representatives on 17 February 2005
Senate on 10 March 2005*]

(21/05)
