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Volume 1: sections 1-110
Volume 2: sections 10.01-186
Volume 3: Schedules
Endnotes

Each volume has its own contents

This compilation includes commenced amendments made by Act No. 94, 2019

About this compilation

This compilation

This is a compilation of the *Competition and Consumer Act 2010* that shows the text of the law as amended and in force on 3 February 2020 (the **compilation date**).

The notes at the end of this compilation (the **endnotes**) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in the compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Contents

Part I—

Preliminary

| | | |
|-----|---|----|
| 1 | | |
| 1 | Short title | 1 |
| 2 | Object of this Act | 1 |
| 2A | Application of Act to Commonwealth and Commonwealth authorities | 1 |
| 2B | Application of Act to States and Territories | 2 |
| 2BA | Application of Part IV to local government bodies | 2 |
| 2C | Activities that are not business | 3 |
| 3 | Repeal | 4 |
| 4 | Interpretation | |
| 4A | Subsidiary, holding and related bodies corporate | 19 |
| 4B | Consumers | 21 |
| 4C | Acquisition, supply and re-supply | 24 |
| 4E | Market | 25 |
| 4F | References to purpose or reason | 25 |
| 4G | Lessening of competition to include preventing or hindering competition | 25 |
| 4H | Application of Act in relation to leases and licences of land and buildings | 26 |
| 4J | Joint ventures | 26 |
| 4K | Loss or damage to include injury | 27 |
| 4KA | Definitions etc. that do not apply in Part XI or Schedule 2 | 27 |
| 4L | Severability | 27 |
| 4M | Saving of law relating to restraint of trade and breach of confidence | 27 |
| 4N | Extended application of Part IIIA | 28 |
| 5 | Extended application of this Act to conduct outside Australia | 28 |
| 6 | Extended application of this Act to persons who are not corporations | 29 |
| 6AA | Application of the <i>Criminal Code</i> | 37 |

Part II—The Australian Competition and Consumer

| | |
|--|----|
| Commission | 38 |
| 6A..... Establishment of Commission..... | 38 |
| 7..... Constitution of Commission..... | 39 |
| 8..... Terms and conditions of appointment..... | 39 |
| 8A..... Associate members..... | 39 |
| 8AB..... AER members taken to be associate members..... | 41 |
| 9..... | |
| Remuneration..... | 42 |
| 10..... Deputy Chairpersons..... | 42 |
| 11..... Acting Chairperson..... | 42 |
| 12..... Leave of absence..... | 43 |
| 13..... Termination of appointment of members of the Commission.. | 43 |
| 14..... Termination of appointment of associate members of the Commission | 44 |
| 15..... Resignation..... | 45 |
| 16..... Arrangement of business..... | 45 |
| 17..... Disclosure of interests by Chairperson..... | 45 |
| 17A..... Disclosure of certain interests by members of the Commission when taking part in determinations of matters..... | 45 |
| 18..... Meetings of Commission..... | 46 |
| 19..... Chairperson may direct Commission to sit in Divisions.. | 47 |
| 25..... Delegation by Commission..... | 48 |
| 26..... Delegation by Commission of certain functions and powers | 49 |
| 27..... Staff of Commission..... | 50 |
| 27A..... Consultants..... | 50 |
| 28..... Functions of Commission in relation to dissemination of information, law reform and research | 51 |
| 29..... Commission to comply with directions of Minister and requirements of the Parliament | 52 |

Part IIA—The National Competition

| | |
|---|----|
| Council | 54 |
| 29A..... Establishment of Council..... | 54 |
| 29B..... Functions and powers of Council..... | 54 |
| 29BA..... Commonwealth consent to conferral of functions etc. on Council | 55 |

| | | |
|-----------|--|----|
| 29BB..... | How duty is imposed..... | 56 |
| 29BC..... | When a State/Territory energy law imposes a duty..... | 57 |
| 29C..... | Membership of Council..... | 57 |
| 29D..... | Terms and conditions of office..... | 57 |
| 29E..... | Acting Council President..... | 58 |
| 29F..... | Remuneration of Councillors..... | 58 |
| 29G..... | Leave of absence..... | 58 |
| 29H..... | Termination of appointment of Councillors..... | 59 |
| 29I..... | Resignation of Councillors..... | 59 |
| 29J..... | Arrangement of Council business..... | 59 |
| 29L..... | Council meetings..... | 60 |
| 29LA..... | Resolutions without meetings..... | 60 |
| 29M..... | Staff to help Council..... | 61 |
| 29N..... | Consultants..... | 61 |
| 29O..... | Annual report..... | 61 |

Part III—The Australian Competition

Tribunal 63

| | | |
|----------|--|----|
| 30..... | Constitution of Tribunal..... | 63 |
| 31..... | Qualifications of members of Tribunal..... | 63 |
| 31A..... | Appointment of Judge as presidential member of Tribunal not to affect tenure etc. | 63 |
| 32..... | Terms and conditions of appointment..... | 64 |
| 33..... | Remuneration and allowances of members of Tribunal.... | 64 |
| 34..... | Acting appointments..... | 64 |
| 35..... | Suspension and removal of members of Tribunal..... | 66 |
| 36..... | Resignation..... | 66 |
| 37..... | Constitution of Tribunal for particular matters..... | 67 |
| 38..... | Validity of determinations..... | 67 |
| 39..... | President may give directions..... | 67 |
| 40..... | Disclosure of interests by members of Tribunal..... | 67 |

| | | |
|----------|--|----|
| 41..... | Presidential member to preside..... | 68 |
| 42..... | Decision of questions..... | 68 |
| 43..... | Member of Tribunal ceasing to be available..... | 68 |
| 43A..... | Counsel assisting Tribunal..... | 69 |
| 43B..... | Consultants..... | 69 |
| 44..... | Staff of Tribunal..... | 70 |
| 44A..... | Acting appointments..... | 70 |

Part IIIAA—The Australian Energy Regulator (AER)

71

Division 1—

Preliminary

71

| | | |
|-----------|-------------------------------------|----|
| 44AB..... | Definitions..... | 71 |
| 44AC..... | This Part binds the Crown..... | 71 |
| 44AD..... | Extra-territorial operation..... | 71 |

Division 2—Establishment of the

AER

73

| | | |
|-----------|---|----|
| 44AE..... | Establishment of the AER..... | 73 |
| 44AF..... | AER to hold money and property on behalf of the Commonwealth | 73 |
| 44AG..... | Constitution of the AER..... | 73 |

Division 3—Functions and powers of the

AER

74

| | | |
|------------|---|----|
| 44AH..... | Commonwealth functions..... | 74 |
| 44AI..... | Commonwealth consent to conferral of functions etc. or AER | 74 |
| 44AIA..... | No merits review of AER decisions..... | 75 |
| 44AJ..... | How duty is imposed..... | 75 |
| 44AK..... | When a State/Territory energy law etc. imposes a duty..... | 77 |
| 44AL..... | Powers of the AER..... | 77 |

Division 4—Administrative provisions relating to the

AER

78

Subdivision A—Appointment etc. of members

78

| | | |
|-----------|--|----|
| 44AM..... | Appointment of Commonwealth AER members..... | 78 |
| 44AO..... | Acting appointment of Commonwealth AER member..... | 78 |

| | | |
|------------|---|----|
| 44AP..... | Appointment of State/Territory AER members..... | 79 |
| 44AQ..... | Acting appointment of State/Territory AER member..... | 79 |
| 44AR..... | AER Chair..... | 80 |
| 44ARA..... | AER Deputy Chair..... | 80 |
| 44ARB..... | AER Deputy Chair to act as the AER Chair..... | 81 |
| 44AS..... | Acting AER Deputy Chair..... | 81 |
| 44AT..... | Remuneration of AER members..... | 82 |
| 44AU..... | Additional remuneration of AER Chair..... | 82 |
| 44AV..... | Leave of absence..... | 82 |
| 44AW..... | Other terms and conditions..... | 83 |
| 44AX..... | Outside employment..... | 83 |
| 44AY..... | Disclosure of interests..... | 83 |
| 44AZ..... | Resignation..... | 84 |
| 44AAB..... | Termination of appointment..... | 84 |

Subdivision B—Staff etc. to assist the

AER 85

| | | |
|------------|-----------------------------------|----|
| 44AAC..... | Staff etc. to assist the AER..... | 85 |
|------------|-----------------------------------|----|

Subdivision C—Meetings of the AER

etc. 85

| | | |
|-------------|-----------------------------------|----|
| 44AAD..... | Meetings..... | 85 |
| 44AAE..... | Resolutions without meetings..... | 86 |
| 44AAEA..... | Arbitration..... | 86 |

Subdivision CA—Divisions of the

AER 87

| | | |
|-------------|--|----|
| 44AAEB..... | Divisions of the AER—functions and powers under a law of the Commonwealth | 87 |
| 44AAEC..... | Divisions of the AER—functions and powers under a State/Territory energy law or a local energy instrument..... | 89 |

Subdivision D—

Miscellaneous

| | | |
|------------|---|----|
| | | 91 |
| 44AAF..... | Confidentiality..... | 91 |
| 44AFA..... | Power of AER to obtain information and documents..... | 93 |
| 44AFB..... | Failure to comply with notice to give information etc. is | |

| | | |
|---|--|-----|
| | an offence | 94 |
| 44AAFC..... | AER may inspect, copy and retain documents..... | |
| | | 95 |
| 44AAG..... | Federal Court may make certain orders..... | 96 |
| 44AAGA..... | Federal Court may order disconnection if an event specified in the National Electricity Rules occurs | 97 |
| 44AAH..... | Delegation by the AER..... | |
| | | 98 |
| 44AAI..... | Fees..... | |
| | | 98 |
| 44AAK..... | Regulations may deal with transitional matters..... | 98 |
| Part IIIAB—Application of the finance law | | |
| | | 100 |
| 44AAL..... | Application of the finance law..... | |
| | | 100 |
| Part IIIA—Access to services | | |
| | | 101 |
| Division 1—Preliminary | | |
| | | 101 |
| 44AA..... | Objects of Part..... | |
| | | 101 |
| 44B..... | Definitions..... | |
| | | 101 |
| 44C..... | How this Part applies to partnerships and joint venture | |
| | | 105 |
| 44CA..... | Meaning of <i>declaration criteria</i> | |
| | | 106 |
| 44D..... | Meaning of <i>designated Minister</i> | |
| | | 107 |
| 44DA..... | The principles in the Competition Principles Agreement have status as guidelines | 108 |
| 44E..... | This Part binds the Crown..... | |
| | | 109 |
| Division 2—Declared services | | |
| | | 110 |
| Subdivision A—Recommendation by the Council | | |
| | | 110 |
| 44F..... | Person may request recommendation..... | |
| | | 110 |
| 44FA..... | Council may request information..... | |
| | | 112 |
| 44G..... | Criteria for the Council recommending declaration of a service | 113 |
| 44GA..... | Time limit for Council recommendations..... | |
| | | 113 |
| 44GB..... | Council may invite public submissions on the application | 115 |
| 44GC..... | Council must publish its recommendation..... | |
| | | 117 |
| Subdivision B—Declaration by the designated Minister | | |
| | | 118 |
| 44H..... | Designated Minister may declare a service..... | |

| | |
|--|---|
| | 118 |
| 44HA..... | Designated Minister must publish his or her decision.... |
| | 118 |
| 44I..... | Duration and effect of declaration..... |
| | 119 |
| 44J..... | Revocation of declaration..... |
| | 120 |
| 44K..... | Review of declaration..... |
| | 121 |
| 44KA..... | Tribunal may stay operation of declaration..... |
| | 122 |
| 44KB..... | Tribunal may order costs be awarded..... |
| | 124 |
| 44L..... | Review of decision not to revoke a declaration..... |
| | 125 |
| Division 2AA—Services that are ineligible to be declared | 127 |
| Subdivision A—Scope of Division | 127 |
| 44LA..... | Constitutional limits on operation of this Division..... |
| | 127 |
| Subdivision B—Ineligibility recommendation by Council | 127 |
| 44LB..... | Ineligibility recommendation..... |
| | 127 |
| 44LC..... | Council may request information..... |
| | 129 |
| 44LD..... | Time limit for Council recommendations..... |
| | 130 |
| 44LE..... | Council may invite public submissions on the application |
| | 132 |
| 44LF..... | Council must publish its recommendation..... |
| | 133 |
| Subdivision C—Designated Minister’s decision on ineligibility | 134 |
| 44LG..... | Designated Minister’s decision on ineligibility..... |
| | 134 |
| 44LH..... | Designated Minister must publish his or her decision.... |
| | 136 |
| Subdivision D—Revocation of ineligibility decision | 136 |
| 44LI..... | Revocation of ineligibility decision..... |
| | 136 |
| Subdivision E—Review of decisions | 138 |
| 44LJ..... | Review of ineligibility decisions..... |
| | 138 |
| 44LK..... | Review of decision to revoke or not revoke an ineligibility decision |
| | 140 |
| Subdivision F—Other matters | |
| | 142 |
| 44LL..... | Ineligibility decisions subject to alteration, cancellation etc. |
| | 142 |
| Division 2A—Effective access regimes | 143 |

Subdivision A—Recommendation by Council

143

44M..... Recommendation for a Ministerial decision on
effectiveness of access regime 143

44MA..... Council may request information.....
144

Subdivision B—Decision by Commonwealth

Minister 144

44N..... Ministerial decision on effectiveness of access regime..
144

**Subdivision C—Extensions of Commonwealth Minister’s
decision** 146

44NA..... Recommendation by Council.....
146

44NAA..... Council may request information.....
147

44NB..... Decision by the Commonwealth Minister.....
147

**Subdivision CA—Revocation of Commonwealth Minister’s
decision** 148

44NBA..... Recommendation by Council.....
148

44NBB..... Council may request information.....
150

44NBC..... Decision by the Commonwealth Minister.....
151

Subdivision D—Procedural provisions

151

44NC..... Time limit for Council recommendations.....
151

44NE..... Council may invite public submissions.....
154

44NF..... Publication—Council.....
156

44NG..... Publication—Commonwealth Minister.....
157

**Subdivision E—Review of
decisions**

158

44O..... Review of Ministerial decision on effectiveness of acces
regime 158

**Subdivision F—State or Territory ceasing to be a party to
Competition Principles Agreement** 159

44P..... State or Territory ceasing to be a party to Competition
Principles Agreement 159

**Division 2B—Competitive tender processes for government
owned facilities** 161

44PA..... Approval of competitive tender process.....
161

44PAA..... Commission may request information.....
162

44PB..... Report on conduct of tender process.....
163

44PC..... Revocation of approval decision.....
163

44PD..... Time limit for Commission decisions.....
165

| | | |
|-----------|---|-----|
| 44PE..... | Commission may invite public submissions..... | 167 |
| 44PF..... | Commission must publish its decisions..... | 168 |
| 44PG..... | Review of Commission's initial decision..... | 169 |
| 44PH..... | Review of decision to revoke an approval..... | 171 |

Division 2C—Register of decisions and declarations

173

| | | |
|----------|---|-----|
| 44Q..... | Register of decisions, declarations and ineligibility decisions | 173 |
|----------|---|-----|

Division 3—Access to declared services

174

Subdivision A—Scope of Division

174

| | | |
|----------|--|-----|
| 44R..... | Constitutional limits on operation of this Division..... | 174 |
|----------|--|-----|

Subdivision B—Notification of access disputes

174

| | | |
|----------|--------------------------------------|-----|
| 44S..... | Notification of access disputes..... | 174 |
| 44T..... | Withdrawal of notifications..... | 175 |

Subdivision C—Arbitration of access disputes

175

| | | |
|-----------|--|-----|
| 44U..... | Parties to the arbitration..... | 175 |
| 44V..... | Determination by Commission..... | 175 |
| 44W..... | Restrictions on access determinations..... | 177 |
| 44X..... | Matters that the Commission must take into account.... | 179 |
| 44XA..... | Time limit for Commission's final determination..... | 180 |
| 44Y..... | Commission may terminate arbitration in certain cases. | 181 |
| 44YA..... | Commission must terminate arbitration if declaration varied or set aside by Tribunal | 182 |

Subdivision D—Procedure in arbitrations

182

| | | |
|-----------|---|-----|
| 44Z..... | Constitution of Commission for conduct of arbitration.. | 182 |
| 44ZA..... | Member of the Commission presiding at an arbitration.. | 182 |
| 44ZB..... | Reconstitution of Commission..... | 183 |
| 44ZC..... | Determination of questions..... | 183 |
| 44ZD..... | Hearing to be in private..... | 183 |
| 44ZE..... | Right to representation..... | 184 |
| 44ZF..... | Procedure of Commission..... | |

| | | |
|------------|--|-----|
| 44ZG..... | Particular powers of Commission..... | 185 |
| 44ZH..... | Power to take evidence on oath or affirmation..... | 186 |
| 44ZI..... | Failing to attend as a witness..... | 186 |
| 44ZJ..... | Failing to answer questions etc..... | 186 |
| 44ZK..... | Intimidation etc..... | 187 |
| 44ZL..... | Party may request Commission to treat material as confidential | 187 |
| 44ZM..... | Sections 18 and 19 do not apply to the Commission in a arbitration | 188 |
| 44ZN..... | Parties to pay costs of an arbitration..... | 188 |
| 44ZNA..... | Joint arbitration hearings..... | 188 |

Subdivision DA—Arbitration reports

| | | |
|------------|--------------------------|-----|
| 44ZNB..... | Arbitration reports..... | 190 |
|------------|--------------------------|-----|

Subdivision E—Effect of determinations

| | | |
|------------|--|-----|
| 44ZO..... | Operation of final determinations..... | 192 |
| 44ZOA..... | Effect and duration of interim determinations..... | 193 |

Subdivision F—Review of final determinations

| | | |
|-----------|---|-----|
| 44ZP..... | Review by Tribunal..... | 194 |
| 44ZQ..... | Provisions that do not apply in relation to a Tribunal review | 195 |
| 44ZR..... | Appeals to Federal Court from determinations of the Tribunal | 195 |
| 44ZS..... | Operation and implementation of a determination that is subject to appeal | 196 |
| 44ZT..... | Transmission of documents..... | 197 |

Subdivision G—Variation and revocation of determinations

| | | |
|------------|---|-----|
| 44ZU..... | Variation of final determinations..... | 197 |
| 44ZUA..... | Variation and revocation of interim determinations..... | 197 |

Division 4—Registered contracts for access to declared services

| | | |
|-----------|--|-----|
| 44ZV..... | Constitutional limits on operation of this Division..... | 198 |
| 44ZW..... | Registration of contract..... | 198 |
| 44ZX..... | Review of decision not to register contract..... | 199 |
| 44ZY..... | Effect of registration of contract..... | |

Division 5—Hindering access to declared services

201

44ZZ..... Prohibition on hindering access to declared services....

201

Division 6—Access undertakings and access codes for services

202

Subdivision A—Giving of access undertakings and access codes

202

44ZZA..... Access undertakings by providers.....

202

44ZZAAA..... Proposed amendments to access undertakings.....

204

44ZZAAB..... Access undertakings containing fixed principles.....

206

44ZZAA..... Access codes prepared by industry bodies.....

208

44ZZAB..... Commission may rely on industry body consultations...

210

Subdivision B—Effect of access undertakings and access codes

211

44ZZBA..... When access undertakings and access codes come into
operation

211

Subdivision C—Extensions of access undertakings and access codes

212

44ZZBB..... Extensions of access undertakings and access codes.....

212

Subdivision D—Procedural provisions

214

44ZZBC..... Time limit for Commission decisions.....

214

44ZZBCA..... Commission may request information.....

216

44ZZBD..... Commission may invite public submissions.....

217

44ZZBE..... Commission must publish its decisions.....

218

Subdivision E—Review of decisions

219

44ZZBF..... Review of decisions.....

219

Subdivision F—Register of access undertakings and access codes

221

44ZZC..... Register of access undertakings and access codes.....

221

Division 6A—Pricing principles for access disputes and access undertakings or codes

222

44ZZCA..... Pricing principles for access disputes and access
undertakings or codes

222

Division 6B—Overlap among determinations, registered contracts, access undertakings and Tribunal review

223

44ZZCB..... Deferring access disputes or access undertakings.....

223

| | | |
|--------------|--|-----|
| 44ZZCBA..... | Deferral of arbitration if review is underway..... | 225 |
| 44ZZCC..... | Overlap between determinations and access undertakings | 226 |
| 44ZZCD..... | Overlap between registered contracts and access undertakings | 226 |

Division 7—Enforcement and remedies

228

| | | |
|------------|--|-----|
| 44ZZD..... | Enforcement of determinations..... | 228 |
| 44ZZE..... | Enforcement of prohibition on hindering access..... | 229 |
| 44ZZF..... | Consent injunctions..... | 230 |
| 44ZZG..... | Interim injunctions..... | 230 |
| 44ZZH..... | Factors relevant to granting a restraining injunction..... | 230 |
| 44ZZI..... | Factors relevant to granting a mandatory injunction..... | 230 |
| 44ZZJ..... | Enforcement of access undertakings..... | 231 |
| 44ZZK..... | Discharge or variation of injunction or other order..... | 231 |

Division 8—

Miscellaneous

232

| | | |
|---------------|--|-----|
| 44ZZL..... | Register of determinations..... | 232 |
| 44ZZM..... | Commonwealth consent to conferral of functions etc. or the Commission or Tribunal by State or Territory laws..... | 232 |
| 44ZZMAA..... | No merits review by Tribunal of decisions under energy laws | 233 |
| 44ZZMA..... | How duty is imposed..... | 233 |
| 44ZZMB..... | When a law of a State or Territory imposes a duty..... | 234 |
| 44ZZN..... | Compensation for acquisition of property..... | 235 |
| 44ZZNA..... | Operation of Parts IV and VII not affected by this Part.. | 235 |
| 44ZZO..... | Conduct by directors, servants or agents..... | 235 |
| 44ZZOAAA..... | Information to be given to Tribunal..... | 237 |
| 44ZZOAA..... | Tribunal only to consider particular material..... | 239 |
| 44ZZOA..... | Time limit for Tribunal decisions..... | 240 |
| 44ZZP..... | Regulations about review by the Tribunal..... | 243 |
| 44ZZQ..... | Regulations about fees for inspection etc. of registers... | 243 |
| 44ZZR..... | Procedure of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law | 243 |

Part IV—Restrictive trade practices

245

Division 1—Cartel conduct

245

Subdivision A—

Introduction

245

45AA..... Simplified outline.....

245

45AB..... Definitions.....

245

45AC..... Extended meaning of *party*.....

247

45AD..... Cartel provisions.....

247

45AE..... Meaning of expressions in other provisions of this Act.

253

Subdivision B—Offences

etc.

254

45AF..... Making a contract etc. containing a cartel provision.....

254

45AG..... Giving effect to a cartel provision.....

255

45AH..... Determining guilt.....

256

45AI..... Court may make related civil orders.....

256

Subdivision C—Civil penalty provisions

256

45AJ..... Making a contract etc. containing a cartel
provision..... 256

45AK..... Giving effect to a cartel provision.....

257

Subdivision D—

Exceptions

257

45AL..... Conduct notified.....

257

45AM..... Cartel provision subject to grant of authorisation.....

258

45AN..... Contracts, arrangements or understandings between
related bodies corporate 258

45AO..... Joint ventures—prosecution.....

259

45AP..... Joint ventures—civil penalty proceedings.....

260

45AQ..... Resale price maintenance.....

261

45AR..... Exclusive dealing.....

261

45AS..... Dual listed company arrangement.....

262

45AT..... Acquisition of shares or assets.....

263

45AU..... Collective acquisition of goods or services by the parties

Division 2—Other**provisions 265**

| | | |
|------------|--|-----|
| 45..... | Contracts, arrangements or understandings that restrict dealings or affect competition | 265 |
| 45D..... | Secondary boycotts for the purpose of causing substantial loss or damage | 269 |
| 45DA..... | Secondary boycotts for the purpose of causing substantial lessening of competition | 270 |
| 45DB..... | Boycotts affecting trade or commerce..... | 270 |
| 45DC..... | Involvement and liability of employee organisations..... | 271 |
| 45DD..... | Situations in which boycotts permitted..... | 273 |
| 45E..... | Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services..... | 277 |
| 45EA..... | Provisions contravening section 45E not to be given effect | 280 |
| 45EB..... | Sections 45D to 45EA do not affect operation of other provisions of Part | 281 |
| 46..... | Misuse of market power..... | 281 |
| 46A..... | Misuse of market power—corporation with substantial degree of power in trans-Tasman market | 283 |
| 46B..... | No immunity from jurisdiction in relation to certain New Zealand laws | 285 |
| 47..... | Exclusive dealing..... | 286 |
| 48..... | Resale price maintenance..... | 292 |
| 49..... | Dual listed company arrangements that affect competition | 293 |
| 50..... | Prohibition of acquisitions that would result in a substantial lessening of competition | 294 |
| 50A..... | Acquisitions that occur outside Australia..... | 296 |
| 51..... | Exceptions..... | 299 |
| 51AAA..... | Concurrent operation of State and Territory laws..... | 303 |

Part IVB—Industry**codes 304****Division 1—****Preliminary**

304

| | | |
|------------|------------------|-----|
| 51ACA..... | Definitions..... | 304 |
|------------|------------------|-----|

Division 2—Contravention of industry**codes 306**

| | | |
|------------|--------------------------------------|-----|
| 51ACB..... | Contravention of industry codes..... | 306 |
|------------|--------------------------------------|-----|

Division 2A—Infringement**notices 307**

| | |
|---|-----|
| 51ACC..... Purpose and effect of this Division..... | 307 |
| 51ACD..... Issuing an infringement notice..... | 307 |
| 51ACE..... Matters to be included in an infringement notice..... | 308 |
| 51ACF..... Amount of penalty..... | 308 |
| 51ACG..... Effect of compliance with an infringement notice..... | 309 |
| 51ACH..... Effect of failure to comply with an infringement notice.. | 309 |
| 51ACI..... Infringement notice compliance period for infringement notice | 310 |
| 51ACJ..... Withdrawal of an infringement notice..... | 310 |

Division 3—Public warning notices

313

| | |
|--|-----|
| 51ADA..... Commission may issue a public warning notice..... | 313 |
|--|-----|

Division 4—Orders to redress loss or damage suffered by non-parties etc.

314

| | |
|---|-----|
| 51ADB..... Orders to redress loss or damage suffered by non-parties etc. | 314 |
| 51ADC..... Kinds of orders that may be made to redress loss or damage suffered by non-parties etc. | 316 |

Division 5—Investigation power

318

| | |
|---|-----|
| 51ADD..... Commission may require corporation to provide information | 318 |
| 51ADE..... Extending periods for complying with notices..... | 318 |
| 51ADF..... Compliance with notices..... | 319 |
| 51ADG..... False or misleading information etc..... | 319 |

Division 6— Miscellaneous

320

| | |
|--|-----|
| 51AE..... Regulations relating to industry codes..... | 320 |
| 51AEA..... Concurrent operation of State and Territory laws..... | 320 |

Part IVC—Payment surcharges

321

Division 1— Preliminary

321

| | |
|----------------------------------|-----|
| 55..... Object of this Part..... | 321 |
| 55A..... Definitions..... | 321 |

Division 2—Limit on payment surcharges

323

| | |
|--|--|
| 55B..... Payment surcharges must not be excessive..... | |
|--|--|

Division 3—Information about payment**surcharges**

324

55C..... Surcharge information notices.....

324

55D..... Extending periods for complying with notices.....

324

55E..... Participant must comply with notice.....

325

Division 4—Infringement**notices**

326

55F..... Purpose and effect of this Division.....

326

55G..... Issuing an infringement notice.....

326

55H..... Matters to be included in an infringement

notice..... 327

55J..... Amount of penalty.....

327

55K..... Effect of compliance with an infringement notice.....

327

55L..... Effect of failure to comply with an infringement notice.

328

55M..... Infringement notice compliance period for infringement

notice 328

55N..... Withdrawal of an infringement notice.....

329

Part IVD—Consumer data**right**

331

Division 1—**Preliminary**

331

Subdivision A—Object and simplified**outline**

331

56AA..... Object of this Part.....

331

56AB..... Simplified outline.....

331

Subdivision B—Designating sectors subject to the consumer data**right**

332

56AC..... Designated sectors subject to the consumer data

right.... 332

56AD..... Minister's tasks before designating a sector etc.....

334

56AE..... Commission must analyse, consult and report about an

instrument proposing to designate a sector 336

56AF..... Information Commissioner must analyse and report

about an instrument proposing to designate a

sector.....

336

56AG..... Commission may recommend that a sector be designate

etc. 337

56AH..... Other matters.....

338

Subdivision C—Meanings of key

| | | |
|-----------|--|-----|
| 56AI..... | Meanings of <i>CDR data, directly or indirectly derived and CDR consumer</i> | 338 |
| 56AJ..... | Meaning of <i>data holder</i> | 339 |
| 56AK..... | Meaning of <i>accredited data recipient</i> | 341 |
| 56AL..... | Meanings of <i>CDR participant and designated gateway</i> .. | 341 |
| 56AM..... | Meanings of <i>chargeable CDR data, chargeable circumstances and fee-free CDR data</i> | 342 |

Subdivision D—Extension to external Territories and extraterritorial operation 343

| | | |
|-----------|---|-----|
| 56AN..... | Extension to external Territories..... | 343 |
| 56AO..... | Extraterritorial operation of the CDR provisions..... | 343 |
| 56AP..... | Geographical application of offences..... | 345 |

Subdivision E—Application to government entities 345

| | | |
|-----------|---|-----|
| 56AQ..... | CDR provisions bind the Crown..... | 345 |
| 56AR..... | Government entities may participate under this Part..... | 345 |
| 56AS..... | Participating government entities of a State or Territory—declaration | 347 |
| 56AT..... | Participating government entities of a State or Territory—revocation | 347 |

Division 2—Consumer data right 349

Subdivision A—Power to make consumer data rules 349

| | | |
|------------|---|-----|
| 56BA..... | Commission may make consumer data rules..... | 349 |
| 56BAA..... | Rules must include requirement to delete CDR data on request from CDR consumer | 349 |
| 56BB..... | Matters that the consumer data rules may deal with..... | 351 |
| 56BC..... | Rules about disclosure, collection, use, accuracy, storage, security or deletion of CDR data for which there are CDR consumers..... | 351 |
| 56BD..... | Limitations for rules about CDR data for which there are CDR consumers | 353 |
| 56BE..... | Rules about disclosure, collection, use, accuracy, storage, security or deletion of product data | 355 |
| 56BF..... | Limitations for rules about product data..... | 355 |
| 56BG..... | Rules about designated gateways..... | 356 |
| 56BH..... | Rules about accreditation of data recipients..... | 358 |
| 56BI..... | Rules about reporting, record keeping and auditing..... | 360 |
| 56BJ..... | Rules about incidental or related | 361 |

| | |
|---|-----|
| matters..... | 361 |
| 56BK..... Further limitations on the consumer data rules..... | 362 |
| Subdivision B—Compliance with consumer data rules | 364 |
| 56BL..... Obligation to comply with consumer data rules..... | 364 |
| 56BM..... Infringement notices..... | 364 |
| 56BN..... Misleading or deceptive conduct—offence..... | 365 |
| 56BO..... Misleading or deceptive conduct—civil penalty..... | 366 |
| Subdivision C—Process for making consumer data rules etc. | 367 |
| 56BP..... Matters to which Commission must have regard when making the rules | 367 |
| 56BQ..... Commission to consult before making the rules..... | 367 |
| 56BR..... Ministerial consent to rules required..... | 368 |
| 56BS..... Emergency rules: usual consultation and consent not required | 368 |
| 56BT..... Emergency rules: consequences if made..... | 368 |
| Subdivision D—Fees for disclosing CDR data | 369 |
| 56BU..... Charging a fee in inappropriate circumstances when required to disclose CDR data | 369 |
| 56BV..... Commission may intervene if fee for disclosing or using chargeable CDR data is unreasonable etc. | 370 |
| 56BW..... Review by the Tribunal of determinations specifying particular CDR participants | 372 |
| 56BX..... Functions and powers of Tribunal..... | 372 |
| 56BY..... Provisions that do not apply in relation to a Tribunal review | 373 |
| Division 3—Accreditation etc. | 374 |
| Subdivision A—Accreditation process | 374 |
| 56CA..... Granting accreditations..... | 374 |
| 56CB..... Review of decisions refusing to accredit..... | 374 |
| 56CC..... Prohibition on holding out—offence..... | 374 |
| 56CD..... Prohibition on holding out—civil penalty..... | 375 |
| Subdivision B—Register of Accredited Persons | 376 |
| 56CE..... Register of Accredited Persons..... | 376 |
| 56CF..... Evidentiary value of the register..... | 376 |
| Subdivision C—Data Recipient Accreditor | |

| | | |
|-----------|---|-----|
| 56CG..... | Appointment of the Data Recipient Accreditor..... | 376 |
| 56CH..... | Functions, powers and annual report..... | 377 |
| 56CI..... | Directions by Minister..... | 378 |
| 56CJ..... | Delegation..... | 378 |

Subdivision D—Accreditation

Registrar 379

| | | |
|-----------|---|-----|
| 56CK..... | Appointment of the Accreditation Registrar..... | 379 |
| 56CL..... | Functions, powers and annual report..... | 379 |
| 56CM..... | Directions by Minister..... | 380 |
| 56CN..... | Delegation..... | 381 |

Division 4—External dispute resolution

382

| | | |
|-----------|--|-----|
| 56DA..... | Commission may recognise external dispute resolution schemes | 382 |
|-----------|--|-----|

Division 5—Privacy safeguards

384

Subdivision A—Preliminary

384

| | | |
|-----------|---|-----|
| 56EA..... | Simplified outline..... | 384 |
| 56EB..... | Kinds of CDR data to which the privacy safeguards apply | 384 |
| 56EC..... | Relationship with other laws..... | 385 |

Subdivision B—Consideration of CDR data privacy

386

| | | |
|-----------|---|-----|
| 56ED..... | Privacy safeguard 1—open and transparent management of CDR data | 386 |
| 56EE..... | Privacy safeguard 2—anonymity and pseudonymity..... | 389 |

Subdivision C—Collecting CDR data

389

| | | |
|-----------|---|-----|
| 56EF..... | Privacy safeguard 3—soliciting CDR data from CDR participants | 389 |
| 56EG..... | Privacy safeguard 4—dealing with unsolicited CDR data from CDR participants | 390 |
| 56EH..... | Privacy safeguard 5—notifying of the collection of CDR data | 390 |

Subdivision D—Dealing with CDR data

391

| | | |
|-----------|---|-----|
| 56EI..... | Privacy safeguard 6—use or disclosure of CDR data by accredited data recipients or designated gateways..... | 391 |
| 56EJ..... | Privacy safeguard 7—use or disclosure of CDR data for direct marketing by accredited data recipients or designated gateways | 391 |

| | |
|---|-----|
| designated gateways..... | 392 |
| 56EK..... Privacy safeguard 8—overseas disclosure of CDR data by accredited data recipients | 393 |
| 56EL..... Privacy safeguard 9—adoption or disclosure of government related identifiers by accredited data recipients..... | 394 |
| 56EM..... Privacy safeguard 10—notifying of the disclosure of CDR data | 395 |
| Subdivision E—Integrity of CDR data | |
| | 396 |
| 56EN..... Privacy safeguard 11—quality of CDR data..... | 396 |
| 56EO..... Privacy safeguard 12—security of CDR data, and destruction or de-identification of redundant CDR data..... | 398 |
| Subdivision F—Correction of CDR data | |
| | 399 |
| 56EP..... Privacy safeguard 13—correction of CDR data..... | 399 |
| Subdivision G—Compliance with the privacy safeguards | |
| | 400 |
| 56EQ..... Information Commissioner to promote compliance etc.. | 400 |
| 56ER..... Information Commissioner may conduct an assessment relating to the management and handling of CDR data..... | 401 |
| 56ES..... Notification of CDR data security breaches..... | 402 |
| 56ET..... Investigating breaches of the privacy safeguards etc..... | 403 |
| 56EU..... Civil penalty provisions..... | 406 |
| 56EV..... Civil penalty provisions—maximum amount of penalty. | 408 |
| 56EW..... Enforceable undertakings..... | 409 |
| 56EX..... Injunctions..... | 410 |
| 56EY..... Actions for damages..... | 410 |
| 56EZ..... Delegation to the Commission etc..... | 412 |
| Division 6—Data standards | |
| etc. | 414 |
| Subdivision A—Data | |
| standards | 414 |
| 56FA..... Making data standards..... | 414 |
| 56FB..... What data standards can set out etc..... | 415 |
| 56FC..... Data standards must be published..... | 415 |
| 56FD..... Legal effect of data standards..... | 415 |

| | | |
|-----------|--|-----|
| 56FE..... | Enforcement of binding data standards..... | 416 |
|-----------|--|-----|

Subdivision B—Data Standards Chair

| | | |
|-----------|---|-----|
| 56FF..... | Data Standards Chair..... | 417 |
| 56FG..... | Appointment of the Data Standards Chair..... | 417 |
| 56FH..... | Functions and powers of the Data Standards Chair..... | 417 |
| 56FI..... | Directions by Minister..... | 418 |

Subdivision C—Data Standards Body

| | | |
|-----------|---|-----|
| 56FJ..... | Appointment of the Data Standards Body..... | 418 |
| 56FK..... | Function and powers of the Data Standards Body..... | 419 |

Subdivision D—Administrative provisions

| | | |
|-----------|---|-----|
| 56FL..... | Acting appointments..... | 419 |
| 56FM..... | Terms and conditions..... | 420 |
| 56FN..... | Remuneration..... | 420 |
| 56FO..... | Leave..... | 420 |
| 56FP..... | Application of the finance law etc..... | 421 |
| 56FQ..... | Resignation..... | 421 |
| 56FR..... | Termination of appointment..... | 422 |
| 56FS..... | Delegation..... | 422 |

Division 7—Other matters

| | | |
|-----------|---|-----|
| 56GA..... | CDR functions of the Information Commissioner..... | 424 |
| 56GB..... | Referring to instruments as in force from time to time.. | 424 |
| 56GC..... | Complying with requirements to provide CDR data: protection from liability | 425 |
| 56GD..... | Exemptions by the Commission..... | 425 |
| 56GE..... | Exemptions and modifications by regulations..... | 426 |
| 56GF..... | Constitutional basis..... | 427 |
| 56GG..... | Compensation for acquisition of property..... | 429 |
| 56GH..... | Review of the operation of this Part..... | 429 |

Part V—Carbon tax price reduction

Division 1—**Preliminary**

431

| | | |
|-----------|--------------------------------------|-----|
| 60..... | Simplified outline of this Part..... | 431 |
| 60AA..... | Objects etc..... | 432 |
| 60A..... | Definitions..... | 433 |
| 60B..... | Regulated goods..... | 438 |

Division 2—Carbon tax price reduction**obligation**

439

| | | |
|-----------|---|-----|
| 60C..... | Price exploitation in relation to the carbon tax repeal..... | 439 |
| 60CA..... | Failure to pass on cost savings—250% penalty..... | 439 |
| 60D..... | Notice to entity that is considered to have engaged in price exploitation in relation to the carbon tax repeal..... | 441 |
| 60E..... | Commission may issue notice to aid prevention of price exploitation in relation to the carbon tax repeal..... | 442 |
| 60F..... | Acquisition of property..... | 443 |

Division 2A—Carbon tax removal substantiation**notices**

444

| | | |
|-----------|---|-----|
| 60FA..... | Carbon tax removal substantiation notices..... | 444 |
| 60FB..... | Extending periods for complying with carbon tax removal substantiation notices | 445 |
| 60FC..... | Compliance with carbon tax removal substantiation notices | 445 |

Division 2B—Carbon tax removal substantiation**statements**

447

| | | |
|-----------|--|-----|
| 60FD..... | Carbon tax removal substantiation statements..... | 447 |
|-----------|--|-----|

Division 2C—Statements for**customers**

450

| | | |
|-----------|-------------------------------|-----|
| 60FE..... | Statements for customers..... | 450 |
|-----------|-------------------------------|-----|

**Division 3—Price monitoring in relation to the carbon tax
repeal etc.**

| | | |
|----------|--|-----|
| 60G..... | Commission may monitor prices in relation to the carbon tax repeal etc. | 452 |
| 60H..... | Information-gathering powers..... | 454 |
| 60J..... | Reporting..... | 456 |

**Division 4—False or misleading representations about the
effect of the carbon tax repeal etc. on
prices**

457

| | | |
|----------|--|-----|
| 60K..... | False or misleading representations about the effect of the carbon tax repeal etc. on prices | 457 |
|----------|--|-----|

Division 5—Infringement

| | |
|----------------|-----|
| notices | 458 |
|----------------|-----|

| | | |
|----------|---|-----|
| 60L..... | Issuing an infringement notice..... | 458 |
| 60M..... | Effect of compliance with an infringement notice..... | 459 |
| 60N..... | Effect of failure to comply with an infringement notice.. | 460 |
| 60P..... | Infringement notice compliance period for infringement notice | 460 |
| 60Q..... | Withdrawal of an infringement notice..... | 461 |
| 60R..... | Effect of this Division..... | 462 |

Part VI—Enforcement and

| | |
|-----------------|-----|
| remedies | 464 |
|-----------------|-----|

| | | |
|-----------|---|-----|
| 75B..... | Interpretation..... | 464 |
| 76..... | Pecuniary penalties..... | 464 |
| 76A..... | Defence to proceedings under section 76 relating to a contravention of section 92 | 468 |
| 76B..... | Consequences in some cases if substantially the same conduct contravenes a provision of this Act and is an offence..... | 469 |
| 77..... | Civil action for recovery of pecuniary penalties..... | 471 |
| 77A..... | Indemnification of officers..... | 471 |
| 77B..... | Certain indemnities not authorised and certain documents void | 472 |
| 77C..... | Application of section 77A to a person other than a body corporate | 472 |
| 78..... | Criminal proceedings not to be brought for contraventions of Part IV | 472 |
| 79..... | Offences against section 45AF or 45AG..... | 473 |
| 79A..... | Enforcement and recovery of certain fines..... | 474 |
| 79B..... | Preference must be given to compensation for victims.. | 476 |
| 80..... | Injunctions..... | 477 |
| 80A..... | Price exploitation in relation to the carbon tax repeal—orders limiting prices or requiring refunds of money..... | 480 |
| 80AB..... | Stay of injunctions..... | 480 |
| 80AC..... | Injunctions to prevent mergers if authorisation granted on the basis of false or misleading information | 482 |
| 81..... | Divestiture where merger contravenes section 50 or 50A | 482 |
| 81A..... | Divestiture where merger done under authorisation | |

| | | |
|-----------|---|-----|
| | granted on false etc. information | 484 |
| 82..... | Actions for damages..... | |
| | 486 | |
| 83..... | Findings and admissions of fact in proceedings to be evidence | 487 |
| 84..... | Conduct by directors, employees or agents..... | |
| | 488 | |
| 85..... | Defences..... | |
| | 490 | |
| 86..... | Jurisdiction of courts..... | |
| | 491 | |
| 86AA..... | Limit on jurisdiction of Federal Circuit Court..... | |
| | 492 | |
| 86A..... | Transfer of matters..... | |
| | 492 | |
| 86C..... | Non-punitive orders..... | |
| | 493 | |
| 86D..... | Punitive orders—adverse publicity..... | |
| | 495 | |
| 86E..... | Order disqualifying a person from managing corporations | 496 |
| 86F..... | Privilege against exposure to penalty—disqualification from managing corporations | 498 |
| 87..... | Other orders..... | |
| | 499 | |
| 87AA..... | Special provision relating to Court’s exercise of powers under this Part in relation to boycott conduct | 503 |
| 87B..... | Enforcement of undertakings..... | |
| | 504 | |
| 87C..... | Enforcement of undertakings—Secretary of the Department | 505 |
| 87CA..... | Intervention by Commission..... | |
| | 506 | |

Part VIA—Proportionate liability for misleading and deceptive conduct

| | |
|-----------|---|
| | 507 |
| 87CB..... | Application of Part..... |
| | 507 |
| 87CC..... | Certain concurrent wrongdoers not to have benefit of apportionment |
| | 507 |
| 87CD..... | Proportionate liability for apportionable claims..... |
| | 508 |
| 87CE..... | Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware |
| | 509 |
| 87CF..... | Contribution not recoverable from defendant..... |
| | 510 |
| 87CG..... | Subsequent actions..... |
| | 510 |
| 87CH..... | Joining non-party concurrent wrongdoer in the action.. |
| | 510 |
| 87CI..... | Application of Part..... |
| | 510 |

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

Division 1—

Introduction

| | |
|---|-----|
| | 512 |
| 87D..... Definitions..... | |
| | 512 |
| 87E..... Proceedings to which this Part applies..... | |
| | 514 |
| Division 2—Limitation periods | 515 |
| 87F..... Basic rule..... | |
| | 515 |
| 87G..... Date of discoverability..... | |
| | 516 |
| 87H..... Long-stop period..... | |
| | 518 |
| 87J..... The effect of minority or incapacity..... | |
| | 518 |
| 87K..... The effect of close relationships..... | |
| | 519 |
| Division 3—Limits on personal injury damages for non-economic loss | 520 |
| 87L..... Limits on damages for non-economic loss..... | |
| | 520 |
| 87M..... Maximum amount of damages for non-economic loss... | |
| | 520 |
| 87N..... Index numbers..... | |
| | 521 |
| 87P..... Most extreme cases..... | |
| | 521 |
| 87Q..... Cases of 33% or more (but not 100%) of a most extreme case | 522 |
| 87R..... Cases of 15% or more (but less than 33%) of a most extreme case | 522 |
| 87S..... Cases of less than 15% of a most extreme case..... | |
| | 523 |
| 87T..... Referring to earlier decisions on non-economic loss..... | |
| | 523 |
| Division 4—Limits on personal injury damages for loss of earning capacity | 524 |
| 87U..... Personal injury damages for loss of earning capacity..... | |
| | 524 |
| 87V..... Average weekly earnings..... | |
| | 524 |
| Division 5—Limits on personal injury damages for gratuitous attendant care services | 526 |
| 87W..... Personal injury damages for gratuitous attendant care services for plaintiff | 526 |
| 87X..... Personal injury damages for loss of plaintiff's capacity to provide gratuitous attendant care services | 527 |
| Division 6—Other limits on personal injury damages | 529 |
| 87Y..... Damages for future economic loss—discount rate..... | |
| | 529 |
| 87Z..... Damages for loss of superannuation entitlements..... | |
| | 529 |
| 87ZA..... Interest on damages..... | |
| | 530 |
| 87ZB..... Exemplary and aggravated damages..... | |

Division 7—Structured settlements

532

87ZC..... Court may make orders under section 87 for structured settlements 532

Part VII—Authorisations and notifications

533

Division 1—

Authorisations

533

87ZP..... Definitions..... 533

88..... Commission may grant authorisations..... 533

89..... Procedure for applications and the keeping of a register. 535

90..... Determination of applications for authorisations..... 538

90A..... Commission to afford opportunity for conference before determining application for authorisation 543

90B..... Commission may rely on consultations undertaken by the AEMC 547

91..... Grant and variation of authorisations..... 548

91A..... Minor variations of authorizations..... 550

91B..... Revocation of an authorization..... 553

91C..... Revocation of an authorization and substitution of a replacement 555

92..... Providing false or misleading information..... 558

Division 2—

Notifications

560

Subdivision A—Exclusive dealing and resale price maintenance

560

93..... Notification of exclusive dealing or resale price maintenance.. 560

93AAA..... Imposing conditions relating to notifications..... 566

Subdivision B—Collective bargaining

567

93AA..... Definitions..... 567

93AB..... Notification of collective bargaining..... 567

93AC..... Commission's objection notice..... 572

93ACA..... Imposing conditions relating to collective boycott conduct 574

93AD..... When collective bargaining notice comes into force and ceases to be in force 575

93AE..... Withdrawal of collective bargaining notice..... 578

93AF..... Collection of bargaining costs by the Commission

| | | |
|------------|--|-----|
| 93AEA..... | Only 1 collective bargaining notice under subsection 93AB(1A) may be given | 578 |
| 93AF..... | Only 1 collective bargaining notice under subsection 93AB(1) may be given | 579 |
| 93AG..... | Stop notice for collective boycott conduct..... | 579 |

Subdivision C—Conferences

| | | |
|----------|--|-----|
| 93A..... | Commission to afford opportunity for conference before giving notice | 581 |
|----------|--|-----|

Subdivision D—Register of notifications

| | | |
|---------|--------------------------------|-----|
| 95..... | Register of notifications..... | 584 |
|---------|--------------------------------|-----|

Division 3—Class exemptions

| | | |
|-----------|---|-----|
| 95AA..... | Commission may determine class exemptions..... | 588 |
| 95AB..... | Commission may withdraw the benefit of class exemption in particular case | 589 |

Part VIIA—Prices surveillance

Division 1—Preliminary

| | | |
|----------|---------------------------------------|-----|
| 95A..... | Interpretation..... | 591 |
| 95B..... | Exempt supplies..... | 595 |
| 95C..... | Application of Part..... | 595 |
| 95D..... | Crown to be bound..... | 596 |
| 95E..... | Object of this Part..... | 596 |
| 95F..... | Simplified overview of this Part..... | 597 |

Division 2—Commission’s functions under this Part

| | | |
|----------|---|-----|
| 95G..... | Commission’s functions under this Part..... | 598 |
|----------|---|-----|

Division 3—Price inquiries

Subdivision A—Holding of inquiries

| | | |
|----------|---|-----|
| 95H..... | Price inquiries..... | 600 |
| 95J..... | Content of inquiry notices..... | 601 |
| 95K..... | Period for completing inquiry..... | 602 |
| 95L..... | Notice of holding of inquiry..... | 603 |
| 95M..... | Notice of extension of period for completing inquiry..... | 603 |
| 95N..... | Price restrictions | |

| | | |
|---|---|-----|
| 95N..... | Price restrictions..... | 604 |
| Subdivision B—Reports on inquiries | | |
| 95P..... | Copies of report to be made available..... | 606 |
| 95Q..... | Notification of proposed prices after receipt of report... | 607 |
| Subdivision C—Procedure at inquiries | | |
| 95R..... | Public inquiries etc..... | 608 |
| 95S..... | Taking of evidence on oath or affirmation..... | 609 |
| 95T..... | Failure of witness to attend..... | 610 |
| 95U..... | Refusal to be sworn or to answer question..... | 610 |
| 95V..... | Protection of witnesses..... | 611 |
| 95W..... | Allowances to witnesses..... | 611 |
| Division 4—Price notifications | | |
| 95X..... | Declarations by Minister or Commission..... | 613 |
| 95Y..... | Declarations in relation to State or Territory authorities.. | 613 |
| 95Z..... | Price restrictions..... | 615 |
| 95ZA..... | Later notices modifying a locality notice..... | 618 |
| 95ZB..... | Applicable period in relation to a locality notice..... | 618 |
| 95ZC..... | Register of price notifications..... | 619 |
| 95ZD..... | Delegation by Commission..... | 621 |
| Division 5—Price monitoring | | |
| 95ZE..... | Directions to monitor prices, costs and profits of an industry | 622 |
| 95ZF..... | Directions to monitor prices, costs and profits of a business | 622 |
| 95ZG..... | Exceptions to price monitoring..... | 623 |
| Division 6—Other provisions | | |
| 95ZH..... | Ministerial directions..... | 624 |
| 95ZI..... | Inquiries by an unincorporated body or a group of 2 or more individuals | 624 |
| 95ZJ..... | Withdrawal of notices..... | 625 |
| 95ZK..... | Power to obtain information or documents..... | 625 |

| | | |
|------------|---|-----|
| 95ZL..... | Inspection of documents etc..... | |
| | | 628 |
| 95ZM..... | Retention of documents..... | |
| | | 629 |
| 95ZN..... | Confidential information..... | |
| | | 629 |
| 95ZO..... | Immunity..... | |
| | | 630 |
| 95ZP..... | Secrecy: members or staff members of the Commission etc. | 631 |
| 95ZPA..... | Disclosure of protected information to the Energy Department | 632 |
| 95ZQ..... | Secrecy: persons involved in inquiries by bodies other than the Commission | 634 |

Part VIII—Resale price maintenance

636

| | | |
|----------|--|-----|
| 96..... | Acts constituting engaging in resale price maintenance... | 636 |
| 96A..... | Resale price maintenance in relation to services..... | 639 |
| 97..... | Recommended prices..... | 639 |
| 98..... | Withholding the supply of goods..... | 639 |
| 99..... | Statements as to the minimum price of goods..... | 640 |
| 100..... | Evidentiary provisions..... | 641 |

Part IX—Review by Tribunal of Determinations of Commission

643

Division 1—Applications for review

643

| | | |
|-----------|---|-----|
| 101..... | Applications for review..... | 643 |
| 101A..... | Application for review of notices under Division 2 of Part VII | 645 |
| 101B..... | Application for review of notice under section 95AB..... | 645 |
| 102..... | Functions and powers of Tribunal..... | 645 |

Division 2—Procedure and Evidence

655

| | | |
|----------|---|-----|
| 103..... | Procedure generally..... | 655 |
| 104..... | Regulations as to certain matters..... | 655 |
| 105..... | Power to take evidence on oath..... | 656 |
| 106..... | Hearings to be in public except in special circumstance | 656 |
| 107..... | Evidence in form of written statement..... | 656 |
| 108..... | Taking of evidence by single member..... | 657 |
| 109..... | Participants in proceedings before Tribunal..... | 657 |

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

—Preliminary

Short title

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

Object of this Act

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

Application of Act to Commonwealth and Commonwealth authorities

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

Application of Act to States and Territories

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

a State or Territory.

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

Activities that are not business

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

(a) imposing or collecting:

(i) taxes; or

(ii) levies; or

(iii) fees for licences;

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

(c) a transaction involving:

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

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

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

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

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

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

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

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

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

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

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

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

(3) In this section:

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

legislation includes vesting or ownership of primary products to a government body by legislation.

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

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

primary products means:

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

(4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is

non-commercial if:

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

al

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

pretation

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

accountable authority has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

Accreditation Registrar means:

- (a) if a person holds an appointment under subsection 56C(1)—that person; or
- (b) otherwise—the Commission.

accredited data recipient has the meaning given by section 56AK.

accredited person means a person who holds an accreditation under subsection 56CA(1).

acquire includes:

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

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

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

AER Chair means the Chair of the AER.

AER member means a member of the AER.

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

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

Australian law has the same meaning as in the *Privacy Act 1988*.

authorisation means an authorisation under Division 1 of Part 8-2 granted by the Commission or by the Tribunal on a review of a determination of the Commission.

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

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

authority of the Commonwealth means:

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

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

binding data standard has the meaning given by subsection 56FA(3).

business includes a business not carried on for profit.

cartel provision has the meaning given by section 45AD.

CDR consumer has the meaning given by subsection 56AI(3).

CDR data has the meaning given by subsection 56AI(1).

CDR participant has the meaning given by subsection 56AL(1).

CDR provisions has the meaning given by section 56AN.

Chairperson means the Chairperson of the Commission.

chargeable CDR data has the meaning given by subsection 56AM(1).

chargeable circumstances:

- (a) in relation to the disclosure of chargeable CDR data—has the meaning given by subsection 56AM(2); or
- (b) in relation to the use of chargeable CDR data—has the meaning given by subsection 56AM(3).

civil penalty provision of the consumer data rules means a provision of the consumer data rules that is a civil penalty provision (within the meaning of the Regulatory Powers Act).

collective boycott conduct means conduct that has a purpose referred to in subsection 45AD(3) in relation to a contract, arrangement or understanding.

collects: a person **collects** information only if the person collects the information for inclusion in:

- (a) a record (within the meaning of the *Privacy Act 1988*); or
- (b) a generally available publication (within the meaning of the Act).

Commission means the Australian Competition and Consumer Commission established by section 6A, and includes a member

the Commission or a Division of the Commission performing functions of the Commission.

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

competition includes:

- (a) competition from goods that are, or are capable of being imported into Australia; and
- (b) competition from services that are rendered, or are capable of being rendered, in Australia by persons not resident or carrying on business in Australia.

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

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

consumer data rules means rules in force under section 56B.

contract includes a covenant.

corporation means a body corporate that:

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

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

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

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

court/tribunal order has the same meaning as in the *Privacy Act 1988*.

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

data holder has the meaning given by subsection 56AJ(1).

Data Recipient Accreditor means:

- (a) if a person holds an appointment under subsection 56C(1)—that person; or
- (b) otherwise—the Commission.

data standard means a data standard made under section 56D.

Data Standards Body means the body holding an appointment under subsection 56FJ(1).

Data Standards Chair means:

- (a) if a person holds an appointment under section 56FG—
person; or
- (b) otherwise—the Minister.

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

Deputy Chairperson means a Deputy Chairperson of the Commission.

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

Deputy Registrar means a Deputy Registrar of the Tribunal.

designated Commonwealth energy law means:

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

designated gateway has the meaning given by subsection 56AL(2).

designated sector has the meaning given by subsection 56AO(2).

directly or indirectly derived has the meaning given by subsection 56AI(2).

document means any record of information, and includes:

- (a) anything on which there is writing; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- (d) a map, plan, drawing or photograph.

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

earliest holding day has the meaning given by paragraph 56AG(c).

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

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

(e) whether in any other form; or

(f) whether in any combination of forms.

Federal Circuit Court means the Federal Circuit Court of Australia.

fee-free CDR data has the meaning given by subsection 56A(1).

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

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

fully-participating jurisdiction means a State or Territory that

(a) is a participating jurisdiction as defined in section 150A(1);

(b) is not named in a notice in operation under section 150A(2).

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

goods includes:

(a) ships, aircraft and other vehicles;

(b) animals, including fish;

(c) minerals, trees and crops, whether on, under or attached to land or not; and

(d) gas and electricity.

holds: a person **holds** information if the person has possession or control of a record (within the meaning of the *Privacy Act 1988*) that contains the information.

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

(a) the instrument is made or has effect under a law of a State or Territory; and

(b) the law of the State or Territory applies a uniform energy law as a law of its own jurisdiction.

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

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

merger authorisation means an authorisation that:

(a) is an authorisation for a person to engage in conduct to which section 50 or 50A would or might apply; but

(b) is not an authorisation for a person to engage in conduct to which any provision of Part IV other than section 50 or 50A would or might apply.

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

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

an instrument of the Crown in respect of the Government of New Zealand.

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

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

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

personal information has the same meaning as in the *Privacy Act 1988*.

personal injury includes:

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

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

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

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

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

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

price includes a charge of any description.

privacy safeguard penalty provision has the meaning given in subsection 56EU(1).

privacy safeguards means the provisions in Subdivisions B to D of Division 5 of Part IVD (about the consumer data right).

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

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

Registrar means the Registrar of the Tribunal.

Regulatory Powers Act means the *Regulatory Powers (Standard Provisions) Act 2014*.

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

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

services includes any rights (including rights in relation to, or interests in, real or personal property), benefits, privileges or

facilities that are, or are to be, provided, granted or conferred trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities are, or are to be, provided, granted or conferred under:

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

share includes stock.

South Australian Electricity Legislation means:

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

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

South Australian Energy Retail Legislation means:

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

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

South Australian Gas Legislation means:

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

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

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

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

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

supply, when used as a verb, includes:

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

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

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

Territory means:

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

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

the Family Court means the Family Court of Australia.

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

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

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

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

uniform energy law means:

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

Western Australian Gas Legislation means:

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

Part 3 of that Act.

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

(2) In this Act:

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

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

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

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

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

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

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

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

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

(4) In this Act:

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

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

Subsidiary, holding and related bodies corporate

(1) For the purposes of this Act, a body corporate shall, subject to subsection (3), be deemed to be a subsidiary of another body corporate if:

(a) that other body corporate:

(i) controls the composition of the board of directors

- (i) controls the composition of the board of directors of the first-mentioned body corporate;
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that may be cast at a general meeting of the first-mentioned body corporate; or
 - (iii) holds more than one-half of the allotted share capital of the first-mentioned body corporate (excluding any part of that allotted share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
 - (b) the first-mentioned body corporate is a subsidiary of another body corporate that is that other body corporate's subsidiary (including any body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).
- (2) For the purposes of subsection (1), the composition of a body corporate's board of directors shall be deemed to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make an appointment if:
- (a) a person cannot be appointed as a director without the exercise in his or her favour by that other body corporate of such a power; or
 - (b) a person's appointment as a director follows necessarily from his or her being a director or other officer of that other body corporate.
- (3) In determining whether a body corporate is a subsidiary of another body corporate:
- (a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;
 - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:
 - (i) by any person as a nominee for that other body corporate (except where that other body corporate is concerned only in a fiduciary capacity); or
 - (ii) by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity;shall be treated as held or exercisable by that other body corporate;
 - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any allotment of such debentures, shall be disregarded; and
 - (d) any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being a subsidiary or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

the ordinary course of that business.

(4) A reference in this Act to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.

(5) Where a body corporate:

- (a) is the holding company of another body corporate;
- (b) is a subsidiary of another body corporate; or
- (c) is a subsidiary of the holding company of another body corporate;

that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

(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 to which it is related to the other party to the arrangement.

(6) In proceedings under this Act, whether in the Court or before the Tribunal or the Commission, it shall be presumed, unless the contrary is established, that bodies corporate are not, or were not at a particular time, related to each other.

Consumers

(1) For the purposes of this Act, unless the contrary intention appears:

(a) a person shall be taken to have acquired particular goods as a consumer if, and only if:

- (i) the price of the goods did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount, the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;

and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of reselling them or for the purpose of using them up or transforming them for trade or commerce, in the course of a process of production, manufacture or of repairing or treating other goods or fixing them on land; and

(b) a person shall be taken to have acquired particular services as a consumer if, and only if:

- (i) the price of the services did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount, the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

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

(a) the prescribed amount is \$40,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;

(b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;

(c) where a person purchased goods or services together with other property or services, or with both other property and other services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been

(i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time;

(d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been:

(i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were not so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and

(e) without limiting by implication the meaning of the expression **services** in subsection 4(1), the obtaining of credit by a person in connection with the acquisition of goods or services by him or her shall be deemed to be the acquisition by him or her of a service and any amount by which the amount paid or payable by him or her for the goods or services is increased by reason of his or her so obtaining credit shall be deemed to be paid or payable by him or her for that service.

(3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services it shall be presumed, unless the contrary is established, that that person was a consumer in relation to those goods or services.

(4) In this section, **commercial road vehicle** means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

Acquisition, supply and re-supply

In this Act, unless the contrary intention appears:

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

Market

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

References to purpose or reason

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

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

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

Lessening of competition to include preventing or hindering competition

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

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

In this Act:

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

Joint ventures

In this Act:

- (a) a reference to a joint venture is a reference to an activity in trade or commerce:
 - (i) carried on jointly by two or more persons, whether or not in partnership; or
 - (ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate; and
- (b) a reference to a contract or arrangement made or entered into, or to a proposed contract or arrangement to be made or proposed, or to an understanding arrived at, or to a proposed understanding to be arrived at, for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate as mentioned in subparagraph (a)(ii), be read as including a reference to the memorandum and articles of association, rules or other document that constitute or constitute, or are or is to constitute, that body corporate.

Loss or damage to include injury

In this Act:

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

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

Severability

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

Effect of law relating to restraint of trade and breaches of confidence

This Act does not affect the operation of:

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

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

Extended application of Part IIIA

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

- (a) an external Territory; or
- (b) the offshore area in respect of a State, of the Northern Territory, or of an external Territory, as specified in section 2 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

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

- (a) the coastal sea of Australia; or
- (b) the coastal sea of an external Territory;

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

- (4) For the purposes of this section:

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

Extended application of this Act to conduct outside Australia

- (1) Each of the following provisions:

- (a) Part IV;
- (b) Part XI;
- (c) the Australian Consumer Law (other than Part 5-3);
- (f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (b) or (c));

extends to the engaging in conduct outside Australia by:

- (g) bodies corporate incorporated or carrying on business within Australia; or
- (h) Australian citizens; or

- (i) persons ordinarily resident within Australia.

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

- (a) New Zealand and New Zealand Crown corporations; or
- (b) bodies corporate carrying on business within New Zealand or
- (c) persons ordinarily resident within New Zealand.

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

Extended application of this Act to persons who are not corporations

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

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

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

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

(b) the following provisions:

- (i) sections 45AF, 45AG, 45AJ, 45AK, 45, 45D to 45E (other than section 45DB), 46 and 46A;
- (ia) Part V (other than Division 5);
- (ii) Part VIII;
- (iii) sections 31 and 43, Division 3 of Part 3-1, and sections 50, 153, 163, 164 and 168, of the Australian Consumer Law;

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

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

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

of goods or services, as the case may be:

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

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

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

- (a) the reference in paragraph 45AD(2)(c) to goods or services supplied, or likely to be supplied, were, by express provision, confined to goods or services supplied, or likely to be supplied, to corporations or classes of corporations; and
- (b) the reference in paragraph 45AD(2)(d) to goods or services acquired, or likely to be acquired, were, by express provision, confined to goods or services acquired, or likely to be acquired, from corporations or classes of corporations; and
- (c) the reference in paragraph 45AD(2)(e) to goods or services re-supplied, or likely to be re-supplied, were, by express provision, confined to goods or services re-supplied, or likely to be re-supplied, to corporations or classes of corporations; and
- (d) the reference in paragraph 45AD(2)(f) to goods or services likely to be re-supplied were, by express provision, confined to goods or services likely to be re-supplied, to corporations or classes of corporations; and

goods or services likely to be re-supplied to corporations or classes of corporations; and

(e) the following paragraphs were added at the end of subsection 45AD(2):

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

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

(f) the reference in subparagraph 45AD(3)(a)(i) to the production, or likely production, of goods were, by express provision, confined to the production, or likely production, of goods for supply to corporations or classes of corporations; and

(g) the reference in subparagraph 45AD(3)(a)(ii) to the supply of services were, by express provision, confined to the supply of services to corporations or classes of corporations; and

(h) each reference in subparagraphs 45AD(3)(a)(iii) and (iv) to persons or classes of persons were, by express provision, confined to corporations or classes of corporations; and

(i) the reference in subparagraph 45AD(3)(b)(iii) to the geographical areas in which goods or services are supplied likely to be supplied, were, by express provision, confined to the geographical areas in which goods or services are supplied, or likely to be supplied, to corporations or classes of corporations; and

(j) the reference in subparagraph 45AD(3)(b)(iv) to the geographical areas in which goods or services are acquired likely to be acquired, were, by express provision, confined to the geographical areas in which goods or services are acquired, or likely to be acquired, from corporations or classes of corporations; and

(k) the reference in paragraph 45AD(3)(c) to the supply or acquisition of goods or services were, by express provision, confined to supply of goods or services to, or the acquisition of goods or services from, corporations or classes of corporations; and

(l) the reference in paragraph 45AD(4)(e) to paragraph (2)(f) included a reference to paragraph (2)(g) or (h); and

(m) section 45AD also provided that it is immaterial whether the identities of the corporations referred to in subsection (2)(3) of that section can be ascertained; and

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

(i) Division 1 of Part IV (other than section 45AD);

(ii) any other provision (other than section 4, 45AD, 151AJ or this subsection or subsection (5A)) to the extent to which it relates to Division 1 of Part IV;

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

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

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

subsection, the effect it would have is:

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

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

(i) Division 1 of Part IV;

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

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

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

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

(i) a Territory; or

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

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

(i) Division 1 of Part IV;

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

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

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

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

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

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

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

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

(3A) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by subsection (2), the provisions of Part

of the Australian Consumer Law have, by force of this subsection the effect they would have if:

- (a) those provisions were, by express provision, confined in their operation to contracts for or relating to:
 - (i) the use of postal, telegraphic or telephonic service;
 - (ii) radio or television broadcasts; and
- (b) a reference in the provisions of Part XI to a corporation included a reference to a person not being a corporation.

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

- (a) those provisions were, by express provision, confined in their operation to engaging in conduct in a Territory; and
- (b) a reference in those provisions to a thing done by a corporation in trade or commerce included a reference to a thing done in the course of the promotional activities of a professional person.

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

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

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

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

Application of the *Criminal Code*

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

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

(2) Despite subsection (1), Part 2.5 of the *Criminal Code* does not apply to an offence against Part IIIA or XIC, Division 7 of Part 3-2 or section 45AF or 45AG.

I—The Australian Competition and Consumer Commission

Establishment of Commission

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

(1A) However, the Commission is taken, for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

- (a) to be a non-corporate Commonwealth entity, and not to be a corporate Commonwealth entity; and
- (b) to be a part of the Commonwealth; and
- (c) not to be a body corporate.

(2) The Commission:

- (a) is a body corporate, with perpetual succession;
- (b) shall have an official seal;
- (c) may acquire, hold and dispose of real and personal property and
- (d) may sue or be sued in its corporate name.

(3) Any real or personal property held by the Commission is held and on behalf of the Commonwealth.

(4) Any money received by the Commission is received for and on behalf of the Commonwealth.

(5) To avoid doubt, a right to sue is taken not to be personal property for the purposes of subsection (3).

Composition of Commission

(1) The Commission shall consist of a Chairperson and such number of other members as are from time to time appointed in accordance with this Act.

(2) The members of the Commission shall be appointed by the Governor-General and shall be so appointed as full-time members.

(3) Before the Governor-General appoints a person as a member of the Commission or as Chairperson, the Minister must:

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

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

Note: Under section 23 of the *Public Governance, Performance and Accountability Act 2013*, the Chairperson may enter into contracts and other arrangements on behalf of the Commonwealth.

Terms and conditions of appointment

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

Associate members

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

(1A) If there is at least one fully-participating jurisdiction, the Minister

must not appoint a person as an associate member unless the Minister is satisfied that a majority of such jurisdictions support the appointment.

- (2) An associate member of the Commission shall be appointed for a term of office of such period not exceeding 5 years as is specified in the instrument of his or her appointment, but is eligible for re-appointment.
- (3) Subject to this Part, an associate member of the Commission holds office on such terms and conditions as the Minister determines.
- (4) The Chairperson may, by writing signed by him or her, direct that, for the purposes of the exercise of the powers of the Commission under this Act, or the consumer data rules, in relation to a specified matter, not being an exercise of those powers by the Division of the Commission, a specified associate member of the Commission or specified associate members of the Commission shall be deemed to be a member or members of the Commission and, in that case, unless the contrary intention appears, a reference in this Act to a member of the Commission shall, for the purpose only of the exercise of the powers of the Commission in relation to that matter, be construed as including a reference to that associate member of the Commission or each of those associate members of the Commission, as the case may be.
- (5) Associate members of the Commission shall be deemed to be members of the Commission for the purposes of section 19.
- (6) For the purpose of the determination by the Commission of an application for an authorization, or the making by the Commission of any decision for the purposes of subsection 93(3), (3A) or (3B), 93AC(1), (2) or (2A), the Chairperson shall consider:
 - (a) whether he or she should give a direction under subsection (4) of this section; or
 - (b) in the case of a matter in relation to which the Chairperson proposes to give a direction under subsection 19(1), whether he or she should direct that the Division concerned is to include an associate member of the Commission or associate members of the Commission.
- (7) Nothing in subsection (4) or (5) deems an associate member of the Commission to be a member of the Commission for any purpose related to the preparation of a report by the Commission referred to in section 171.

AER members taken to be associate members

- (1) For the purposes of this Act and the *Public Governance, Performance and Accountability Act 2013*, an AER member is taken to be an associate member of the Commission during the period in which he or she is an AER member.

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

- (2) However, an AER member who is taken to be an associate member under subsection (1), is not taken to be an associate member for the purposes of sections 8A, 9, 14 and 15 and for purposes of section 29 of the *Public Governance, Performance and Accountability Act 2013*.
- (3) As an associate member, the AER member holds office on such terms and conditions as are specified in the instrument of his or her appointment.

terms and conditions as are specified in the instrument or his appointment under section 44AM or 44AP.

Remuneration

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

Deputy Chairpersons

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

Acting Chairperson

- (1) Where there is, or is expected to be, a vacancy in the office of Chairperson, the Governor-General may appoint a person to act as Chairperson until the filling of the vacancy.

Note: For rules that apply to acting appointments, see section 33A of the *Interpretation Act 1901*.

- (2) Where the Chairperson is absent from duty or from Australia:
 - (a) if there are 2 Deputy Chairpersons available to act as Chairperson, the Minister may appoint 1 of them to act as Chairperson during the absence of the Chairperson; or
 - (b) if there is only 1 Deputy Chairperson available to act as Chairperson, that Deputy Chairperson is to act as Chairperson during the absence of the Chairperson; or
 - (c) if there are no Deputy Chairpersons or none of the Deputy Chairpersons is available to act as Chairperson, the Minister may appoint a person to act as Chairperson during the absence of the Chairperson.

Chairpersons are available to act as Chairperson, the Minister may appoint a member of the Commission to act as Chairperson during the absence of the Chairperson, but a such appointment ceases to have effect if a person is appointed as a Deputy Chairperson or a Deputy Chairperson becomes available to act as Chairperson.

Note: For rules that apply to persons acting as the Chairperson, see section 33A of the *Acts Interpretation Act 1901*.

- (3) A person acting as Chairperson shall act in that capacity on terms and conditions as the Governor-General determines and all the powers and duties, and shall perform all the functions, conferred on the Chairperson by this Act.

Leave of absence

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

Termination of appointment of members of the Commission

- (1) The Governor-General may terminate the appointment of a member of the Commission for misbehaviour or physical or mental incapacity.
- (2) If a member of the Commission:
 - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with or her creditors or makes an assignment of his or her property for the remuneration for their benefit; or
 - (b) fails to comply with his or her obligations under:
 - (i) for any member (including the Chairperson)—section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section; or
 - (ii) for the Chairperson—section 17 of this Act; or
 - (c) without the consent of the Minister engages in any paid employment outside the duties of his or her office; or
 - (d) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;the Governor-General shall terminate the appointment of that member of the Commission.

Termination of appointment of associate members of the Commission

- (1) The Minister may terminate the appointment of an associate member of the Commission for misbehaviour or physical or mental incapacity.
- (2) If an associate member of the Commission:
 - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with or her creditors or makes an assignment of his or her property for the remuneration for their benefit; or
 - (b) fails to comply with his or her obligations under section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section; or

2013 (which deals with the duty to disclose interests) or rules made for the purposes of that section;

the Minister shall terminate the appointment of that associate member of the Commission.

Resignation

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

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

Arrangement of business

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

Closure of interests by Chairperson

(1) The Chairperson must give written notice to the Minister of pecuniary interests that the Chairperson has or acquires in any business carried on in Australia or in any body corporate carrying on any such business.

(2) Subsection (1) applies in addition to section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests).

Disclosure of certain interests by members of the Commission when taking part in determinations of matters

(1) If, as a result of rules made for the purposes of section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests), the Chairperson becomes aware that:

- (a) a member of the Commission is taking part, or is to take part, in the determination of a matter; and
- (b) the member has a pecuniary interest that could conflict with the proper performance of his or her functions in relation to the determination of the matter;

then:

- (c) the Chairperson must cause the interest of the member to be disclosed to each person concerned in the matter (if the matter has not already been disclosed to that person in accordance with the rules); and
- (d) unless each person concerned in the matter consents to the member taking part, or continuing to take part, in the determination of the matter—the member must not take part, or continue to take part, in the determination of the matter.

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

Meetings of Commission

(1) Subject to this section, the Chairperson shall convene such meetings of the Commission as he or she thinks necessary for the efficient performance of the functions of the Commission.

(2) Meetings of the Commission shall be held at such places as the Chairperson determines.

(3) The Chairperson shall preside at all meetings of the Commission.

at which he or she is present.

- (4) In the absence of the Chairperson from a meeting of the Commission:
 - (a) if there are 2 Deputy Chairpersons available to preside the meeting—the Chairperson may nominate 1 of them to preside at the meeting; or
 - (b) if there is only 1 Deputy Chairperson available to preside the meeting—that Deputy Chairperson is to preside at the meeting.
- (5) Subject to this Act and the regulations, the member presiding at a meeting of the Commission may give directions regarding the procedure to be followed at or in connexion with the meeting.
- (6) At a meeting of the Commission:
 - (a) three members (including the Chairperson or a Deputy Chairperson) form a quorum;
 - (b) all questions shall be decided by a majority of votes of members present and voting; and
 - (c) the member presiding has a deliberative vote and, in the event of an equality of votes, also has a casting vote.
- (7) If the Commission so determines, a member or members may participate in, and form part of a quorum at, a meeting of the Commission or a Division of the Commission by means of any of the following methods of communication:
 - (a) telephone;
 - (b) closed circuit television;
 - (c) another method of communication determined by the Commission.
- (8) A determination made by the Commission under subsection (7) may be made in respect of a particular meeting or meetings of the Commission or a Division of the Commission or in respect of all meetings of the Commission or a Division of the Commission.

Chairperson may direct Commission to sit in Divisions

- (1) The Chairperson may, by writing signed by him or her, direct that the powers of the Commission under this Act, or the constitutional rules, in relation to a matter shall be exercised by a Division of the Commission constituted by the Chairperson and such other members (not being less than two in number) as are specified in the direction.
- (2) Where the Chairperson has given a direction under subsection (1), he or she may, by writing signed by him or her at any time before the Division of the Commission specified in the direction has made a determination in relation to the matter, revoke the direction or amend the direction in relation to the membership of the Division or in any other respect, and where the membership of a Division of the Commission is changed, the Division as constituted after the change may complete the determination of the matter.
- (3) For the purposes of the determination of a matter specified in a direction given under subsection (1), the Commission shall be deemed to consist of the Division of the Commission specified in the direction.
- (4) The Chairperson is not required to attend a meeting of a Division of the Commission if he or she does not think fit to do so.

- (5) At a meeting of a Division of the Commission at which neither a Chairperson nor a Deputy Chairperson is presiding, a member of the Commission nominated for the purpose by the Chairperson shall preside.
- (6) Notwithstanding section 18, at a meeting of a Division of the Commission, two members form a quorum.
- (7) A Division of the Commission may exercise powers of the Commission under this Act, or the consumer data rules, notwithstanding that another Division of the Commission is exercising powers of the Commission at the same time.

Delegation by Commission

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

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

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

Delegation by Commission of certain functions and powers

Delegation to staff members of ASIC

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

Delegations relating to Part IVD or the consumer data rules

- (3) The Commission may, by resolution and in accordance with subsection (5), delegate any of its functions and powers under
 - (a) Part VI; or
 - (b) Division 5 of Part XI; or
 - (c) section 155;
 to the extent that the functions or powers relate to Part IVD or the consumer data rules.

Note: Division 5 of Part XI relates to the consumer data rules in the way described in section 56BM.

(4) A member of the Commission may, by writing and in accord with subsection (5), delegate any of the member's functions or powers under section 155 to the extent that the functions or powers relate to Part IVD or the consumer data rules.

(5) A delegation under subsection (3) or (4) of a function or power may be:

- (a) to the Information Commissioner; or
- (b) to a member of the staff of the Office of the Australian Information Commissioner referred to in section 23 of the *Australian Information Commissioner Act 2010*;

if:

- (c) the Information Commissioner agrees to the delegation in writing; and
- (d) in the case of a delegation to a staff member referred to in paragraph (b)—the Information Commissioner is satisfied the staff member:
 - (i) is an SES employee or acting SES employee; or
 - (ii) is holding or performing the duties of a sufficiently senior office or position for the function or power.

Staff of Commission

(1) The staff necessary to assist the Commission shall be persons engaged under the *Public Service Act 1999*.

(2) For the purposes of the *Public Service Act 1999*:

- (a) the Chairperson of the Commission and the APS employees assisting the Chairperson together constitute a Statutory Agency; and
- (b) the Chairperson is the Head of that Statutory Agency.

Consultants

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

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

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

(1) In addition to any other functions conferred on the Commission, the Commission has the following functions:

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

are referred to the Commission by the Council and that refer to the Commission's other functions;

(d) to make available to the public general information in relation to matters affecting the interests of consumers, but not matters with respect to which the Parliament has power to make laws;

(e) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.

(2) Where a matter of a kind mentioned in paragraph (1)(b) is referred by the Minister to the Commission for examination and report:

(a) the Commission shall cause to be published in the *Gazette* and in such newspapers and other journals as the Commission considers appropriate a notice:

(i) stating that the reference has been made and specifying the matter to which the reference relates; and

(ii) inviting interested persons to furnish to the Commission their views on that matter and specifying time and manner within which those views are to be furnished;

(b) the Commission shall not furnish its report to the Minister until a reasonable opportunity has been given to interested persons to furnish to the Commission their views on the matter to which the reference relates; and

(c) the Commission shall include in its report to the Minister any recommendations that it considers desirable with respect to the reform of the law relating to the matter to which the reference relates, whether those recommendations relate to the amendment of existing laws or the making of new law.

(3) The Minister shall cause a copy of each report furnished to him or her by the Commission in relation to a matter referred to the Commission under paragraph (1)(b) to be laid before each House of the Parliament as soon as practicable after the report is received by him or her.

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

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

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

(a) Part IIIA, IV, VII, VIIA, X, XIB or XIC; or

(b) Division 3 of Part XI in relation to individual cases.

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

(2) Any direction given to the Commission under subsection (1) must be in writing and the Minister shall cause a copy of the direction to be published in the *Gazette* as soon as practicable after the direction is given.

(3) If either House of the Parliament or a Committee of either House or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the functions of the Commission under this Act

Commission shall comply with the requirement.

IA—The National Competition Council

Establishment of Council

- (1) The National Competition Council is established by this section.
- (2) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
 - (a) the Council is a listed entity; and
 - (b) the Council President is the accountable authority of the Council; and
 - (c) the following persons are officials of the Council:
 - (i) the Council President;
 - (ii) the other Councillors;
 - (iii) the staff referred to in subsection 29M(1);
 - (iv) consultants engaged under section 29N; and
 - (d) the purposes of the Council include the functions of the Council referred to in section 29B.

Functions and powers of Council

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

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

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

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

Note: Section 29BC sets out when such a law imposes a duty on the Council.
- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a State/Territory energy

to the extent to which:

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

How duty is imposed

Application

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

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

State or Territory legislative power sufficient to support duty

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

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

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

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

When a State/Territory energy law imposes a duty

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

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

the function or to exercise the power.

Membership of Council

- (1) The Council consists of the Council President and up to 4 other Councillors.
- (2) Each Councillor is to be appointed by the Governor-General for a term of up to 5 years.
- (3) The Governor-General must not appoint a person as a Councillor or Council President unless the Governor-General is satisfied that:
 - (a) the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration; and
 - (b) a majority of the States and Territories that are parties to the Competition Principles Agreement support the appointment.

Terms and conditions of office

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

Acting Council President

The Minister may appoint a Councillor to act as the Council President:

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

Note: For rules that apply to acting appointments, see section 33A of the *Interpretation Act 1901*.

Remuneration of Councillors

- (1) A Councillor is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of the Remuneration Tribunal is in operation, the Councillor is to be paid the remuneration that is prescribed.
- (2) A Councillor is to be paid such allowances as are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

Leave of absence

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

Termination of appointment of Councillors

- (1) The Governor-General may terminate the appointment of a Councillor for misbehaviour or for physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of a Councillor who:
 - (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with or her creditors or makes an assignment of his or her property in whole or in part for the benefit of their creditors;
 - (b) fails to comply with his or her obligations under section 10 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or is found to have contravened that section; or
 - (c) in the case of a full-time Councillor—engages in any paid employment outside the duties of the Councillor's office without the consent of the Minister;
 - (d) in the case of a full-time Councillor—is absent from duty without leave of absence, for 14 consecutive days or for more than 20 days in any 12 months.

Resignation of Councillors

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

Arrangement of Council business

- (1) Subject to subsection (2), the Council President may give directions about the arrangement of the Council's business.
- (2) The Council must not carry out any work (other than work relating to a function under Part IIIA or VIIA) except in accordance with a program agreed to by:
 - (a) a majority of the parties to the Competition Principles Agreement; or
 - (b) if the parties to the Agreement are evenly divided on the question of agreeing to a program—the Commonwealth.

Council meetings

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

Resolutions without meetings

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

Staff to help Council

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

Consultants

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

Annual report

An annual report prepared by the Council President and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* for a period must include details of the following:

- (a) the time taken by the Council to make a recommendation on any application under section 44F, 44M, 44NA or 44NBA (about access regime applications under Part IIIA);
- (b) any court or Tribunal decision interpreting:
 - (i) paragraph (f) of the definition of **service** in section 44 (which is an exclusion to do with production processes);
 - (ii) section 44CA (about declaration criteria for services under Part IIIA);
- (c) any matter the Council considers has impeded the operation of Part IIIA from delivering efficient access outcomes;
- (d) any evidence of the benefits arising from determinations by the Commission under section 44V (about arbitration determinations under Part IIIA);
- (e) any evidence of the costs of, or the disincentives for, investment in the infrastructure by which declared services (within the meaning of Part IIIA) are provided;
- (f) any implications for the operation of Part IIIA in the future.

Part II—The Australian Competition Tribunal

Continuation and Constitution of Tribunal

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

Qualifications of members of Tribunal

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

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

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

Terms and conditions of appointment

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

Remuneration and allowances of members of Tribunal

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

Resigning appointments

(1) Where:

(a) the President is, or is expected to be, absent from duty

(b) there is, or is expected to be, a vacancy in the office of President;

the Minister may appoint a Deputy President or an acting Deputy President to act as President during the absence, or while there is a vacancy in the office of President, as the case may be.

Note: For rules that apply to acting appointments, see section 33A of the *Interpretation Act 1901*.

(2) Where a presidential member (including the President) of the Tribunal is, or is expected to be, absent from duty, the Governor-General may appoint a person qualified to be appointed as a presidential member to act as a Deputy President during the absence from duty of the member.

Note: For rules that apply to acting appointments, see section 33A of the *Interpretation Act 1901*.

(3) Where a member of the Tribunal other than a presidential member is, or is expected to be, absent from duty, the Governor-General may appoint a person qualified to be appointed as a member of the Tribunal other than a presidential member to act as such a member during the absence from duty of the member.

Note: For rules that apply to acting appointments, see section 33A of the *Interpretation Act 1901*.

(4) Where a person has been appointed under subsection (2) or (3), the Governor-General may, by reason of pending proceedings or other special circumstances, direct, before the absent member resumes duty, that the person so appointed shall continue to act under the appointment after the resumption of duty by the absent member until the Governor-General terminates the appointment, but a person shall not continue to act as a member of the Tribunal by virtue of this subsection for more than 12 months after the resumption of duty by the absent member.

(5) Where a person has been appointed under this section to act as a member of the Tribunal during the absence from duty of a member of the Tribunal, and that member ceases to hold office without having resumed duty, the period of appointment of the person so appointed shall be deemed to continue until it is terminated by the Governor-General, or until the expiration of 12 months from the date on which the absent member ceases to hold office, whichever first happens.

pension and removal of members of Tribunal

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

(2) The Minister shall cause a statement of the ground of the suspension to be laid before each House of the Parliament within 15 sitting days of the House after the suspension.

(3) Where such a statement has been laid before a House of the Parliament, that House may, within 15 sitting days of that House after the day on which the statement has been laid before it, by resolution, declare that the member of the Tribunal should be restored to office and, if each House so passes a resolution, the Governor-General shall terminate the suspension.

(4) If, at the expiration of 15 sitting days of a House of the

- (4) If, at the expiration of 10 sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General may remove the member of the Tribunal from office.
- (5) If a member of the Tribunal becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, the Governor-General shall remove him or her from office.
- (6) A member of the Tribunal shall not be removed from office except as provided by this section.
- (7) A presidential member of the Tribunal ceases to hold office if he or she no longer holds office as a Judge of a Federal Court, not being the High Court or a court of an external Territory.

Resignation

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

Constitution of Tribunal for particular matters

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

Validity of determinations

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

President may give directions

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

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

Closure of interests by members of Tribunal

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

- (2) Where the President becomes aware that a member of the Tribunal is, or is to be, a member of a Division of the Tribunal

tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and that the member has in relation to the proceedings such an interest:

- (a) if the President considers that the member should not take part, or should not continue to take part, in the proceedings, the President shall give a direction to the member accordingly or
- (b) in any other case—the President shall cause the interest of the member to be disclosed to the persons concerned in the proceedings.

Presidential member to preside

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

Decision of questions

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

Member of Tribunal ceasing to be available

- (1) This section applies where the hearing of any proceedings has been commenced or completed by the Tribunal but, before the matter to which the proceedings relate has been determined, one of the members constituting the Tribunal for the purposes of the proceedings has ceased to be a member of the Tribunal or has ceased to be available for the purposes of the proceedings.
- (2) Where the President is satisfied that this section applies in relation to proceedings, the President may direct that a specified member of the Tribunal shall take the place of the member referred to in subsection (1) for the purposes of the proceedings.
- (3) Where this section applies in relation to proceedings that were being dealt with before the Tribunal, the President may, instead of giving a direction under subsection (2), direct that the hearing, determination, or the determination, of the proceedings be completed by the Tribunal constituted by the members other than the member referred to in subsection (1).
- (4) Where the President has given a direction under subsection (2), he or she may, at any time before the determination of the proceedings, direct that a third member be added to the Tribunal as constituted in accordance with subsection (3).
- (5) The Tribunal as constituted in accordance with any of the provisions of this section for the purposes of any proceedings shall have regard to any record of the proceedings before the Tribunal previously constituted.

Counsel assisting Tribunal

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

(2) In this section:

(2) in this section:

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

Consultants

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

Staff of Tribunal

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

Acting appointments

The Minister may appoint a person who is engaged under the *Public Service Act 1999* to act as the Registrar or as a Deputy Registrar during any period, or during all periods, when:

- (a) the Registrar or that Deputy Registrar, as the case may be, is absent from duty or from Australia or is, for any other reason, unable to perform the duties and functions of his or her office; or
- (b) there is a vacancy in the office of Registrar or in that of Deputy Registrar, as the case may be.

Note: For rules that apply to acting appointments, see section 33A of the *Interpretation Act 1901*.

IIAA—The Australian Energy Regulator (AER)

Division 1—Preliminary

Definitions

In this Part, unless the contrary intention appears:

Australian Energy Market Agreement means the agreement between the Commonwealth and the States, the Australian Capital Territory and the Northern Territory, as amended from time to time:

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

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

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

This Part binds the Crown

This Part binds the Crown in each of its capacities.

Extra-territorial operation

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

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

Division 2—Establishment of the AER

Establishment of the AER

- (1) The Australian Energy Regulator (the **AER**) is established by this section.
- (2) The AER:
 - (a) is a body corporate with perpetual succession; and
 - (b) must have a common seal; and
 - (c) may acquire, hold and dispose of real and personal property and
 - (d) may sue and be sued in its corporate name.
- (3) However, the AER is taken, for the purposes of the *Financial Management and Accountability Act 2013* (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):
 - (a) not to be a corporate Commonwealth entity; and
 - (b) to be a part of the Commonwealth, and a part of the Commission; and
 - (c) not to be a body corporate.

AER to hold money and property on behalf of the Commonwealth

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

Constitution of the AER

The AER consists of:

- (a) 2 Commonwealth AER members, appointed in accordance with section 44AM; and
- (b) 3 State/Territory AER members, appointed in accordance with section 44AP.

Division 3—Functions and powers of the AER

44AH Commonwealth functions

- (1) The AER has any functions:
 - (a) conferred under a law of the Commonwealth; or
 - (b) prescribed by regulations made under this Act.

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

- (2) Regulations made for the purposes of paragraph (1)(b) may empower the AER to make legislative instruments.
- (3) Section 42 (disallowance) of the *Legislation Act 2003* does not apply to legislative instruments empowered by regulations made

for the purposes of paragraph (1)(b).

- (4) Subsection (3) has effect subject to any express provision to the contrary in the regulations.

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

General rule

- (1) Subject to section 44AIA, a State/Territory energy law or a local energy instrument may confer functions or powers, or impose duties, on the AER for the purposes of that law or instrument.

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

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a State/Territory energy law or local energy instrument to the extent to which:

- (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the AER; or
- (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.

- (3) The AER cannot perform a duty or function, or exercise a power, under a State/Territory energy law or local energy instrument unless the conferral of the function or power, or the imposition of the duty, is in accordance with the Australian Energy Market Agreement, or any other relevant agreement between the Commonwealth and the State or Territory concerned.

- (4) A local energy instrument may confer functions or powers, or impose duties, on the AER only if the instrument is designated for the purposes of this subsection under the Australian Energy Market Agreement, or any other relevant agreement between the Commonwealth and the State or Territory that made the instrument.

- (5) To avoid doubt, if a State/Territory energy law is also a local energy instrument, subsection (4) applies to the law.

No merits review of AER decisions

A decision of the AER under a State/Territory energy law or local energy instrument is not to be subject to merits review (however described) by a body established under a law of a State or Territory.

How duty is imposed

Application

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

Note 1: Section 44AK sets out when such a law or instrument imposes a duty on the AER.

Note 2: Section 320 of the South Australian Energy Retail Legislation, as amended, applies as a law of a State or Territory, deals with the case where a local energy instrument purportedly imposed on a Commonwealth body under that applied law cannot be imposed by the State or Territory or the Commonwealth due to constitutional doctrines restricting such duties.

State or Territory legislative power sufficient to support duty

- (2) The duty is taken not to be imposed by this Part (or any other law or instrument 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 or instrument of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the AER.

Note: If this subsection applies, the duty will be taken to be imposed by the law or instrument of the State or Territory (the Commonwealth having consented under section 44AI to the imposition of the duty by law or instrument).

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

When a State/Territory energy law etc. imposes a duty

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

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

Powers of the AER

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

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

Part 4—Administrative provisions relating to the AER

Division A—Appointment etc. of members

Appointment of Commonwealth AER members

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

part-time basis.

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

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

Acting appointment of Commonwealth AER member

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

Note: For rules that apply to acting appointments, see sections 33AB and 33AD of the *Acts Interpretation Act 1901*.

- (2) A person is not eligible for appointment to act as a Commonwealth AER member unless the person has knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration.

Appointment of State/Territory AER members

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

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

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

Acting appointment of State/Territory AER member

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

Note: For rules that apply to acting appointments, see sections 33AB and 33AC of the *Acts Interpretation Act 1901*.

- (2) A person is not eligible for appointment to act as a State/Territory AER member unless the person has knowledge or experience in, industry, commerce, economics, law, consumer protection or public administration.

AER Chair

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

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

AER Deputy Chair

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

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

AER Deputy Chair to act as the AER Chair

The AER Deputy Chair is to act as the AER Chair:

- (a) during a vacancy in the office of the AER Chair, whether or not an appointment has previously been made to the office;
- (b) during all periods when the AER Chair:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: See also subsection 33A(2) of the *Acts Interpretation Act 1901*.

Acting AER Deputy Chair

- (1) The Minister may, by written instrument, appoint an AER member to act as the AER Deputy Chair:
 - (a) during a vacancy in the office of the AER Deputy Chair, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the AER Deputy Chair:

- (i) is absent from duty or from Australia; or
- (ii) is, for any reason, unable to perform the duties of office.

Note: For rules that apply to acting appointments, see sections 33AB and 33AC of the *Acts Interpretation Act 1901*.

- (2) If a person acting as the AER Deputy Chair ceases to be an AER member, then the appointment to act as the AER Deputy Chair ceases.

Remuneration of AER members

- (1) An AER member is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed.
- (2) An AER member is to be paid the allowances that are prescribed.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

Additional remuneration of AER Chair

- (1) The AER Chair is to be paid additional remuneration (if any) that is determined by the Remuneration Tribunal.
- (2) The AER Chair is to be paid additional allowances (if any) that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973* other than subsection 7(11) of that Act.

Leave of absence

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

Other terms and conditions

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

Outside employment

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

Disclosure of interests

- (1) If an AER member has any direct or indirect interest in a matter being considered, or about to be considered, by the AER, being an interest that could conflict with the proper performance of the member's functions in relation to a matter arising at a meeting

member of the AER, then the member must as soon as practicable disclose that interest at a meeting of the AER.

- (2) The disclosure, and any decision made by the AER in relation to the disclosure, must be recorded in the minutes of the meeting.
- (3) Section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) does not apply in relation to a person who is an AER member when he or she is acting in his or her capacity as an AER member.

Note: Section 29 of the *Public Governance, Performance and Accountability Act 2013* will apply in relation to a person who is an AER member when he or she is acting in his or her capacity as an associate member of the Commission.

Resignation

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

Termination of appointment

All AER members

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

Additional grounds: full-time AER members

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

Additional grounds: part-time AER members

- (3) The Governor-General may terminate the appointment of a part-time AER member if:
 - (a) the member is absent, except on leave of absence, from 3 consecutive meetings of the AER; or

- (b) the member engages in paid employment that conflicts with the proper performance of the duties of the member or her office.

Division B—Staff etc. to assist the AER

Staff etc. to assist the AER

The Chairperson must make available:

- (a) persons engaged under section 27; and
- (b) consultants engaged under section 27A;

to assist the AER to perform its functions.

Division C—Meetings of the AER etc.

Meetings

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

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

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

- (3) At a meeting of the AER, 3 AER members constitute a quorum. The quorum must include the AER Chair.

- (4) Questions arising at a meeting must be determined by a majority of the votes of the members present and voting.

- (4A) The AER Chair has a deliberative vote and, in the event of an equality of votes, also has a casting vote.

- (5) The AER Chair must preside at all meetings of the AER.

- (6) The AER Chair may give directions regarding the procedure to be followed at or in connection with a meeting.

Resolutions without meetings

- (1) If all AER members sign a document containing a statement that they are in favour of a resolution in terms set out in the document, then a resolution in those terms is taken to have been passed at a duly constituted meeting of the AER held on the day the document was signed, or, if the members sign the document on different days, on the last of those days.

- (2) For the purposes of subsection (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more members are together taken to constitute one document containing a statement in those terms signed by those members on the respective days on which they signed the separate documents.

- (3) A member must not sign a document containing a statement in favour of a resolution if the resolution concerns a matter in which the member has any direct or indirect interest, being an interest that could conflict with the proper performance of the member's functions in relation to any matter.

Part 4A Arbitration

- (1) Sections 44AAD and 44AAE do not apply to the AER as constituted for an arbitration under:

- (a) the National Electricity (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*); or
 - (b) the National Gas (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*); or
 - (c) a provision of a State/Territory energy law.
- (2) The reference in subsection (1) to an **arbitration** includes a reference to each of the following:
- (a) the making, variation or revocation of an access determination (within the meaning of the law concerned);
 - (b) the performance of a function, or the exercise of a power, in connection with the making, variation or revocation of an access determination (within the meaning of the law concerned).

Division CA—Divisions of the AER

3 Divisions of the AER—functions and powers under a law of the Commonwealth

Directions

- (1) The AER Chair may, by writing, direct that all or any of the functions and powers:
- (a) under this Part or under regulations made under this Act;
 - (b) under another law of the Commonwealth;
- in relation to a matter are to be performed and exercised by a Division of the AER constituted by the AER Chair and at least one other AER member, as specified in the direction.
- (2) If a direction under subsection (1) is in force in relation to a matter, the Division of the AER specified in the direction may make recommendations to the AER in relation to the matter.
- (3) If a direction under subsection (1) is in force in relation to a matter, the AER Chair may, by writing, at any time before the Division of the AER specified in the direction has made a determination in relation to the matter:
- (a) revoke the direction; or
 - (b) amend the direction in relation to the membership of the Division or in any other respect.

If the membership of a Division of the AER is changed, the Division as constituted after the change may complete the determination in relation to the matter.

The AER is taken to consist of the Division

- (4) For the purposes of the determination of a matter specified in a direction given under subsection (1), the AER is taken to consist of the Division of the AER specified in the direction.

Meetings

- (5) The AER Chair is not required to attend a meeting of a Division of the AER if the AER Chair does not think fit to do so.
- (6) The AER Deputy Chair is not required to attend a meeting of a Division of the AER if the AER Deputy Chair does not think fit to do so.
- (7) At a meeting of a Division of the AER at which neither the AER Chair nor the AER Deputy Chair is presiding, an AER member nominated for the purpose by the AER Chair is to preside.
- (8) Despite section 44AAD, at a meeting of a Division of the AER

(8) Despite section 44AAD, at a meeting of a Division of the AER, AER members form a quorum. The quorum need not include the AER Chair or AER Deputy Chair.

Functions and powers of the AER

(9) A Division of the AER specified under subsection (1) may perform the functions and exercise the powers of the AER mentioned in subsection (1) despite the fact that another Division of the AER is performing those functions and exercising those powers at the same time.

C Divisions of the AER—functions and powers under a State/Territory energy law or a local energy instrument

Directions

(1) The AER Chair may, by writing, direct that all or any of the functions and powers:

- (a) under a State/Territory energy law; or
- (b) under a local energy instrument;

in relation to a matter are to be performed and exercised by a Division of the AER constituted by the AER Chair and at least two other AER members, as specified in the direction.

(2) If a direction under subsection (1) is in force in relation to a matter, the Division of the AER specified in the direction may make recommendations to the AER in relation to the matter.

(3) If a direction under subsection (1) is in force in relation to a matter, the AER Chair may, by writing, at any time before the Division of the AER specified in the direction has made a determination in relation to the matter:

- (a) revoke the direction; or
- (b) amend the direction in relation to the membership of the Division or in any other respect.

If the membership of a Division of the AER is changed, the Division as constituted after the change may complete the determination in relation to the matter.

The AER is taken to consist of the Division

(4) For the purposes of the determination of a matter specified in a direction given under subsection (1), the AER is taken to consist of the Division of the AER specified in the direction.

Meetings

(5) The AER Chair is not required to attend a meeting of a Division of the AER if the AER Chair does not think fit to do so.

(6) The AER Deputy Chair is not required to attend a meeting of a Division of the AER if the AER Deputy Chair does not think fit to do so.

(7) At a meeting of a Division of the AER at which neither the AER Chair nor the AER Deputy Chair is presiding, an AER member nominated for the purpose by the AER Chair is to preside.

(8) Despite section 44AAD, at a meeting of a Division of the AER, AER members form a quorum. The quorum need not include the AER Chair or AER Deputy Chair.

Functions and powers of the AER

(9) A Division of the AER specified under subsection (1) may perform the functions and exercise the powers of the AER mentioned in subsection (1) despite the fact that another Division of the AER is performing those functions and exercising those powers at the same time.

the functions and exercise the powers of the AER mentioned in subsection (1) despite the fact that another Division of the AER is performing those functions and exercising those powers at the same time.

Application

- (10) This section does not apply to a State/Territory energy law unless a provision of:
- (a) the State/Territory energy law; or
 - (b) another law of the State or Territory concerned;
- provides that this section extends to, and has effect for the purposes of, the State/Territory energy law.
- (11) This section does not apply to a local energy instrument unless a provision of:
- (a) the local energy instrument; or
 - (b) the State/Territory energy law of the State or Territory concerned; or
 - (c) another law of the State or Territory concerned;
- provides that this section extends to, and has effect for the purposes of, the local energy instrument.

Division D—Miscellaneous

Confidentiality

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

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

Authorised use and disclosure

- (2) For the purposes of subsection (1), the disclosure of information to the extent required or permitted by a law of the Commonwealth or a State or Territory, is authorised use and disclosure of the information.
- (3) Disclosing information to one of the following is authorised use and disclosure of the information:
- (a) the Commission;
 - (b) the AEMC;
 - (c) Australian Energy Market Operator Limited (ACN 072 010 327);
 - (ca) the Clean Energy Regulator;
 - (cb) the Climate Change Authority;
 - (d) any staff or consultant assisting a body mentioned in paragraph (a), (b), (c), (ca) or (cb) in performing its functions or exercising its powers;
 - (e) any other person or body prescribed by the regulations for the purpose of this paragraph.

- (3A) If the AER is satisfied that particular information will enable or assist an entity covered by subsection (3B) to perform or exercise any of the entity's functions or powers, disclosing the information to the entity is authorised use and disclosure of the information.

- (3B) The entities are as follows:

- (a) a Department;
 - (b) a body (whether incorporated or not) established or appointed for a public purpose by or under a law of the Commonwealth;
 - (c) a body established or appointed by the Governor-General by a Minister, otherwise than by or under a law of the Commonwealth;
 - (d) the holder of an office established for public purposes by or under a law of the Commonwealth.
- (4) A person or body to whom information is disclosed under subsection (3) or (3A) may use the information for any purpose connected with the performance of the functions, or the exercise of the powers, of the person or body.
- (5) The AER may impose conditions to be complied with in relation to information disclosed under subsection (3) or (3A).
- (6) For the purposes of subsection (1), the use or disclosure of information by a person for the purposes of:
- (a) performing the person's functions, or exercising the person's powers, as:
 - (i) an AER member, a person referred to in section 4 or a delegate of the AER; or
 - (ii) a person who is authorised to perform or exercise a function or power of, or on behalf of, the AER; or
 - (b) the performance of functions, or the exercise of powers, by the person by way of assisting a delegate of the AER; or
- is authorised use and disclosure of the information.
- (7) Regulations made for the purposes of this section may specify authorised uses of information and authorised disclosures of information that are authorised uses and authorised disclosures for the purposes of this section.
- (8) Nothing in any of the above subsections limits:
- (a) anything else in any of those subsections; or
 - (b) what may otherwise constitute, for the purposes of subsection (1), authorised use or disclosure of information.
- (9) Despite subsections (3) to (7), if:
- (a) any of the following restricts or prohibits the use or disclosure of information:
 - (i) section 18D of the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; or
 - (ii) that section applied as a law of another State or Territory; and
 - (b) the use or disclosure of the information would, apart from this subsection, be authorised under this section;
- the use or disclosure of the information is authorised for the purposes of this section only to the extent that the use or disclosure of the information is required or permitted in accordance with the relevant section mentioned in subparagraph (i) or (ii).

A Power of AER to obtain information and documents

Notice requiring information etc.

- (1) This section applies if the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance

functions referred to in section 44AH (Commonwealth functions).

- (2) The AER may, by written notice given to the person, require the person to do one or more of the following:
- (a) give such information to the AER;
 - (b) produce any such documents to the AER;
 - (c) appear before the AER, or before a specified person assisting the AER who is an SES employee or an acting SES employee, to give any such evidence (either orally or in writing) and produce any such documents.
- (3) The notice must specify:
- (a) if paragraph (2)(a) or (b) applies:
 - (i) the period within which the person must comply with the notice; and
 - (ii) the manner in which the person must comply with the notice; or
 - (b) if paragraph (2)(c) applies:
 - (i) the time at which the person must appear before the AER or person; and
 - (ii) the place at which the person must appear before the AER or person.

Oath or affirmation

- (4) The AER may require the evidence given under paragraph (2) to be given on oath or affirmation. For that purpose, an AER member or a person assisting the AER may administer the oath or affirmation.

3 Failure to comply with notice to give information etc. is an offence

Offence

- (1) A person commits an offence if:
- (a) the person is given a notice under section 44AAFA; and
 - (b) the person fails to comply with the notice.

Penalty: Imprisonment for 2 years or 100 penalty units, or both.

Exceptions

- (2) Subsection (1) does not apply to the extent that the person is incapable of complying with the notice.

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

- (3) Subsection (1) does not apply to the extent that:
- (a) the notice relates to producing documents; and
 - (b) the person proves that, after a reasonable search, the person is not aware of the documents; and
 - (c) the person provides a written response to the notice, including a description of the scope and limitations of the search.

Note: A defendant bears a legal burden in relation to the matter in paragraph (3)(b) (see section 13.4 of the *Criminal Code*).

- (4) For the purposes of (but without limiting) paragraph (3)(b), determination of whether a search is reasonable may take into account the following:

- (a) the nature and complexity of the matter to which the notice relates

relates;

- (b) the number of documents involved;
- (c) the ease and cost of retrieving a document relative to the resources of the person who was given the notice;
- (d) any other relevant matter.

3 AER may inspect, copy and retain documents

- (1) A member of the AER, or a person authorised by a member of the AER, may inspect a document produced under section 44AAFA, and may make and retain copies of such a document.
- (2) The AER may take, and retain for as long as is necessary, possession of a document produced under section 44AAFA.
- (3) The person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by a member of the AER to be a true copy.
- (4) The certified copy must be received in all courts and tribunals as evidence as if it were the original.
- (5) Until a certified copy is supplied, the AER must, at such time and places as the AER thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of the document.

Federal Court may make certain orders

- (1) The Federal Court may make an order, on application by the Commonwealth, on behalf of the Commonwealth, declaring that a person is in breach of:
 - (a) a uniform energy law that is applied as a law of the Commonwealth; or
 - (b) a State/Territory energy law.
- (2) If the order declares the person to be in breach of such a law, the order may include one or more of the following:
 - (a) an order that the person pay a civil penalty determined in accordance with the law;
 - (b) an order that the person cease, within a specified period, the act, activity or practice constituting the breach;
 - (c) an order that the person take such action, or adopt such practice, as the Court requires for remedying the breach or preventing a recurrence of the breach;
 - (d) an order that the person implement a specified program of compliance with the law;
 - (e) an order of a kind prescribed by regulations made under this Act.
- (3) If a person has engaged, is engaging or is proposing to engage in any conduct in breach of:
 - (a) a uniform energy law that is applied as a law of the Commonwealth; or
 - (b) a State/Territory energy law;the Federal Court may, on application by the AER on behalf of the Commonwealth, grant an injunction:
 - (c) restraining the person from engaging in the conduct; and
 - (d) if, in the court's opinion, it is desirable to do so—requiring the person to do something.
- (4) The power of the Federal Court under subsection (3) to grant

injunction restraining a person from engaging in conduct of a particular kind may be exercised:

- (a) if the court is satisfied that the person has engaged in conduct of that kind—whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
- (b) if it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the person engages in conduct of that kind.

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

- (1) If a relevant disconnection event occurs, the Federal Court may make an order, on application by the AER on behalf of the Commonwealth, directing that a Registered participant's loads be disconnected.
- (2) In this section:

National Electricity Law means:

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

National Electricity Rules means:

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

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

relevant disconnection event means an event specified in the National Electricity Rules as being an event for which a Registered participant's loads may be disconnected, where the event does constitute a breach of the National Electricity Rules.

Delegation by the AER

The AER may, by resolution, delegate:

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

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

Note 1: Section 2B of the *Acts Interpretation Act 1901* contains the definition of **SES employee** and **acting SES employee**.

Note 2: See also sections 34AA to 34A of the *Acts Interpretation Act 1901*.

Fees

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

Regulations may deal with transitional matters

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

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

IIAB—Application of the finance law

Application of the finance law

For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

- (a) the following combination of bodies is a listed entity:
 - (i) the Commission;
 - (ii) the AER; and
- (b) the listed entity is to be known as the Australian Competition and Consumer Commission; and
- (c) the Chairperson is the accountable authority of the listed entity; and
- (d) the following persons are officials of the listed entity:
 - (i) the Chairperson;
 - (ii) the other members of the Commission;
 - (iii) the associate members of the Commission;
 - (iv) the AER members;
 - (v) persons engaged under section 27; and
- (e) the purposes of the listed entity include:
 - (i) the functions conferred on the Commission by this Act and
 - (ii) the functions of the AER under Division 3 of Part 1

IIA—Access to services

Objects of Part

The objects of this Part are to:

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

Definitions

In this Part, unless the contrary intention appears:

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

access code application means:

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

access code decision means:

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

access undertaking means an undertaking under section 44ZZAAB.

access undertaking application means:

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

access undertaking decision means:

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

Commonwealth Minister means the Minister.

constitutional trade or commerce means any of the following:

- (a) trade or commerce among the States;

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

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

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

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

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

designated Minister has the meaning given by section 44D.

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

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

entity means a person, partnership or joint venture.

final determination means a determination other than an interim determination.

fixed principle has the meaning given by section 44ZZAAB.

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

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

modifications includes additions, omissions and substitutions.

National Gas Law means:

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

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

party means:

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

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

be:

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

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

responsible Minister means:

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

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

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

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

but does not include:

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

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

State or Territory access regime law means:

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

State or Territory body means:

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

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

How this Part applies to partnerships and joint ventures

- (1) This section applies if the provider of a service is a partnership or joint venture that consists of 2 or more corporations. Those corporations are referred to in this section as the **participant corporations**.
- (2) If this Part requires or permits something to be done by the provider, the thing may be done by one or more of the participant corporations on behalf of the provider.
- (3) If a provision of this Part refers to the provider bearing any costs, the provision applies as if the provision referred to any of the participant corporations bearing any costs.
- (4) If a provision of this Part refers to the provider doing something, the provision applies as if the provision referred to one or more of the participant corporations doing that thing on behalf of the provider.
- (5) If:
 - (a) a provision of this Part requires the provider to do something, or prohibits the provider from doing something,

and

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

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

(6) If:

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

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

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

Meaning of *declaration criteria*

(1) The ***declaration criteria*** for a service are:

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

Note: **Market** is defined in section 4E.

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

(i) over the period for which the service would be declared; and

(ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility); and

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

(i) the size of the facility; or

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

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

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

(2) For the purposes of paragraph (1)(b):

(a) if the facility is currently at capacity, and it is reasonable to expect that it is possible to expand that capacity, have regard to the facility as if it had that expanded capacity; and

(b) without limiting paragraph (1)(b), the cost referred to in that paragraph includes all costs associated with having multiple users of the facility (including such costs that would be incurred if the service is declared).

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

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

(i) infrastructure services; and

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

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

declared.

Meaning of *designated Minister*

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

The principles in the Competition Principles Agreement have status as guidelines

- (1) For the avoidance of doubt:
 - (c) the requirement, under subsection 44M(4), that the Commonwealth Minister apply the relevant principles set out in the Competition Principles Agreement in deciding whether to recommend to the Commonwealth Minister that he or she should decide whether an access regime is, or is not, an effective access regime;
 - (d) the requirement, under subsection 44N(2), that the Commonwealth Minister, in making a decision on a recommendation received from the Council, apply the relevant principles set out in the Agreement;are obligations that the Council and the relevant Ministers must treat each individual relevant principle as having the status of guideline rather than a binding rule.
- (2) An effective access regime may contain additional matters that are not inconsistent with Competition Principles Agreement principles.

This Part binds the Crown

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

Northern Territory.

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

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

Division 2—Declared services

Division A—Recommendation by the Council

Section 44—A person may request recommendation

(1) The designated Minister, or any other person, may apply in writing to the Council asking the Council to recommend that a particular service be declared unless:

(a) the service is the subject of a regime for which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(b) the service is the subject of an access undertaking in operation under Division 6; or

(c) if a decision is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process—the service was specified, in the application for that decision, as a service proposed to be provided by means of the facility; or

(d) if the service is provided by means of a pipeline (within the meaning of a National Gas Law)—there is:

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

(ii) a price regulation exemption in force under the National Gas Law in respect of the pipeline; or

(e) there is a decision of the designated Minister in force under section 44LG that the service is ineligible to be a declared service.

Note: This means an application can only be made or dealt with under this Subdivision if none of paragraphs (a) to (e) apply.

(1A) If the Council decides that one or more of paragraphs (1)(a) to (e) apply for a service mentioned in a person's purported application under that subsection, the Council must give the person written notice explaining:

(a) why those paragraphs apply; and

(b) that such an application cannot be made for the service.

(2) After receiving an application under subsection (1), the Council

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

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

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

(ii) that the service not be declared.

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

Note 2: The Council may request information and invite public submission in relation to the application: see sections 44FA and 44GB.

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

- (3) If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.
- (5) The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.
- (6) The applicant may request, in writing, the Council to vary the application at any time before the Council makes a recommendation relating to it.
- (7) If a request is made under subsection (6), the Council must decide to:
 - (a) make the variation; or
 - (b) reject the variation.
- (9) The Council may reject the variation if it is satisfied that the requested variation is of a kind, or the request for the variation made at a time or in a manner, that:
 - (a) would unduly prejudice the provider (if the provider is the applicant) or anyone else the Council considers has a material interest in the application; or
 - (b) would unduly delay the process for considering the application.

Council may request information

- (1) The Council may give a person a written notice requesting that the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44F.
- (2) The Council must:
 - (a) give a copy of the notice to:
 - (i) if the person is not the applicant—the applicant; and
 - (ii) if the person is not the provider of the service—the provider; and
 - (b) publish, by electronic or other means, the notice.
- (3) In deciding what recommendation to make on the application, the Council:
 - (a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and
 - (b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.
- (4) Subsections 44GB(4) to (6) apply to information given in response to a notice under this section (whether given in compliance with the notice or not) in a corresponding way to the way those subsections apply to a submission made in response to a notice under subsection 44GB(1).

Note: This allows the Council to make the information publicly available subject to any confidentiality concerns.

Criteria for the Council recommending declaration of a service

The Council cannot recommend that a service be declared unless

the Council cannot recommend that a service be delivered if it is satisfied of all of the declaration criteria for the service.

Time limit for Council recommendations

Council to make recommendation within the consideration period

- (1) The Council must make a recommendation on an application under section 44F within the consideration period.
- (2) The consideration period is a period of 180 days (the **expected period**), starting at the start of the day the application is received unless the consideration period is extended under subsection 44F(3).

Stopping the clock

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

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

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

Stopping the clock by agreement

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

Council may extend time for making recommendation

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

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

Publication

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

Failure to comply with time limit does not affect validity

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

Council may invite public submissions on the application

Invitation

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

Consideration of submissions

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

Council may make submissions publicly available

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

Confidentiality

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

submission, or the person withdraws the whole or the part of the submission, the Council must not:

- (i) make the whole or the part of the submission available under subsection (4); and
- (ii) publish or make available the whole or the part of the submission under section 44GC; and
- (iii) have regard to the whole or the part of the submission in making its recommendation on the application.

Council must publish its recommendation

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

Timing

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

Consultation

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

Division B—Declaration by the designated Minister

Designated Minister may declare a service

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

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

- (1A) The designated Minister must have regard to the objects of the Part in making his or her decision.
- (4) The designated Minister cannot declare a service unless he or she is satisfied of all of the declaration criteria for the service.
- (8) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.
- (9) If the designated Minister does not publish under section 44F, his or her decision on the declaration recommendation within

his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period:

- (a) to have made a decision under this section in accordance with the declaration recommendation; and
- (b) to have published that decision under section 44HA.

Designated Minister must publish his or her decision

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

Consultation

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

Operation and effect of declaration

- (1) Subject to this section, a declaration begins to operate at a time specified in the declaration. The time cannot be earlier than 2 days after the declaration is published.
- (2) If:
 - (a) an application for review of a declaration is made within 14 days after the day the declaration is published; and
 - (b) the Tribunal makes an order under section 44KA staying the operation of the declaration;the declaration does not begin to operate until the order is no longer of effect under subsection 44KA(6) or the Tribunal makes a decision on the review to affirm the declaration, whichever is later.
- (3) A declaration continues in operation until its expiry date, unless it is earlier revoked.
- (4) The expiry or revocation of a declaration does not affect:
 - (a) the arbitration of an access dispute that was notified before the expiry or revocation; or
 - (b) the operation or enforcement of any determination made before the expiry or revocation of the declaration in relation to the arbitration of an access dispute that was notified before the expiry or revocation of the declaration.

the expiry or revocation.

Revocation of declaration

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

Review of declaration

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

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

- (5) For the purposes of the review, the Tribunal has the same

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

Tribunal may stay operation of declaration

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

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

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

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

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

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

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

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

(b) has effect until:

- (i) if a period for the operation of the order is specified in the order—the expiration of that period or, if the application for review is decided by the Tribunal before the expiration of that period, the decision of the Tribunal on the application for review comes into operation; or
- (ii) if no period is so specified—the decision of the Tribunal on the application for review comes into operation.

Tribunal may order costs be awarded

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

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

- (a) the costs that would be incurred by the other party to the proceedings as a result of that conduct; or
- (b) the time required by the Tribunal to make a decision on the review as a result of that conduct; or
- (c) the time required by the other party to prepare their case for the purposes of the review as a result of that conduct; or
- (d) the submissions or arguments made during the proceedings to the Tribunal by the other party or parties to the proceedings.

or by the Council.

- (3) If the Tribunal makes an order under subsection (1), it may further orders that it considers appropriate in relation to the assessment or taxation of the costs.
- (4) The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.
- (5) If a party (the **first party**) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.

Review of decision not to revoke a declaration

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

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

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

Division 2AA—Services that are ineligible to be declared

Division A—Scope of Division

Constitutional limits on operation of this Division

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

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

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

Division B—Ineligibility recommendation by Council

Ineligibility recommendation

Person may request recommendation

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

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

Council must make recommendation

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

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

Note 2: The Council may request information and invite public submission in relation to the application: see sections 44LC and 44LE.

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

Limits on recommendation

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

Relationship between ineligibility recommendations, access undertakings and competitive tender processes

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

- (6) The Council may recommend that the designated Minister decide that the service is ineligible to be a declared service even if

that the service is intended to be a declared service even if:

- (a) the service is proposed to be provided by means of a facility specified under paragraph 44PA(2)(a); and
- (b) a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of the facility, as a competitive tender process.

Applicant may withdraw application

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

Council may request information

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

Time limit for Council recommendations

Council to make recommendation within the consideration period

- (1) The Council must make a recommendation on an application under section 44LB within the consideration period.
- (2) The consideration period is a period of 180 days (the **expected period**), starting at the start of the day the application is received, unless the consideration period is extended under subsection 44LB(4).

Stopping the clock

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

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

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

Stopping the clock by agreement

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

Extension of time for making decision

- (7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or it has been previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.
- (8) The notice must:
- (a) specify when the Council must now make a recommendation on the application; and
 - (b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.
- (9) The Council must give a copy of the notice to:
- (a) the applicant; and
 - (b) if the applicant is not the person who is, or expects to be, the provider—that person.

Publication

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

Failure to comply with time limit does not affect validity

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

Council may invite public submissions on the application

Invitation

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

Consideration of submissions

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

Council may make submissions publicly available

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

Confidentiality

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

Council must publish its recommendation

Council must publish its recommendation

- (1) The Council must publish, by electronic or other means, a recommendation under section 44LB and its reasons for the recommendation.
- (2) The Council must give a copy of the publication to:
- (a) the person who made the application under section 44LB and
 - (b) if the applicant is not the person who is, or expects to be, the provider—that person.

Timing

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

Consultation

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

Division C—Designated Minister’s decision on ineligibility

Designated Minister’s decision on ineligibility

- (1) On receiving an ineligibility recommendation, the designated Minister must:
- (a) decide:
 - (i) that the service is ineligible to be a declared service and
 - (ii) the period for which the decision is in force (which must be at least 20 years); or
 - (b) decide that the service is not ineligible to be a declared service.
- Note: The designated Minister must publish his or her decision: see section 44LH.
- (2) The designated Minister must have regard to the objects of Part in making his or her decision.
- (3) The designated Minister may decide that the service is ineligible to be a declared service even if the service is the subject of an access undertaking in operation under Division 6.
- (4) The designated Minister may decide that the service is ineligible to be a declared service even if:
- (a) the service is proposed to be provided by means of a facility specified under paragraph 44PA(2)(a); and
 - (b) a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of the facility, as a competitive tender process.
- (5) The designated Minister must not decide that the service is ineligible to be a declared service unless he or she is satisfied both of the following matters:
- (a) that the service is to be provided by means of the proposed facility when constructed;
 - (b) that he or she is not satisfied of at least one of the declaration criteria for the service to be provided by means of the proposed facility.
- (6) If the designated Minister does not publish under section 44LH his or her decision on the ineligibility recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:
- (a) the designated Minister is taken, immediately after the end of that 60-day period, to have made a decision under

subsection (1) in accordance with the ineligibility recommendation and to have published that decision under section 44LH; and

- (b) if the Council recommended that the designated Minister decide that the service be ineligible to be a declared service, the period for which the decision is in force is taken to be the period recommended by the Council.

Designated Minister must publish his or her decision

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

Consultation

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

Division D—Revocation of ineligibility decision

Revocation of ineligibility decision

Council may recommend revocation if facility materially different from that described in application upon request

- (1) The Council may recommend to the designated Minister that the designated Minister revoke his or her decision (the **ineligibility decision**) that a service is ineligible to be a declared service. The Council must have regard to the objects of this Part in making the recommendation.
- (2) The Council cannot recommend that a decision be revoked unless:
- (a) it is satisfied that, at the time of the recommendation, the facility that is (or will be) used to provide the service concerned is so materially different from the proposed facility described in the application made under section 44LB that the Council is satisfied of all of the declaration criteria for the service; or
 - (b) the person who is, or expects to be, the provider of the service that is provided, or that is proposed to be provided, by means of the facility requests that it be revoked.

Minister must decide whether to revoke

- (3) On receiving a recommendation that the designated Minister

revoke the ineligibility decision, the designated Minister must either revoke the ineligibility decision or decide not to revoke ineligibility decision.

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

Minister must publish decision

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

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

Deemed decision of Minister

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

- (a) to have made a decision (the **deemed decision**) under subsection (3) that the ineligibility decision be revoked; and
- (b) to have published the deemed decision under subsection (5).

Limits on when a revocation can be made

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

When a revocation comes into operation

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

Division E—Review of decisions

Review of ineligibility decisions

Application for review

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

Note: There are limits on the information to which the Tribunal may have access.

regard (see section 44ZZOAA) and time limits that apply to the Tribunal decision on the review (see section 44ZZOA).

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

Council to provide assistance

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

Tribunal's decision

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

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

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

Effect of Tribunal's decision

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

Review of decision to revoke or not revoke an ineligibility decision

Application for review

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

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

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

Council to give assistance

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

Tribunal's decision

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

Effect of Tribunal's decision

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

Division F—Other matters

ineligibility decisions subject to alteration, cancellation etc.

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

paragraphs.

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

Division 2A—Effective access regimes

Division A—Recommendation by Council

Recommendation for a Ministerial decision on effectiveness of access regime

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

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

Note 2: The Council may request information and invite public submission in relation to the application: see sections 44MA and 44NE.

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

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

Council may request information

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

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

Division B—Decision by Commonwealth Minister

Ministerial decision on effectiveness of access regime

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

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

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

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

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

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

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

- (a) the Commonwealth Minister is taken, immediately after the end of that 60-day period:
 - (i) to have made a decision under subsection (1) in accordance with the recommendation made by the Council under section 44M; and
 - (ii) to have published that decision under section 44N; and
- (b) if the Council recommended that the Commonwealth Minister decide that the access regime is an effective access regime for the service, or proposed service—the decision is taken to be in force for the period recommended by the Council under subsection 44M(5).

Division C—Extensions of Commonwealth Minister's decision

Recommendation by Council

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

Territory for access to a service is an effective access regime.

Application to Council

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

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

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

Assessment by Council

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

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

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

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

Council may request information

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

Decision by the Commonwealth Minister

- (1) On receiving a recommendation under section 44NA, the

Commonwealth Minister must assess whether the access regime (including any proposed variations) is an effective access regime. He or she must do this in accordance with subsection 44N(2).

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

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

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

(3A) If the Commonwealth Minister does not publish under section 44NG his or her decision on a recommendation under section 44NA within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day:

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

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

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

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

Multiple extensions

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

Division CA—Revocation of Commonwealth Minister's decision

Recommendation by Council

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

(a) may, on its own initiative; and

(b) must, on an application made under subsection (3); consider whether to recommend that the Commonwealth Minister revoke the decision.

(2) Before considering on its own initiative whether to recommend that the Commonwealth Minister revoke the decision, the Council must:

(a) publish, by electronic or other means, a notice to that effect; and

(b) give a copy of the notice to:

(i) the responsible Minister for the State or Territory

(ii) the provider of the service.

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

revoke the decision:

- (a) a person who is seeking access to the service;
- (b) the responsible Minister for the State or Territory;
- (c) the provider of the service.

The Council must give a copy of the application to each entity mentioned in paragraph (b) or (c), unless that entity is the applicant.

- (4) Subject to subsection (5), the Council's consideration of whether to make the recommendation must be in accordance with subsection 44M(4).
- (5) In considering whether to make the recommendation, the Council must consider whether it is satisfied that the regime no longer meets the relevant principles, set out in the Competition Principles Agreement, relating to whether access regimes are effective access regimes, because of either or both of the following:
 - (a) substantial changes to the regime;
 - (b) substantial amendments of those principles.
- (6) If the Council is so satisfied, the Council must, in writing, recommend to the Commonwealth Minister that he or she revoke the decision.
- (7) If the Council is not so satisfied, the Council must, in writing, recommend to the Commonwealth Minister that he or she not revoke the decision.

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

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

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

Council may request information

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

Decision by the Commonwealth Minister

- (1) On receiving a recommendation under section 44NBA, the

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

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

- (2) In making his or her assessment, the Commonwealth Minister must consider whether he or she is satisfied as to the matter set out in subsection 44NBA(5).
- (3) If the Commonwealth Minister is so satisfied, he or she must, by notice in writing, decide to revoke the decision. The notice must specify the day on which the revoked decision is to cease to be in force.
- (4) If the Commonwealth Minister is not so satisfied, he or she must, by notice in writing, decide not to revoke the decision.
- (5) If the Commonwealth Minister does not publish under section 44NG his or her decision on the recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, he or she is taken, immediately after the end of that 60-day period:
 - (a) to have made a decision under this section in accordance with the recommendation made by the Council under section 44NBA; and
 - (b) to have published that decision under section 44NG.

Division D—Procedural provisions

Time limit for Council recommendations

Council to make recommendation within the consideration period

- (1) The Council must make a recommendation on an application under section 44M, 44NA or 44NBA, or on a consideration by the Council on its own initiative under section 44NBA, within the consideration period.
- (2) The consideration period is a period of 180 days (the **expected period**), starting at the start of the day the application is received or the consideration is notified under paragraph 44NBA(2)(a), unless the consideration period is extended under subsection 44NBA(3).

Stopping the clock

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

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

| | application | | |
|---|--|--------------------------------------|--|
| 3 | A notice is given under subsection 44NAA(1) requesting information in relation to the application | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information |
| 4 | A notice is given under subsection 44NBB(1) requesting information in relation to the application or consideration | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information |

(4) Despite subsection (3):

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

Stopping the clock by agreement

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

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

Council may extend time for making recommendation

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

(8) The notice must:

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

(9) The Council must give a copy of the notice to:

- (a) if the Commission is not acting on its own initiative under paragraph 44NBA(1)(a)—the applicant; and
- (b) if the applicant is not the provider of the service—the provider.

Publication

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

- (a) stating that it has done so; and
- (b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

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

Invitation

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

Consideration of submissions

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

Council may make submissions publicly available

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

Confidentiality

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

Publication—Council

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

- (a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative); and
- (b) the provider of the service.

Timing

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

Consultation

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

Publication—Commonwealth Minister

- (1) The Commonwealth Minister must publish, by electronic or other means, his or her decision on a recommendation under section 44M, 44NA or 44NBA and his or her reasons for the decision.
- (2) The Commonwealth Minister must give a copy of the publication to:
 - (a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative); and
 - (b) the provider of the service.

Consultation

- (3) Before publishing under subsection (1), the Commonwealth Minister may give any one or more of the following persons:
 - (a) the applicant under section 44M or 44NA, or under section 44NBA (unless the recommendation relates to a consideration by the Council under that section on its own initiative);
 - (b) the provider of the service;
 - (c) any other person the Minister considers appropriate;a notice in writing:
 - (d) specifying what the Minister is proposing to publish; and
 - (e) inviting the person to make a written submission to the Minister within 14 days after the notice is given identifying information the person considers should not be published

information the person considers should not be published because of its confidential commercial nature.

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

Division E—Review of decisions

Review of Ministerial decision on effectiveness of access regime

- (1) The responsible Minister of the State or Territory:
- (a) who applied for a recommendation under section 44MA and the Commonwealth Minister decide that the access regime is not an effective access regime; or
 - (b) who applied for a recommendation under section 44NA and the Commonwealth Minister decide to extend the period for which the decision under section 44N is in force;
- may apply to the Tribunal for review of the Commonwealth Minister's decision.
- (1A) If, on receiving a recommendation under section 44NBA relating to a decision under section 44N, the Commonwealth Minister has made a decision under section 44NBC:
- (a) the person who applied under subsection 44NBA(3) for the Council to make a recommendation relating to that decision under section 44N; or
 - (b) any other person who could have applied under subsection 44NBA(3) for the Council to make such a recommendation;
- may apply to the Tribunal for review of the Commonwealth Minister's decision under section 44NBC.
- (2) An application for review must be made within 21 days after publication of the Commonwealth Minister's decision.
- (3) The review by the Tribunal is a reconsideration of the matter based on the information, reports and things referred to in section 44ZZOAA.
- Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).
- (4) For the purposes of the review, the Tribunal has the same powers as the Commonwealth Minister.
- (5) The member of the Tribunal presiding at the review may request the Council to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for the review; and
 - (ii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (6) The Tribunal may affirm, vary or reverse the Commonwealth Minister's decision.

- (7) A decision made by the Tribunal is to be taken to be a decision of the Commonwealth Minister for all purposes of this Part (except this section).

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

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

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

- (a) a decision by the Commonwealth Minister that the regime is no longer an effective access regime ceases to be in force; and
- (b) the Council, the Commonwealth Minister and the Tribunal need not take any further action relating to an application or a decision by the Commonwealth Minister that the regime is no longer an effective access regime.

Division 2B—Competitive tender processes for government owned facilities

Approval of competitive tender process

Application to Commission

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

Decision of Commission

- (3) The Commission must, by notice in writing, approve or refuse to approve the tender process as a competitive tender process.

Note 1: While a decision is in force approving a tender process as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph (2)(a) to be a competitive tender process: see subsection 44H(3A).

Note 2: There are time limits that apply to the Commission's decision: see section 44PD.

Note 3: The Commission may request information and invite public submission on the application: see sections 44PAA and 44PE.

Note 4: The Commission must publish its decision: see section 44PF.

- (4) The Commission must not approve a tender process as a competitive tender process unless:
 - (a) it is satisfied that reasonable terms and conditions of access to any service specified under paragraph (2)(a) will be the result of the process; and
 - (b) it is satisfied that the tender process meets the requirements prescribed by the regulations.

- (4A) The Commission may approve the tender process as a competitive tender process even if the service proposed to be provided by

means of the facility is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be declared service.

Period for which decision in force

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

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

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

Legislation Act 2003

- (7) A notice under subsection (3) is not a legislative instrument.

Commission may request information

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

Report on conduct of tender process

Report

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

Commission may ask for further information

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

Legislation Act 2003

- (4) A report under subsection (1) is not a legislative instrument.

Revocation of approval decision

Discretionary revocation

- (1) The Commission may, by writing, revoke a decision to approve

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

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

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

(2) The Commission may, by writing, revoke a decision to approve a tender process as a competitive tender process if it is satisfied that the provider of a service:

(a) specified under paragraph 44PA(2)(a); and

(b) being provided by means of the facility concerned;

is not complying with the terms and conditions of access to the service.

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

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

(3) Before making a decision under subsection (2), the Commission must give the applicant under subsection 44PA(1), and the provider of the service, a written notice:

(a) stating that the Commission is proposing to make such a decision and the reasons for it; and

(b) inviting the person to make a written submission to the Commission on the proposal; and

(c) stating that any submission must be made within the period of 40 business days after the notice is given.

(4) The Commission must consider any written submission received within that period.

Mandatory revocation

(5) If:

(a) the Commission approves a tender process as a competitive tender process; and

(b) the Commission gives the applicant a notice under subsection 44PB(1) or (3); and

(c) the applicant does not comply with the notice within the period of 40 business days beginning on the day on which notice is given;

the Commission must, by writing, revoke the approval decision at the end of that period. The Commission must give notice of the revocation to the applicant.

Definition

(6) In this section:

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

Time limit for Commission decisions

Commission to make decision within 90 days

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

Stopping the clock

(2) In working out the expected period in relation to a decision application under subsection 44PA(1), in a situation referred to in column 1 of an item of the following table, disregard any day in the period:

- (a) starting on the day referred to in column 2 of the item;
- (b) ending on the day referred to in column 3 of the item.

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

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

Stopping the clock by agreement

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

(5) The Commission must publish, by electronic or other means, the agreement.

Deemed approval as a competitive tender process

(6) If the Commission does not publish under subsection 44PF(1) a decision on the application within the expected period, it is taken to have immediately after the end of the expected period, to have:

- (a) approved the tender process as a competitive tender process; and
- (b) published the decision to approve the process and its reasons for that decision; and
- (c) specified that the decision is in force for a period of 20 years, starting 21 days after the start of the day the decision is taken to have been published.

Commission may invite public submissions

Invitation

(1) The Commission may publish, by electronic or other means, a notice inviting public submissions:

- (a) on an application under subsection 44PA(1); or
- (b) on any proposed decision under subsection 44PC(1) or to revoke a decision under subsection 44PA(3) to approve a tender process as a competitive tender process;

if it considers that it is appropriate and practicable to do so.

(2) The notice must specify how submissions may be made and the day by which submissions may be made (which must be at least

days after the day the notice is published).

Consideration of submissions

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

Commission may make submissions publicly available

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

Confidentiality

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

Commission must publish its decisions

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

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

Consultation

- (3) Before publishing under subsection (1), the Commission must consult the following persons:
- (a) for any decision—the applicant under subsection 44PA(1)

- any other person the Commission considers appropriate;
- (b) for a decision under subsection 44PC(2)—the provider service;

a notice in writing:

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

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

Review of Commission's initial decision

Application

- (1) A person whose interests are affected by a decision of the Commission under subsection 44PA(3) may apply in writing to the Tribunal for review of the decision.
- (2) The person must apply for review within 21 days after the Commission publishes its decision.

Review

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

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

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

Tribunal's decision

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

tender process is taken to be a decision by the Commission for the purposes of this Part (except this section).

- (8) If the Commission approved a tender process as a competitive tender process, the Tribunal must, by writing, affirm or set aside the Commission's decision.

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

Review of decision to revoke an approval

Application

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

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

Review

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

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

- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
- (5) The member of the Tribunal presiding at the review may request the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

- (5B) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the person who made the application under subsection 44PA(1) requesting approval of a tender process as a competitive tender process; and
 - (iii) for a review of a decision under subsection 44PC(2)—the provider of the service; and
 - (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.

Tribunal's decision

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

Division 2C—Register of decisions and declarations

Register of decisions, declarations and ineligibility decisions

The Commission must maintain a public register that includes:

- (a) each decision of the Commonwealth Minister that a request established by a State or Territory for access to a service is not an effective access regime for the service or proposed service; and
- (aa) each decision of the Commonwealth Minister to extend the period for which a decision under section 44N is in force;
- (b) each declaration (including a declaration that is no longer in force); and
- (ba) each decision of a designated Minister under section 44 that a service is ineligible to be a declared service; and
- (bb) each decision of a designated Minister under section 44 to revoke his or her decision that a service is ineligible to be a declared service; and
- (c) each decision of the Commission under subsection 44P(2) to approve a tender process as a competitive tender process; and
- (d) each decision of the Commission under section 44PC to revoke a decision under subsection 44PA(3).

Division 3—Access to declared services

Division A—Scope of Division

Constitutional limits on operation of this Division

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

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

Division B—Notification of access disputes

Notification of access disputes

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

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

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

Withdrawal of notifications

- (1) A notification may be withdrawn as follows (and not otherwise):

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

Division C—Arbitration of access disputes

Parties to the arbitration

The parties to the arbitration of an access dispute are:

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

Determination by Commission

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

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

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

- (2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:
- (a) require the provider to provide access to the service by the third party;
 - (b) require the third party to accept, and pay for, access to the service;
 - (c) specify the terms and conditions of the third party's access to the service;
 - (d) require the provider to extend the facility;
 - (da) require the provider to permit interconnection to the facility by the third party;
 - (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.
- (2A) Without limiting paragraph (2)(d), a requirement referred to in that paragraph may do either or both of the following:
- (a) require the provider to expand the capacity of the facility;

- (b) require the provider to expand the geographical reach of the facility.
- (3) A determination does not have to require the provider to provide access to the service by the third party.
- (4) Before making a determination, the Commission must give a draft determination to the parties.
- (5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.
- (6) A determination is not a legislative instrument.

Restrictions on access determinations

- (1) The Commission must not make a determination that would have any of the following effects:
 - (a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;
 - (b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;
 - (c) depriving any person of a protected contractual right;
 - (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility), with the consent of the provider;
 - (e) requiring the provider to bear some or all of the costs of extending the facility (including expanding the capacity of the facility and expanding the geographical reach of the facility);
 - (ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expanding the capacity of the facility and expansions of the geographical reach of the facility);
 - (f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.
- (2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.
- (3) A determination is of no effect if it is made in contravention of subsection (1).
- (4) If the Commission makes a determination that has the effect of depriving a person (the **second person**) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:
 - (a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and
 - (b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agreed to pay or is required by a court order, to pay to the second person as compensation for the deprivation.

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

(4A) If an application for review of a declaration of a service has been made under subsection 44K(1), the Commission must not make a determination in relation to the service until the Tribunal has made its decision on the review.

(5) In this section:

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

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

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

matters that the Commission must take into account

Final determinations

(1) The Commission must take the following matters into account when making a final determination:

(aa) the objects of this Part;

(a) the legitimate business interests of the provider, and the provider's investment in the facility;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions (including expansion of capacity and expansions of geographical reach) whose cost is borne by someone else;

(ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility;

(h) the pricing principles specified in section 44ZZCA.

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

Interim determinations

(3) The Commission may take the following matters into account when making an interim determination:

(a) a matter referred to in subsection (1);

(b) any other matter it considers relevant.

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

Time limit for Commission's final determination

Commission to make final determination within 180 days

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

Stopping the clock

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

| Stopping the clock | | | |
|---------------------------|--|---|--|
| Item | Column 1 Situation | Column 2 Start day | Column 3 End day |
| 1 | An agreement is made in relation to the arbitration under subsection (4) | The first day of the period specified in the agreement | The last day of the period specified in the agreement |
| 2 | A direction is given under subsection 44ZG(1) to give information or make a submission within a specified period | The first day of the period specified for the giving of the information or the making of the submission | The last day of the period specified for the giving of the information or the making of the submission |
| 3 | A decision is published under subsection 44ZZCB(4) deferring consideration of the dispute while the Commission considers an access undertaking | The day on which the decision is published | The day on which the Commission makes its decision on the access undertaking under subsection 44ZZA(3) |
| 4 | The Commission, under subsection 44ZZCBA(1) or (2), defers arbitrating the dispute while a declaration is under review by the Tribunal | The day on which the Commission gives the notice to defer arbitrating the dispute | The day the Tribunal makes its decision under section 44K on the review |

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

Stopping the clock by agreement

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

Deemed final determination

- (6) If the Commission does not publish under section 44ZNB a written report about a final determination within the expected period, it is taken, immediately after the end of the expected period, to have:
- (a) made a final determination that does not impose any obligations on the parties or alter any obligations (if any) exist at that time between the parties; and
 - (b) published a written report about the final determination under section 44ZNB.

Commission may terminate arbitration in certain cases

- (1) The Commission may at any time terminate an arbitration (without making a final determination) if it thinks that

(without making a final determination) if it thinks that:

- (a) the notification of the dispute was vexatious; or
 - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (c) the party who notified the dispute has not engaged in negotiations in good faith; or
 - (d) access to the service should continue to be governed by an existing contract between the provider and the third party.
- (2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

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

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

Division D—Procedure in arbitrations

Constitution of Commission for conduct of arbitration

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

Member of the Commission presiding at an arbitration

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

Reconstitution of Commission

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

Determination of questions

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

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

Hearing to be in private

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

Right to representation

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

Procedure of Commission

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

Particular powers of Commission

- (1) The Commission may do any of the following things for the purpose of arbitrating an access dispute:
 - (a) give a direction in the course of, or for the purposes of, an arbitration hearing;
 - (b) hear and determine the arbitration in the absence of a

person who has been summoned or served with a notice to appear;

(c) sit at any place;

(d) adjourn to any time and place;

(e) refer any matter to an expert and accept the expert's report as evidence;

(f) generally give all such directions, and do all such things as are necessary or expedient for the speedy hearing and determination of the access dispute.

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

Penalty: Imprisonment for 6 months.

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

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

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

Power to take evidence on oath or affirmation

(1) The Commission may take evidence on oath or affirmation and for that purpose a member of the Commission may administer an oath or affirmation.

(2) The member of the Commission who is presiding may summon a person to appear before the Commission to give evidence and produce such documents (if any) as are referred to in the summons.

(3) The powers in this section may be exercised only for the purposes of arbitrating an access dispute.

Failing to attend as a witness

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

(a) fail to attend as required by the summons; or

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

Penalty: Imprisonment for 6 months.

Failing to answer questions etc.

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

(a) refuse or fail to be sworn or to make an affirmation; or

(b) refuse or fail to answer a question that the person is required to answer by the Commission; or

(c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part served on him or her as prescribed.

Penalty: Imprisonment for 6 months.

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

Intimidation etc.

A person must not:

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

because that other person:

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

Penalty: Imprisonment for 12 months.

Party may request Commission to treat material as confidential

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

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

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

Parties to pay costs of an arbitration

The regulations may provide for the Commission to:

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

conducting the arbitration; and

(b) apportion the charge between the parties.

Joint arbitration hearings

Joint arbitration hearing

(1) If:

(a) the Commission is arbitrating 2 or more access disputes at a particular time; and

(b) one or more matters are common to those disputes;

the Chairperson may, by notice in writing, decide that the Commission must hold a joint arbitration hearing in respect of all or some of those disputes (the **nominated disputes**) as are specified in the notice.

(2) The Chairperson may do so only if he or she considers this would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.

Consulting the parties

(3) Before doing so, the Chairperson must give each party to the arbitration of each nominated dispute a notice in writing:

(a) specifying what the Chairperson is proposing to do; and

(b) inviting the party to make a written submission on the proposal to the Chairperson within 14 days after the notice is given.

(4) The Chairperson must have regard to any submission so made when deciding whether to do so. He or she may have regard to any other matter he or she considers relevant.

Directions to presiding member

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

Constitution and procedure of Commission

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

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

Record of proceedings etc.

(7) The Commission as constituted for the purposes of the joint arbitration hearing may have regard to any record of the proceedings of the arbitration of any nominated dispute.

(8) The Commission as constituted for the purposes of the arbitration of each nominated dispute may, for the purposes of making a determination in relation to that arbitration:

(a) have regard to any record of the proceedings of the joint arbitration hearing; and

(b) adopt any findings of fact made by the Commission as constituted for the purposes of the joint arbitration hearing.

Legislation Act 2003

(9) The following are not legislative instruments:

- (a) a notice made under subsection (1);
- (b) a direction given under subsection (5).

Division DA—Arbitration reports

Arbitration reports

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

Report must include certain matters

- (3) The report must set out the following matters:
 - (a) the principles the Commission applied in making the determination;
 - (b) the methodologies the Commission applied in making the determination and the reasons for the choice of the asset valuation methodology;
 - (c) how the Commission took into account the matters mentioned in subsection 44X(1) in making the determination;
 - (d) any matter the Commission took into account under subsection 44X(2) in making the determination and the reasons for doing so;
 - (e) any information provided by the parties to the arbitration that was relevant to those principles or methodologies;
 - Note: Confidentiality issues are dealt with in subsections (5) to (7).
 - (f) any implications the Commission considers the determination has for persons seeking access to the services to similar services in the future;
 - (g) if applicable—the reasons for the determination dealing with matters that were already agreed between the parties to the arbitration at the time the access dispute was notified;
 - (h) if applicable—the reasons for the access dispute being subject of a joint arbitration hearing under section 44ZNA despite the objection of a party to the arbitration.

Report may include other matters

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

Confidentiality

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

- (8) A report prepared under subsection (1) is not a legislative instrument.

Division E—Effect of determinations

Operation of final determinations

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

Backdating

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

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

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

Operation of interim determination

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

Interest

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

Guidelines

- (7) In exercising the power conferred by subsection (3) or (6), the Commission must have regard to any guidelines in force under subsection (8). It may have regard to any other matter it considers relevant.

- (8) The Commission must, by legislative instrument, determine guidelines for the purposes of subsection (7).
- (9) The Commission must take all reasonable steps to ensure that the first set of guidelines under subsection (8) is made within 12 months after the commencement of this subsection.

Effect and duration of interim determinations

- (1) An interim determination takes effect on the day specified in the determination.
 - (2) Unless sooner revoked, an interim determination continues in effect until the earliest of the following:
 - (a) the notification of the access dispute is withdrawn under section 44T;
 - (b) a final determination relating to the access dispute takes effect;
- Note: A backdated final determination may prevail over an interim determination: see subsection 44ZO(5).
- (c) an interim determination made by the Tribunal (while reviewing a final determination relating to the access dispute) takes effect.

Division F—Review of final determinations

Review by Tribunal

- (1) A party to a final determination may apply in writing to the Tribunal for a review of the determination.
 - (2) The application must be made within 21 days after the Commission made the final determination.
 - (3) A review by the Tribunal is a re-arbitration of the access dispute based on the information, reports and things referred to in section 44ZZOAA.
- Note: There are time limits that apply to the Tribunal's decision on the review: see section 44ZZOA.
- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
 - (5) The member of the Tribunal presiding at the review may request the Commission to give assistance for the purposes of the review.
 - (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
 - (5B) The Tribunal must:
 - (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the other party or parties to the final determination; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
 - (6) The Tribunal may either affirm or vary the Commission's determination.
 - (7) The determination, as affirmed or varied by the Tribunal, is taken to be a determination of the Commission for all purposes.

this Part (except this section).

(8) The decision of the Tribunal takes effect from when it is made.

Provisions that do not apply in relation to a Tribunal review

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

Appeals to Federal Court from determinations of the Tribunal

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

Operation and implementation of a determination that is subject to appeal

- (1) Subject to this section, the fact that an appeal is instituted in the Federal Court from a decision of the Tribunal does not affect the operation of the decision or prevent action being taken to implement the decision.
- (2) If an appeal is instituted in the Federal Court from a decision of the Tribunal, the Federal Court or a judge of the Federal Court may make any orders staying or otherwise affecting the operation or implementation of the decision of the Tribunal that the Federal Court or judge thinks appropriate to secure the effectiveness of the hearing and determination of the appeal.
- (3) If an order is in force under subsection (2) (including an order previously varied under this subsection), the Federal Court or a judge of the Federal Court may make an order varying or revoking the first-mentioned order.
- (4) An order in force under subsection (2) (including an order previously varied under subsection (3)):
 - (a) is subject to any conditions that are specified in the order; and
 - (b) has effect until:
 - (i) the end of any period for the operation of the order that is specified in the order; or
 - (ii) the giving of a decision on the appeal.

- (ii) the giving of a decision on the appeal; whichever is earlier.

Transmission of documents

If an appeal is instituted in the Federal Court:

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

Division G—Variation and revocation of determinations

Variation of final determinations

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

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

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

Variation and revocation of interim determinations

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

Division 4—Registered contracts for access to declared services

Constitutional limits on operation of this Division

This Division does not apply to a contract unless:

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

Registration of contract

- (1) On application by all the parties to a contract, the Commission must:
 - (a) register the contract by entering the following details of the contract in the public register:

- (i) the names of the parties to the contract;
 - (ii) the service to which the contract relates;
 - (iii) the date on which the contract was made; or
- (b) decide not to register the contract.
- (2) In deciding whether to register a contract, the Commission take into account:
 - (aa) the objects of this Part; and
 - (a) the public interest, including the public interest in having competition in markets (whether or not in Australia); and
 - (b) the interests of all persons who have rights to use the service to which the contract relates.
- (2A) The Commission must not register a contract if it deals with matter or matters relating to access to the service that are dealt with in an access undertaking that is in operation.
- (3) The Commission must publish a decision not to register a contract.
- (4) If the Commission publishes a decision not to register a contract, it must give the parties to the contract reasons for the decision when it publishes the decision.

Review of decision not to register contract

- (1) If the Commission decides not to register a contract, a party to the contract may apply in writing to the Tribunal for review of the decision.
- (2) An application for review must be made within 21 days after publication of the Commission's decision.
- (3) The review by the Tribunal is a re-consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.
- Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal decision on the review (see section 44ZZOA).
- (4) For the purposes of the review, the Tribunal has the same powers as the Commission.
- (5) The member of the Tribunal presiding at the review may request the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
 - (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) the other party or parties to the contract; and
 - (iii) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice; and
- (6) The Tribunal may either:
 - (a) affirm the Commission's decision; or
 - (b) register the contract.

Effect of registration of contract

The parties to a contract that has been registered:

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

Division 5—Hindering access to declared services

Prohibition on hindering access to declared services

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

Division 6—Access undertakings and access codes for declared services

Division A—Giving of access undertakings and access codes

Access undertakings by providers

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

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

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

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

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

(3AA) The Commission must not accept the undertaking if a decision of the Commonwealth Minister is in force under section 44N that the regime established by a State or Territory for access to the service is an effective access regime.

(3AB) The Commission may reject the undertaking if it incorporates one or more amendments (see subsection 44ZZAAA(5)) and the Commission is satisfied that the amendment or amendments are of a kind, are made at a time, or are made in a manner that:

- (a) unduly prejudices anyone the Commission considers has a material interest in the undertaking; or
- (b) unduly delays the process for considering the undertaking.

(3A) The Commission must not accept the undertaking unless:

- (a) the provider, or proposed provider, is a corporation (or partnership or joint venture consisting wholly of corporations) or
- (b) the undertaking provides for access only to third parties that are corporations; or
- (c) the undertaking provides for access that is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

(6) If the undertaking provides for disputes about the undertaking to be resolved by the Commission, then the Commission may resolve the disputes in accordance with the undertaking.

(6A) If the undertaking provides for the Commission to perform functions or exercise powers in relation to the undertaking, then the Commission may perform those functions and exercise those powers. If the Commission decides to do so, it must do so in accordance with the undertaking.

(6B) The Commission may accept the undertaking even if the service is the subject of a decision by the designated Minister under section 44LG that the service is ineligible to be a declared service.

(7) The provider may:

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

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

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

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

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

4A Proposed amendments to access undertakings

Commission may give an amendment notice in relation to an

Commission may give an amendment notice in relation to an undertaking

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

Person may give a revised undertaking in response to notice

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

Commission not required to accept revised undertaking

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

No duty to propose amendments

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

Notice of proposed amendment is not a legislative instrument

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

44B Access undertakings containing fixed principles

Access undertakings may contain fixed principles

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

Consideration of fixed principles

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

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

Fixed principles must be carried over to later undertakings

- (5) Subsection (6) applies if:
 - (a) the Commission accepts an undertaking (the **earlier undertaking**) in connection with the provision of access to a service that includes a fixed principle; and
 - (b) an undertaking (the **later undertaking**) is given to the Commission in connection with the provision of access to a service within the fixed period for the fixed principle; and
 - (c) at the time the later undertaking is given:
 - (i) the fixed principle has not been revoked under subsection (7); and
 - (ii) the earlier undertaking has not been varied under subsection 44ZZA(7) so that the fixed principle is not a term of the earlier undertaking.

- (6) The Commission must not accept the later undertaking under subsection 44ZZA unless the undertaking includes a term that is the same as the fixed principle.

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

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

Note: Subsection 44ZZA(7) contains provision for fixed principles to be varied or revoked in the situation where there is an access undertaking in operation.

operation. This may include a variation of the fixed period for the fixed period principle.

Alteration of fixed principles

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

Access codes prepared by industry bodies

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

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

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

- (7) If the industry body that gave the code to the Commission has ceased to exist, a withdrawal or variation under subsection (6) may be made by a body or association prescribed by the regulation as replacement for the original industry body.

(8) In this section:

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

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

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

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

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

3 Commission may rely on industry body consultations

(1) The Commission may accept a code if the industry body has done the following before giving the code to the Commission under subsection 44ZZAA(1):

- (a) published the code or a draft of the code and invited persons to make submissions to the industry body on the code or draft;
- (b) specified the effect of this subsection and subsection (2) when it published the code or draft;
- (c) considered any submissions that were received within the time limit specified by the industry body when it published the code or draft.

(2) In deciding whether to accept the code, the Commission may consider any submission referred to in paragraph (1)(c).

(3) Before consenting to a variation or withdrawal of a code under subsection 44ZZAA(6), the Commission may rely on:

- (a) publication of the variation or notice of the withdrawal by the industry body, including specification of the effect of the variation or withdrawal; and
- (b) consideration by the industry body of any submissions that were received within the time limit specified by the industry body when it published the variation or notice.

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

(5) In this section:

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

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

Division B—Effect of access undertakings and access codes

A When access undertakings and access codes come into operation

Acceptance of access undertakings or access codes

(1) If the Commission accepts an access undertaking or an access code, it comes into operation at:

- (a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review of the decision—the end of that period; or
- (b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the end of that period.

the time of the Tribunal's decision.

- (2) If the Tribunal decides under paragraph 44ZZBF(7)(e) to acc an access undertaking or access code, it comes into operation the time of the Tribunal's decision.
- (3) An access undertaking or access code continues in operation until its expiry date, unless it is earlier withdrawn.

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

Withdrawal or variation of access undertakings or access code

- (4) If the Commission consents to the withdrawal or variation o access undertaking or an access code, the withdrawal or varia comes into operation at:
- (a) if, within 21 days after the Commission publishes its decision, no person has applied to the Tribunal for review the decision—the end of that period; or
 - (b) if a person applies to the Tribunal within that period fo review of the decision and the Tribunal affirms the decisio the time of the Tribunal's decision.

- (5) If the Tribunal decides under paragraph 44ZZBF(7)(e) to co to the withdrawal or variation of an access undertaking or acc code, the withdrawal or variation comes into operation at the of the Tribunal's decision.

Revocation or variation of fixed principles in access undertaki

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

- (7) If the Tribunal decides under paragraph 44ZZBF(7)(e) to co to the revocation or variation of a fixed principle that is includ term of an access undertaking, the revocation or variation con into operation at the time of the Tribunal's decision.

ision C—Extensions of access undertakings and access codes

3 Extensions of access undertakings and access codes

Access undertakings

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

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

- (2) The provider of the service must specify in the application a proposed extension period.

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

Access codes

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

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

(5) The industry body must specify in the application a proposed extension period.

(6) The Commission may, by notice in writing, extend the period for which the code is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZAA(3). The notice must specify the extension period.

(7) If the industry body that gave the code to the Commission has ceased to exist, an application under subsection (4) may be made by a body or association referred to in subsection 44ZZAA(7).

Multiple extensions

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

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

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

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

Division D—Procedural provisions

2 Time limit for Commission decisions

Commission to make decision on application within 180 days

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

Stopping the clock

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

| Stopping the clock | | | |
|--------------------|--|--|---|
| Item | Column 1 Situation | Column 2 Start day | Column 3 End day |
| 1 | An agreement is made in relation to the application under subsection (4) | The first day of the period specified in the agreement | The last day of the period specified in the agreement |

| | | | |
|---|--|--|---|
| 2 | A notice is given under subsection 44ZZBCA(1) requesting information in relation to the application | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information |
| 3 | A notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application | The day on which the notice is published | The day specified in the notice as the day by which submissions may be made |
| 4 | A decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the Commission arbitrates an access dispute | The day on which the decision is published | The day on which the final determination in relation to the arbitration of the access dispute is made |

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

Stopping the clock by agreement

(4) The Commission and:

(a) for an access undertaking application—the provider of service; and

(b) for an access code application—the industry body or its replacement;

may agree in writing that a specified period is to be disregarded working out the expected period.

(5) The Commission must publish, by electronic or other means agreement.

Deemed final determination

(6) If the Commission does not publish under section 44ZZBE a access undertaking decision or an access code decision within expected period, it is taken, immediately after the end of the expected period, to have:

(a) made a decision to not accept the application; and

(b) published its decision under section 44ZZBE and its reasons for that decision.

CA Commission may request information

(1) The Commission may give a person a written notice requesting the person give to the Commission, within a specified period, information of a kind specified in the notice that the Commission considers may be relevant to making a decision on an access undertaking application or an access code application.

(2) The Commission must:

(a) give a copy of the notice to:

(i) in the case of an access undertaking application—the provider of the service (unless the provider is the person); and

(ii) in the case of an access code application—the industry body that gave the application to the Commission (unless the body is the person); and

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

(3) In making a determination, the Commission:

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

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

D Commission may invite public submissions

Invitation

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

Consideration of submissions

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

Commission may make submissions publicly available

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

Confidentiality

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

E Commission must publish its decisions

- (1) The Commission must publish, by electronic or other means, its access undertaking decision or an access code decision and its reasons for the decision.

- (2) The Commission must give a copy of the publication to:
- (a) for an access undertaking decision—the provider of the service; or
 - (b) for an access code decision—the industry body or its replacement.

Consultation

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

Division E—Review of decisions

7 Review of decisions

Application

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

Review

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

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

- (4) For the purposes of the review, the Tribunal has the same powers as the Commission (other than the power to propose amendments under section 44ZZAAA).
- (5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.
- (5A) Without limiting subsection (5), the member may, by written notice, require the Commission to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.
- (5B) The Tribunal must:
- (a) give a copy of the notice to:

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

Tribunal's decision

- (6) If the Commission:
- (a) accepted an access undertaking or access code; or
 - (b) consented to the withdrawal or variation of an access undertaking or access code; or
 - (ba) consented to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or
 - (c) extended the period for which an access undertaking or access code is in operation;
- the Tribunal must, by writing, affirm or set aside the Commission's decision.
- (7) If the Commission:
- (a) rejected an access undertaking or access code; or
 - (b) refused to consent to the withdrawal or variation of an access undertaking or access code; or
 - (ba) refused to consent to the revocation or variation of a fixed principle under subsection 44ZZAAB(7); or
 - (c) refused to extend the period for which an access undertaking or access code is in operation;
- the Tribunal must, by writing:
- (d) affirm the Commission's decision; or
 - (e) set aside the Commission's decision and accept the undertaking or code, consent to the withdrawal or variation of the undertaking or code, consent to the revocation or variation of the fixed principle or extend the period for which the undertaking or code is in operation.

Division F—Register of access undertakings and access codes

Register of access undertakings and access codes

- (1) The Commission must maintain a public register that includes access undertakings and access codes that have been accepted by the Commission, including those that are no longer in operation.
- (1A) For the purposes of subsection (1), if an access undertaking includes one or more fixed principles, the register must also include details of the fixed principles, including their fixed period.
- (2) The register must include all variations of access undertakings and access codes.
- (3) The register must also include details of all extensions of the period for which an access undertaking or an access code is in operation.

Division 6A—Pricing principles for access disputes and access undertakings or codes

6A Pricing principles for access disputes and access undertakings or codes

The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination where it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.

Division 6B—Overlap among determinations, registered contracts, access undertakings and Tribunal review

3 Deferring access disputes or access undertakings

- (1) If, at a particular time, the Commission is:
 - (a) arbitrating an access dispute under Division 3 relating to one or more matters of access to a declared service; and
 - (b) considering whether to accept an access undertaking relating to the service and to one or more of those matters,
 then the Commission may, by notice in writing, decide to:
 - (c) defer arbitrating the access dispute, in whole or in part, while it considers the access undertaking; or
 - (d) defer considering whether to accept the access undertaking, in whole or in part, while it arbitrates the access dispute.

Deferral of arbitration of access dispute

- (2) If:
 - (a) the Commission defers arbitrating the access dispute; and
 - (b) the Commission then accepts the access undertaking as it comes into operation;
 then the Commission must terminate the arbitration when the undertaking comes into operation, but only to the extent of the matters relating to access to the service that are dealt with in the undertaking.

Note: The third party's access to the service is determined under the access undertaking to the extent of the matters it deals with. If the access code deals with other matters, the third party's access to the service in relation to those other matters is determined under any determination the Commission makes.

Deferral of consideration of access undertaking

- (3) If:
 - (a) the Commission defers considering whether to accept the access undertaking; and
 - (b) the Commission then makes a final determination in relation to the arbitration of the access dispute:

to the arbitration of the access dispute,
then the Commission must resume considering whether to acc
the access undertaking.

Publication

- (4) The Commission must publish, by electronic or other means
decision it makes under subsection (1) and its reasons for the
decision. The Commission must give a copy of the decision
(including the reasons for the decision) to each party to the
arbitration.

Guidelines

- (5) In exercising the power conferred by subsection (1), the
Commission must have regard to:
- (a) the fact that the access undertaking will, if accepted, a
generally to access seekers and a final determination rela
to the access dispute will only apply to the parties to the
arbitration; and

- (b) any guidelines in force under subsection (6).

It may have regard to any other matter it considers relevant.

- (6) The Commission must, by legislative instrument, determine
guidelines for the purposes of subsection (5).
- (7) The Commission must take all reasonable steps to ensure th
the first set of guidelines under subsection (6) is made within
months after the commencement of this subsection.

Legislation Act 2003

- (8) A notice made under subsection (1) is not a legislative
instrument.

3A Deferral of arbitration if review is underway

Commission may defer arbitration if declaration not stayed

- (1) If:

- (a) the Commission is arbitrating an access dispute relatin
one or more matters of access to a declared service; and
- (b) an application for review of the declaration of the servi
has been made under subsection 44K(1); and
- (c) the Tribunal does not make an order under section 44K
staying the operation of the declaration;

then the Commission may, by notice in writing to each party to
arbitration, decide to defer arbitrating the access dispute unti
Tribunal has made its decision on the review if it considers it
appropriate to do so.

Commission must defer arbitration if declaration stayed

- (2) If:

- (a) the Commission is arbitrating an access dispute relatin
one or more matters of access to a declared service; and
- (b) an application for review of the declaration of the servi
has been made under subsection 44K(1); and
- (c) the Tribunal makes an order under section 44KA stayin
operation of the declaration;

then the Commission must, by notice in writing to each party to
arbitration, defer arbitrating the access dispute until the Tribu
has made its decision on the review.

Resumption of arbitration if declaration affirmed

Resumption of arbitration if declaration affirmed

- (3) If the Commission defers arbitrating the access dispute and Tribunal affirms the declaration, the Commission must resume arbitrating the dispute.

Termination of arbitration if declaration varied or set aside

- (4) If the Commission defers arbitrating the access dispute and Tribunal sets aside or varies the declaration, the Commission terminate the arbitration.

- (5) If:

- (a) an arbitration is terminated under subsection (4) or section 44YA; and
- (b) an access dispute is notified under section 44S in relation to access to the same declared service; and
- (c) the parties to the dispute are the same parties to the terminated arbitration;

then the Commission may have regard to any record made in the course of the terminated arbitration if it considers it appropriate to do so.

Notices are not legislative instruments

- (6) A notice given under subsection (1) or (2) is not a legislative instrument.

2 Overlap between determinations and access undertakings

If, at a particular time:

- (a) a final determination is in operation in relation to a declared service; and
- (b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with matter or matters relating to access to the service that are not dealt with in the determination.

3 Overlap between registered contracts and access undertakings

If, at a particular time:

- (a) a contract is registered under Division 4 in relation to a declared service; and
- (b) an access undertaking is in operation in relation to the service;

the third party's access to the service at that time is to be determined under the undertaking to the extent that it deals with matter or matters relating to access to the service that are not dealt with in the contract.

Part 7—Enforcement and remedies

Enforcement of determinations

- (1) If the Federal Court is satisfied, on the application of a party to a determination, that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination, the Court may make all or any of the following orders:

- (a) an order granting an injunction on such terms as the Court

thinks appropriate:

- (i) restraining the other party from engaging in the conduct; or
 - (ii) if the conduct involves refusing or failing to do something—requiring the other party to do that thing
- (b) an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;
- (c) any other order that the Court thinks appropriate.

(2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.

(3) A reference in this section to a person involved in the contravention is a reference to a person who has:

- (a) aided, abetted, counselled or procured the contravention;
- (b) induced the contravention, whether through threats or promises or otherwise; or
- (c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or
- (d) conspired with others to effect the contravention.

Enforcement of prohibition on hindering access

(1) If the Federal Court is satisfied, on the application of any person, that another person (the **obstructor**) has engaged, is engaging or is proposing to engage in conduct constituting a contravention of section 44ZZ, the Court may make all or any of the following orders:

- (a) an order granting an injunction on such terms as the Court thinks appropriate:
 - (i) restraining the obstructor from engaging in the conduct; or
 - (ii) if the conduct involves refusing or failing to do something—requiring the obstructor to do that thing;
- (b) an order directing the obstructor to compensate a person who has suffered loss or damage as a result of the contravention;
- (c) any other order that the Court thinks appropriate.

(2) If the Federal Court has power under subsection (1) to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do anything, the Court may make any other orders (including granting an injunction) that it thinks appropriate against any other person who was involved in the contravention concerned.

(3) The grounds on which the Court may decide not to make an order under this section include the ground that Divisions 2 and 3 provide a more appropriate way of dealing with the issue of the applicant's access to the service concerned.

(4) A reference in this section to a person involved in the contravention is a reference to a person who has:

- (a) aided, abetted, counselled or procured the contravention;
- (b) induced the contravention, whether through threats or promises or otherwise; or

- (c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or
- (d) conspired with others to effect the contravention.

Consent injunctions

On an application for an injunction under section 44ZZD or 44ZZE, the Federal Court may grant an injunction by consent of the parties to the proceedings, whether or not the Court is satisfied that the section applies.

Interim injunctions

- (1) The Federal Court may grant an interim injunction pending determination of an application under section 44ZZD or 44ZZE.
- (2) If the Commission makes an application under section 44ZZD to the Federal Court for an injunction, the Court must not require the Commission or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

Factors relevant to granting a restraining injunction

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

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

Factors relevant to granting a mandatory injunction

The power of the Federal Court to grant an injunction under section 44ZZD or 44ZZE requiring a person to do a thing may be exercised whether or not:

- (a) it appears to the Court that the person intends to refuse to do that thing, or to fail again, or to continue to refuse or fail, to do that thing; or
- (b) the person has previously refused or failed to do that thing; or
- (c) there is an imminent danger of substantial damage to a person if the first-mentioned person refuses or fails to do that thing.

Enforcement of access undertakings

- (1) If the Commission thinks that the provider of an access undertaking in operation under Division 6 has breached any of the terms of the undertaking, the Commission may apply to the Federal Court for an order under subsection (2).
- (2) If the Federal Court is satisfied that the provider has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the provider to comply with that term of the undertaking;
 - (b) an order directing the provider to compensate any other person who has suffered loss or damage as a result of the breach;
 - (c) any other order that the Court thinks appropriate.

Discharge or variation of injunction or other order

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

Division 8—Miscellaneous

Register of determinations

The Commission must maintain a public register that specifies the following information for each determination:

- (a) the names of the parties to the determination;
- (b) the service to which the determination relates;
- (c) the date on which the determination was made.

44ZZM Commonwealth consent to conferral of functions etc. by the Commission or Tribunal by State or Territory law

- (1) Subject to section 44ZZMAA, a State or Territory access regime law may confer functions or powers, or impose duties, on the Commission or Tribunal.

Note: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a law of a State or Territory to the extent to which:

- (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duty that may be imposed on the Commission or Tribunal; or
- (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.

- (3) The Commission or Tribunal cannot perform a duty or function or exercise a power, under a State or Territory access regime law, unless the conferral of the function or power, or the imposition of the duty, is in accordance with an agreement between the Commonwealth and the State or Territory concerned.

AA No merits review by Tribunal of decisions under energy laws

- (1) This section applies if a State/Territory energy law or the *Australian Energy Market Act 2004* purports to confer a function or power, or to impose a duty, in relation to a decision made under

- (a) a State/Territory energy law; or
- (b) a uniform energy law applied as a law of the Commonwealth under the *Australian Energy Market Act 2004*.

However, this section does not apply in relation to a decision relating to the disclosure of confidential or protected information under such a law.

- (2) The purported conferral or imposition has no effect to the extent to which it would require or permit merits review (however described) of the decision by the Tribunal.

- (3) This section applies despite anything in any law of the Commonwealth, a State or a Territory.

A How duty is imposed

Application

- (1) This section applies if a State or Territory access regime law purports to impose a duty on the Commission or Tribunal.

Note 1: Section 44ZZMB sets out when such a law imposes a duty on the Commission or Tribunal.

Note 2: Section 320 of the South Australian Energy Retail Legislation, as it applies as a law of a State or Territory, deals with the case where a duty purportedly imposed on a Commonwealth body under that applied law cannot be imposed by the State or Territory or the Commonwealth due to constitutional doctrines restricting such duties.

State or Territory legislative power sufficient to support duty

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

Note: If this subsection applies, the duty will be taken to be imposed by the law of the State or Territory (the Commonwealth having consented under section 44ZZM to the imposition of the duty by that law).

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

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

B When a law of a State or Territory imposes a duty

For the purposes of sections 44ZZM and 44ZZMA, a State or Territory access regime law **imposes a duty** on the Commission or Tribunal if:

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

Compensation for acquisition of property

- (1) If:
- (a) a determination would result in an acquisition of property, and
 - (b) the determination would not be valid, apart from this

section, because a particular person has not been sufficiently compensated;

the Commonwealth must pay that person:

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

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

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

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

A Operation of Parts IV and VII not affected by this Part

This Part does not affect the operation of Parts IV and VII.

Conduct by directors, servants or agents

(1) If, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind

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

- (a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

is taken for the purposes of this Part to have been engaged in by the body corporate, unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

(3) If, in a proceeding under this Part in respect of conduct engaged in by an individual, it is necessary to establish the state of mind of the individual, it is sufficient to show:

- (a) that the conduct was engaged in by a servant or agent of the individual within the scope of his or her actual or apparent authority; and
- (b) that the servant or agent had the relevant state of mind

(4) Conduct engaged in on behalf of an individual:

- (a) by a servant or agent of the individual within the scope of the actual or apparent authority of the servant or agent; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the individual, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;

is taken, for the purposes of this Part, to have been engaged in by that individual, unless that individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

(5) If:

(a) an individual is convicted of an offence; and

(b) the individual would not have been convicted of the offence if subsections (3) and (4) had not been enacted;

the individual is not liable to be punished by imprisonment for the offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth or of a State or of a Territory.

AAA Information to be given to Tribunal

Tribunal to notify decision maker

(1) If an application for review of a decision (however described) made under this Part, the Tribunal must notify the decision maker of the application.

(2) If the application is made under section 44K, 44L, 44LJ, 44LH or 44O, the Tribunal must also notify the Council of the application.

Decision maker to give material to Tribunal

(3) The decision maker must give the following information to the Tribunal within the period specified by the Tribunal:

(a) if the decision is taken to have been made because of the operation of subsection 44H(9), 44J(7), 44LG(6), 44LI(7), 44N(4), 44NB(3A) or 44NBC(5)—all of the information that the Council took into account in connection with making the recommendation to which the decision under review relates;

(b) if the decision is taken to have been made because of the operation of subsection 44PD(6), 44XA(6) or 44ZZBC(6)—information or documents given to the Commission in connection with the decision to which the review relates, other than information or documents in relation to which the Commission could not have regard because of subparagraph 44PE(6)(c)(iii) or 44ZZBD(6)(c)(iii);

(c) otherwise—all of the information that the decision maker took into account in connection with the making of the decision to which the review relates.

Tribunal may request further information

(4) The Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under this Part.

(5) A request under subsection (4) must be made by written notice given to a person specifying the information requested and the period within which the information must be given to the Tribunal.

- (6) The Tribunal must:
- (a) give a copy of the notice to:
 - (i) the person who applied for review; and
 - (ii) if the application is made under section 44K, 44L, 44LK or 44O—the Council; and
 - (iii) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and
 - (iv) any other person who has been made a party to the proceedings for review by the Tribunal; and
 - (b) publish, by electronic or other means, the notice.
- (7) Without limiting the information that may be given in accordance with the notice, information may include information that could have reasonably been made available to the decision maker at the time the decision under review was made.

Certain material before the Tribunal not to be disclosed

- (8) The Tribunal may, on the application of a person, prohibit or restrict the disclosure of the contents of a document or other information given to the Tribunal under this section if the Tribunal is satisfied that it is desirable to do so because of the confidential nature of the document or other information, or for any other reason.

- (9) In this section:

decision maker, in relation to an application for review under this Part, means:

- (a) if the application was made under section 44K, 44L, 44LK or 44O—the designated Minister; or
- (b) if the application was made under section 44PH—the Commonwealth Minister; or
- (c) if the application was made under section 44PG, 44PH, 44ZP, 44ZX, or 44ZZBF—the Commission.

4A Tribunal only to consider particular material

For the purposes of a review under this Part, the Tribunal:

- (a) subject to paragraph (b), must have regard to:
 - (i) information that was given to the Tribunal under subsection 44ZZOAAA(3); and
 - (ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and
 - (iii) any thing done as mentioned in subsection 44K(6), 44L(5), 44LJ(5), 44LK(5), 44O(5), 44PG(5), 44PH(5), 44ZP(5), 44ZX(5) or 44ZZBF(5); and
 - (iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) within the specified period;
- (b) may disregard:
 - (i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and
 - (ii) any information or report of the kind specified in a notice under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) that is given to the Tribunal after the specified period has ended.

A Time limit for Tribunal decisions

- (1) The Tribunal must make a decision on a review under this Part within the consideration period.
- (2) The consideration period is a period of 180 days (the **expected period**), starting at the start of the day the application for review is received, unless the consideration period is extended under subsection (7).

Stopping the clock

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

| Stopping the clock | | | |
|--------------------|--|--|--|
| Item | Column 1 Situation | Column 2 Start day | Column 3 End day |
| 1 | An agreement is made in relation to the application under subsection (5) | The first day of the period specified in the agreement | The last day of the period specified in the agreement |
| 2 | A notice is given under subsection 44ZZOAAA(5) requesting information in relation to the decision to which the application relates | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information |
| 3 | A notice is given under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) requiring information or a report to be given in relation to the review | The day on which the notice is given | The last day of the period specified in the notice for the giving of the information or the report |

- (4) Despite subsection (3), do not disregard any day more than

Stopping the clock by agreement

- (5) The following may agree in writing that a specified period is to be disregarded in working out the expected period:
- (a) the Tribunal;
 - (b) the person who applied for review;
 - (c) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council;
 - (d) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission;
 - (e) any other person who has been made a party to the proceedings for review by the Tribunal.
- (6) The Tribunal must publish, by electronic or other means, the agreement.

Extension of time for making decision

- (7) If the Tribunal is unable to make a decision on an application for review within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.
- (8) The notice must:

- (a) specify when the Tribunal must now make its decision on the application for review; and
 - (b) include a statement explaining why the Tribunal has been unable to make a decision on the review within the consideration period.
- (9) The Tribunal must give a copy of the notice to:
- (a) the person who applied for review; and
 - (b) if the application for review is made under section 44K, 44LJ, 44LK or 44O—the Council; and
 - (c) if the application for review is made under section 44P, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and
 - (d) any other person who has been made a party to the proceedings for review by the Tribunal.

Publication

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

Failure to comply with time limit does not affect validity

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

Regulations about review by the Tribunal

- (1) The regulations may make provision about the following matters in relation to the functions of the Tribunal under this Part:
- (a) the constitution of the Tribunal;
 - (b) the arrangement of the business of the Tribunal;
 - (c) the disclosure of interests by members of the Tribunal;
 - (d) determining questions before the Tribunal and questions that arise during a review;
 - (e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report).
- (2) Regulations made for the purposes of subsection (1) do not apply in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law.

Note: See section 44ZZR.

Regulations about fees for inspection etc. of registers

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

Procedure of the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law

- (1) Sections 103, 105, 106, 107, 108 and 110 of this Act apply to the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law.
- (2) The regulations may make provision about the following matters in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law:

energy law or a designated Commonwealth energy law:

- (a) the constitution of the Tribunal;
- (b) the arrangement of the business of the Tribunal;
- (c) the disclosure of interests by members of the Tribunal;
- (d) determining questions before the Tribunal and questions that arise during a review;
- (e) procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report);
- (f) the fees and expenses of witnesses in proceedings before the Tribunal.

(3) Subsection (1), and regulations made for the purposes of subsection (2), have no effect to the extent (if any) to which they are inconsistent with the State/Territory energy law, or the designated Commonwealth energy law, concerned.

V—Restrictive trade practices

Division 1—Cartel conduct

Division A—Introduction

Simplified outline

The following is a simplified outline of this Division:

- This Division sets out parallel offences and civil penalty provisions relating to cartel conduct.
- A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
- A cartel provision is a provision relating to:
 - (a) price-fixing; or
 - (b) restricting outputs in the production and supply chain; or
 - (c) allocating customers, suppliers or territories;
 - (d) bid-rigging;by parties that are, or would otherwise be, in competition with each other.

Definitions

In this Division:

annual turnover, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

- (a) supplies made from any of those bodies corporate to any other of those bodies corporate; or
- (b) supplies that are input taxed; or
- (c) supplies that are not for consideration (and are not tax 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 enter

that the body corporate carries on; or

(e) supplies that are not connected with Australia.

Expressions used in this definition that are also used in the *Australian Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

benefit includes any advantage and is not limited to property.

bid includes:

(a) tender; and

(b) the taking, by a potential bidder or tenderer, of a preliminary step in a bidding or tendering process.

evidential burden, in relation to a matter, means the burden adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

likely, in relation to any of the following:

(a) a supply of goods or services;

(b) an acquisition of goods or services;

(c) the production of goods;

(d) the capacity to supply services;

includes a possibility that is not remote.

obtaining includes:

(a) obtaining for another person; and

(b) inducing a third person to do something that results in another person obtaining.

party has a meaning affected by section 45AC.

production includes manufacture, processing, treatment, assembly, disassembly, renovation, restoration, growing, raising, mining, extraction, harvesting, fishing, capturing and gathering.

Extended meaning of **party**

For the purposes of this Division, if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a **party** to that contract, arrangement or understanding.

Cartel provisions

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a **cartel provision** if:

(a) either of the following conditions is satisfied in relation to the provision:

(i) the purpose/effect condition set out in subsection

(ii) the purpose condition set out in subsection (3); or

(b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

Purpose/effect condition

(2) The purpose/effect condition is satisfied if the provision has purpose, or has or is likely to have the effect, of directly or indirectly:

(a) fixing, controlling or maintaining; or

(b) providing for the fixing, controlling or maintaining of; the price for, or a discount, allowance, rebate or credit in relation to:

- (c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
- (d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
- (e) goods or services re-supplied, or likely to be re-supplied to persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
- (f) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions—see subsection (8).

Note 2: **Party** has an extended meaning—see section 45AC.

Purpose condition

- (3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
- (a) preventing, restricting or limiting:
 - (i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
 - (ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or
 - (iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or
 - (iv) the acquisition, or likely acquisition, of goods or services from persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or
 - (b) allocating between any or all of the parties to the contract, arrangement or understanding:
 - (i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or
 - (ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or
 - (iii) the geographical areas in which goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
 - (iv) the geographical areas in which goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
 - (c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:
 - (i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or
 - (ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the

understanding any, or at least 2 of them as to be or one that one of those bids is more likely to be successful than the others; or

(iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or

(iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

(v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a contract for the supply of after-hours medical services if the roster does not permit or restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered in relation to related provisions—see subsection (9).

Note 3: **Party** has an extended meaning—see section 45AC.

Competition condition

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

(c) if paragraph (2)(c) or (3)(b) applies in relation to a supply of goods or services—the supply of those goods or services in trade or commerce; or

(d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or

(e) if paragraph (2)(e) or (f) applies in relation to a re-supply of goods or services—the supply of those goods or services in trade or commerce to that re-supplier; or

(f) if subparagraph (3)(a)(i) applies in relation to preventing or restricting the production, or likely production, of goods—the production of those goods in trade or commerce; or

(g) if subparagraph (3)(a)(ii) applies in relation to preventing or restricting the capacity, or likely capacity, to supply services—the supply of those services in trade or commerce; or

(h) if subparagraph (3)(a)(iii) applies in relation to preventing or restricting the supply, or likely supply, of goods or services—the supply of those goods or services in trade or commerce; or

(i) if subparagraph (3)(a)(iv) applies in relation to preventing or restricting the acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services in trade or commerce; or

(j) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services in trade or commerce; or

(k) if paragraph (3)(c) applies in relation to an acquisition

goods or services—the acquisition of those goods or services in trade or commerce.

Note 1: **Party** has an extended meaning—see section 45AC.

Note 2: **Trade or commerce** is defined in section 4 to mean trade or commerce within Australia or between Australia and places outside Australia.

Immaterial whether identities of persons can be ascertained

- (5) It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (f) or subparagraph (3)(a)(iii) or (iv) or (c)(i) or (ii) can be ascertained.

Recommending prices etc.

- (6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:
- (a) to have the purpose mentioned in subsection (2); or
 - (b) to have, or be likely to have, the effect mentioned in subsection (2);
- by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

Immaterial whether particular circumstances or particular conditions

- (7) It is immaterial whether:
- (a) for the purposes of subsection (2), subparagraphs (3)(a)(i) and (iv) and paragraphs (3)(b) and (c)—a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and
 - (b) for the purposes of subparagraph (3)(a)(i)—the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and
 - (c) for the purposes of subparagraph (3)(a)(ii)—the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

Considering related provisions—purpose/effect condition

- (8) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:
- (a) the other provisions of the contract, arrangement or understanding;
 - (b) the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;
- has that purpose, or has or is likely to have that effect.

Considering related provisions—purpose condition

- (9) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:
- (a) the other provisions of the contract, arrangement or understanding;
 - (b) the provisions of another contract, arrangement or

understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose.

Purpose/effect of a provision

(10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have that purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

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

Purpose of a provision

(11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have that purpose mentioned in a paragraph of subsection (3) by reason only of:

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

Meaning of expressions in other provisions of this Act

In determining the meaning of an expression used in a provision of this Act (other than this Division, subsection 6(2C), paragraph 76(1A)(aa) or subsection 93AB(1A)), this Division is to be disregarded.

Division B—Offences etc.

Making a contract etc. containing a cartel provision

Offence

- (1) A corporation commits an offence if:
- (a) the corporation makes a contract or arrangement, or enters into an understanding; and
 - (b) the contract, arrangement or understanding contains a cartel provision.

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

- (2) The fault element for paragraph (1)(b) is knowledge or belief

Penalty

- (3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
- (a) \$10,000,000;
 - (b) if the court can determine the total value of the benefit that:
 - (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;3 times that total value;
 - (c) if the court cannot determine the total value of those

- (c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during 12-month period ending at the end of the month in which corporation committed, or began committing, the offence

Indictable offence

- (4) An offence against subsection (1) is an indictable offence.

Giving effect to a cartel provision

Offence

- (1) A corporation commits an offence if:
 - (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the corporation gives effect to the cartel provision.

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

- (2) The fault element for paragraph (1)(a) is knowledge or belief

Penalty

- (3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
 - (a) \$10,000,000;
 - (b) if the court can determine the total value of the benefit that:
 - (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;
 - 3 times that total value;
 - (c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during 12-month period ending at the end of the month in which corporation committed, or began committing, the offence

Pre-commencement contracts etc.

- (4) Paragraph (1)(a) applies to contracts or arrangements made or understandings arrived at, before, at or after the commencement of this section.

Indictable offence

- (5) An offence against subsection (1) is an indictable offence.

Determining guilt

- (1) A corporation may be found guilty of an offence against section 45AF or 45AG even if:
 - (a) each other party to the contract, arrangement or understanding is a person who is not criminally responsible for the offence;
 - (b) subject to subsection (2), all other parties to the contract, arrangement or understanding have been acquitted of the offence.

Note: **Party** has an extended meaning—see section 45AC.

- (2) A corporation cannot be found guilty of an offence against section 45AF or 45AG if:
 - (a) all other parties to the contract, arrangement or understanding have been acquitted of such an offence; and
 - (b) a finding of guilt would be inconsistent with their acquittal

court may make related civil orders

If a prosecution against a person for an offence against section 45AF or 45AG is being, or has been, heard by a court, court may:

- (a) grant an injunction under section 80 against the person in relation to:
 - (i) the conduct that constitutes, or is alleged to constitute, the offence; or
 - (ii) other conduct of that kind; or
- (b) make an order under section 86C, 86D, 86E or 87 in relation to the offence.

Division C—Civil penalty provisions

Making a contract etc. containing a cartel provision

A corporation contravenes this section if:

- (a) the corporation makes a contract or arrangement, or enters into an understanding; and
- (b) the contract, arrangement or understanding contains a cartel provision.

Note: For enforcement, see Part VI.

Giving effect to a cartel provision

- (1) A corporation contravenes this section if:
 - (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the corporation gives effect to the cartel provision.

Note: For enforcement, see Part VI.

- (2) Paragraph (1)(a) applies to contracts or arrangements made or understandings arrived at, before, at or after the commencement of this section.

Division D—Exceptions

Conduct notified

- (1) Sections 45AF, 45AG, 45AJ and 45AK do not apply to a corporation in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
 - (a) the cartel provision:
 - (i) has the purpose, or has or is likely to have the effect, mentioned in subsection 45AD(2); or
 - (ii) has the purpose mentioned in a paragraph of subsection 45AD(3) other than paragraph (c); and
 - (b) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) setting out particulars of the contract, arrangement or understanding;
 - (c) the notice is in force under section 93AD.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

Cartel provision subject to grant of authorisation

(1) Sections 45AF and 45AJ do not apply in relation to the making of a contract that contains a cartel provision if:

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

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ bears an evidential burden in relation to that matter.

Contracts, arrangements or understandings between related bodies corporate

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding if the only parties to the contract, arrangement or understanding are bodies corporate that are related to each other.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

Joint ventures—prosecution

Sections 45AF and 45AG do not apply in relation to a contract, arrangement or understanding containing a cartel provision if a defendant proves that:

- (a) the cartel provision is:
 - (i) for the purposes of a joint venture; and
 - (ii) reasonably necessary for undertaking the joint venture; and
 - (b) the joint venture is for any one or more of the following:
 - (i) production of goods;
 - (ii) supply of goods or services;
 - (iii) acquisition of goods or services; and
 - (c) the joint venture is not carried on for the purpose of substantially lessening competition; and
 - (d) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and
 - (e) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; or
- of that body corporate.

Note 1: A defendant bears a legal burden in relation to the matter in this section (see section 13.4 of the *Criminal Code*).

Note 2: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

Joint ventures—civil penalty proceedings

(1) Sections 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision if the defendant proves that:

- (a) the cartel provision is:
 - (i) for the purposes of a joint venture; and
 - (ii) reasonably necessary for undertaking the joint venture; and
- (b) the joint venture is for any one or more of the following:
 - (i) production of goods;
 - (ii) supply of goods or services;
 - (iii) acquisition of goods or services; and
- (c) the joint venture is not carried on for the purpose of substantially lessening competition; and
- (d) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and
- (e) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; orof that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

(2) A defendant who wishes to rely on subsection (1) must prove the matter on the balance of probabilities.

Resale price maintenance

(1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:

- (a) conduct that contravenes section 48; or
- (b) conduct that would contravene section 48 but for the operation of section 88; or
- (c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed, offered for sale or supply.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to contravention of section 45AI or 45AK bears an evidential burden.

contravention of section 47 of the *Criminal Code* or an evidential burden in relation to that matter.

Exclusive dealing

- (1) Sections 45AF and 45AJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as giving effect to the cartel provision would but for the operation of subsection 47(10) or section 88 or 93, constitute a contravention of section 47.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

- (2) Sections 45AG and 45AK do not apply in relation to the giving effect to a cartel provision by way of:

- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or section 88 or 93 contravene, section 47; or
- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an authorisation under section 88 is in force in relation to conduct engaged in by that person on that condition;
 - (ii) by reason of subsection 93(7), conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

- (3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

Dual listed company arrangement

- (1) Sections 45AF and 45AJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as:

- (a) the contract, arrangement or understanding is a dual listed company arrangement; and
- (b) the making of the contract, arrangement or understanding would, or would apart from section 88, contravene section 49.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

- (2) Sections 45AG and 45AK do not apply in relation to the giving effect to a cartel provision, in so far as:

- (a) the cartel provision is a provision of a dual listed company arrangement; and
- (b) the giving effect to the cartel provision would, or would apart from section 88, contravene section 49.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code* and subsection (3) of this section).

- (3) A person who wishes to rely on subsection (1) or (2) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

Acquisition of shares or assets

- (1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of:

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

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

Collective acquisition of goods or services by the parties to a contract, arrangement or understanding

- (1) Sections 45AF, 45AG, 45AJ and 45AK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:

- (a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in subsection 45AD(2); and
- (b) either:
 - (i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or
 - (ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45AJ or 45AK bears an evidential burden in relation to that matter.

Section 2—Other provisions

Contracts, arrangements or understandings that restrict dealings or affect competition

- (1) A corporation must not:
- (a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have the effect, of substantially lessening competition; or
 - (b) give effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
 - (c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(2) Paragraph (1)(b) applies in relation to contracts or arrangements made, or understandings arrived at, before or after the commencement of this section.

(3) For the purposes of this section, **competition** means:

(a) in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding—competition in any market in which:

(i) a corporation that is a party to the contract, arrangement or understanding, or would be a party to proposed contract, arrangement or understanding; or

(ii) any body corporate related to such a corporation; supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire or be likely to supply or acquire, goods or services; or

(b) in relation to a concerted practice—competition in any market in which:

(i) a corporation that is a party to the practice; or

(ii) any body corporate related to such a corporation; supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire or be likely to supply or acquire, goods or services.

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

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

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

together have or are likely to have that effect.

(5) This section does not apply to or in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or to or in relation to a concerted practice, in so far as the provision or practice relates to:

(a) conduct that contravenes section 48; or

(b) conduct that would contravene section 48 if subsection 48(2) did not apply; or

(c) conduct that would contravene section 48 if it were not authorised under section 88; or

(d) conduct that would contravene section 48 if this Act dealt with the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(5A) The making of a contract, arrangement or understanding do not constitute a contravention of this section because the contract, arrangement or understanding contains a provision the giving effect to which would, or would apart from subsection 47(10) or section 88 or 93, constitute a contravention of section 47.

(6) This section does not apply to or in relation to the giving effect

a provision of a contract, arrangement or understanding, or to or in relation to engaging in a concerted practice, by way of:

- (a) engaging in conduct that contravenes, or would but for operation of subsection 47(10) or section 88 or 93 contravene section 47; or
- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), by or in relation to an act done by a person at a time when:
 - (i) an authorization under section 88 is in force in relation to conduct engaged in by that person on that condition;
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6A) The following conduct:

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

does not contravene this section if the conduct would, or would but for section 88, contravene section 49.

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

- (a) a contract, arrangement or understanding to the extent that the contract, arrangement or understanding directly or indirectly provides for; or
- (b) a proposed contract, arrangement or understanding to the extent that the proposed contract, arrangement or understanding would directly or indirectly provide for; or
- (c) a concerted practice to the extent that the practice directly involves;

the acquisition of any shares in the capital of a body corporate or any assets of a person.

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

- (a) a contract, arrangement or understanding, or
- (b) a proposed contract, arrangement or understanding; or
- (c) a concerted practice;

the only parties to which are or would be bodies corporate that are related to each other.

(8AA) This section does not apply to or in relation to a concerted practice if the only persons engaging in it are or would be:

- (a) the Crown in right of the Commonwealth and one or more authorities of the Commonwealth; or
- (b) the Crown in right of a State or Territory and one or more authorities of that State or Territory.

(8A) Subsection (1) does not apply to a corporation engaging in conduct described in that subsection if:

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

(9) The making by a corporation of a contract that contains a provision in relation to which the corporation intends to apply an authorisation under section 88 is not a contravention of subsection (1) of this section if

subsection (1) of this section is:

- (a) the contract is subject to a condition that the provision not come into force unless and until the corporation is granted an authorization to give effect to the provision; and
 - (b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;
- but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (1).

Secondary boycotts for the purpose of causing substantial loss or damage

- (1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
- (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
 - (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Note 1: Conduct that would otherwise contravene this section can be authorized under section 88.

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
- (3) Subsection (1) applies if the fourth person is a corporation.
- (4) Subsection (1) also applies if:
- (a) the third person is a corporation and the fourth person is not a corporation; and
 - (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the fourth person.

Secondary boycotts for the purpose of causing substantial lessening of competition

- (1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:
- (a) that hinders or prevents:
 - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
 - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
 - (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

Note 1: Conduct that would otherwise contravene this section can be authorized

under section 88.

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

(3) Subsection (1) applies if:

- (a) the third person or the fourth person is a corporation, or both of them are corporations; and
- (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

Boycotts affecting trade or commerce

(1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Note 1: Conduct that would otherwise contravene this section can be authorised under section 88.

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

Involvement and liability of employee organisations

Certain organisations taken to be acting in concert

(1) If 2 or more persons (the **participants**), each of whom is a member or officer of the same organisation of employees, engage in conduct in concert with one another, whether or not the organisation is also engaged in concert with another person, then, unless the organisation proves otherwise, the organisation is taken for the purposes of sections 45D, 45DA and 45DB:

- (a) to engage in that conduct in concert with the participants; and
- (b) to have engaged in that conduct for the purposes for which the participants engaged in it.

Consequences of organisation contravening subsection 45D(1), 45DA(1) or 45DB(1)

(2) The consequences of an organisation of employees engaging in conduct being taken by subsection (1) to engage, in conduct in concert with any of its members or officers in contravention of subsection 45D(1), 45DA(1) or 45DB(1) are as set out in subsections (3), (4) and (5).

Loss or damage taken to have been caused by organisation's conduct

(3) Any loss or damage suffered by a person as a result of the conduct is taken, for the purposes of this Act, to have been caused by the conduct of the organisation.

Taking proceedings if organisation is a body corporate

- (4) If the organisation is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organisation in respect of the conduct.

Taking proceedings if organisation is not a body corporate

- (5) If the organisation is not a body corporate:
- (a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all persons who were members of the organisation at the time when the conduct was engaged in; and
 - (b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and
 - (c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in respect of a body corporate; and
 - (d) except as provided by paragraph (a), a proceeding in respect of the conduct must not be brought under section 82 against any of the members or officers of the organisation; and
 - (e) for the purpose of enforcing any judgment or order given in a proceeding mentioned in paragraph (a) that was brought under section 77 or 82, process may be issued and executed against the following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:
 - (i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or otherwise held;
 - (ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or otherwise held;
 - (iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity as members, whether vested in trustees or otherwise held; and
 - (f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

Situations in which boycotts permitted

Dominant purpose of conduct relates to employment matters—conduct by a person

- (1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

Dominant purpose of conduct relates to employment matters—

(2) If:

- (a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:
 - (i) an organisation of employees; or
 - (ii) an officer of an organisation of employees; and
 - (b) the conduct is only engaged in by the persons covered by paragraph (a); and
 - (c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a); and
- the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in the conduct.

Dominant purpose of conduct relates to environmental protection or consumer protection

(3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

- (a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and
- (b) engaging in the conduct is not industrial action.

Note 1: If an environmental organisation or a consumer organisation is a body corporate:

- (a) it is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption; and
- (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

Note 2: If an environmental organisation or a consumer organisation is not a body corporate:

- (a) it is not a “person” and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but
- (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

*Meaning of **industrial action**—basic definition*

(4) In subsection (3), **industrial action** means:

- (a) the performance of work in a manner different from the manner in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
 - (i) the terms and conditions of the work are prescribed wholly or partly, by a workplace instrument or an order of an industrial body; or
 - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or
- (b) a ban, limitation or restriction on the performance of work or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by a workplace instrument or by an order of an industrial body; or
- (c) a ban, limitation or restriction on the performance of work or on acceptance of or offering for work, that is adopted in

connection with an industrial dispute; or

- (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

For this purpose, **industrial body** and **workplace instrument** have the same meanings as in the *Fair Work Act 2009*.

Meaning of industrial action—further clarification

- (5) For the purposes of subsection (3):
 - (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and
 - (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Subsections (1), (2) and (3) do not protect people not covered by them

- (6) In applying subsection 45D(1), 45DA(1) or 45DB(1) to a person who is not covered by subsection (1), (2) or (3) in respect of certain conduct, disregard the fact that other persons may be covered by one of those subsections in respect of the same conduct.

Defences to contravention of subsection 45DB(1)

- (7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:
 - (a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or
 - (b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

Each person to prove defence

- (8) If:
 - (a) a person engages in conduct in concert with another person; and
 - (b) the other person proves a matter specified in paragraph (a) or (b) in respect of that conduct;in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

Note: Section 415 of the *Fair Work Act 2009* limits the right to bring an action under this Act in respect of industrial action that is protected action for the purposes of that section.

Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services

Situations to which section applies

- (1) This section applies in the following situations:
 - (a) a **supply situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to supply goods or services to another person (the **second person**); or
 - (b) an **acquisition situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to acquire goods or services from another person (the **second person**).

person).

Despite paragraphs (a) and (b), this section does not apply unless the first or second person is a corporation or both of them are corporations.

Note : For the meanings of ***accustomed to supply*** and ***accustomed to acquire***, see subsections (5) and (7).

Prohibition in a supply situation

(2) In a supply situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including that purpose, of:

- (a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or
- (b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:
 - (i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and
 - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

Prohibition in an acquisition situation

(3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including that purpose, of:

- (a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or
- (b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:
 - (i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and
 - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

No contravention if second person gives written consent to written contract etc.

(4) Subsections (2) and (3) do not apply to a contract, arrangement or understanding if it is in writing and was made or arrived at with the written consent of the second person.

*Meaning of ***accustomed to supply****

(5) In this section, a reference to a person who has been **accustomed to supply** goods or services to a second person includes (subject to subsection (6)):

- (a) a regular supplier of such goods or services to the second person; or
- (b) the latest supplier of such goods or services to the second person; or
- (c) a person who, at any time during the immediately preceding 3 months, supplied such goods or services to the second person.

Exception to subsection (5)

(6) If:

- (a) goods or services have been supplied by a person to a second person under a contract between them that requires the first person to supply such goods or services over a period; and
- (b) the period has ended; and
- (c) after the end of the period, the second person has been supplied with such goods or services by another person and has not also been supplied with such goods or services by the first person;

then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to supply such goods or services to the second person.

Meaning of accustomed to acquire

(7) In this section, a reference to a person who has been **accustomed to acquire** goods or services from a second person includes (subject to subsection (8)):

- (a) a regular acquirer of such goods or services from the second person; or
- (b) a person who, when last acquiring such goods or services, acquired them from the second person; or
- (c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

Exception to subsection (7)

(8) If:

- (a) goods or services have been acquired by a person from a second person under a contract between them that requires the first person to acquire such goods or services over a period; and
- (b) the period has ended; and
- (c) after the end of the period, the second person has refused to supply such goods or services to the first person;

then, for the purposes of the application of this section in relation to anything done after the second person has refused to supply goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to acquire such goods or services from the second person.

Note: Conduct that would otherwise contravene this section can be authorised under section 88.

Provisions contravening section 45E not to be given effect

A person must not give effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person:

- (a) contravened subsection 45E(2) or (3); or
- (b) would have contravened subsection 45E(2) or (3) if:
 - (i) section 45E had been in force when the contract or arrangement was made, or the understanding was arrived at; and
 - (ii) the words “is in writing and” and “written” were not included in subsection 45E(4).

Note: Conduct that would otherwise contravene this section can be authorised under section 88.

Sections 45D to 45EA do not affect operation of other provisions of Part

Nothing in section 45D, 45DA, 45DB, 45DC, 45DD, 45E or 45EA affects the operation of any other provision of this Part.

Use of market power

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
 - (a) that market; or
 - (b) any other market in which that corporation, or a body corporate that is related to that corporation:
 - (i) supplies goods or services, or is likely to supply goods or services; or
 - (ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons or
 - (c) any other market in which that corporation, or a body corporate that is related to that corporation:
 - (i) acquires goods or services, or is likely to acquire goods or services; or
 - (ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons
- (2) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:
 - (a) a body corporate that is related to that corporation has, or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or
 - (b) that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is related to that corporation, together have a substantial degree of power in that market.
- (3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:
 - (a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

market; or

(ii) persons to whom or from whom the body corporate or bodies corporate supplies or acquires goods or services in that market; and

(b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:

(i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or

(ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

(5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control that market; or

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate have in a market.

(7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

(8) In this section:

(a) a reference to power is a reference to market power; and

(b) a reference to a market is a reference to a market for goods or services; and

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

Abuse of market power—corporation with substantial degree of power in trans-Tasman market

(1) In this section:

conduct, in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market;

impact market means a market in Australia that is not a market exclusively for services.

market power, in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market.

trans-Tasman market means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

(2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation;

- corporation, in an impact market; or
- (b) preventing the entry of a person into an impact market
- (c) deterring or preventing a person from engaging in competitive conduct in an impact market.

(2A) For the purposes of subsection (2):

- (a) the reference in paragraph (2)(a) to a competitor includes reference to competitors generally, or to a particular class or classes of competitors; and
- (b) the reference in paragraphs (2)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(3) If:

- (a) a body corporate that is related to a corporation has, or more bodies corporate each of which is related to the one corporation together have, a substantial degree of market power in a trans-Tasman market; or
- (b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to the corporation, together have a substantial degree of market power in a trans-Tasman market;

the corporation is taken, for the purposes of this section, to have a substantial degree of market power in the trans-Tasman market.

(4) In determining for the purposes of this section the degree of market power that a body corporate or bodies corporate has or have in a trans-Tasman market, the Federal Court is to have regard to the extent to which the conduct of the body corporate or of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:

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

(5) Without extending by implication the meaning of subsection (4), a corporation is not taken to contravene that subsection merely because it acquires plant or equipment.

(6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 47, 49 and 50, because authorisation is in force or because of the operation of subsection 45(8A) or section 93.

(7) Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its market power for a purpose referred to in subsection (2) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

(8) It is the intention of the Parliament that this section, and the provisions of Parts VI and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the

Commonwealth and authorities of the Commonwealth.

(9) Subsection (8) has effect despite section 9 of the *Foreign State Immunities Act 1985*.

Immunity from jurisdiction in relation to certain laws

(1) It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and Northern Territory, and their authorities, are not immune, and do not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 98H and 99A of the Commerce Act 1986 of New Zealand.

(2) This section applies in and outside Australia.

Exclusive dealing

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

(2) A corporation engages in the practice of exclusive dealing if the corporation:

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

on the condition that the person to whom the corporation supplies or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:

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

(3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

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

to a person;

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

(d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(4) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) acquires, or offers to acquire, goods or services; or

(b) acquires, or offers to acquire, goods or services at a particular price;

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(5) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to acquire goods or services from a person; or

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

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

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(6) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;

on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(7) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to supply goods or services to a person;

(b) to supply goods or services at a particular price to a person or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a person;

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

(8) A corporation also engages in the practice of exclusive dealing if the corporation grants or renews, or makes it known that it will exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate

(a) will not, or will not except to a limited extent:

(i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation

(b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

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

(a) has acquired, or has not agreed not to acquire, goods or

- (a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
 - (b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
 - (c) has supplied goods or services, or goods or services of a particular kind or description:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places; or
 - (d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.
- (10) Subsection (1) does not apply to the practice of exclusive dealing by a corporation unless:
 - (a) the engaging by the corporation in the conduct that constitutes the practice of exclusive dealing has the purpose or has or is likely to have the effect, of substantially lessening competition; or
 - (b) the engaging by the corporation in the conduct that constitutes the practice of exclusive dealing, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind together have or are likely to have the effect of substantially lessening competition.
- (11) Subsections (8) and (9) do not apply with respect to:
 - (a) conduct engaged in:
 - (i) by a registered charity; and
 - (ii) for or in accordance with the purposes or objects of that registered charity; or
 - (b) conduct engaged in in pursuance of a legally enforceable requirement made by a registered charity, being a requirement made for or in accordance with the purposes or objects of that registered charity.
- (12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings with another body corporate if those bodies corporate are related to each other.
- (13) In this section:
 - (a) a reference to a condition shall be read as a reference to a condition, whether direct or indirect and whether having or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;
 - (b) a reference to competition, in relation to conduct to which this provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which.

market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and

(c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

Resale price maintenance

(1) A corporation or other person shall not engage in the practice of resale price maintenance.

(2) Subsection (1) does not apply to a corporation or other person engaging in conduct that constitutes the practice of resale price maintenance if:

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

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 section 88.

Exception

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

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

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

*Meaning of **competition***

(3) For the purposes of this section, **competition**, in relation to 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.

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

(1) A corporation must not directly or indirectly:

(a) acquire shares in the capital of a body corporate; or

(b) acquire any assets of a person;

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

Note: The corporation will not be prevented from making the acquisition if the corporation is granted an authorisation for the acquisition under section 88.

(2) A person must not directly or indirectly:

(a) acquire shares in the capital of a corporation; or

(b) acquire any assets of a corporation;

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

Note: The person will not be prevented from making the acquisition if the person is granted an authorisation for the acquisition under section 88.

(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market.

or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

(4) Where:

(a) a person has entered into a contract to acquire shares or other capital of a body corporate or assets of a person;

(b) the contract is subject to a condition that the provision of the contract relating to the acquisition will not come into effect unless and until the person has been granted an authorisation to acquire the shares or assets; and

(c) the person applied for the grant of such an authorisation before the expiration of 14 days after the contract was entered into;

the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:

(d) the application for the authorisation is disposed of; or

(e) the contract ceases to be subject to the condition;

whichever first happens.

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

(6) In this section:

market means a market for goods or services in:

(a) Australia; or

(b) a State; or

(c) a Territory; or

(d) a region of Australia.

Acquisitions that occur outside Australia

(1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the **first controlling interest**) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest (the **second controlling interest**) in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:

(a) the person's obtaining the second controlling interest will or may have the effect, or be likely to have the effect, of substantially lessening competition in a market; and

(b) the person's obtaining the second controlling interest will or may not, in all the circumstances, result, or be likely to result, in such a benefit to the public that the obtaining should be disregarded for the purposes of this section;

make a declaration accordingly.

(1A) Without limiting the matters that may be taken into account in determining whether the obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the matters

mentioned in subsection 50(3) must be taken into account for purpose.

- (1B) In determining whether the obtaining of the second controlling interest would result, or be likely to result, in such a benefit to the public that it should be disregarded for the purposes of this section:
- (a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.
- (2) Where an application under subsection (1) is made:
- (a) the Tribunal shall give to:
 - (i) each corporation in relation to which the application relates; and
 - (ii) the Minister and the Commission;a notice in writing stating that the application has been made; and
 - (b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person entitled to appear, or be represented, at the proceedings following the application.
- (3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.
- (4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under subsection (1).
- (5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).
- (6) After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market in which the declaration relates.
- (7) Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.
- (8) For the purposes of this section:
- (a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and
 - (b) where a person holds a controlling interest (including a

controlling interest held by virtue of another application of this paragraph) in a body corporate or another application of this paragraph) in a body corporate or that body corporate:

- (i) controls the composition of the board of directors of another body corporate;
- (ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or
- (iii) holds shares in the capital of another body corporate and the person or that other person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.

(9) In this section:

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

Options

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

- (a) anything specified in, and specifically authorised by:
 - (i) an Act (not including an Act relating to patents, trademarks, designs or copyrights); or
 - (ii) regulations made under such an Act;
- (b) anything done in a State, if the thing is specified in, and specifically authorised by:
 - (i) an Act passed by the Parliament of that State; or
 - (ii) regulations made under such an Act;
- (c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:
 - (i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988*; or
 - (ii) regulations made under such an enactment;
- (d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:
 - (i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or
 - (ii) regulations made under such an enactment;
- (e) anything done in another Territory, if the thing is specified in, and specifically authorised by:
 - (i) an Ordinance of that Territory; or
 - (ii) regulations made under such an Ordinance.

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

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

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

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

to in those subsections were passed, made or issued.

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

- (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;
- (b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;
- (c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;
- (d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations
 - (i) referred to in the subparagraph concerned; and
 - (ii) that came into operation more than 2 years before the particular thing happened;
- (e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:
 - (i) at the time of the alleged contravention referred to in subsection (1) the State or Territory was a fully-participating jurisdiction and a party to the Competition Principles Agreement; or
 - (ii) all of the following conditions are met:
 - (A) the Minister published a notice in the *Gazette* under subsection 150K(1) in relation to the State or Territory, or the State or Territory ceased to be a party to the Competition Principles Agreement, within 12 months before the alleged contravention referred to in subsection (1);
 - (B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the Minister published the notice or the State or Territory ceased to be a party;
 - (C) the law authorising the thing was in force immediately before the Minister published the notice or the State or Territory ceased to be a party;
- (f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things are prescribed by regulations made under this Act for the purposes of this paragraph.

(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:

- (a) to any act done, or concerted practice, to the extent that it relates to the remuneration, conditions of employment, hours of work or working conditions of employees; or

(aa) to:

- (i) the making of a contract or arrangement, or the entering into of an understanding; or
- (ii) any provision of a contract, arrangement or understanding;

to the extent that the contract, arrangement, understanding or provision relates to the remuneration, conditions of

employment, hours of work or working conditions of employees; or

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after termination of, the contract; or

(c) to:

(i) any provision of a contract, arrangement or understanding; or

(ii) any concerted practice;

to the extent that the provision or concerted practice obliges a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia or a prescribed association; or

(d) to:

(i) any provision of a contract, arrangement or understanding; or

(ii) any concerted practice;

between partners none of whom is a body corporate, to the extent that the provision or concerted practice relates to:

(iii) the terms of the partnership; or

(iv) the conduct of the partnership business; or

(v) competition between the partnership and a party to a contract, arrangement, understanding or concerted practice, while the party is, or after the party ceases to be, a partner; or

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business—to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to:

(i) any provision of a contract, arrangement or understanding; or

(ii) any concerted practice;

to the extent that the provision or concerted practice relates exclusively to:

(iii) the export of goods from Australia; or

(iv) the supply of services outside Australia;

if full and accurate particulars of the provision or concerted practice were given to the Commission no more than 14 days after the day the contract or arrangement was made or the understanding or concerted practice was entered into, or before 8 September 1976, whichever was the later.

(2AA) For the purposes of paragraph (2)(g), the particulars to be given to the Commission:

(a) need not include particulars of prices for the goods or services; but

(b) must include particulars of any method of fixing, controlling or maintaining such prices.

(2A) In determining whether a contravention of a provision of this Act other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or

commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

- (5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

Concurrent operation of State and Territory laws

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.

Part VB—Industry codes

Division 1—Preliminary

Definitions

- (1) In this Part:

applicable industry code, in relation to a corporation that is a participant in an industry, means:

- (a) the prescribed provisions of any mandatory industry code relating to the industry; and
- (b) the prescribed provisions of any voluntary industry code that binds the corporation.

consumer, in relation to an industry, means a person to whom goods or services are or may be supplied by participants in the industry.

industry code means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

infringement notice means an infringement notice issued under subsection 51ACD(1).

infringement notice compliance period: see subsection 51ACI(1).

mandatory industry code means an industry code that is declared by regulations under section 51AE to be mandatory.

related contravention: a person engages in conduct that constitutes a **related contravention** of an applicable industry code, if the person:

- (a) aids, abets, counsels or procures a corporation to contravene the applicable industry code; or
- (b) induces, whether by threats or promises or otherwise, a corporation to contravene the applicable industry code; or
- (c) is in any way, directly or indirectly, knowingly concerned or party to, a contravention by a corporation of the applicable industry code; or
- (d) conspires with others to effect a contravention by a corporation of the applicable industry code.

voluntary industry code means an industry code that is declared by regulations under section 51AE to be voluntary.

- (2) For the purposes of this Part, a voluntary industry code binds a person who has agreed, as prescribed, to be bound by the code, who has not subsequently ceased, as prescribed, to be bound by the code.
- (3) To avoid doubt, it is declared that:

- (a) franchising is an industry for the purposes of this Part;
- (b) franchisors and franchisees are participants in the industry of franchising, whether or not they are also participants in another industry.

Division 2—Contravention of industry codes

Contravention of industry codes

A corporation must not, in trade or commerce, contravene an applicable industry code.

Division 2A—Infringement notices

Purpose and effect of this Division

- (1) The purpose of this Division is to provide for the issue of an infringement notice to a person for an alleged contravention of a civil penalty provision of an industry code as an alternative to proceedings for an order under section 76 for the payment of a pecuniary penalty.
- (2) This Division does not:
 - (a) require an infringement notice to be issued to a person for an alleged contravention of a civil penalty provision of an industry code; or
 - (b) affect the liability of a person to proceedings under section 76 in relation to an alleged contravention of a civil penalty provision of an industry code if:
 - (i) an infringement notice is not issued to the person for the contravention; or
 - (ii) an infringement notice issued to the person for the contravention is withdrawn under section 51ACJ; or
 - (c) prevent a court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

Issuing an infringement notice

- (1) If the Commission has reasonable grounds to believe that a person has contravened a civil penalty provision of an industry code, the Commission may issue an infringement notice to the person.
- (2) The Commission must not issue more than one infringement notice to the person for the same alleged contravention of the civil penalty provision of the industry code.
- (3) The infringement notice does not have any effect if the notice
 - (a) is issued more than 12 months after the day that the contravention of the civil penalty provision of the industry code is alleged to have occurred; or
 - (b) relates to more than one alleged contravention of a civil penalty provision of the industry code by the person.

Matters to be included in an infringement notice

- (1) An infringement notice must:
 - (a) be identified by a unique number; and
 - (b) state the day on which it is issued; and
 - (c) state the name and address of the person to whom it is issued; and
 - (d) identify the Commission and state how it may be contacted.

and

- (e) give details of the alleged contravention, including:
 - (i) the day of the alleged contravention; and
 - (ii) the civil penalty provision of the industry code that the person allegedly contravened; and
- (f) state the maximum pecuniary penalty that the court can order the person to pay under section 76 for the alleged contravention; and
- (g) specify the penalty that is payable in relation to the alleged contravention; and
- (h) state that the penalty is payable within the infringement notice compliance period for the notice; and
- (i) state that the penalty is payable to the Commission on behalf of the Commonwealth; and
- (j) explain how payment of the penalty is to be made; and
- (k) explain the effect of sections 51ACG, 51ACH, 51ACI and 51ACJ.

Amount of penalty

The penalty to be specified in an infringement notice that is issued to a person, in relation to an alleged contravention of a penalty provision of an industry code, must be a penalty equal to the following amount:

- (a) if the person is a body corporate—50 penalty units;
- (b) otherwise—10 penalty units.

Effect of compliance with an infringement notice

- (1) This section applies if:
 - (a) an infringement notice for an alleged contravention of a penalty provision of an industry code is issued to a person;
 - (b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 51ACJ.
- (2) The person is not, merely because of the payment, regarded as having contravened the civil penalty provision of the industry code.
- (3) No proceedings (whether criminal or civil) may be started or continued against the person, by or on behalf of the Commonwealth, in relation to the alleged contravention of the penalty provision of the industry code.

Effect of failure to comply with an infringement notice

If:

- (a) an infringement notice for an alleged contravention of a penalty provision of an industry code is issued to a person;
- (b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
- (c) the infringement notice is not withdrawn under section 51ACJ;

the person is liable to proceedings under section 76 in relation to the alleged contravention of the civil penalty provision of the industry code.

Infringement notice compliance period for infringement

notice

- (1) Subject to this section, the ***infringement notice compliance period*** for an infringement notice is the period of 28 days beginning on the day after the day that the infringement notice is issued by the Commission.
- (2) The Commission may extend, by notice in writing, the infringement notice compliance period for the infringement notice if the Commission is satisfied that it is appropriate to do so.
- (3) Only one extension may be given and the extension must not be for longer than 28 days.
- (4) Notice of the extension must be given to the person to whom the infringement notice was issued.
- (5) A failure to comply with subsection (4) does not affect the validity of the extension.
- (6) If the Commission extends the infringement notice compliance period for an infringement notice, a reference in this Division to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

Withdrawal of an infringement notice

Representations to the Commission

- (1) A person to whom an infringement notice has been issued for an alleged contravention of a civil penalty provision of an industry code may make written representations to the Commission seeking the withdrawal of the infringement notice.
- (2) Evidence or information that the person, or a representative of the person, gives to the Commission in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by the Commission

- (3) The Commission may, by written notice (the ***withdrawal notice***), given to the person to whom an infringement notice was issued, withdraw the infringement notice if the Commission is satisfied it is appropriate to do so.
- (4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

- (5) The withdrawal notice must state:
 - (a) the name and address of the person; and
 - (b) the day on which the infringement notice was issued to the person; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that proceedings under section 76 may be started or continued against the person in relation to the alleged contravention of the civil penalty provision of the industry code.

Time limit for giving withdrawal notices

- (6) To be effective, the withdrawal notice must be given to the

- (6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

- (7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, the Commission must refund to the person an amount equal to the amount paid.

Part 3—Public warning notices

Commission may issue a public warning notice

Commission may issue a public warning notice

- (1) The Commission may issue to the public a written notice containing a warning about the conduct of a person if:
- (a) the Commission has reasonable grounds to suspect that the conduct may constitute:
 - (i) if the person is a corporation—a contravention of an applicable industry code by the corporation; or
 - (ii) in any case—a related contravention of an applicable industry code by the person; and
 - (b) the Commission is satisfied that one or more persons have suffered, or is likely to suffer, detriment as a result of the conduct; and
 - (c) the Commission is satisfied that it is in the public interest to issue the notice.

Notice is not a legislative instrument

- (2) A notice issued under subsection (1) is not a legislative instrument.

Part 4—Orders to redress loss or damage suffered by non-parties etc.

Orders to redress loss or damage suffered by non-parties etc.

Orders

- (1) If:
- (a) a person engaged in conduct (the **contravening conduct**) that:
 - (i) if the person was a corporation—constituted a contravention of an applicable industry code; or
 - (ii) in any case—constituted a related contravention of an applicable industry code; and
 - (b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and
 - (c) the class includes persons (**non-parties**) who are not, or have not been, parties to a proceeding (an **enforcement proceeding**) instituted under Part VI in relation to the contravening conduct;

any court having jurisdiction in the matter may, on the application of the Commission, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the court may make include all or any of the orders set out in section 51ADC.

- (2) An order under subsection (1) may be made against:
- (a) the person mentioned in paragraph (1)(a); or
 - (b) a person involved in the contravening conduct.
- (3) A court must not make an order under subsection (1) unless the court considers that the order will:
- (a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct; or
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct.

Application for orders

- (4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.
- (5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

- (6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), a court may have regard to the conduct of:
- (a) the person; and
 - (b) the non-parties;
- in relation to the contravening conduct, since the contravention occurred.
- (7) In determining whether to make an order under subsection (1), a court need not make a finding about either of the following matters:
- (a) which persons are non-parties in relation to the contravening conduct;
 - (b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party is bound by an order etc.

- (8) If:
- (a) an order is made under subsection (1) against a person;
 - (b) the loss or damage suffered, or likely to be suffered, by a non-party in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and
 - (c) the non-party has accepted the redress, prevention or reduction;
- then:
- (d) the non-party is bound by the order; and
 - (e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party; and
 - (f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party in relation to that loss or damage.

Kinds of orders that may be made to redress loss or damage suffered by non-parties etc.

Without limiting subsection 51ADB(1), the orders that a court may make under that subsection against a person (the **respondent**) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a non-party referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to a non-party referred to in that subsection;
- (e) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party referred to in that subsection;
- (f) an order directing the respondent, at his or her own expense, to supply specified services to a non-party referred to in that subsection;
- (g) an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 53A), directing the respondent to execute an instrument that:
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

Section 5—Investigation power

Commission may require corporation to provide information

- (1) This section applies if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code.
- (2) The Commission may give the corporation a written notice that requires the corporation to give the information, or to produce the document, to the Commission within 21 days after the notice is given to the corporation.
- (3) The notice must:
 - (a) name the corporation to which it is given; and
 - (b) specify:
 - (i) the information or document to which it relates; and
 - (ii) the provisions of the applicable industry code which

require the corporation to keep, to generate or to publish the information or document; and

(c) explain the effect of sections 51ADE, 51ADF and 51ADG.

(4) The notice may relate to more than one piece of information or more than one document.

Extending periods for complying with notices

(1) A corporation that has been given a notice under section 51ADD may, at any time within the period within which the corporation must comply with the notice (as extended under any previous application of subsection (2)), apply in writing to the Commission for an extension of the period for complying with the notice.

(2) The Commission may, by written notice given to the corporation, extend the period within which the corporation must comply with the notice.

Compliance with notices

A corporation that is given a notice under section 51ADD must comply with it within:

- (a) the period of 21 days specified in the notice; or
- (b) if the period for complying with the notice has been extended under section 51ADE—the period as so extended.

False or misleading information etc.

(1) A corporation must not, in compliance or purported compliance with a notice given under section 51ADD:

- (a) give to the Commission false or misleading information;
- (b) produce to the Commission documents that contain false or misleading information.

(2) This section does not apply to:

- (a) information that the corporation could not have known to be false or misleading; or
- (b) the production to the Commission of a document containing false or misleading information if the document is accompanied by a statement of the corporation that the information is false or misleading.

Part 6—Miscellaneous

Regulations relating to industry codes

(1) The regulations may:

- (a) prescribe an industry code, or specified provisions of an industry code, for the purposes of this Part; and
- (b) declare the industry code to be a mandatory industry code or a voluntary industry code; and
- (c) for a voluntary industry code, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be so bound (by reference to provisions of the code or otherwise).

(2) If regulations prescribe an industry code, the industry code must prescribe pecuniary penalties not exceeding 300 penalty units or civil penalty provisions of the industry code.

(3) If regulations prescribe an industry code that applies to one or more entities that are authorised by or under a law of the Commonwealth or of a State or Territory to sell electricity, the

regulations may make provision in relation to a matter by approving, adopting or incorporating, with or without modification, any provision contained in an instrument or other writing as in force or existing from time to time.

- (4) Subsection (3) applies despite subsection 14(2) of the *Legislation Act 2003*.

Concurrent operation of State and Territory laws

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.

Part 5C—Payment surcharges

Division 1—Preliminary

Object of this Part

The object of this Part is to ensure that payment surcharges

- (a) are not excessive; and
- (b) reflect the cost of using the payment methods for which they are charged.

Definitions

In this Part:

excessive, in relation to a payment surcharge, has the meaning given by subsection 55B(2).

infringement notice compliance period has the meaning given by subsection 55M(1).

listed corporation has the meaning given by section 9 of the *Corporations Act 2001*.

payment surcharge means:

- (a) an amount charged, in addition to the price of goods or services, for processing payment for the goods or services;
- (b) an amount (however described) charged for using one payment method rather than another.

Reserve Bank standard means a standard determined under section 18 of the *Payment Systems (Regulation) Act 1998* after the commencement of this definition.

surcharge information notice has the meaning given by subsection 55C(3).

surcharge participant has the meaning given by subsection 55C(2).

Division 2—Limit on payment surcharges

Payment surcharges must not be excessive

- (1) A corporation must not, in trade or commerce, charge a payment surcharge that is excessive.
- (2) A payment surcharge is **excessive** if:
 - (a) the surcharge is for a kind of payment covered by:
 - (i) a Reserve Bank standard; or
 - (ii) regulations made for the purposes of this subparagraph; and
 - (b) the amount of the surcharge exceeds the permitted

surcharge referred to in the Reserve Bank standard or the regulations.

- (3) Subsection (1) does not apply to a corporation who is exempt from its operation by the regulations.

Division 3—Information about payment surcharges

Surcharge information notices

- (1) The Commission may, by written notice given to a surcharge participant, require the participant to give to the Commission information or documents evidencing either or both of the following:
- (a) the amount of a payment surcharge;
 - (b) the cost of processing a payment in relation to which a payment surcharge was paid.
- (2) A corporation is a **surcharge participant** if, in trade or commerce, the corporation:
- (a) charges a payment surcharge; or
 - (b) processes a payment for which a payment surcharge is charged.
- (3) The notice given by the Commission to the surcharge participant is a **surcharge information notice**.
- (4) The surcharge information notice must specify:
- (a) the kinds of information or documents to be given to the Commission; and
 - (b) the period for giving the information or documents.

Extending periods for complying with notices

- (1) A surcharge participant that has been given a notice under section 55C may, at any time within 21 days after the notice was given to the participant, apply in writing to the Commission for an extension of the period for complying with the notice.
- (2) The Commission may, by written notice given to the surcharge participant, extend the period within which the participant must comply with the notice.

Participant must comply with notice

- (1) A surcharge participant commits an offence if:
- (a) the surcharge participant is given a surcharge information notice; and
 - (b) the surcharge participant fails to comply with the notice within the period for so complying.

Penalty: 30 penalty units.

- (2) Subsection (1) is an offence of strict liability.

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Division 4—Infringement notices

Purpose and effect of this Division

- (1) The purpose of this Division is to provide for the issue of an infringement notice to a person for an alleged contravention of section 55B as an alternative to proceedings for an order under section 76 for the payment of a pecuniary penalty.

- (2) This Division does not:
- (a) require an infringement notice to be issued to a person in relation to an alleged contravention of section 55B; or
 - (b) affect the liability of a person to proceedings under section 76 in relation to an alleged contravention of section 55B if:
 - (i) an infringement notice is not issued to the person in relation to the contravention; or
 - (ii) an infringement notice issued to the person for the contravention is withdrawn under section 55N; or
 - (c) prevent a court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

When an infringement notice may be issued

- (1) If the Commission has reasonable grounds to believe that a person has contravened section 55B, the Commission may issue an infringement notice to the person.
- (2) The Commission must not issue more than one infringement notice to the person for the same alleged contravention of section 55B.
- (3) The infringement notice does not have any effect if the notice:
 - (a) is issued more than 12 months after the day that the contravention of section 55B is alleged to have occurred;
 - (b) relates to more than one alleged contravention of section 55B by the person.

Contents of an infringement notice

- (1) An infringement notice must:
 - (a) be identified by a unique number; and
 - (b) state the day on which it is issued; and
 - (c) state the name and address of the person to whom it is issued; and
 - (d) identify the Commission and state how it may be contacted; and
 - (e) give details of the alleged contravention, including the details of the alleged contravention; and
 - (f) state the maximum pecuniary penalty that the court could order the person to pay under section 76 for the alleged contravention; and
 - (g) specify the penalty that is payable in relation to the alleged contravention; and
 - (h) state that the penalty is payable within the infringement notice compliance period for the notice; and
 - (i) state that the penalty is payable to the Commission on behalf of the Commonwealth; and
 - (j) explain how payment of the penalty is to be made; and
 - (k) explain the effect of sections 55K, 55L, 55M and 55N.

Amount of penalty

The penalty that is to be specified in an infringement notice that is issued to a person in relation to an alleged contravention of section 55B must be:

- (a) if the person is a listed corporation—600 penalty units;
- (b) if the person is a body corporate other than a listed

corporation—60 penalty units; or

(c) if the person is not a body corporate—12 penalty units.

Effect of compliance with an infringement notice

- (1) This section applies if:
 - (a) an infringement notice for an alleged contravention of section 55B is issued to a person; and
 - (b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 55C.
- (2) The person is not, merely because of the payment, regarded as having contravened section 55B.
- (3) No proceedings (whether criminal or civil) may be started or continued against the person, by or on behalf of the Commonwealth, in relation to the alleged contravention of section 55B.

Effect of failure to comply with an infringement notice

If:

- (a) an infringement notice for an alleged contravention of section 55B is issued to a person; and
 - (b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 55C,
- the person is liable to proceedings under section 76 in relation to the alleged contravention of section 55B.

Infringement notice compliance period for infringement notice

- (1) Subject to this section, the ***infringement notice compliance period*** for an infringement notice is the period of 28 days beginning on the day after the day that the infringement notice is issued by the Commission.
- (2) The Commission may extend, by notice in writing, the infringement notice compliance period for the infringement notice if the Commission is satisfied that it is appropriate to do so.
- (3) Only one extension may be given and the extension must not be for longer than 28 days.
- (4) Notice of the extension must be given to the person to whom the infringement notice was issued.
- (5) A failure to comply with subsection (4) does not affect the validity of the extension.
- (6) If the Commission extends the infringement notice compliance period for an infringement notice, a reference in this Division to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

Withdrawal of an infringement notice

Representations to the Commission

- (1) A person to whom an infringement notice has been issued for an alleged contravention of section 55B may make written

alleged contravention of section 55B may make written representations to the Commission seeking the withdrawal of infringement notice.

- (2) Evidence or information that the person, or a representative of the person, gives to the Commission in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by the Commission

- (3) The Commission may, by written notice (the **withdrawal notice**) given to the person to whom an infringement notice was issued, withdraw the infringement notice if the Commission is satisfied it is appropriate to do so.
- (4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

- (5) The withdrawal notice must state:
- (a) the name and address of the person; and
 - (b) the day on which the infringement notice was issued to the person; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that proceedings under section 76 may be started or continued against the person in relation to the alleged contravention of section 55B.

Time limit for giving withdrawal notices

- (6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

- (7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, the Commission must refund to the person an amount equal to the amount paid.

Part 1—Consumer data right

Division 1—Preliminary

Division A—Object and simplified outline

Object of this Part

The object of this Part is:

- (a) to enable consumers in certain sectors of the Australian economy to require information relating to themselves in those sectors to be disclosed safely, efficiently and conveniently:
 - (i) to themselves for use as they see fit; or
 - (ii) to accredited persons for use subject to privacy safeguards; and
- (b) to enable any person to efficiently and conveniently access information in those sectors that:
 - (i) is about goods (such as products) or services; and
 - (ii) does not relate to any identifiable, or reasonably identifiable, consumers; and
- (c) as a result of paragraphs (a) and (b), to create more choice

(c) as a result of paragraph (a) and (b), to create more order and competition, or to otherwise promote the public interest.

Simplified outline

Rules made under this Part may:

- (a) enable consumers in certain sectors of the Australian economy to require information relating to themselves or those sectors to be disclosed to themselves or to accredited persons; and
- (b) enable any person to be disclosed information in those sectors that is about goods (such as products) or services, and does not relate to any identifiable, or reasonably identifiable, consumers; and
- (c) may require these kinds of disclosures, and other things, to be done in accordance with data standards.

A register is to be kept of accredited persons.

Privacy safeguards apply. These mainly apply to accredited persons who, under those rules, are disclosed information relating to identifiable, or reasonably identifiable, consumers.

Division B—Designating sectors subject to the consumer data right

Designated sectors subject to the consumer data right

Designating a sector

- (1) A **designated sector** means a sector of the Australian economy designated under subsection (2).
- (2) The Minister may, by legislative instrument, designate a sector of the Australian economy by specifying:
 - (a) classes of information (the **designated information**);
 - (b) persons who hold one or more specified classes of the designated information (or on whose behalf such information is held); and
 - (c) the earliest day (the **earliest holding day**) applicable to the sector for beginning to hold the designated information; and
 - (d) each of the classes of information within the designated information for which a person may charge a fee if:
 - (i) the person is required under the consumer data rules to disclose information within that class to another person in specified circumstances; or
 - (ii) another person uses information within that class in specified circumstances as the result of a disclosure required of the first-mentioned person under the consumer data rules; and
 - (e) if the sector is to have one or more gateways:
 - (i) the particular persons who are gateways; and
 - (ii) for each of those persons, the classes of information within the designated information for which the person is a gateway.

Note 1: The persons specified under paragraph (b):

- (a) may be specified by class (see subsection 13(3) of the *Legislation Act 2003*); and
- (b) will be holders of the information, rather than the consumers to whom the information relates; and
- (c) may not be the only holders of the information who can be required to disclose it under the consumer data rules (see section 56AJ (about the meaning of **data holder**)).

Note 2: While a class of information specified under paragraph (b), (d) or (e) is

Note 2: While a class or information specified under paragraph (b), (d) or (e) needs to be of the information specified under paragraph (a), it need not be of the same class as a class specified under paragraph (a).

Note 3: Subparagraph (e)(i) allows only particular persons to be specified rather than classes of persons.

Note 4: For variation and repeal, see subsection 33(3) of the *Acts Interpretation Act 1901*.

Geographical limitation on information that can be designated

(3) Despite paragraph (2)(a), treat a class of information specified in that paragraph as only including so much of the information in that class as:

(a) has at any time been generated or collected wholly or partly in Australia or the external Territories, and:

(i) has been so generated or collected by (or on behalf of) one or more Australian persons; or

(ii) relates to one or more Australian persons (other than the persons who so generated or collected it); or

(iii) relates to goods or services supplied, or offered for supply, to one or more Australian persons; or

(b) has only ever been generated and collected outside of Australia and the external Territories, and:

(i) has been so generated or collected by (or on behalf of) one or more Australian persons; and

(ii) relates to one or more Australian persons (other than the persons who so generated or collected it), or relates to goods or services supplied, or offered for supply, to one or more Australian persons.

In this subsection, **Australian person** has the same meaning as in subsection 56AO(5).

Limitation on the earliest holding day

(4) While the earliest holding day may be before the day the instrument under subsection (2) is made, the earliest holding day must not be earlier than the first day of the calendar year that begins 2 years before the calendar year in which that instrument is made.

Example: The instrument is made on 1 July 2020. The earliest holding day cannot be earlier than 1 January 2018, but not before.

Note: The earliest holding day helps to work out if a person is a data holder for information specified under paragraph (2)(a), and so whether that information is subject to the consumer data right.

Minister's tasks before designating a sector etc.

(1) Before making an instrument under subsection 56AC(2), the Minister must consider all of the following:

(a) the likely effect of making the instrument on:

(i) the interests of consumers; and

(ii) the efficiency of relevant markets; and

(iii) the privacy or confidentiality of consumers' information; and

(iv) promoting competition; and

(v) promoting data-driven innovation; and

(vi) any intellectual property in the information to be covered by the instrument; and

(vii) the public interest;

(b) the likely regulatory impact of allowing the consumer data

rules to impose requirements relating to the information covered by the instrument;

(c) the following matters when considering whether to specify a class of information, as described in paragraph 56AC(2)(d) of the instrument:

(i) whether not specifying that class could result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution);

(ii) whether holders of information within that class currently charge a fee for disclosing such information;

(iii) whether the incentive to generate, collect, hold or maintain information within that class would be reduced if that class were not so specified;

(iv) the marginal cost of the disclosures required under consumer data rules of information within that class;

(d) whether one or more gateways need to be specified in the instrument in order to facilitate access to the information covered by the instrument;

(e) any other matters the Minister considers relevant.

Note: The consumers could be individuals or other persons such as companies (see also subsection 56AI(4)).

(2) Before making an instrument under subsection 56AC(2), the Minister must:

(a) consult each of the following about the matters in paragraphs (1)(a) to (e) of this section:

(i) the Commission;

(ii) any person or body prescribed by the regulations;

(b) wait at least 60 days after the day the Commission publishes its report arising from that consultation (see section 56AE).

(3) Before making an instrument under subsection 56AC(2), the Minister must consult the Information Commissioner about the likely effect of making the instrument on the privacy or confidentiality of consumers' information.

Commission must analyse, consult and report about an instrument proposing to designate a sector

(1) When the Commission is consulted under subsection 56AD(1), the Commission must:

(a) analyse the matters in paragraphs 56AD(1)(a) to (e) in relation to the instrument; and

(b) consult the public about those matters in relation to the instrument:

(i) for at least 28 days; and

(ii) in one or more ways that includes making information available on the Commission's website and inviting the public to comment; and

(c) consult each of the following about those matters in relation to the instrument:

(i) the Information Commissioner;

(ii) the person or body (if any) that the Commission believes to be the primary regulator of the sector that the instrument would designate;

(iii) any person or body prescribed by the regulations;

(d) report to the Minister about that analysis and consultation.

(2) The Commission must publish the report on its website.

Information Commissioner must analyse and report about an instrument proposing to designate a sector

- (1) When the Information Commissioner is consulted under subsection 56AD(3), the Information Commissioner must:
 - (a) analyse the likely effect of making the instrument on the privacy or confidentiality of consumers' information; and
 - (b) report to the Minister about that analysis.
- (2) The Information Commissioner must publish the report on the Information Commissioner's website, except for any excluded part of the report.
- (3) In deciding whether or not to exclude a part of the report from publication, the Information Commissioner must:
 - (a) have regard to the need to prevent the matters in subsection 33(2) of the *Privacy Act 1988*; and
 - (b) try to achieve an appropriate balance between the need to prevent those matters and the desirability of ensuring that interested persons are sufficiently informed of the Information Commissioner's analysis in the report.

Commission may recommend that a sector be designated etc.

- (1) The Commission may, in writing, recommend to the Minister that the Minister make an instrument under subsection 56AC(2):
 - (a) designating a particular sector of the Australian economy; or
 - (b) varying or revoking an instrument designating a sector under that subsection.

The Commission must publish the recommendation on its website.

- (2) However, before making a recommendation under subsection (1), the Commission must do all of the following:
 - (a) analyse the matters in paragraphs 56AD(1)(a) to (d) in relation to the proposed instrument;
 - (b) consult the public about those matters in relation to the proposed instrument:
 - (i) for at least 28 days; and
 - (ii) in one or more ways that includes making information available on the Commission's website and inviting the public to comment;
 - (c) consult each of the persons or bodies covered by paragraph 56AE(1)(c) about those matters in relation to the proposed instrument;
 - (d) report to the Minister about that analysis and consultation;
 - (e) publish the report on the Commission's website.

- (3) If the Commission publishes under subsection (1) a recommendation that the Minister make a proposed instrument, the Minister must wait at least a further 60 days before making an instrument under subsection 56AC(2).

Note: The Minister must also consult the Information Commissioner about the proposed instrument (see subsection 56AD(3)).

- (4) Neither subsection 56AD(2) nor section 56AE applies in relation to a proposed instrument recommended under subsection (1) of this section.

Other matters

A failure to comply with section 56AD, 56AE, 56AF or 56AG not invalidate an instrument made under subsection 56AC(2).

Division C—Meanings of key terms

Meanings of *CDR data, directly or indirectly derived* and *CDR consumer*

(1) **CDR data** is information that:

- (a) is within a class of information specified, as described in paragraph 56AC(2)(a), in an instrument designating a section under subsection 56AC(2); or
- (b) is not covered by paragraph (a) of this subsection, but wholly or partly derived from information covered by:
 - (i) paragraph (a) of this subsection; or
 - (ii) a previous application of this paragraph.

Note 1: Geographical limitations may cause some information within a class specified as described in paragraph 56AC(2)(a) to be disregarded (see subsection 56AC(3)), which means it will not be CDR data.

Note 2: Information covered by paragraph (b) includes information derived from information covered by paragraph (a), information derived from that derived information, and so on.

Note 3: Information covered by paragraph (b), for which there is a CDR consumer, cannot be required to be disclosed under the consumer data rules (see subsection 56BD(1)).

Note 4: Only certain kinds of CDR data for which there are no CDR consumer data rules (also known as product data) can be required to be disclosed under the consumer data rules (see subsection 56BF(1)).

(2) CDR data is ***directly or indirectly derived*** from other CDR data if the first-mentioned CDR data is wholly or partly derived from other CDR data after one or more applications of paragraph (1).

(3) A person is a **CDR consumer** for CDR data if:

- (a) the CDR data relates to the person because:
 - (i) of the supply of a good or service to the person or one or more of the person's associates (within the meaning of section 318 of the *Income Tax Assessment Act 1936*); or
 - (ii) of circumstances of a kind prescribed by the regulations; and
- (b) the CDR data is held by another person who:
 - (i) is a data holder of the CDR data; or
 - (ii) is an accredited data recipient of the CDR data; or
 - (iii) is holding the CDR data on behalf of a person mentioned in subparagraph (i) or (ii); and
- (c) the person is identifiable, or reasonably identifiable, from:
 - (i) the CDR data; or
 - (ii) other information held by the other person referred to in paragraph (b); and
- (d) none of the conditions (if any) prescribed by the regulations apply to the first-mentioned person in relation to the CDR data.

(4) Subsection 4B(1) (about consumers) does not apply to this Part.

Meaning of *data holder*

(1) A person is a **data holder**, of CDR data, if:

- (a) the CDR data:
 - (i) is information within a class of information specified

as described in paragraph 56AC(2)(a), in an instrument designating a sector under subsection 56AC(2) (the **designation instrument**); or

(ii) is directly or indirectly derived from information covered by subparagraph (i); and

(b) the CDR data is held by (or on behalf of) the person, or began to be so held on or after the earliest holding day specified in the designation instrument; and

(c) the person is not a designated gateway for the CDR data; and

(d) subsection (2), (3) or (4) applies to the person and the CDR data.

Note 1: Geographical limitations may cause some information within a class of information specified as described in paragraph 56AC(2)(a) to be disregarded (see subsection 56AC(3)), which means it will not be CDR data.

Note 2: If the person begins holding the CDR data before the earliest holding day, the person:

(a) will not be a data holder of the CDR data; and

(b) will not be required to disclose it under the consumer data rules.

First case—person is also specified in the designation instrument

(2) This subsection applies to a person and CDR data if:

(a) the person, or a class of persons to which the person belongs, is specified, as described in paragraph 56AC(2)(a), in the designation instrument as holding a class of information to which the CDR data belongs; and

(b) neither the CDR data, nor any other CDR data from which the CDR data was directly or indirectly derived, was disclosed to the person under the consumer data rules.

Second case—reciprocity arising from the person being disclosing other CDR data under the consumer data rules

(3) This subsection applies to a person and CDR data if:

(a) neither the CDR data, nor any other CDR data from which the CDR data was directly or indirectly derived, was disclosed to the person under the consumer data rules; and

(b) the person is an accredited data recipient of other CDR data.

Note 1: Paragraph (b) is referring to other CDR data not covered by paragraph (a).

Note 2: The other CDR data referred to in paragraph (b) could be within a class of information specified in another instrument designating a different sector under subsection 56AC(2).

Third case—conditions in the consumer data rules are met

(4) This subsection applies to a person and CDR data if:

(a) the person is an accredited person; and

(b) the CDR data, or any other CDR data from which it was directly or indirectly derived, was disclosed to the person under the consumer data rules; and

(c) the conditions specified in the consumer data rules are met.

Meaning of accredited data recipient

A person is an **accredited data recipient**, of CDR data, if:

(a) the person is an accredited person; and

(b) the CDR data is held by (or on behalf of) the person; and

- (c) the CDR data, or any other CDR data from which it was directly or indirectly derived, was disclosed to the person under the consumer data rules; and
- (d) the person is neither a data holder, nor a designated gateway, for the first-mentioned CDR data.

Note: For paragraph (d), the person will be a data holder of that CDR data if subsection 56AJ(4) applies.

Meanings of *CDR participant* and *designated gateway*

- (1) A ***CDR participant***, for CDR data, is a data holder, or an accredited data recipient, of the CDR data.
- (2) A person is a ***designated gateway***, for CDR data, if:
 - (a) the person is specified as a gateway, as described in subparagraph 56AC(2)(e)(i), in an instrument designating a sector under subsection 56AC(2); and
 - (b) the CDR data is information within a class, specified in an instrument, for which the person is a gateway; and
 - (c) the CDR data is, or is to be, disclosed to the person under the consumer data rules because the person is:
 - (i) acting as described in a subparagraph of paragraph 56BG(1)(a) or (b); or
 - (ii) if there are no consumers for the CDR data—acting between a CDR participant for the CDR data and a person requesting a disclosure of the CDR data;and not because the person is an accredited person or a CDR consumer for the CDR data.

Meanings of *chargeable CDR data*, *chargeable circumstances* and *fee-free CDR data*

- (1) CDR data is ***chargeable CDR data*** if the CDR data is information within a class specified, as described in paragraph 56AC(2)(d), in an instrument designating a sector under subsection 56AC(2) (the ***designation instrument***).
- (2) The chargeable CDR data is disclosed in ***chargeable circumstances*** if it is disclosed in circumstances specified:
 - (a) for that class of information; and
 - (b) as described in subparagraph 56AC(2)(d)(i);in the designation instrument.
- (3) The chargeable CDR data is used in ***chargeable circumstances*** if it is used in circumstances specified:
 - (a) for that class of information; and
 - (b) as described in subparagraph 56AC(2)(d)(ii);in the designation instrument.
- (4) CDR data is ***fee-free CDR data*** if it is not chargeable CDR data.

Division D—Extension to external Territories and extraterritorial operation

Extension to external Territories

Each of the following provisions (the ***CDR provisions***) extends to every external Territory:

- (a) a provision of this Part;
- (b) a provision of the regulations made for the purposes of this provision of this Part;
- (c) a provision of the consumer data rules;

- (d) another provision of this Act to the extent that it relates to a provision covered by paragraph (a), (b) or (c);
- (e) a provision of the Regulatory Powers Act to the extent that it applies in relation to a provision of this Part;
- (f) a provision of the *Privacy Act 1988* to the extent that it applies as described in section 56ES or 56ET of this Act.

Extraterritorial operation of the CDR provisions

CDR provisions generally apply inside and outside Australia

- (1) Subject to subsections (2) and (3), the CDR provisions extend to acts, omissions, matters and things outside Australia.

CDR provisions apply for CDR data held inside Australia

- (2) To the extent that the CDR provisions have effect in relation to CDR data held within Australia, the CDR provisions apply in relation to all persons (including foreign persons).

CDR provisions can apply for CDR data held outside Australia

- (3) To the extent that the CDR provisions have effect in relation to an act, or omission, relating to CDR data held outside Australia, the CDR provisions only apply if:
 - (a) the act or omission is by (or on behalf of) an Australian person; or
 - (b) the act or omission occurs wholly or partly in Australia, wholly or partly on board an Australian aircraft or an Australian ship; or
 - (c) the act or omission occurs wholly outside Australia, and an Australian person suffers, or is likely to suffer, financial or other disadvantage as a result of the act or omission.

Interpretation

- (4) For the purposes of subsection (3), if a person's act or omission includes sending, omitting to send, causing to be sent or omitting to cause to be sent an electronic communication or other thing:
 - (a) from a point outside Australia to a point inside Australia; or
 - (b) from a point inside Australia to a point outside Australia;
 that act or omission is taken to have occurred partly in Australia.
- (5) In this section:

Australia, when used in a geographical sense, includes all the external Territories.

Australian person means:

- (a) a body corporate established by or under a law of the Commonwealth, of a State or of a Territory; or
- (b) an Australian citizen, a permanent resident (within the meaning of the *Australian Citizenship Act 2007*), or any other person ordinarily resident within Australia or an external Territory; or
- (c) an entity covered by subsection 56AR(1), (2) or (3) (about Australian government entities).

foreign person means a person other than an Australian person.

point includes a mobile or potentially mobile point, whether on land, underground, in the atmosphere, underwater, at sea or anywhere else.

Geographical application of offences

Division 14 (Standard geographical jurisdiction) of the *Criminal Code* does not apply in relation to an offence against the CDR provisions.

Note: The extended geographical application that section 56AO gives to CDR provisions applies to the offences against the CDR provisions.

Division E—Application to government entities

CDR provisions bind the Crown

- (1) The CDR provisions bind the Crown in each of its capacities
- (2) However, the CDR provisions do not make the Crown:
 - (a) liable to a pecuniary penalty or to be prosecuted for an offence; or
 - (b) subject to a remedy under section 56EY (about actions damages for contravening the privacy safeguards); or
 - (c) subject to a remedy under Part VI (about enforcement) than section 87B (about enforceable undertakings); or
 - (d) subject to a remedy under Part 4 (about civil penalties) (about injunctions) of the Regulatory Powers Act; or
 - (e) subject to Part XIX of this Act (about search and seizure)

Government entities may participate under this Part

Application to Commonwealth government entities

- (1) The CDR provisions apply in relation to an entity that:
 - (a) is part of the Commonwealth; or
 - (b) is a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
 - (c) is a body (whether or not incorporated) established by or under a law of the Commonwealth; or
 - (d) is:
 - (i) holding or performing the duties of an office established by or under a law of the Commonwealth; or
 - (ii) holding an appointment made under a law of the Commonwealth; or
 - (e) is prescribed by the regulations.

Note: For how the CDR provisions so apply, see subsection (4).

Application to State or Territory government entities

- (2) The CDR provisions apply only in relation to an entity that:
 - (a) is part of a State or Territory; or
 - (b) is a body (whether or not incorporated) established for a public purpose by or under a law of a State or Territory; or
 - (c) is:
 - (i) holding or performing the duties of an office established by or under a law of a State or Territory; or
 - (ii) holding an appointment made under a law of a State or Territory; or
 - (d) is an entity prescribed by the regulations in relation to a State or Territory;

if a declaration under subsection 56AS(1), that the entity is a participating entity for the State or Territory, is in force.

Note: For how the CDR provisions so apply, see subsection (4).

- (3) However, whether or not such a declaration is in force for a

entity referred to in subsection (2), the CDR provisions apply in relation to the entity to the extent that:

- (a) the CDR provisions relate to a CDR consumer for CDR data and
- (b) the entity is a CDR consumer for CDR data (or would be a CDR consumer for CDR data if the entity were a person).

Note: For how the CDR provisions so apply, see subsection (4).

How the CDR provisions apply to a government entity

(4) For an entity covered by subsection (1), (2) or (3), the CDR provisions apply as described in that subsection in relation to the entity:

- (a) as if the entity were a person; and
- (b) with the modifications (if any) prescribed by the regulations.

This subsection does not affect how subsection 56AQ(2) applies to the entity.

Participating government entities of a State or Territory— declaration

(1) The Minister may, by notifiable instrument, declare that an entity is a participating entity for a State or Territory.

Note: An entity may be specified by class (see subsection 13(3) of the *Legislation Act 2003*).

(2) However, the Minister must not do so unless the Minister is satisfied that the State or Territory has agreed to the entity participating under this Part.

(3) If:

- (a) a State or Territory has agreed to an entity of the State or Territory participating under this Part; and
- (b) the entity is a body corporate;

the entity is taken to have also agreed to participate under this Part.

Participating government entities of a State or Territory— revocation

(1) The Minister may, by notifiable instrument, revoke a declaration made under subsection 56AS(1) that an entity is a participating entity for a State or Territory.

(2) If a State or Territory requests in writing the Minister to revoke a declaration made under subsection 56AS(1) that an entity is a participating entity for the State or Territory, the Minister must, under subsection (1) of this section, revoke the declaration as soon as practicable.

(3) If the Minister revokes a declaration made under subsection 56AS(1) in relation to an entity, then, despite the revocation, subsection 56AR(2) continues to apply to the entity in relation to:

- (a) any right, privilege, obligation or liability acquired, accrued or incurred before the revocation; and
- (b) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability;

as if the declaration were still in force.

Division 2—Consumer data right

Division A—Power to make consumer data rules

Commission may make consumer data rules

- (1) The Commission may, by legislative instrument, make rules (**consumer data rules**) for designated sectors in accordance with this Division.

Note: Subdivision C deals with the process for making the consumer data rules.

- (2) Without limiting subsection (1), the consumer data rules may include:

- (a) different rules for different designated sectors; or
- (b) different rules for different classes of CDR data; or
- (c) different rules for different classes of persons specified or described in paragraph 56AC(2)(b), in an instrument designating a sector under subsection 56AC(2); or
- (d) different rules for different classes of persons who are to be disclosed CDR data under the consumer data rules.

Rules must include requirement to delete CDR data on request from CDR consumer

Requirement to delete CDR data in response to request from CDR consumer

- (1) The consumer data rules must include a requirement on an accredited data recipient of CDR data to delete all or part of the CDR data in response to a valid request by a CDR consumer for the CDR data to be deleted.
- (2) However, a rule described in subsection (1) must not require deletion of all or part of the CDR Data if:
- (a) the accredited data recipient is required to retain the CDR data by or under an Australian law or a court/tribunal order;
 - (b) the CDR data relates to any current or anticipated:
 - (i) legal proceedings; or
 - (ii) dispute resolution proceedings;to which the accredited data recipient is a party; or
 - (c) the CDR data relates to any current or anticipated:
 - (i) legal proceedings; or
 - (ii) dispute resolution proceedings;to which the CDR consumer is a party.

Consumer data rules may include rules in relation to the requirement

- (3) The consumer data rules may include the following rules in relation to the requirement:
- (a) rules about:
 - (i) how the CDR consumer may make a valid request
 - (ii) what must be included in a request for it to be a valid request and when a request ceases to be a valid request;
 - (b) rules specifying circumstances (in addition to those in subsection (2)) in which the accredited data recipient may refuse to delete the CDR data despite the requirement;
 - (c) rules about how an accredited data recipient is to delete CDR data covered in a valid request;
 - (d) rules about how the requirement is to be complied with depending on the class of CDR data requested to be deleted;
 - (e) rules about how an accredited data recipient is to notify

CDR consumer of:

- (i) the deletion of the CDR data and the extent of the deletion; or
 - (ii) if the CDR data is not deleted—the reasons the deletion did not occur;
- (f) rules about any other matters incidental or related to the requirement (see also section 56BJ).
- (4) This section applies despite any other provision of this Division.
- (5) This section does not limit the consumer data rules dealing with the deletion of CDR data in circumstances other than compliance with the requirement.

Matters that the consumer data rules may deal with

The consumer data rules may deal with the following matters:

- (a) disclosure, collection, use, accuracy, storage, security or deletion of CDR data for which there are one or more CDR consumers (see also sections 56BC and 56BD);
- (b) disclosure, collection, use, accuracy, storage, security or deletion of CDR data for which there are no CDR consumers (see also sections 56BE and 56BF);
- (c) designated gateways for CDR data (see also section 56BH);
- (d) accreditation of data recipients (see also section 56BH);
- (e) reporting, record keeping and auditing (see also section 56BI);
- (f) matters incidental or related to any of the above matters (see also section 56BJ).

Rules about disclosure, collection, use, accuracy, storage, security or deletion of CDR data for which there are CDR consumers

Required disclosures in response to valid requests

- (1) Without limiting paragraph 56BB(a), the consumer data rules may include the following rules:
- (a) requirements on a CDR participant for CDR data to disclose all or part of the CDR data, in response to a valid request from a CDR consumer for the CDR data, to:
 - (i) the CDR consumer for use as the CDR consumer's own; or
 - (ii) an accredited person for use subject to the privacy safeguards;
 - (b) rules about:
 - (i) how a CDR consumer for the CDR data may make a valid request of the kind described in paragraph (a); and
 - (ii) what must be included in a request for it to be valid, what disclosures or other matters a valid request may cover, and when a request ceases to be a valid request;
 - (c) requirements on a person (other than a CDR consumer for the CDR data) to satisfy in order to be disclosed the CDR data in the way described in paragraph (a).

Note 1: The requirements described in paragraph (a) could, for example, include a requirement that the disclosure be in accordance with the relevant privacy standards.

Note 2: A fee may be charged for such a disclosure if the CDR data is charged for, unless section 56BU provides otherwise.

(2) Without limiting paragraph 56BB(a), the consumer data rule may include the following rules:

- (a) rules authorising a CDR participant for CDR data to disclose all or part of the CDR data to a person in accordance with valid consent of a CDR consumer for the CDR data;
- (b) rules authorising a person to use CDR data in accordance with a valid consent of a CDR consumer for the CDR data;
- (c) rules about:
 - (i) how a CDR consumer for the CDR data may make valid consent of the kind described in paragraph (a) or (b); and
 - (ii) what must be included in a consent for it to be valid, what disclosures, uses or other matters a valid consent may cover, and when a consent ceases to be a valid consent.

Note: Fees may be charged for these disclosures or uses.

Other rules

(3) Without limiting paragraph 56BB(a), the consumer data rule may include the following rules relating to CDR data for which there are one or more CDR consumers:

- (a) rules relating to the privacy safeguards;
- (b) other rules relating to the disclosure, collection, use, accuracy, storage or security of the CDR data that affect:
 - (i) an accredited person; or
 - (ii) a CDR participant, or CDR consumer, for the CDR data;
- (c) other rules relating to the deletion of the CDR data that affect:
 - (i) an accredited person; or
 - (ii) an accredited data recipient of the CDR data; or
 - (iii) a CDR consumer for the CDR data.

Note 1: Subsection 56BD(3) limits how such rules can affect a data holder.

Note 2: The rules may deal with similar or additional matters to those in the privacy safeguards. When doing so, the rules will need to be consistent with those safeguards (see subsections 56EC(1) and (2)).

Note 3: The rules must include a requirement on an accredited data recipient to delete all or part of the CDR data in response to a valid request by a CDR consumer for the CDR data (see section 56BAA).

Limitations for rules about CDR data for which there are CDR consumers

Only designated CDR data can be required to be disclosed

(1) The consumer data rules can only require a disclosure of CDR data for which there are one or more CDR consumers if:

- (a) the CDR data is within a class of information specified, described in paragraph 56AC(2)(a), in an instrument designating a sector under subsection 56AC(2); and
- (b) the disclosure is to:
 - (i) one or more of those CDR consumers; or
 - (ii) an accredited person; or
 - (iii) a designated gateway for the CDR data.

Note 1: This means CDR data cannot be required to be disclosed if it:

- (a) is not within a class specified in such an instrument; and
- (b) is directly or indirectly derived from CDR data that is within a class specified in such an instrument.

specified in such an instrument.

Note 2: The consumer data rules can include other rules relating to this or derived CDR data.

Note 3: Voluntary disclosures of this other derived CDR data can be authorised under the consumer data rules.

No fee when fee-free CDR data is required to be disclosed

- (2) The consumer data rules cannot allow a fee to be charged for
- (a) the disclosure of fee-free CDR data under rules like those described in paragraph 56BC(1)(a) or 56BG(1)(a); or
 - (b) the use of fee-free CDR data received as the result of such disclosure.

Note: Fees may be charged for other kinds of disclosures or uses of fee-free CDR data.

Rules affecting data holders that relate to the use, accuracy, storage, security or deletion of CDR data

- (3) For a data holder of CDR data for which there are one or more CDR consumers, the consumer data rules:
- (a) cannot include rules affecting the data holder that relate to the deletion of the CDR data; and
 - (b) can only include rules affecting the data holder that relate to the use, accuracy, storage or security of the CDR data; and such rules also relate to the disclosure of the CDR data under the consumer data rules.

Effect of limitations

- (4) Subsections (1), (2) and (3) apply despite any other provision in this Division.

Rules about disclosure, collection, use, accuracy, storage, security or deletion of product data

Without limiting paragraph 56BB(b), the consumer data rules may include the following rules for CDR data for which there are CDR consumers:

- (a) requirements on a CDR participant for the CDR data to disclose all or part of the CDR data to a person in response to a valid request by the person;
- (b) rules about:
 - (i) how a person may make a valid request of the kind described in paragraph (a); and
 - (ii) what must be included in a request for it to be valid, what disclosures or other matters a valid request may cover, and when a request ceases to be a valid request;
- (c) requirements on a person to satisfy in order to be disclosed the CDR data in the way described in paragraph (a);
- (d) other rules affecting:
 - (i) CDR participants for the CDR data; or
 - (ii) persons wishing to be disclosed the CDR data;that relate to the disclosure, collection, use, accuracy, storage, security or deletion of the CDR data.

Note 1: A request for this CDR data could be made, for example, to assist in the development of a product or service.

Note 2: The requirements described in paragraph (a) could, for example, include a requirement that the disclosure be in accordance with the relevant standards.

Note 3: The privacy safeguards do not apply to this CDR data (see subsection 56EB(1)).

Limitations for rules about product data

Only certain kinds of product data can be required to be disclosed

- (1) The consumer data rules can only require a disclosure of CDR data for which there are no CDR consumers if:
- (a) the CDR data is about the eligibility criteria, terms and conditions, price, availability or performance of:
 - (i) a product or other kind of good; or
 - (ii) a service; and
 - (b) in the case where the CDR data is about availability or performance—the CDR data is publicly available.

Note 1: This means other kinds of CDR data for which there are no CDR consumers cannot be required to be disclosed.

Note 2: The consumer data rules can include other rules relating to other kinds of CDR data for which there are no CDR consumers.

Note 3: Voluntary disclosures of other kinds of CDR data for which there are no CDR consumers can be authorised under the consumer data rules.

No fee when this CDR data is required to be disclosed

- (2) The consumer data rules cannot allow a fee to be charged for:
- (a) the disclosure of CDR data under rules like those described in paragraph 56BE(a) or 56BG(2)(a); or
 - (b) the use of CDR data received as the result of such a disclosure.

Note: A fee could be charged for other disclosures or uses of CDR data for which there are no CDR consumers.

Effect of limitations

- (3) Subsections (1) and (2) apply despite any other provision of this Division.

Rules about designated gateways

CDR data for which there are CDR consumers

- (1) Without limiting paragraph 56BB(c), if there is a designated gateway for CDR data for which there are one or more CDR consumers, the consumer data rules may include the following rules:
- (a) rules like those described in subsection 56BC(1) for the disclosure of CDR data, but involving the designated gateway:
 - (i) acting between the CDR consumer and the CDR participant in the making of a valid request; or
 - (ii) acting between the CDR consumer and the accredited person who is the proposed recipient of the requested disclosure; or
 - (iii) acting between the CDR participant and the CDR consumer, or accredited person, who is the proposed recipient of the requested disclosure;
 - (b) rules like those described in subsection 56BC(2) for the disclosure of CDR data, but involving the designated gateway:
 - (i) acting between the CDR consumer and a person authorised as described in that subsection; or
 - (ii) acting between persons authorised as described in that subsection.

subsection;

- (c) other rules affecting the designated gateway that relate to the disclosure, collection, use, accuracy, storage, security or deletion of the CDR data.

Product data

- (2) Without limiting paragraph 56BB(c), if there is a designated gateway for CDR data for which there are no CDR consumers, consumer data rules may include the following rules:
 - (a) rules like those described in paragraphs 56BE(a) to (c) involving the designated gateway acting between the CDR participant and the person requesting the disclosure;
 - (b) other rules affecting the designated gateway that relate to the disclosure, collection, use, accuracy, storage, security or deletion of the CDR data.

Limitation—rules relating to the collection, use, accuracy, storage, security or deletion of CDR data

- (3) For a designated gateway for CDR data for which there are one or more CDR consumers, the consumer data rules:
 - (a) can only include rules affecting the designated gateway requiring or authorising the disclosure of the CDR data if the rules are as described in paragraph (1)(a) or (b); and
 - (b) can only include rules affecting the designated gateway that relate to the collection, use, accuracy, storage, security or deletion of the CDR data if such rules also relate to a disclosure described in paragraph (a) of this subsection.

Note: Paragraph (a) does not prevent the inclusion of a rule relating to a disclosure described in that paragraph.

- (4) Subsection (3) applies despite any other provision of this Division.

Transitional rules

- (5) Without limiting paragraph 56BB(c), if there is a designated gateway for CDR data, the consumer data rules may include transitional rules for when a person ceases to be the designated gateway, including about the disclosure, collection, use, accuracy, storage, security or deletion of the CDR data.

Note: These rules could, for example, include a requirement that the CDR data be disclosed in accordance with the relevant data standards to another designated gateway. Some of these transitional rules could be similar to some of the privacy safeguards.

Rules about accreditation of data recipients

- (1) Without limiting paragraph 56BB(d), the consumer data rules may include the following rules:
 - (a) rules conferring functions or powers on the Data Recipient Accreditor;
 - (b) the criteria for a person to be accredited under subsection 56CA(1);
 - (c) rules providing that accreditations may be granted subject to conditions, and that conditions may be imposed on an accreditation after it has been granted;
 - (d) rules providing that accreditations may be granted at different levels corresponding to different risks, including risks associated with:
 - (i) specified classes of CDR data; or

- (i) specified classes of CDR data; or
- (ii) specified classes of activities; or
- (iii) specified classes of applicants for accreditation;
- (e) rules for the period, renewal, transfer, variation, suspension, revocation or surrender of accreditations;
- (f) notification requirements on persons whose accreditation have been varied, suspended, revoked or surrendered;
- (g) transitional rules for when an accreditation is varied, is suspended or ends, including about the disclosure, collection, use, accuracy, storage, security or deletion of CDR data;
- (h) rules about a matter referred to in subsection 56CE(4) (about the Register of Accredited Persons).

Note: The rules described in paragraph (g) could, for example, include a requirement that the CDR data be disclosed in accordance with the relevant data standards to an accredited person. Some of these transitional rules could be similar to some of the privacy safeguards.

- (2) Without limiting paragraph (1)(b):
 - (a) the criteria may differ for different classes of persons;
 - (b) the criteria may include the payment of a fee.

Any fee must not be such as to amount to taxation.

- (3) Without limiting paragraph (1)(e), each of the following may be a ground for varying, suspending or revoking an accreditation:
 - (a) a failure to comply with a requirement in this Part or in the consumer data rules;
 - (b) a failure to comply with a requirement in the privacy safeguards.

Note: An example of a variation could be the imposition of a condition, or changing the level of an accreditation.

- (4) If the consumer data rules include rules enabling decisions to be made to vary, suspend or revoke accreditations, the rules must permit the making of applications to the Administrative Appeals Tribunal for review of those decisions.

Note: The consumer data rules can also provide for internal review of the decisions, and internal and AAT review of other decisions (see section 56BJ).

Rules about reporting, record keeping and auditing

- (1) Without limiting paragraph 56BB(e), the consumer data rules may include the following rules:
 - (a) a power for a CDR consumer for CDR data to direct a CDR participant for the CDR data to give the consumer, or an accredited person, reports about:
 - (i) the consumer's valid requests to the CDR participant under rules like those described in paragraph 56BC(1) or 56BG(1)(a), for the CDR data; and
 - (ii) any disclosures made in response to such request;
 - (b) a power for a CDR consumer for CDR data to direct a CDR participant for the CDR data to give the consumer, or an accredited person, reports about:
 - (i) the consumer's valid consents to the CDR participant under rules like those described in paragraph 56BC(2) or (b) or 56BG(1)(b), for the CDR data; and
 - (ii) any disclosures made in response to such consent;
 - (c) a power for a person referred to in paragraph 56BG(1)(a) to direct a designated gateway referred to in that

paragraph to give reports about:

- (i) valid requests or consents, affecting the designated gateway, under rules like those described in that paragraph; and
 - (ii) any disclosures made in response to such requests or consents;
- (d) requirements for CDR participants for CDR data to give reports to the Commission or the Information Commissioner
 - (e) requirements for accredited persons to give reports to the Commission or the Information Commissioner;
 - (f) requirements for designated gateways for CDR data to give reports to the Commission or the Information Commissioner
 - (g) requirements for the keeping of records relating to the operation of the consumer data rules;
 - (h) requirements for each of the following entities:
 - (i) the Data Recipient Accreditor;
 - (ii) the Accreditation Registrar;
 - (iii) the Data Standards Chair;to give reports to the Commission or the Information Commissioner about that entity's functions or powers.

Note: Information or documents relating to compliance with the consumer data rules may also be required to be given (see subsections 155(1) and (2)).

- (2) Without limiting paragraph 56BB(e), the consumer data rules may include requirements for CDR participants or designated gateways for CDR data, or accredited persons, to give to the Commission or Information Commissioner:
 - (a) copies of one or more of the records required to be kept described in paragraph (1)(g); or
 - (b) information from such records;either periodically, or on request by the Commission or Information Commissioner, or both.

Rules about incidental or related matters

Without limiting paragraph 56BAA(3)(f) or 56BB(f), the consumer data rules may include the following rules:

- (a) rules that refer to the data standards;
- (b) the circumstances in which persons are, or may be, relieved from complying with requirements in the consumer data rules that would otherwise apply to them;
- (c) a rule that depends on a person being satisfied of one or more specified matters;
- (d) rules for the making of applications for internal review or applications to the Administrative Appeals Tribunal for review of decisions of a person under the consumer data rules;
- (e) rules about the manner or form in which persons or bodies:
 - (i) may exercise powers under the consumer data rules;
 - (ii) must comply with requirements imposed by the consumer data rules;which could include requiring the use of a form approved by the Commission or by the Information Commissioner;
- (f) rules about the following matters:
 - (i) the manner in which CDR participants for CDR data may charge (or cause to be charged) a fee for a matter covered by the consumer data rules;
 - (ii) the time for paying such a fee;
 - (iii) giving notice of, or publicising, such a fee or matter;

- (m) giving notice of, or publishing, such a fee or matter about such a fee;
- (g) rules requiring CDR participants, or designated gateways for CDR data to have internal or external dispute resolution processes:
 - (i) that relate to the operation of the consumer data rules or this Part; and
 - (ii) that meet specified criteria;
- (h) rules relating to an external dispute resolution scheme recognised under Division 4, including about access to such scheme;
- (i) transitional rules for the external resolution of disputes:
 - (i) described in subsection 56DA(1); and
 - (ii) not covered by a scheme recognised under that subsection;
- (j) rules about any other matters that the provisions of this Part provide may be specified, or otherwise dealt with, in the consumer data rules.

Further limitations on the consumer data rules

- (1) The consumer data rules cannot impose on a person a requirement that has a retrospective commencement or application.

Example: The rules cannot require a data holder to disclose CDR data on a day before the rules are registered, or on a day before the registration of a variation to the rules that includes the requirement.

Note: Other limitations on the consumer data rules are in sections 56BD and 56BG.

- (2) To avoid doubt, the consumer data rules may require a person to do something on a particular day, in relation to CDR data generated or collected on an earlier day, if the person:
 - (a) is a data holder of the CDR data; or
 - (b) is an accredited person; or
 - (c) is a person who has given a valid request under the consumer data rules relating to the CDR data; or
 - (d) is a designated gateway for the CDR data.

Example: A data holder is given a valid request to disclose CDR data that was generated before the rules are registered. The rules can require that disclosure.

- (3) The regulations may provide that the consumer data rules:
 - (a) have no effect to the extent that the consumer data rules deal with specified matters, or impose specified requirements in relation to:
 - (i) specified classes of CDR data; or
 - (ii) specified classes of persons; or
 - (b) only have effect to the extent that the consumer data rules deal with specified matters, or impose specified requirements in relation to:
 - (i) specified classes of CDR data; or
 - (ii) specified classes of persons.

The consumer data rules have effect (or no effect) accordingly.

- (4) Subsections (1) and (3) apply despite any other provision of Division.

Division B—Compliance with consumer data rules

Obligation to comply with consumer data rules

The consumer data rules may provide that specified provisions of the rules are civil penalty provisions (within the meaning of the Regulatory Powers Act).

Note: Sections 76 to 77 deal with enforcing the civil penalty provisions.

Infringement notices

Object

- (1) The object of this section is for Division 5 of Part XI to apply to a civil penalty provision of the consumer data rules in a corresponding way to the way that Division applies to a provision of Part 2-2 of the Australian Consumer Law.

Note: That Division is about infringement notices issued for alleged contraventions of provisions of the Australian Consumer Law.

Extended application of Division 5 of Part XI etc.

- (2) Division 5 of Part XI, and any other provision of this Act that relates to that Division, also apply in relation to a civil penalty provision of the consumer data rules as if the substitutions in the following table were made.

| Substitutions to be made | | |
|--------------------------|--|---|
| Item | For a reference in Division 5 of Part XI to ... | ... substitute a reference to ... |
| 1 | section 224 of the Australian Consumer Law | section 76 of this Act. |
| 2 | Chapter 4 or Part 5-2 of the Australian Consumer Law | Part VI of this Act. |
| 3 | a provision of Part 2-2 of the Australian Consumer Law | a civil penalty provision of the consumer data rules. |

- (3) To avoid doubt, Division 2 of Part XI does not limit the application of section 56GF (about constitutional basis) to the extended application of Division 5 of Part XI as described in this section.

Misleading or deceptive conduct—offence

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the person does so knowing that the conduct:
 - (i) is misleading or deceptive; or
 - (ii) is likely to be misleading or deceptive; and
 - (c) the conduct misleads or deceives, or is likely to mislead or deceive, another person (the **second person**) into believing that:
 - (i) a person is a CDR consumer for CDR data; or
 - (ii) a person is making a valid request or consent, or is satisfied other criteria, for the disclosure of CDR data under the consumer data rules.

Note: The person mentioned in subparagraph (c)(i) or (ii) could be the first-mentioned person, the second person or a third person.

Defence

- (2) Subsection (1) does not apply if the conduct is not misleading or deceptive in a material particular.

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

Penalty—body corporate

- (3) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine of not more than the greater of the following:
- (a) \$10,000,000;
 - (b) 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 commission of the offence—times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which commission of the offence happened or began.
- (4) For the purposes of paragraph (3)(c), **annual turnover** has the same meaning as in Division 1 of Part IV.

Penalty—other persons

- (5) An offence against subsection (1) committed by a person other than a body corporate is punishable on conviction by imprisonment for not more than 5 years, a fine of not more than \$500,000, or both.

Misleading or deceptive conduct—civil penalty

- (1) A person must not engage in conduct that misleads or deceives or is likely to mislead or deceive, another person (the **second person**) into believing that:
- (a) a person is a CDR consumer for CDR data; or
 - (b) a person is making a valid request or consent, or has satisfied other criteria, for the disclosure of CDR data under the consumer data rules.

Note 1: The person mentioned in paragraph (a) or (b) could be the first-mentioned person, the second person or a third person.

Note 2: For enforcement, see Part VI (including section 76 for an order for payment of a pecuniary penalty).

Defence

- (2) Subsection (1) does not apply if the conduct is not misleading or deceptive in a material particular.
- (3) A person who wishes to rely on subsection (2) bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the conduct is not misleading or deceptive in a material particular.

Division C—Process for making consumer data rules etc.

Matters to which Commission must have regard when making the rules

Before making consumer data rules under subsection 56BA(1), the Commission must consider the kinds of matters referred to in paragraphs 56AD(1)(a) and (b).

Commission to consult before making the rules

- (1) Before making consumer data rules under subsection 56BA(1), the Commission must:
- (a) consult the public about the making of the rules;

- (a) consult the public about the making of the rules:
 - (i) for at least 28 days; and
 - (ii) in one or more ways that includes making information available on the Commission's website, and inviting the public to comment; and
 - (b) consult each of the following about the making of the rules:
 - (i) the Information Commissioner;
 - (ii) if the rules relate to a particular designated sector, a person or body (if any) that the Commission believes to be the primary regulator of that sector;
 - (iii) any person or body prescribed by the regulations;
 - (c) wait at least 60 days after the day consultation of the public begins under paragraph (a) about the making of the rules.
- (2) A failure to comply with subsection (1) does not invalidate the consumer data rules.

Ministerial consent to rules required

The Commission must not make consumer data rules under subsection 56BA(1) unless the Minister has consented, in writing, to the making of the rules.

Note: In an emergency, consent is not required (see section 56BS).

Emergency rules: usual consultation and consent not required

- (1) The Commission may make consumer data rules under subsection 56BA(1):
- (a) after consulting the Information Commissioner, but without otherwise complying with section 56BQ; and
 - (b) without the consent of the Minister as required by section 56BR;
- if the Commission believes (whether or not that belief is reasonable) that it is necessary to do so in order to avoid a risk of serious harm to:
- (c) the efficiency, integrity or stability of any aspect of the Australian economy; or
 - (d) the interests of consumers.

Note: The Commission still needs to comply with section 56BP.

- (2) However, a failure to comply with paragraph (1)(a) does not invalidate rules made as described in subsection (1).

Note: Such rules may have a limited life (see subsection 56BT(3)).

Emergency rules: consequences if made

- (1) If the Commission makes consumer data rules as described in subsection 56BS(1) (the **emergency rules**), the Commission must:
- (a) on the following day, give the Minister a written explanation of the need for the emergency rules; and
 - (b) vary or repeal the emergency rules in accordance with directions given under subsection (2).
- (2) The Minister may, by writing, direct the Commission to vary or repeal the emergency rules.
- (3) If:
- (a) the emergency rules are made without consulting the Information Commissioner, but otherwise in accordance with subsection 56BS(1); and
 - (b) the Minister does not give a direction under subsection

- (d) the minister does not give a direction under subsection 56B(1) about the emergency rules;

the emergency rules cease to be in force 6 months after the day they are made.

Note: If the emergency rules vary other consumer data rules, this subsection causes only the emergency rules to cease to be in force.

- (4) A direction given under subsection (2) is not a legislative instrument.

- (5) Despite subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*, the requirements of sections 56BP, 56BQ and 56BR of this Act do not apply in relation to a variation or repeal of the emergency rules pursuant to a direction given under subsection (2) of this section.

Note: This subsection alters the requirement in subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* that variations or repeals must be made in a like manner and subject to like conditions.

Division D—Fees for disclosing CDR data

Charging a fee in inappropriate circumstances when required to disclose CDR data

- (1) A person contravenes this subsection if:
- (a) the person is a CDR participant for CDR data; and
 - (b) the person is required under the consumer data rules to disclose all or part of the CDR data; and
 - (c) the person charges (or causes to be charged) a fee for or both of the following matters:
 - (i) the disclosure (or a related disclosure by a designated gateway or other CDR participant for the CDR data);
 - (ii) the use of the CDR data as the result of the disclosure (or of that related disclosure); and
 - (d) subsection (2) or any of the following subparagraphs applies:
 - (i) the CDR data is fee-free CDR data;
 - (ii) to the extent that the fee is charged for the disclosure of chargeable CDR data—the fee purports to cover a disclosure in circumstances that are not chargeable circumstances;
 - (iii) to the extent that the fee is charged for the use of chargeable CDR data—the fee purports to cover use in circumstances that are not chargeable circumstances

Note: For enforcement, see Part VI (including section 76 for an order for payment of a pecuniary penalty).

- (2) This subsection applies if:
- (a) any fee (the **reasonable fee**):
 - (i) that has been determined under subsection 56BV(1) for the person; or
 - (ii) that can be worked out from a method determined under subsection 56BV(1) for the person;covers either or both of the matters in paragraph (1)(c) of this section; and
 - (b) the portion of the fee charged as described in that paragraph for those matters exceeds the corresponding portion of the reasonable fee.

Commission may intervene if fee for disclosing or using

chargeable CDR data is unreasonable etc.

- (1) The Commission may determine the following for a specified participant for specified chargeable CDR data:
 - (a) the amount of a fee, or a method for working out the amount of a fee, that the CDR participant may charge (or cause to be charged) for either or both of the following matters (the **chargeable matters**):
 - (i) the disclosure of the chargeable CDR data in chargeable circumstances because of a requirement under the consumer data rules to do so;
 - (ii) the use of the chargeable CDR data in chargeable circumstances as the result of such a disclosure;
 - (b) the specified persons who are liable to pay that fee;if the Commission is satisfied that the fee that the CDR participant would otherwise charge (or cause to be charged) is unreasonable having regard to the criteria in subsection (3).
- (2) When determining an amount or method under subsection (1) the Commission must seek to ensure that the resulting fee:
 - (a) reflects the reasonable costs (including capital costs) necessary for the CDR participant to comply with this Part of the consumer data rules in relation to the chargeable matter; and
 - (b) is reasonable having regard to the criteria in subsection (3).
- (3) The criteria for the purposes of subsection (1) and paragraph (b) are:
 - (a) the matters in subparagraphs 56AD(1)(a)(i), (ii), (iv) to (v) and (c)(ii) and (iv); and
 - (b) whether a lower fee could result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution); and
 - (c) whether a lower fee would reduce the incentive to generate, collect, hold or maintain CDR data of that kind; and
 - (d) any other matters the Commission considers relevant.
- (4) A determination under subsection (1) specifying a class of CDR participants must be made by legislative instrument.
- (5) A determination under subsection (1) specifying a particular participant:
 - (a) must be made by written notice given to the CDR participant; and
 - (b) is not a legislative instrument.
- (6) A fee determined under subsection (1) must not be such as to amount to taxation.

Review by the Tribunal of determinations specifying particular CDR participants

- (1) If the Commission makes a determination under subsection 56BV(1) in the way described in subsection 56BV(5)
 - (a) the CDR participant specified in the determination; or
 - (b) a person whose interests are affected by the determinationmay apply in writing to the Tribunal for a review of the determination.
- (2) An application under this section for a review of a determination must be made within 21 days after the day the Commission made the determination.

- (3) If the Tribunal receives an application under this section for review of a determination, the Tribunal must review the determination.

Functions and powers of Tribunal

- (1) On a review of a determination made under subsection 56B(1) the Tribunal:
- (a) may make a decision affirming, setting aside or varying the determination; and
 - (b) for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.
- (2) A decision by the Tribunal affirming, setting aside or varying such a determination is taken for the purposes of this Act (other than sections 56BW to 56BY) to be a determination of the Commission.
- (3) For the purposes of a review by the Tribunal, 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.
- (4) For the purposes of a review, the Tribunal may have regard to any information given, documents produced or evidence given to the Commission in connection with the making of the determination to which the review relates.

Note: Division 2 of Part IX applies to proceedings before the Tribunal.

Provisions that do not apply in relation to a Tribunal review

Division 1 of Part IX does not apply in relation to a review by the Tribunal of a determination made under subsection 56BV(1).

Part 3—Accreditation etc.

Division A—Accreditation process

Granting accreditations

- (1) The Data Recipient Accreditor may, in writing, accredit a person if the Data Recipient Accreditor is satisfied that the person meets the criteria for accreditation specified in the consumer data rules.
- (2) To avoid doubt, a person may be accredited even if the person:
- (a) is not a body corporate established by or under a law of the Commonwealth, of a State or of a Territory; and
 - (b) is neither an Australian citizen, nor a permanent resident (within the meaning of the *Australian Citizenship Act 2007*).
- (3) An accreditation is granted on the basis that no compensation is payable if the accreditation is varied, transferred, suspended, revoked or surrendered in any way.

Review of decisions refusing to accredit

Applications may be made to the Administrative Appeals Tribunal for review of decisions of the Data Recipient Accreditor under subsection 56CA(1) refusing to accredit persons.

Note: For AAT review of decisions to vary, suspend or revoke accreditation, see subsection 56BH(4).

Prohibition on holding out—offence

- (1) A person commits an offence if the person holds out that the person:
- (a) is an accredited person; or
 - (b) is an accredited person holding an accreditation that has been granted at a particular level (see paragraph 56BH(1) or
 - (c) is an accredited data recipient of CDR data;
- if that is not the case.

Penalty—body corporate

- (2) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine of not more than the greater of the following:
- (a) \$10,000,000;
 - (b) 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 commission of the offence—times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which commission of the offence happened or began.
- (3) For the purposes of paragraph (2)(c), **annual turnover** has the same meaning as in Division 1 of Part IV.

Penalty—other persons

- (4) An offence against subsection (1) committed by a person other than a body corporate is punishable on conviction by imprisonment for not more than 5 years, a fine of not more than \$500,000, or both.

Prohibition on holding out—civil penalty

A person must not hold out that the person:

- (a) is an accredited person; or
 - (b) is an accredited person holding an accreditation that has been granted at a particular level (see paragraph 56BH(1) or
 - (c) is an accredited data recipient of CDR data;
- if that is not the case.

Note: For enforcement, see Part VI (including section 76 for an order for payment of a pecuniary penalty).

Division B—Register of Accredited Persons

Register of Accredited Persons

- (1) The Accreditation Registrar must establish and maintain a register for the purposes of this Part, to be known as the Register of Accredited Persons.
- (2) The Accreditation Registrar must maintain the register by electronic means.
- (3) The register is not a legislative instrument.
- (4) The consumer data rules may make provision for or in relation to the following:
 - (a) the inclusion in the register of entries for accredited

- (c) the inclusion in the register of entries for deceased persons;
- (b) the correction of entries in the register;
- (c) the publication or availability of all or part of the register of specified information in the register;
- (d) any other matter relating to the content, administration or operation of the register.

Evidentiary value of the register

- (1) The register is admissible in any proceedings as prima facie evidence of the matters in it.
- (2) The Accreditation Registrar may issue a document containing details of a matter taken from the register.
- (3) The document issued under subsection (2) is admissible in any proceedings as prima facie evidence of the matter.

Division C—Data Recipient Accreditor

Appointment of the Data Recipient Accreditor

- (1) The Minister may, by written instrument, appoint as the Data Recipient Accreditor a person who:
 - (a) is the accountable authority of a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
 - (b) is a Commonwealth entity (within the meaning of that Act).

Note 1: For variation, see subsection 33(3) of the *Acts Interpretation Act 1954*.

Note 2: The Commission will be the Data Recipient Accreditor in the absence of an appointment under this subsection (see the definition of **Data Recipient Accreditor** in subsection 4(1)).

- (2) The Minister may, at any time by written instrument, terminate an appointment made under subsection (1).

Functions, powers and annual report

- (1) The functions of the Data Recipient Accreditor are:
 - (a) to accredit persons under subsection 56CA(1); and
 - (b) such other functions as are conferred by the consumer rules.
- (2) The Data Recipient Accreditor has the power to do all other things necessary or convenient to be done for or in connection with the performance of the Data Recipient Accreditor's functions.
- (3) To avoid doubt, for a person who is the Data Recipient Accreditor, both:
 - (a) the person's functions and powers in their capacity other than as the Data Recipient Accreditor (their **primary capacity**); and
 - (b) if the person is not a body corporate—the functions that are to be performed, and the powers that may be exercised, by anyone appointed under a Commonwealth law to act as that person in that primary capacity;are taken to include the functions and powers of the Data Recipient Accreditor while the person is the Data Recipient Accreditor.
- (4) If:
 - (a) a person is the Data Recipient Accreditor at any time during a period; and
 - (b) an annual report for the period is prepared under section

(c) an annual report for the period is prepared under section 33 of the *Public Governance, Performance and Accountability Act 2013*:

(i) by the person in the person's primary capacity; or

(ii) about the person in the person's primary capacity

the annual report must include information about the performance of the Data Recipient Accreditor's functions, and the exercise of the Data Recipient Accreditor's powers, at that time.

Directions by Minister

(1) The Minister may, by legislative instrument, give written directions to the Data Recipient Accreditor about the performance of its functions and the exercise of its powers.

Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* do not apply to the directions (see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) of that Act).

(2) A direction under subsection (1) must be of a general nature only.

(3) The Data Recipient Accreditor must comply with a direction under subsection (1).

Delegation

(1) The Data Recipient Accreditor may delegate any or all of the Data Recipient Accreditor's functions or powers to:

(a) an SES employee, or an acting SES employee, in the Department, in the Commission or in the Commonwealth entity appointed under paragraph 56CG(1)(b) (if any); or

(b) an APS employee who is holding or performing the duties of a specified office or position that:

(i) is in the Department, in the Commission or in the Commonwealth entity appointed under paragraph 56CG(1)(b) (if any); and

(ii) is an office or position that the Data Recipient Accreditor is satisfied is sufficiently senior for the APS employee to perform the function or exercise the power.

(2) In doing anything under a delegation under this section, the delegate must comply with any directions of the Data Recipient Accreditor.

Division D—Accreditation Registrar

Appointment of the Accreditation Registrar

(1) The Minister may, by written instrument, appoint as the Accreditation Registrar a person who:

(a) is the accountable authority of a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or

(b) is a Commonwealth entity (within the meaning of that Act).

Note 1: For variation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

Note 2: The Commission will be the Accreditation Registrar in the absence of an appointment under this subsection (see the definition of **Accreditation Registrar** in subsection 4(1)).

(2) The Minister may, at any time by written instrument, terminate an appointment made under subsection (1).

Functions, powers and annual report

- (1) The functions of the Accreditation Registrar are:
 - (a) those described in Subdivision B; and
 - (b) such other functions as are conferred by the consumer rules.
- (2) The Accreditation Registrar has the power to do all other things necessary or convenient to be done for or in connection with the performance of the Accreditation Registrar's functions.
- (3) To avoid doubt, for a person who is the Accreditation Registrar both:
 - (a) the person's functions and powers in their capacity other than as the Accreditation Registrar (their **primary capacity**) and
 - (b) if the person is not a body corporate—the functions that are to be performed, and the powers that may be exercised, by anyone appointed under a Commonwealth law to act as the person in that primary capacity;are taken to include the functions and powers of the Accreditation Registrar while the person is the Accreditation Registrar.
- (4) If:
 - (a) a person is the Accreditation Registrar at any time during the period; and
 - (b) an annual report for the period is prepared under section 44 of the *Public Governance, Performance and Accountability Act 2013*:
 - (i) by the person in the person's primary capacity; or
 - (ii) about the person in the person's primary capacitythe annual report must include information about the performance of the Accreditation Registrar's functions, and the exercise of the Accreditation Registrar's powers, at that time.

Directions by Minister

- (1) The Minister may, by legislative instrument, give written directions to the Accreditation Registrar about the performance of its functions and the exercise of its powers.

Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* do not apply to the directions (see regulations 1.01 and 1.02 for the purposes of paragraphs 44(2)(b) and 54(2)(b) of that Act).
- (2) A direction under subsection (1) must be of a general nature only.
- (3) The Accreditation Registrar must comply with a direction under subsection (1).

Delegation

- (1) The Accreditation Registrar may delegate any or all of the Accreditation Registrar's functions or powers to:
 - (a) an SES employee, or an acting SES employee, in the Department, in the Commission or in the Commonwealth entity appointed under paragraph 56CK(1)(b) (if any); or
 - (b) an APS employee who is holding or performing the duties of a specified office or position that:
 - (i) is in the Department, in the Commission or in the Commonwealth entity appointed under paragraph 56CK(1)(b) (if any); and
 - (ii) is an office or position that the Accreditation Registrar

is satisfied is sufficiently senior for the APS employee perform the function or exercise the power.

Note: For the Registrar's functions and powers, see section 56CE.

- (2) In doing anything under a delegation under this section, the delegate must comply with any directions of the Accreditation Registrar.

Division 4—External dispute resolution

Commission may recognise external dispute resolution schemes

Recognising an external dispute resolution scheme

- (1) The Commission may, by notifiable instrument, recognise an external dispute resolution scheme for the resolution of disputes
- (a) relating to the operation of the consumer data rules, or Part, in relation to one or more designated sectors; and
 - (b) involving one or more of the following:
 - (i) CDR participants for CDR data;
 - (ii) CDR consumers for CDR data;
 - (iii) designated gateways for CDR data;
 - (iv) other persons relating to any of those designated sectors.

Note 1: The consumer data rules may require internal dispute resolution schemes, see paragraph 56BJ(g).

Note 2: For variation and repeal, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) The Commission may, in the instrument under subsection (1)
- (a) specify a period for which the recognition of the external dispute resolution scheme is in force; and
 - (b) make the recognition of the external dispute resolution scheme subject to specified conditions, including conditions relating to the conduct of an independent review of the operation of the scheme.

Before recognising an external dispute resolution scheme

- (3) Before recognising an external dispute resolution scheme under subsection (1), the Commission must consider:
- (a) the accessibility of the scheme; and
 - (b) the independence of the scheme; and
 - (c) the fairness of the scheme; and
 - (d) the accountability of the scheme; and
 - (e) the efficiency of the scheme; and
 - (f) the effectiveness of the scheme; and
 - (g) any other matters the Commission considers relevant.
- (4) Before recognising an external dispute resolution scheme under subsection (1), the Commission must consult the Information Commissioner about the scheme.
- (5) A failure to comply with subsection (4) does not invalidate an instrument made under subsection (1).

Division 5—Privacy safeguards

Division A—Preliminary

Simplified outline

This Division sets out privacy safeguards that protect the privacy or confidentiality of CDR consumers' CDR data, whether the consumers are individuals or bodies corporate.

The privacy safeguards apply mainly to accredited data recipients, but also to data holders and designated gateways, in relation to their handling of the CDR data.

A person's failure to comply with any of these safeguards may lead to consequences, including liability to a civil penalty (see Subdivision G) or the suspension or revocation of the person's accreditation (see subsection 56BH(3)).

Kinds of CDR data to which the privacy safeguards apply

- (1) The privacy safeguards only apply to CDR data for which there are one or more CDR consumers.

Note: One requirement for CDR data to have a CDR consumer is that there needs to be at least one person who is identifiable, or reasonably identifiable, from the CDR data or from related information (see paragraph 56AI(3)(c)).

- (2) The privacy safeguards apply to CDR data whether the CDR is true or not.

Relationship with other laws

Relationship with the consumer data rules

- (1) If there is an inconsistency between the privacy safeguards and the consumer data rules, those safeguards prevail over those rules to the extent of the inconsistency.
- (2) However, the consumer data rules are taken to be consistent with the privacy safeguards to the extent that they are capable of operating concurrently.

Note: This means that the privacy safeguards do not cover the field that the consumer data rules deal with.

Relationship with the Privacy Act 1988

- (3) This Division does not limit Part IIIA (about credit reporting) of the *Privacy Act 1988*. However, the regulations may declare that, in specified circumstances that Part applies in relation to CDR data, if specified provisions of that Part were omitted, modified or varied as specified in the declaration.
- (4) Despite the *Privacy Act 1988*:
 - (a) the Australian Privacy Principles do not apply to an accredited data recipient of CDR data in relation to the CDR data; and
 - (b) if subsection 56EN(1) applies to a disclosure of CDR data by a data holder of the CDR data—Australian Privacy Principle 6 does not apply to the data holder in relation to that disclosure of the CDR data; and
 - (c) if subsection 56EP(1) applies to CDR data and a data holder of the CDR data—Australian Privacy Principle 13 does not apply to the data holder in relation to the CDR data; and
 - (d) Australian Privacy Principles 6, 7 and 11 do not apply to a designated gateway for CDR data in relation to the CDR data.

Note 1: For the accredited data recipient, the privacy safeguards will apply.

instead.

Note 2: Section 56EN (or privacy safeguard 11) is about the quality of CDR data.
Section 56EP (or privacy safeguard 13) is about correcting CDR data.

(5) Apart from paragraphs (4)(b) to (d), this Division does not affect how the Australian Privacy Principles apply to:

- (a) a data holder of CDR data in relation to the CDR data;
- (b) a designated gateway for CDR data in relation to the CDR data.

Note 1: Privacy safeguard 1 will apply to a data holder or designated gateway in a way that is parallel to Australian Privacy Principle 1.

Note 2: The consumer data rules (which are made under Division 2) will affect how the Australian Privacy Principles apply. Requirements and authorisations under those rules will be requirements or authorisations under an Australian law for the purposes of the Australian Privacy Principles.

Division B—Consideration of CDR data privacy

Privacy safeguard 1—open and transparent management of CDR data

Object

(1) The object of this section is to ensure that each person (a **CDR entity**) who is:

- (a) a data holder of CDR data; or
- (b) an accredited data recipient of CDR data; or
- (c) a designated gateway for CDR data;

manages the CDR data in an open and transparent way.

Compliance with this Part etc.

(2) The CDR entity must take such steps as are reasonable in the circumstances to implement practices, procedures and systems that:

- (a) will ensure that the CDR entity complies with this Part and the consumer data rules; and
- (b) will enable the CDR entity to deal with inquiries or complaints from a CDR consumer for the CDR data about the CDR entity's compliance with this Part or the consumer data rules.

Policy about the management of CDR data

(3) The CDR entity must have and maintain a clearly expressed up-to-date policy that:

- (a) is about the CDR entity's management of CDR data; and
- (b) is in a form approved in accordance with the consumer data rules; and
- (c) contains the information required by subsections (4), (5) and (6) (as applicable).

Note: This subsection is a civil penalty provision (see section 56EU).

(4) If the CDR entity is a data holder of any CDR data, the CDR entity's policy must contain the following information:

- (a) how a CDR consumer for the CDR data may access the CDR data and seek the correction of the CDR data;
- (b) how a CDR consumer for the CDR data may complain about a failure of the CDR entity to comply with this Part or the consumer data rules, and how the CDR entity will deal with

such a complaint.

- (5) If the CDR entity is an accredited data recipient of any CDR data, the CDR entity's policy must contain the following information:
- (a) the classes of CDR data held by (or on behalf of) the CDR entity as an accredited data recipient, and how such CDR data is held;
 - (b) the purposes for which the CDR entity may collect, hold, or disclose such CDR data with the consent of a CDR consumer for the CDR data;
 - (c) how a CDR consumer for such CDR data may access the CDR data and seek the correction of the CDR data;
 - (d) how a CDR consumer for such CDR data may complain about a failure of the CDR entity to comply with this Part of the consumer data rules, and how the CDR entity will deal with such a complaint;
 - (e) whether the CDR entity is likely to disclose such CDR data to accredited persons who are based overseas;
 - (f) if the CDR entity is likely to disclose such CDR data to accredited persons who are based overseas—the countries to which such persons are likely to be based if it is practical to specify those countries in the policy;
 - (g) the circumstances in which the CDR entity may disclose such CDR data to a person who is not an accredited person;
 - (h) the events about which the CDR entity will notify the CDR consumers of such CDR data;
 - (i) the circumstances in which the CDR entity must delete or de-identify such CDR data in accordance with a request given by a CDR consumer for the CDR data under the consumer data rules.
- (6) If the CDR entity is a designated gateway for any CDR data, the CDR entity's policy must contain the following information:
- (a) an explanation of how the CDR entity, as a designated gateway, will act between persons to facilitate:
 - (i) the disclosure of CDR data; or
 - (ii) the accuracy of CDR data; or
 - (iii) other matters;under the consumer data rules;
 - (b) how a CDR consumer for such CDR data may complain about a failure of the CDR entity to comply with this Part of the consumer data rules, and how the CDR entity will deal with such a complaint.

Availability of policy etc.

- (7) The CDR entity must make the CDR entity's policy available:
- (a) free of charge; and
 - (b) in accordance with the consumer data rules.

Note: One way the consumer data rules could require the policy to be made available is to require the policy to be made available in accordance with the consumer data standard.

- (8) If a copy of the CDR entity's policy is requested by a CDR consumer for the CDR data, the CDR entity must give the CDR consumer a copy in accordance with the consumer data rules.

Privacy safeguard 2—anonymity and pseudonymity

- (1) An accredited data recipient of CDR data must give each CDR

consumer for the CDR data the option of using a pseudonym, or identifying themselves, when dealing with the accredited data recipient in relation to the CDR data.

Note: The CDR participant from whom the accredited data recipient acc the CDR data may be subject to a similar obligation under Australian Privacy Principle 2.

- (2) That option may be given to a CDR consumer for the CDR d through a designated gateway for the CDR data.
- (3) Subsection (1) does not apply in the circumstances specified the consumer data rules.

ision C—Collecting CDR data

Privacy safeguard 3—soliciting CDR data from CDR participants

- (1) An accredited person must not seek to collect CDR data und the consumer data rules from a CDR participant for the CDR c unless:
 - (a) a CDR consumer for the CDR data has requested this b giving a valid request under the consumer data rules; and
 - (b) the person complies with all other requirements in the consumer data rules for the collection of the CDR data fro the CDR participant.

Note: This subsection is a civil penalty provision (see section 56EU).

- (2) Subsection (1) applies whether the collection is directly fro CDR participant or indirectly from the CDR participant throug designated gateway for the CDR data.

Note: The valid request referred to in paragraph (1)(a) could be given th a designated gateway (see section 56BG).

Privacy safeguard 4—dealing with unsolicited CDR data from CDR participants

- (1) If a person:
 - (a) while the person is an accredited person, collects CDR from a CDR participant for the CDR data:
 - (i) purportedly under the consumer data rules; but
 - (ii) not as the result of seeking to collect that CDR da under the consumer data rules; and
 - (b) is not required to retain that CDR data by or under an Australian law or a court/tribunal order;the person must destroy that CDR data as soon as practicable.

Note: This subsection is a civil penalty provision (see section 56EU).

- (2) Subsection (1) applies whether the collection is directly fro CDR participant or indirectly from the CDR participant throug designated gateway for the CDR data.

Privacy safeguard 5—notifying of the collection of CDR data

If a person collects CDR data in accordance with section 56I the person must:

- (a) take the steps specified in the consumer data rules to r CDR consumers for the CDR data of the collection; and
- (b) ensure that this notification:
 - (i) is given to those of the CDR consumers (if there a more than one) that the consumer data rules require t

- more than one; and the consumer data rules require notified; and
- (ii) covers the matters specified in those rules; and
- (iii) is given at or before the time specified in those rules.

Note: This section is a civil penalty provision (see section 56EU).

Division D—Dealing with CDR data

Privacy safeguard 6—use or disclosure of CDR data by accredited data recipients or designated gateways

- (1) An accredited data recipient of CDR data must not use or disclose it unless:
- (a) in the case of a disclosure—the disclosure is required under the consumer data rules in response to a valid request from the CDR consumer for the CDR data; or
 - (b) the use or disclosure is otherwise required, or authorised, under the consumer data rules; or
 - (c) the use or disclosure is required or authorised by or under:
 - (i) another Australian law; or
 - (ii) a court/tribunal order;and the accredited data recipient makes a written note of the use or disclosure.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: The valid request referred to in paragraph (a) could be given through a designated gateway (see section 56BG).

Note 3: The Australian Privacy Principles will not apply for subparagraph (c) (see paragraph 56EC(4)(a)).

- (2) A designated gateway for CDR data must not use or disclose it unless:
- (a) in the case of a disclosure—the disclosure is required under the consumer data rules; or
 - (b) the use or disclosure is authorised under the consumer data rules; or
 - (c) the use or disclosure is required or authorised by or under:
 - (i) another Australian law; or
 - (ii) a court/tribunal order;and the designated gateway makes a written note of the use or disclosure in accordance with the consumer data rules.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: Australian Privacy Principle 6 will not apply for subparagraph (c) (see paragraph 56EC(4)(d)).

- (3) Neither subsection (1) nor (2) applies to the use or disclosure of CDR data for the purposes of direct marketing.

Note: Section 56EJ deals with the use or disclosure of CDR data for the purposes of direct marketing.

Privacy safeguard 7—use or disclosure of CDR data for direct marketing by accredited data recipients or designated gateways

- (1) An accredited data recipient of CDR data must not use or disclose it for direct marketing unless:
- (a) in the case of a disclosure—the disclosure is required under the consumer data rules in response to a valid request from the CDR consumer for the CDR data; or
 - (b) the use or disclosure is authorised under the consumer data rules.

rules in accordance with a valid consent of a CDR consumer to the CDR data.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: The valid request referred to in paragraph (a), or the valid consent referred to in paragraph (b), could be given through a designated gateway (see section 56BG).

(2) A designated gateway for CDR data must not use or disclose the CDR data for direct marketing unless:

- (a) in the case of a disclosure—the disclosure is required under the consumer data rules; or
- (b) the use or disclosure is authorised under the consumer data rules.

Note: This subsection is a civil penalty provision (see section 56EU).

Privacy safeguard 8—overseas disclosure of CDR data by accredited data recipients

(1) If:

- (a) an accredited data recipient of CDR data proposes to disclose the CDR data; and
- (b) the recipient (the **new recipient**) of the proposed disclosure:
 - (i) is not in Australia or an external Territory; and
 - (ii) is not a CDR consumer for the CDR data;

the accredited data recipient must not make the disclosure unless:

- (c) the new recipient is an accredited person; or
- (d) the accredited data recipient takes reasonable steps to ensure that any act or omission by (or on behalf of) the new recipient will not, after taking into account subsection (3), contravene:
 - (i) subsection 56ED(3); or
 - (ii) another privacy safeguard penalty provision in relation to the CDR data; or
- (e) the accredited data recipient reasonably believes:
 - (i) that the new recipient is subject to a law, or binding scheme, that provides substantially similar protection for the CDR data as the privacy safeguards provide in relation to accredited data recipients; and
 - (ii) that a CDR consumer for the CDR data will be able to enforce those protections provided by that law or binding scheme; or
- (f) the conditions specified in the consumer data rules are met.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: This subsection applies in addition to the disclosure restrictions in sections 56EI, 56EJ and 56EL.

Note 3: A similar disclosure by a data holder of the CDR data that is required under the consumer data rules will be covered by Australian Privacy Principle 8 if the CDR data is personal information about an individual.

(2) If:

- (a) the accredited data recipient of the CDR data makes the disclosure to the new recipient; and
- (b) none of paragraphs (1)(c), (e) and (f) apply in relation to the disclosure to the new recipient; and
- (c) an act or omission by (or on behalf of) the new recipient after taking into account subsection (3), contravenes:

- (i) subsection 56ED(3); or
- (ii) another privacy safeguard penalty provision in relation to the CDR data;

then the act or omission is taken to also be an act or omission of the accredited data recipient.

- (3) For the purposes of paragraphs (1)(d) and (2)(c), assume that the privacy safeguards apply to the new recipient as if the new recipient were an accredited data recipient for the CDR data.

Privacy safeguard 9—adoption or disclosure of government related identifiers by accredited data recipients

- (1) If:

- (a) a person is an accredited data recipient of CDR data; and
- (b) the CDR data includes a government related identifier (within the meaning of the *Privacy Act 1988*) of a CDR consumer for the CDR data who is an individual;

the person must not adopt the government related identifier as a person's own identifier of the CDR consumer, or otherwise use the government related identifier, unless:

- (c) the adoption or use is required or authorised by or under:
 - (i) an Australian law other than the consumer data rules; or
 - (ii) a court/tribunal order; or
- (d) subclause 9.3 of Australian Privacy Principle 9 applies in relation to the adoption or use.

Note: This subsection is a civil penalty provision (see section 56EU).

- (2) If:

- (a) a person who is an accredited data recipient of CDR data proposes to disclose the CDR data; and
- (b) the CDR data includes a government related identifier (within the meaning of the *Privacy Act 1988*) of a CDR consumer for the CDR data who is an individual;

the person must not include the government related identifier in the disclosure unless:

- (c) this is required or authorised by or under:
 - (i) an Australian law other than the consumer data rules; or
 - (ii) a court/tribunal order; or
- (d) subclause 9.3 of Australian Privacy Principle 9 applies in relation to the disclosure.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: This subsection applies in addition to the disclosure restrictions in sections 56EI, 56EJ and 56EK.

- (3) For the purposes of paragraph (1)(d) or (2)(d), disregard paragraph 56EC(4)(a) (about the APPs not applying).

Privacy safeguard 10—notifying of the disclosure of CDR data

- (1) If a data holder of CDR data is required or authorised under the consumer data rules to disclose the CDR data to a person, the data holder must:

- (a) take the steps specified in the consumer data rules to notify the CDR consumers for the CDR data of the disclosure; and
- (b) ensure that this notification:

- (i) is given to those of the CDR consumers (if there are more than one) that the consumer data rules require to be notified; and
- (ii) covers the matters specified in those rules; and
- (iii) is given at or before the time specified in those rules.

Note: This subsection is a civil penalty provision (see section 56EU).

(2) If an accredited data recipient of CDR data discloses the CDR data, the accredited data recipient must:

- (a) take the steps specified in the consumer data rules to notify CDR consumers for the CDR data of the disclosure; and
- (b) ensure that this notification:
 - (i) is given to those of the CDR consumers (if there are more than one) that the consumer data rules require to be notified; and
 - (ii) covers the matters specified in those rules; and
 - (iii) is given at or before the time specified in those rules.

Note: This subsection is a civil penalty provision (see section 56EU).

(3) To avoid doubt, subsection (1) or (2) applies even if the disclosure of the CDR data is to a designated gateway for the CDR data as required or authorised under the consumer data rules.

Note: The designated gateway may be subject to a similar notification requirement under the consumer data rules (see paragraph 56BG(1)).

Division E—Integrity of CDR data

Privacy safeguard 11—quality of CDR data

Disclosures by data holders

(1) If a data holder of CDR data is required or authorised under the consumer data rules to disclose the CDR data, the data holder must take reasonable steps to ensure that the CDR data is, having regard to the purpose for which it is held, accurate, up to date and complete.

Note: This subsection is a civil penalty provision (see section 56EU).

Disclosures by accredited data recipients

(2) If an accredited data recipient of CDR data is disclosing the CDR data when:

- (a) required under the consumer data rules to do so in response to a valid request from a CDR consumer for the CDR data; or
- (b) otherwise required, or authorised, under the consumer data rules to do so;

the accredited data recipient must take reasonable steps to ensure that the CDR data is, having regard to the purpose for which it is held, accurate, up to date and complete.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: The valid request referred to in paragraph (a) could be given through a designated gateway (see section 56BG).

(3) If a CDR participant for CDR data:

- (a) makes a disclosure referred to in subsection (1) or (2) to a CDR consumer; and
- (b) later becomes aware that some or all of the CDR data was incorrect when it was disclosed because, having regard to the purpose for which it was held, it was inaccurate, out of date or incomplete;

the CDR participant must advise the CDR consumer according to the consumer data rules.

Note: This subsection is a civil penalty provision (see section 56EU).

Disclosing corrected CDR data

(4) If:

(a) a CDR consumer for CDR data is advised under subsection (3) by a CDR participant for the CDR data that some or all of the CDR data was incorrect when the CDR participant had earlier disclosed it; and

(b) the CDR consumer requests the CDR participant to fix the CDR data by disclosing the corrected CDR data;

the CDR participant must comply with the request by disclosing the corrected CDR data to the recipient of that earlier disclosure.

Note: This subsection is a civil penalty provision (see section 56EU).

Purpose for which the CDR data was held

(5) When working out the purpose for which the CDR data is or was held, disregard the purpose of holding the CDR data so that it can be disclosed as required under the consumer data rules.

Note: This subsection is relevant for subsections (1) and (2) and paragraph (b).

Privacy safeguard 12—security of CDR data, and destruction or de-identification of redundant CDR data

(1) Each person (a **CDR entity**) who is:

(a) an accredited data recipient of CDR data; or

(b) a designated gateway for CDR data;

must take the steps specified in the consumer data rules to protect the CDR data from:

(c) misuse, interference and loss; and

(d) unauthorised access, modification or disclosure.

Note: This subsection is a civil penalty provision (see section 56EU).

(2) If:

(a) the CDR entity no longer needs any of that CDR data for either of the following purposes (the **redundant data**):

(i) a purpose permitted under the consumer data rules;

(ii) a purpose for which the person is able to use or disclose it in accordance with this Division; and

(b) the CDR entity is not required to retain the redundant data by or under an Australian law or a court/tribunal order; and

(c) the redundant data does not relate to any current or anticipated:

(i) legal proceedings; or

(ii) dispute resolution proceedings;

to which the CDR entity is a party;

the CDR entity must take the steps specified in the consumer data rules to destroy the redundant data or to ensure that the redundant data is de-identified.

Note 1: This subsection is a civil penalty provision (see section 56EU).

Note 2: Australian Privacy Principle 11 will not apply for paragraph (b) (see paragraph 56EC(4)(a) or (d)).

Division F—Correction of CDR data

Privacy safeguard 13—correction of CDR data

Obligation on data holders

- (1) If:
- (a) a CDR consumer for CDR data gives a request to a data holder of the CDR data (including a request given through a designated gateway for the CDR data); and
 - (b) the request is for the data holder to correct the CDR data; and
 - (c) the data holder was earlier required or authorised under consumer data rules to disclose the CDR data;
- the data holder must respond to the request to correct the CDR data by taking such steps as are specified in the consumer data rules to deal with each of the matters in subsection (3).

Note: This subsection is a civil penalty provision (see section 56EU).

Obligation on accredited data recipients

- (2) If:
- (a) a CDR consumer for CDR data gives a request to an accredited data recipient of the CDR data (including a request given through a designated gateway for the CDR data); and
 - (b) the request is for the accredited data recipient to correct the CDR data;
- the accredited data recipient must respond to the request by taking such steps as are specified in the consumer data rules to deal with each of the matters in subsection (3).

Note: This subsection is a civil penalty provision (see section 56EU).

Relevant matters when responding to correction requests

- (3) The matters are as follows:
- (a) either:
 - (i) to correct the CDR data; or
 - (ii) to include a statement with the CDR data, to ensure that, having regard to the purpose for which the CDR data is held, the CDR data is accurate, up to date, complete and not misleading;
 - (b) to give notice of any correction or statement, or notice why a correction or statement is unnecessary or inappropriate;
- (4) When working out the purpose for which the CDR data is held (see subparagraph (3)(a)(ii)), disregard the purpose of holding CDR data so that it can be disclosed as required under the consumer data rules.

Division G—Compliance with the privacy safeguards

Information Commissioner to promote compliance etc.

- (1) The Information Commissioner has the following functions:
- (a) making guidelines for the avoidance of acts or practices that may breach the privacy safeguards;
 - (b) promoting an understanding and acceptance of the privacy safeguards;
 - (c) undertaking educational programs for the purposes of promoting the protection of CDR data.

Note: The Information Commissioner also has functions that relate to the privacy safeguards more broadly (see section 56GA).

Extra matters about guidelines under paragraph (1)(a)

- (2) Before making guidelines under paragraph (1)(a), the Information Commissioner must consult the Minister and the Commission about the proposed guidelines.
- (3) The Information Commissioner may publish guidelines made under paragraph (1)(a) in such manner as the Information Commissioner considers appropriate.
- (4) If there is an inconsistency between the guidelines made under paragraph (1)(a) and the consumer data rules, those rules prevail over the guidelines to the extent of the inconsistency.
- (5) Guidelines made under paragraph (1)(a) are not a legislative instrument.

Extra matters about educational programs under paragraph (1)(c)

- (6) The educational programs referred to in paragraph (1)(c) must be undertaken by:
 - (a) the Information Commissioner; or
 - (b) a person or authority acting on behalf of the Information Commissioner.

Information Commissioner may conduct an assessment relating to the management and handling of CDR data

- (1) The Information Commissioner may assess whether a CDR participant, or designated gateway, for CDR data is maintaining and handling the CDR data in accordance with:
 - (a) the privacy safeguards; or
 - (b) the consumer data rules to the extent that those rules require:
 - (i) the privacy safeguards; or
 - (ii) the privacy or confidentiality of the CDR data.
- (2) The Information Commissioner may conduct the assessment in such manner as the Information Commissioner considers fit.
- (3) The Information Commissioner may report to the Minister, the Commission or the Data Standards Chair about the assessment.

Notification of CDR data security breaches

Object

- (1) The object of this section is for Part IIIC of the *Privacy Act 1988* to apply to an accredited data recipient, or designated gateway that holds a CDR consumer's CDR data in a corresponding way to the way that Part applies to an entity that holds an individual's personal information.

Note: That Part is about notification of eligible data breaches.

Extended application of Part IIIC of the Privacy Act 1988

- (2) Part IIIC of the *Privacy Act 1988*, and any other provision of the Act that relates to that Part, also apply in relation to:
 - (a) an accredited data recipient of CDR data; or
 - (b) a designated gateway for CDR data;as if the substitutions in the following table, and the modification in subsection (3), were made.

Substitutions to be made

| Item | For a reference in | ... substitute a reference to |
|------|--------------------|-------------------------------|
|------|--------------------|-------------------------------|

| | Part IIIC to ... | ... |
|---|--|---|
| 1 | any of the following: (a) personal information; (b) information | CDR data. |
| 2 | any of the following: (a) entity; (b) APP entity; (c) APP entity, credit reporting body, credit provider or file number recipient, as the case may be | each of the following: (a) accredited data recipient; (b) designated gateway. |
| 3 | any of the following: (a) individual to whom information relates; (b) individual | CDR consumer for CDR data. |

Note: When CDR data and the other terms in the last column of the table appear in this notional version of Part IIIC, they have the same meaning as in this Act.

- (3) For the purposes of subsection (2), assume that:
- (a) sections 26WB to 26WD of the *Privacy Act 1988* were re-enacted; and
 - (b) subsection 26WE(1) of that Act were replaced with the following:

“Scope

- (1) This section applies if:
- (a) CDR data of one or more CDR consumers is held by (or on behalf of) either of the following entities (the **CDR entity**):
 - (i) an accredited data recipient of the CDR data;
 - (ii) a designated gateway for the CDR data; and
 - (b) section 56EO (about privacy safeguard 12) of the *Competition and Consumer Act 2010* applies to the CDR data in relation to the CDR data.”.

Investigating breaches of the privacy safeguards etc.

Breaches to which this section applies

- (1) This section applies to a breach (a **privacy safeguard breach**) of any of the following:
- (a) one or more of the privacy safeguards;
 - (b) the consumer data rules to the extent that those rules relate:
 - (i) to one or more of the privacy safeguards; or
 - (ii) to the privacy or confidentiality of CDR data;
 - (c) section 26WH, 26WK or 26WL or subsection 26WR(10) of the *Privacy Act 1988*, as they apply because of section 56EA of this Act;
- in relation to the CDR data of:
- (d) a CDR consumer who is an individual; or
 - (e) a small business (within the meaning of the *Privacy Act 1988*) carried on by a CDR consumer for the CDR data.

- (2) This section also applies to a breach of section 56ED (privacy safeguard 1).

Object

(3) The object of this section is for Part V of the *Privacy Act 1988* to apply to an act or practice:

(a) of a CDR participant or designated gateway; and

(b) that may be:

(i) a privacy safeguard breach relating to CDR data covered by subsection (1); or

(ii) a breach of section 56ED (privacy safeguard 1);

in a corresponding way to the way that Part applies to an act or practice of an organisation, person or entity that may be an interference with the privacy of an individual or a breach of Australian Privacy Principle 1.

Note: That Part is about investigations of interferences with privacy etc.

Extended application of Part V of the Privacy Act 1988

(4) Part V of the *Privacy Act 1988*, and any other provision of that Act that relates to that Part, also apply in relation to:

(a) a CDR participant for CDR data; or

(b) a designated gateway for CDR data;

as if the substitutions in the following table, and the modifications in subsection (5), were made.

| Substitutions to be made | | |
|--------------------------|---|---|
| Item | For a reference in Part V to ... | ... substitute a reference to ... |
| 1 | interference with the privacy of an individual | a privacy safeguard breach relating to the CDR data of: (a) a CDR consumer who is an individual; or (b) a small business (within the meaning of the <i>Privacy Act 1988</i>) carried on by a CDR consumer for the CDR data. |
| 2 | Australian Privacy Principle 1 | section 56ED (privacy safeguard 1) of this Act. |
| 3 | individual | a person who: (a) is a CDR consumer for the CDR data to which the privacy safeguard breach (or possible privacy safeguard breach) relates; and (b) is an individual, or is carrying on a small business (within the meaning of the <i>Privacy Act 1988</i>) to which the CDR data relates. |
| 4 | recognised external dispute resolution scheme | an external dispute resolution scheme for which an instrument is in force under subsection 56DA(1) of this Act. |
| 5 | occupied by an agency, an organisation, a file number recipient, a credit reporting body or a credit provider | occupied by (or on behalf of): (a) a CDR participant for CDR data; or (b) a designated gateway for CDR data. |

Note 1: When CDR data and the other terms in the last column of the table appear in this notional version of Part V, they have the same meaning in this Act.

Note 2: Table item 5 relates to subsection 68(1) of that Act.

- (5) For the purposes of subsection (4), assume that:
- (a) subsection 5B(4) of the *Privacy Act 1988* were not enacted; and
 - (b) section 36 of that Act also stated that:
 - (i) in the case of a complaint about an act or practice of a CDR participant—the CDR participant is the respondent;
 - (ii) in the case of a complaint about an act or practice of a designated gateway—the designated gateway is the respondent; and
 - (c) subsections 36(6) to (8), section 37, subsections 40(1B), 43(1A), (8), (8A) and (9) and 48(2), section 50A, sub-subparagraph 52(1)(b)(i)(A) and sections 53A and 53B of that Act were not enacted; and
 - (d) the paragraphs in each of subsections 55B(1) and (3) of that Act were replaced by:
 - (i) a paragraph that states that an act or practice of a specified CDR participant for CDR data has breached a privacy safeguard; and
 - (ii) a paragraph that states that an act or practice of a specified designated gateway for CDR data has breached a privacy safeguard; and
 - (e) Division 4 of Part V, and subsection 63(2A), of that Act were not enacted.

Civil penalty provisions

The provisions of this Division that are civil penalty provisions

- (1) For the purposes of subparagraph 79(2)(a)(ii) of the Regulatory Powers Act, each of the following provisions of this Division (the **privacy safeguard penalty provisions**) is a civil penalty provision:

- (a) subsection 56ED(3);
- (b) subsection 56EF(1);
- (c) subsection 56EG(1);
- (d) section 56EH;
- (e) subsection 56EI(1) or (2);
- (f) subsection 56EJ(1) or (2);
- (g) subsection 56EK(1);
- (h) subsection 56EL(1) or (2);
- (i) subsection 56EM(1) or (2);
- (j) subsection 56EN(1), (2), (3) or (4);
- (k) subsection 56EO(1) or (2);
- (l) subsection 56EP(1) or (2).

Enforceable civil penalty provisions

- (2) Each privacy safeguard penalty provision is enforceable under Part 4 of the Regulatory Powers Act.

Note: Part 4 of the Regulatory Powers Act allows a civil penalty provision to be enforced by obtaining an order for a person to pay a pecuniary penalty for the contravention of the provision.

Authorised applicant

- (3) For the purposes of Part 4 of the Regulatory Powers Act, the Information Commissioner is an authorised applicant in relation to each privacy safeguard penalty provision.

Relevant court

Relevant court

(4) For the purposes of Part 4 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to each privacy safeguard penalty provision:

- (a) the Federal Court;
- (b) the Federal Circuit Court;
- (c) a court of a State or Territory that has jurisdiction in relation to the matter.

Act or omission also contravening a civil penalty provision of the consumer data rules

(5) If an act or omission constitutes:

- (a) a contravention of one or more of the privacy safeguard penalty provisions; and
- (b) a contravention of one or more civil penalty provisions of the consumer data rules;

proceedings may be instituted against a person in relation to the contravention of any one or more of those provisions.

Note 1: The proceedings for a contravention referred to in paragraph (a) may be instituted under Part 4 of the Regulatory Powers Act.

Note 2: The proceedings for a contravention referred to in paragraph (b) may be instituted under Part VI of this Act.

(6) However, the person is not liable to more than one pecuniary penalty under:

- (a) Part 4 of the Regulatory Powers Act for a contravention referred to in paragraph (5)(a) of this section; and
- (b) Part VI of this Act for a contravention referred to in paragraph (5)(b) of this section;

in relation to the same act or omission.

Note: This means the person cannot be liable for a pecuniary penalty for a contravention of the privacy safeguards, and for a pecuniary penalty for a contravention of the consumer data rules, in relation to the same act or omission.

Civil penalty provisions—maximum amount of penalty

(1) Despite subsection 82(5) of the Regulatory Powers Act, the pecuniary penalty payable:

- (a) by a person; and
- (b) under a civil penalty order under Part 4 of that Act (as Part applies because of section 56EU of this Act);

must not be more than the maximum penalty amount worked out under this section for a contravention by the person.

Maximum amount of civil penalty for a body corporate

(2) For the purposes of subsection (1), the maximum penalty amount for a contravention by a body corporate of a privacy safeguard penalty provision is the greater of the following:

- (a) \$10,000,000;
- (b) if the relevant court (see subsection 56EU(4)) can determine the value of the benefit that the body corporate, and any related body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the contravention—3 times the value of that benefit;
- (c) if that court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which

12 month period ending at the end of the month in which the contravention happened or began.

- (3) For the purposes of paragraph (2)(c), **annual turnover** has the same meaning as in Division 1 of Part IV.

Maximum amount of civil penalty for other persons

- (4) For the purposes of subsection (1), the maximum penalty amount for a contravention by a person other than a body corporate of the privacy safeguard penalty provision is \$500,000.

Enforceable undertakings

Enforceable provisions

- (1) Each provision of the privacy safeguards is enforceable under Part 6 of the Regulatory Powers Act.

Note: Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

Authorised person

- (2) For the purposes of Part 6 of the Regulatory Powers Act, the Information Commissioner is an authorised person in relation to each provision referred to in subsection (1).

Relevant court

- (3) For the purposes of Part 6 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to each provision referred to in subsection (1):
- (a) the Federal Court;
 - (b) the Federal Circuit Court;
 - (c) a court of a State or Territory that has jurisdiction in relation to the matter.

Injunctions

Enforceable provisions

- (1) Each provision of the privacy safeguards is enforceable under Part 7 of the Regulatory Powers Act.

Note: Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

Authorised person

- (2) For the purposes of Part 7 of the Regulatory Powers Act, the Information Commissioner is an authorised person in relation to each provision referred to in subsection (1).

Relevant court

- (3) For the purposes of Part 7 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to each provision referred to in subsection (1):
- (a) the Federal Court;
 - (b) the Federal Circuit Court;
 - (c) a court of a State or Territory that has jurisdiction in relation to the matter.

Actions for damages

Right to bring an action for damages

- (1) A person who suffers loss or damage (within the meaning of

- (1) A person who suffers loss or damage (within the meaning of subsection 25(1) of the *Privacy Act 1988*) by an act or omission:
- (a) of another person; and
 - (b) that was in contravention of:
 - (i) a provision of the privacy safeguards; or
 - (ii) the consumer data rules to the extent that those rules relate to the privacy safeguards or to the privacy or confidentiality of CDR data;

may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

Note: Subsections 84(2) and (4) (about attributing conduct engaged in on behalf of a person) apply for the purposes of this section.

- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the contravention happened or began.

Findings in related proceedings to be prima facie evidence

- (3) If a finding of any fact is made by a court in relation to a person or an admission of any fact is made by a person, in proceedings:
- (a) under the Regulatory Powers Act (as that Act applies because of this Subdivision) in which the person is found to have contravened a provision of the privacy safeguards; or
 - (b) under Part VI of this Act in which the person is found to:
 - (i) have contravened; or
 - (ii) have been involved in a contravention;
- of the consumer data rules to the extent that those rules relate to the privacy safeguards or to the privacy or confidentiality of CDR data;

the finding or admission is prima facie evidence of that fact in proceedings under subsection (1) against the person.

- (4) The finding or admission may be proved by production of:
- (a) in any case—a document under the seal of the court from which the finding or admission appears; or
 - (b) in the case of an admission—a document from which the admission appears that is filed in the court.

Jurisdiction etc.

- (5) The following are conferred with jurisdiction to hear and determine actions under subsection (1):
- (a) the Federal Circuit Court;
 - (b) subject to the Constitution, the several courts of the Territories.

This subsection does not enable an inferior court of a Territory to grant a remedy of a kind that the court is unable to grant under the law of that Territory.

Note: State courts and the Federal Court also have jurisdiction for these actions (see subsection 39(2) and paragraph 39B(1A)(c) of the *Judiciary Act 1903*).

- (6) Section 86AA (about limits on jurisdiction) applies to proceedings under subsection (1) of this section in a corresponding way to the way that section applies to proceedings under section 82.
- (7) Section 86A (about transfer of matters) applies in relation to proceedings under subsection (1) of this section as if paragraph 86A(1)(b) also referred to a matter for determination

arising under:

- (a) a provision of the privacy safeguards; or
- (b) the consumer data rules to the extent that those rules relate to the privacy safeguards or to the privacy or confidential CDR data.

Involved in a contravention

- (8) Subsection 75B(1) applies to a reference that:
 - (a) is in this section; and
 - (b) is to a person involved in a contravention covered by paragraph (1)(b) of this section;in a corresponding way to the way that subsection 75B(1) applies to a reference in Part VI to a person involved in a contravention of section 56CD.

Delegation to the Commission etc.

- (1) This section applies in relation to the following functions or powers (the **safeguard enforcement functions or powers**):
 - (a) the Information Commissioner's functions or powers under section 56ER;
 - (b) the Information Commissioner's functions or powers under Part IIIC or V of the *Privacy Act 1988*, as those Parts apply because of sections 56ES and 56ET of this Act;
 - (c) the Information Commissioner's functions or powers under Part 4, 6 or 7 of the Regulatory Powers Act, that are conferred because of this Subdivision.
- (2) The Information Commissioner may delegate, in writing, any of the safeguard enforcement functions or powers to:
 - (a) the Commission; or
 - (b) a member of the Commission; or
 - (c) a member of the staff of the Commission referred to in section 27 of this Act.
- (3) However, the Information Commissioner must not delegate a safeguard enforcement function or power under subsection (2) unless:
 - (a) the Commission has agreed to the delegation in writing;
 - (b) in the case of a delegation to a staff member referred to in paragraph (2)(c)—the Commission is satisfied that the staff member:
 - (i) is an SES employee or acting SES employee; or
 - (ii) is holding or performing the duties of a sufficiently senior office or position for the function or power.

Division 6—Data standards etc.

Division A—Data standards

Making data standards

- (1) The Data Standards Chair may, by writing, make one or more data standards about each of the following matters:
 - (a) the format and description of CDR data;
 - (b) the disclosure of CDR data;
 - (c) the collection, use, accuracy, storage, security and deletion of CDR data;
 - (d) de-identifying CDR data, including so that it no longer relates to:

- (i) an identifiable person; or
- (ii) a person who is reasonably identifiable;
- (e) other matters prescribed by the regulations.

Note: For variation and repeal, see subsection 33(3) of the *Acts Interpretation Act 1901*.

Complying with consumer data rules when making standards

(2) The Data Standards Chair must comply with the consumer data rules when:

- (a) making a data standard; or
- (b) varying or revoking a data standard;

including complying with any related requirements specified in those rules about approval, consultation and the formation of committees, advisory panels and consultative groups.

Note: The rules could, for example, require a proposed data standard to be approved by the Commission before it is made.

(3) Without limiting subsection (2), the Data Standards Chair must

- (a) make, under subsection (1), a data standard about a particular matter mentioned in subsection (1) if the consumer data rules so requires; and
- (b) specify in that data standard that it is binding if the consumer data rules so requires.

A data standard is a ***binding data standard*** if it is made under subsection (1) in accordance with paragraph (b) of this subsection.

Data standards are not legislative instruments

(4) A data standard made under subsection (1) is not a legislative instrument.

What data standards can set out etc.

(1) Without limiting subsection 56FA(1), a single data standard can set out:

- (a) different provisions for different designated sectors; or
- (b) different provisions for different classes of CDR data; or
- (c) different provisions for different classes of persons specified, as described in paragraph 56AC(2)(b), in an instrument designating a sector under subsection 56AC(2); or
- (d) different provisions for different classes of accredited persons.

(2) Without limiting subsection 56FA(1), a separate data standard could deal with:

- (a) each of the different designated sectors referred to in paragraph (1)(a) of this section; or
- (b) each of the different classes referred to in paragraph (1)(c) or (d) of this section.

Data standards must be published

The Data Standards Chair must publish on the internet a copy of each data standard made under subsection 56FA(1).

Note: Once published, the data standards will be available for free.

Legal effect of data standards

(1) A contract is taken to be in force between:

- (a) a data holder of CDR data to which a binding data standard applies; and

- (b) each accredited person;
- under which each of those persons:
- (c) agrees to observe the standard to the extent that the standard applies to the person; and
 - (d) agrees to engage in conduct that the person is required to observe the standard to engage in.

Note: This means the data holder will be taken to have a separate contract with each accredited person.

- (2) If there is a designated gateway for CDR data to which a binding data standard applies, a contract is taken to be in force between
- (a) a data holder of the CDR data; and
 - (b) the designated gateway for the CDR data; and
 - (c) each accredited person;
- under which each of those persons:
- (d) agrees to observe the standard to the extent that the standard applies to the person; and
 - (e) agrees to engage in conduct that the person is required to observe the standard to engage in.

Note: This means the data holder will be taken to have a separate 3-party contract with the designated gateway and each accredited person.

- (3) However, if there is an inconsistency between a data standard and the consumer data rules, those rules prevail over the standard to the extent of the inconsistency.

Enforcement of binding data standards

- (1) If a person who is under an obligation to comply with a binding data standard fails to meet that obligation, an application to the Court may be made by:
- (a) the Commission; or
 - (b) a person aggrieved by the failure.
- (2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
- (a) the person against whom the order is sought; or
 - (b) if that person is a body corporate—the directors of the body corporate;
- about compliance with, or enforcement of, the binding data standard.
- (3) Without limiting subsection (1), an obligation to comply with a binding data standard includes an obligation arising under a contract referred to in section 56FD.

Division B—Data Standards Chair

Data Standards Chair

There is to be a Data Standards Chair.

Appointment of the Data Standards Chair

- (1) The Data Standards Chair is to be appointed, on a full-time basis or a part-time basis, by the Minister by written instrument.
- (2) The Data Standards Chair holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

Note 1: The Minister will be the Data Standards Chair in the absence of a

appointment under this section (see the definition of **Data Standards Chair** in subsection 4(1)).

Note 2: The Data Standards Chair may be reappointed (see section 33AA of the *Acts Interpretation Act 1901*).

Functions and powers of the Data Standards Chair

- (1) The functions of the Data Standards Chair are:
 - (a) to make standards under Subdivision A; and
 - (b) to review those standards regularly; and
 - (c) such other functions as are prescribed by the regulation.
- (2) The Data Standards Chair has the following powers:
 - (a) the power to establish committees, advisory panels and consultative groups;
 - (b) the power to do all other things necessary or convenient to be done for or in connection with the performance of the Chair's functions.

Directions by Minister

- (1) The Minister may, by legislative instrument, give written directions to the Data Standards Chair about the performance of the Chair's functions and the exercise of the Chair's powers.

Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* do not apply to the directions (see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) of that Act).
- (2) A direction under subsection (1) must be of a general nature only.
- (3) The Data Standards Chair must comply with a direction under subsection (1).

Division C—Data Standards Body

Appointment of the Data Standards Body

- (1) The Minister may, by written instrument, appoint as the Data Standards Body:
 - (a) the Department; or
 - (b) another Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

Note: For variation, see subsection 33(3) of the *Acts Interpretation Act 1901*.
- (2) The Minister may, at any time by written instrument, terminate an appointment made under subsection (1).

Function and powers of the Data Standards Body

- (1) The function of the Data Standards Body is to assist the Data Standards Chair.
- (2) The Data Standards Body has the power to do all other things necessary or convenient to be done for or in connection with the performance of the Data Standards Body's function.
- (3) The Data Standards Body must comply with the consumer data rules when assisting the Data Standards Chair, including complying with any requirements specified in those rules about:
 - (a) the Body's composition; or
 - (b) the Body's governance or processes.
- (4) To avoid doubt, for a body that is the Data Standards Body,

body's functions and powers in its capacity other than as the Information Standards Body are taken to include the function and powers of the Data Standards Body while it is the Data Standards Body.

Division D—Administrative provisions

Acting appointments

The Minister may, by written instrument, appoint a person to act as the Data Standards Chair:

- (a) during a vacancy in the office of Data Standards Chair (whether or not an appointment has previously been made to the office); or
- (b) during any period, or during all periods, when the Data Standards Chair:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33AC of the *Acts Interpretation Act 1901*.

Terms and conditions

- (1) The Data Standards Chair holds office on the terms and conditions (if any) in relation to matters not covered by this Division that are determined by the Minister.
- (2) Subsection (1) does not apply while the Data Standards Chair is the Minister.

Remuneration

- (1) The Data Standards Chair is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Data Standards Chair is to be paid the remuneration that is prescribed by the regulations.
- (2) The Data Standards Chair is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.
- (4) Subsections (1) and (2) do not apply while the Data Standards Chair is the Minister.

Leave

- (1) If the Data Standards Chair is appointed on a full-time basis, the Data Standards Chair has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) If the Data Standards Chair is appointed on a full-time basis, the Minister may grant the Data Standards Chair leave of absence other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.
- (3) If the Data Standards Chair is appointed on a part-time basis, the Secretary of the Department may grant leave of absence to the Data Standards Chair on the terms and conditions that the Secretary determines.

Application of the finance law etc.

- (1) For the purposes of the finance law (within the meaning of the

- (1) For the purposes of the Finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*), the Data Standards Chair is taken to be an official of the Department.

Note: A consequence of this subsection is that the Secretary of the Department will be the accountable authority (within the meaning of that Act) applicable to the Data Standards Chair.

- (2) The Secretary of the Department, when preparing the Department's annual report under section 46 of the *Public Governance, Performance and Accountability Act 2013* for a period, must include information in that report about:
- (a) the performance of the Data Standards Chair's functions; and
 - (b) the exercise of the Data Standards Chair's powers; during the period.
- (3) If at any time the Data Standards Chair is the Minister then
- (a) subsections (1) and (2) do not apply; and
 - (b) the Department's annual report under section 46 of the *Public Governance, Performance and Accountability Act 2013* for the period that includes that time must include information about the performance of the Data Standards Chair's functions, and the exercise of the Data Standards Chair's powers, at that time.

Resignation

- (1) The Data Standards Chair may resign the Data Standards Chair's appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

Termination of appointment

- (1) The Minister may terminate the appointment of the Data Standards Chair:
- (a) for misbehaviour; or
 - (b) if the Data Standards Chair is unable to perform the duties of the Data Standards Chair's office because of physical or mental incapacity.
- (2) The Minister may terminate the appointment of the Data Standards Chair if:
- (a) the Data Standards Chair:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with the Data Standards Chair's creditors; or
 - (iv) makes an assignment of the Data Standards Chair's remuneration for the benefit of the Data Standards Chair's creditors; or
 - (b) if the Data Standards Chair is appointed on a full-time basis—the Data Standards Chair is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12-month period; or
 - (c) the Data Standards Chair fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purpose of that section.

Delegation

- (1) The Data Standards Chair may delegate, in writing, any or all of the Chair's functions or powers to:
 - (a) an SES employee, or an acting SES employee, in the Data Standards Body, in the Department or in the Commission;
 - (b) an APS employee who is holding or performing the duties of a specified office or position that:
 - (i) is in the Data Standards Body, in the Department or in the Commission; and
 - (ii) is an office or position that the Chair is satisfied is sufficiently senior for the APS employee to perform the function or exercise the power; or
 - (c) if there are no APS employees (including SES employees) in the Data Standards Body—a person:
 - (i) who holds an office or position in the Data Standards Body that the Chair considers is sufficiently senior for that person to perform the function; and
 - (ii) who the Chair considers has appropriate qualifications or expertise to perform the function.
 - (2) Subsection (1) does not apply to the function referred to in paragraph 56FH(1)(a) (about making standards).
- Note: This subsection does not prevent a person who is acting as the Data Standards Chair from making a standard.
- (3) In performing a delegated function or exercising a delegated power, the delegate under subsection (1) must comply with any directions of the Data Standards Chair.

Part 7—Other matters

Delegation of functions of the Information Commissioner

- (1) The Information Commissioner has the following functions:
 - (a) the functions conferred on the Information Commissioner by another provision of this Part, or by an instrument made under this Part;
 - (b) to consult with or advise the Minister, Commission or Information Standards Chair about any matter relevant to the operation of this Part (or the operation of instruments made under this Part).
- Note: The Commission may also delegate to the Information Commissioner some of the Commission's functions relating to this Part (see subsection 2(2)).
- (2) The functions referred to in subsection (1) may be performed by the Information Commissioner on request or on the Information Commissioner's own initiative.

Referring to instruments as in force from time to time

- (1) This section applies to the following instruments:
 - (a) designations under section 56AC (about designated sectors);
 - (b) regulations made for the purposes of a provision of this Part;
 - (c) the consumer data rules;
 - (d) data standards.
- (2) An instrument to which this section applies may make provision in relation to a matter by applying, adopting or incorporating (wholly or partly) the provisions of another instrument.

or without modification) any matter contained in any other instrument or writing:

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

(3) Subsection (2) has effect despite subsection 14(2) of the *Legislation Act 2003*.

Complying with requirements to provide CDR data: protection from liability

(1) If:

(a) a CDR participant, or designated gateway, for CDR data is a **CDR entity**:

- (i) provides the CDR data to another person; or
- (ii) otherwise allows another person access to the CDR data; and

(b) the CDR entity does so, in good faith, in compliance with:

- (i) this Part; and
- (ii) regulations made for the purposes of this Part; and
- (iii) the consumer data rules;

the CDR entity is not liable to an action or other proceeding, whether civil or criminal, for or in relation to the matter in paragraph (a).

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) for a criminal action or criminal proceeding (see subsection 13.3(3) of the *Criminal Code*).

(2) A person who wishes to rely on subsection (1) in relation to a civil action or civil proceeding bears an evidential burden in relation to that matter.

(3) In this section:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Exemptions by the Commission

(1) The **provisions covered by this section** are:

- (a) the following provisions:
 - (i) the provisions of this Part;
 - (ii) the provisions of regulations made for the purposes of the provisions of this Part;
 - (iii) the provisions of the consumer data rules; and
- (b) definitions in this Act, or in the regulations or consumer data rules, as they apply to references in provisions referred to in paragraph (a).

(2) The Commission may, by written notice given to a person, exempt the person, in relation to particular CDR data or one or more classes of CDR data, from all or specified provisions covered by this section.

(3) An exemption under subsection (2):

- (a) may or may not be limited to a specified period; and
- (b) may apply unconditionally or subject to specified conditions.

(4) The Commission must publish on its website the details of each exemption under subsection (2).

(5) Applications may be made to the Administrative Appeals Tribunal

for review of a decision of the Commission exempting, or refusing to exempt, a person under subsection (2).

Exemptions and modifications by regulations

- (1) The **provisions covered by this section** are:
 - (a) the following provisions:
 - (i) the provisions of this Part;
 - (ii) the provisions of regulations made for the purpose of the provisions of this Part;
 - (iii) the provisions of the consumer data rules; and
 - (b) definitions in this Act, or in the regulations or consumer data rules, as they apply to references in provisions referred to in paragraph (a).
- (2) The regulations may:
 - (a) exempt a particular person, in relation to particular CDR data or one or more classes of CDR data, from all or specified provisions covered by this section; or
 - (b) exempt a class of persons, in relation to particular CDR data or one or more classes of CDR data, from all or specified provisions covered by this section; or
 - (c) declare that provisions covered by this section apply in relation to:
 - (i) a particular person in relation to particular CDR data or one or more classes of CDR data; or
 - (ii) a class of persons in relation to particular CDR data or one or more classes of CDR data;as if specified provisions were omitted, modified or varied as specified in the declaration.
- (3) An exemption under paragraph (2)(a) or (b), or a declaration under paragraph (2)(c):
 - (a) may or may not be limited to a specified period; and
 - (b) may apply unconditionally or subject to specified conditions.

Constitutional basis

Main constitutional basis

- (1) The CDR provisions have the effect they would have if their operation were expressly confined to CDR entities that are corporations.

Note: For the meaning of **corporation**, see subsection 4(1).

Other constitutional bases

- (2) Independently of subsection (1), the CDR provisions also have effect as provided by subsections (3), (4), (5) and (6).
- (3) The CDR provisions also have the effect they would have if their operation were expressly confined to CDR entities acting in the course of, or in relation to, the carrying on of:
 - (a) a postal, telegraphic, telephonic or other like service (within the meaning of paragraph 51(v) of the Constitution); or
 - (b) the business of banking, other than State banking (within the meaning of paragraph 51(xiii) of the Constitution) not extending beyond the limits of the State concerned; or
 - (c) the business of insurance, other than State insurance (within the meaning of paragraph 51(xiv) of the Constitution) not extending beyond the limits of the State concerned.

- (4) The CDR provisions also have the effect they would have if the operation were expressly confined to CDR entities:
- (a) making a supply or communication; or
 - (b) conducting an activity or otherwise doing something; using a postal, telegraphic, telephonic or other like service (within the meaning of paragraph 51(v) of the Constitution).
- (5) The CDR provisions also have the effect they would have if the operation were expressly confined to CDR entities acting in the course of, or in relation to, any of the following:
- (a) trade or commerce between Australia and places outside Australia;
 - (b) trade or commerce among the States;
 - (c) trade or commerce within a Territory, between a State and Territory or between 2 Territories.
- (6) The CDR provisions also have the effect they would have if the operation were expressly confined to:
- (a) protecting CDR entities against interference, or attacks, of the kind described in paragraph 1 of Article 17 of the ICCPR or
 - (b) protecting against interference, or attacks, of the kind described in paragraph 1 of Article 17 of the ICCPR by CDR entities.

Related matters

- (7) Section 6 (about the application of this Act to persons who are not corporations) does not apply in relation to the CDR provisions.
- (8) In this section:

CDR entity means any of the following:

- (a) a data holder of CDR data;
- (b) an accredited person;
- (c) a designated gateway for CDR data.

ICCPR means the International Covenant on Civil and Political Rights, done at New York on 16 December 1966, as amended and in force for Australia from time to time.

Note: The text of the International Covenant is set out in Australian Treaty Series 1980 No. 23 ([1980] ATS 23). In 2019, the text of a Covenant in the Australian Treaty Series was accessible through the Australian Treaty Library on the AustLII website (www.austlii.edu.au).

Compensation for acquisition of property

- (1) This section applies if the operation of the CDR provisions would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person other than on just terms (within the meaning of that paragraph).
- (2) The person who acquires the property is liable to pay a reasonable amount of compensation to the first-mentioned person.
- (3) If the 2 persons do not agree on the amount of the compensation, the person to whom compensation is payable may institute proceedings in:
- (a) the Federal Court; or
 - (b) the Supreme Court of a State or Territory;
- for the recovery from the other person of such reasonable amount of compensation as the Court determines.

Review of the operation of this Part

- (1) The Minister must cause an independent review to be conducted of the operation of this Part.
- (2) The persons who conduct the review must complete it, and give the Minister a written report of the review, before 1 July 2022.
- (3) The Minister must cause copies of the report to be tabled in the House of the Parliament within 15 sitting days of that House after the report is given to the Minister.

Part 7—Carbon tax price reduction obligation

Division 1—Preliminary

Simplified outline of this Part

- An entity must not engage in price exploitation in relation to the carbon tax repeal.
- The Commission may monitor prices in relation to the carbon tax repeal and the carbon tax scheme.
- An entity must not make false or misleading representations about the effect of the carbon tax repeal on the carbon tax scheme, on the price for the supply of goods or services.
- An entity that sells electricity or natural gas, or an entity that is a bulk SGG importer and sells synthetic greenhouse gas, will be required to explain and substantiate:
 - (a) how the carbon tax repeal has affected, or is affecting, the entity's regulated supply input costs; and
 - (b) how reductions in the entity's regulated supply input costs that are directly or indirectly attributable to the carbon tax repeal are reflected in the prices charged by the entity for regulated supplies of electricity, natural gas or synthetic greenhouse gas.
- An entity that sells electricity or natural gas to customers or an entity that is a bulk SGG importer and sells synthetic greenhouse gas to customers, must:
 - (a) give a carbon tax removal substantiation statement to the Commission; and
 - (b) include in the statement the entity's estimate, on an average annual percentage price basis, or an average annual dollar price basis, of the entity's cost savings that have been, are, or will be, attributable to the carbon tax repeal and that have been, are being, or will be, passed on to customers during the financial year that began on 1 July 2014; and
 - (c) provide information with the statement that substantiates such an estimate; and
 - (d) in a case where the entity sells electricity or natural gas to customers—communicate to customers a statement that identifies, on an average annual percentage price basis, or an average annual dollar price basis, the estimated cost savings to customers that are for the financial year that began on 1 July 2014.
- Infringement notices may be issued for certain

Objects etc.

- (1) The main objects of this Part are:
 - (a) to deter price exploitation in relation to the carbon tax repeal at each point in the supply chain for regulated goods and
 - (b) to ensure that all cost savings attributable to the carbon tax repeal are passed through the supply chain for regulated goods.
- (2) The intention of the Parliament in enacting this Part is to ensure that all cost savings attributable to the carbon tax repeal are passed on to consumers of regulated goods through lower prices.

Definitions

In this Part:

applicable compliance period, for a carbon tax removal substantiation notice, has the meaning given by subsection 60FC(2).

bulk SGG importer means an entity that:

- (a) holds a controlled substances licence under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* that allows the entity to import synthetic greenhouse gases; and
- (b) supplies synthetic greenhouse gas to SGG customers.

carbon charge component of levy means so much of the amount of the levy as is calculated by multiplying the number of tonnes of carbon dioxide equivalence by a per unit charge applicable under subsection 100(1) of the *Clean Energy Act 2011* for the issue of a carbon unit.

carbon tax removal substantiation notice has the meaning given by subsection 60FA(3).

carbon tax removal substantiation statement has the meaning given by subsection 60FD(3).

carbon tax repeal means:

- (a) the repeal of the following Acts by the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014*:
 - (i) the *Clean Energy Act 2011*;
 - (ii) the *Clean Energy (Charges—Customs) Act 2011*;
 - (iii) the *Clean Energy (Charges—Excise) Act 2011*;
 - (iv) the *Clean Energy (Unit Issue Charge—Auctions) Act 2011*;
 - (v) the *Clean Energy (Unit Issue Charge—Fixed Charge) Act 2011*;
 - (vi) the *Clean Energy (Unit Shortfall Charge—General) Act 2011*; and
- (b) the amendments of the following Acts made by the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014*:
 - (i) the *Fuel Tax Act 2006*;
 - (ii) the *Fuel Tax (Consequential and Transitional Provisions) Act 2006*; and
- (c) the amendments made by the following Acts:
 - (i) the *Customs Tariff Amendment (Carbon Tax Repeal) Act 2014*;

Act 2014;

(ii) the *Excise Tariff Amendment (Carbon Tax Repeal) Act 2014*;

(iii) the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Act 2014*;

(iv) the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Act 2014*.

carbon tax repeal transition period means the period:

- (a) beginning at the start of 1 July 2014; and
- (b) ending at the end of 30 June 2015.

carbon tax scheme means the scheme embodied in the following:

- (a) the *Clean Energy Act 2011*, as in force at the start of 1 January 2014;
- (b) the associated provisions (within the meaning of that Act) in force at that time;
- (c) the following provisions of the *Fuel Tax Act 2006*, as in force at the start of 1 January 2014:
 - (i) Division 42A;
 - (ii) section 43-5, so far as that section relates to a carbon charge reduction;
 - (iii) section 43-8;
 - (iv) section 43-11;
- (d) section 3A of the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995*, as in force at the start of 1 January 2014, so far as that section relates to carbon charge component;
- (e) section 4A of the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995*, as in force at the start of 1 January 2014, so far as that section relates to carbon charge component;
- (f) section 3A of the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995*, as in force at the start of 1 January 2014, so far as that section relates to carbon charge component;
- (g) sections 6FA, 6FB and 6FC of the *Excise Tariff Act 1992*, as in force at the start of 1 January 2014;
- (h) section 19A of the *Customs Tariff Act 1995*, as in force at the start of 1 January 2014.

electricity customer means an entity that purchases electricity

electricity retailer means:

- (a) an entity who:
 - (i) is a retailer within the meaning of the *National Electricity Retail Law* as it applies in a State or a Territory; and
 - (ii) sells electricity to electricity customers; or
- (b) an entity who is a retailer within the meaning of the *Electricity Industry Act 2000* (Vic.); or
- (c) an entity who is a retail entity within the meaning of the *Electricity Act 1994* (Qld); or
- (d) an entity who:
 - (i) holds a retail licence within the meaning of the *Electricity Industry Act 2004* (WA); or
 - (ii) holds an integrated regional licence within the meaning of the *Electricity Industry Act 2004* (WA) that authorises the entity to sell electricity; or

- (e) an entity who is an electricity entity within the meaning of the *Electricity Reform Act* (NT) and whose licence under that Act authorises the entity to sell electricity; or
- (f) any other entity who produces electricity in Australia.

engages in price exploitation in relation to the carbon tax repeal: see section 60C.

entity means any of the following:

- (a) a corporation (as defined by section 4);
- (b) an individual;
- (c) a body corporate;
- (d) a corporation sole;
- (e) a body politic;
- (f) a partnership;
- (g) any other unincorporated association or body of entities;
- (h) a trust;
- (i) any party or entity which can or does buy or sell electricity, natural gas or synthetic greenhouse gas.

infringement notice means an infringement notice issued under subsection 60L(1).

infringement notice compliance period: see section 60P.

infringement notice provision means section 60C or 60K.

listed corporation has the meaning given by section 9 of the *Corporations Act 2001*.

National Energy Retail Law means the National Energy Retail Law set out in the Schedule to the *National Energy Retail Law (South Australia) Act 2011* (SA).

natural gas has the same meaning as in the National Gas (Commonwealth) Law (as defined by the *Australian Energy Market Act 2004*).

natural gas customer means an entity that purchases natural gas.

natural gas retailer means:

- (a) an entity who:
 - (i) is a retailer within the meaning of the *National Energy Retail Law* as it applies in a State or a Territory; and
 - (ii) sells natural gas to natural gas customers; or
- (b) an entity who is a gas retailer within the meaning of the *Gas Industry Act 2001* (Vic.); or
- (c) an entity who is a retailer within the meaning of the *Gas Supply Act 2003* (Qld); or
- (d) an entity who holds a trading licence under the *Energy Coordination Act 1994* (WA); or
- (e) an entity who holds a licence under the *Gas Act 2000* (NT) to sell gas by retail.

price, in relation to a supply, includes:

- (a) a charge of any description for the supply; and
- (b) any pecuniary or other benefit, whether direct or indirect, received or to be received by a person for or in connection with the supply.

regulated goods: see section 60B.

regulated supply means a supply that:

- (a) occurs during the carbon tax repeal transition period; and

- (a) occurs during the carbon tax repeal transition period; and
- (b) is of regulated goods.

regulated supply input costs of an entity means the entity's input costs in relation to the making by the entity of regulated supplies of electricity, natural gas or synthetic greenhouse gas.

Royal Assent day means the day on which the Act that inserts this Part receives the Royal Assent.

SGG customer means an entity that purchases synthetic greenhouse gas.

SGG equipment has the same meaning as in the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

synthetic greenhouse gas has the same meaning as in the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

Regulated goods

- (1) For the purposes of this Part, **regulated goods** means:
 - (a) natural gas; or
 - (b) electricity; or
 - (c) synthetic greenhouse gas; or
 - (d) SGG equipment; or
 - (e) other goods of a kind specified in a legislative instrument under subsection (2).
- (2) The Minister may, by legislative instrument, specify one or more kinds of goods for the purposes of paragraph (1)(e).

Division 2—Carbon tax price reduction obligation

Price exploitation in relation to the carbon tax repeal

- (1) An entity must not engage in price exploitation in relation to the carbon tax repeal.
- (2) For the purposes of this Part, an entity **engages in price exploitation in relation to the carbon tax repeal** if, and only if:
 - (a) it makes a regulated supply; and
 - (b) the price for the supply does not pass through all of the entity's cost savings relating to the supply that are directly or indirectly attributable to the carbon tax repeal.
- (3) For the purposes of this Part, in determining whether the price for a supply made by an entity does not pass through all of the entity's cost savings relating to the supply that are directly or indirectly attributable to the carbon tax repeal, have regard to the following matters:
 - (a) the entity's cost savings that are directly or indirectly attributable to the carbon tax repeal;
 - (b) how the cost savings mentioned in paragraph (a) can reasonably be attributed to the different supplies that the entity makes;
 - (c) the entity's costs;
 - (d) any other relevant matter that may reasonably influence price.

Failure to pass on cost savings—250% penalty

- (1) If:
 - (a) either:
 - (i) an entity contravenes subsection 60C(1) in relation

particular supply of electricity or natural gas; or

(ii) an entity that is a bulk SGG importer contravenes subsection 60C(1) in relation to a particular supply of synthetic greenhouse gas; and

(b) the contravention involved a failure to pass through all the entity's cost savings relating to the supply that are directly or indirectly attributable to the carbon tax repeal;

there is payable by the entity to the Commonwealth, and the entity shall pay to the Commonwealth, by way of penalty, an amount equal to 250% of those cost savings that were not passed thro

When penalty becomes due and payable

(2) An amount payable by an entity under subsection (1) is due payable on 1 July 2015.

Late payment penalty

(3) If an amount payable by an entity under subsection (1) remains unpaid after the time when it became due for payment, there is payable by the entity to the Commonwealth, and the entity shall pay to the Commonwealth, by way of penalty, an amount calculated at the rate of 6% per annum on the amount unpaid, computed from that time.

Recovery of penalties

(4) An amount payable by an entity under subsection (1) or (3):
(a) is a debt due to the Commonwealth; and
(b) shall be recovered by the Commission, on behalf of the Commonwealth, by action in a court of competent jurisdiction unless the cost of doing so exceeds the amount.

Report to Parliament

(5) Within 13 months after the Royal Assent day, the Commission must report to Parliament in respect of penalties payable by entities.

Notice to entity that is considered to have engaged in price exploitation in relation to the carbon tax repeal

(1) The Commission may give an entity a written notice under this section if the Commission considers that the entity has engaged in price exploitation in relation to the carbon tax repeal.

(2) The notice must:

(a) be expressed to be given under this section; and

(b) identify:

(i) the entity that made the supply; and

(ii) the kind of supply made; and

(iii) the circumstances in which the supply was made;

(c) state that, in the Commission's opinion, the price for the supply did not pass through all of the entity's cost savings relating to the supply that were directly or indirectly attributable to the carbon tax repeal.

(3) In any proceedings:

(aa) under section 60CA; or

(a) under section 76 for a pecuniary penalty order relating to section 60C; or

(b) under section 80 for an injunction relating to section 60C; or

(c) under section 80A, 82, 86C, 86D or 87 for an order relating to section 60C.

to section 60C;

the notice is prima facie evidence that the price for the supply not pass through all of the entity's cost savings relating to the supply that were directly or indirectly attributable to the carbon tax repeal.

- (4) The Commission may vary or revoke the notice on its own initiative or on application made by the entity. The Commission must give the entity written notice of the variation or revocation.
- (5) A notice under this section is not a legislative instrument.

Commission may issue notice to aid prevention of price exploitation in relation to the carbon tax repeal

- (1) The Commission may give an entity a written notice under this section if the Commission considers that doing so will aid the prevention of the entity engaging in price exploitation in relation to the carbon tax repeal.
- (2) The notice must:
 - (a) be expressed to be given under this section; and
 - (b) be expressed to relate to any supply that the entity makes that is:
 - (i) of a kind specified in the notice; and
 - (ii) made in circumstances specified in the notice; and
 - (iii) made during the period specified in the notice (which must not be a period ending after the end of the carbon tax repeal transition period); and
 - (c) specify the maximum price that, in the Commission's opinion, may be charged for a supply to which the notice is expressed to relate.
- (3) The Commission may, on its own initiative or on application by the entity:
 - (a) vary the notice to:
 - (i) change the period specified as required by subparagraph (2)(b)(iii); or
 - (ii) change the price specified in the notice as required by paragraph (2)(c); or
 - (b) revoke the notice.

The Commission must give the entity written notice of the variation or revocation.

- (4) The Commission may publish the notice, or particulars of any variation or revocation of the notice, in such manner as the Commission considers appropriate.
- (5) A notice under this section is not a legislative instrument.

Acquisition of property

Scope

- (1) This section applies to the following provisions of this Act:
 - (a) section 60C;
 - (b) any other provision to the extent to which it relates to section 60C.

Effect of provision

- (2) The provision has no effect to the extent (if any) to which its operation would result in the acquisition of property (within the

meaning of paragraph 51(xxxi) of the Constitution) otherwise on just terms (within the meaning of that paragraph).

Division 2A—Carbon tax removal substantiation notices

Carbon tax removal substantiation notices

Scope

- (1) This section applies to an entity if the entity:
 - (a) is an electricity retailer that sells electricity to electricity customers; or
 - (b) is a natural gas retailer that sells natural gas to natural gas customers; or
 - (c) is a bulk SGG importer that sells synthetic greenhouse gas to SGG customers.

Carbon tax removal substantiation notice

- (2) The Commission must, within 30 days after the Royal Assent of this Act, by written notice given to the entity, require the entity:
 - (a) to give to the Commission, within the period specified in the notice, a written statement that explains:
 - (i) how the carbon tax repeal has affected, or is affecting, the entity's regulated supply input costs; and
 - (ii) how reductions in the entity's regulated supply input costs that are directly or indirectly attributable to the carbon tax repeal are reflected in the prices charged by the entity for regulated supplies of electricity, natural gas or synthetic greenhouse gas; and
 - (b) to do either or both of the following:
 - (i) give to the Commission, within the period and in the manner and form specified in the notice, information that substantiates the explanation set out in the statement
 - (ii) produce to the Commission, within the period and in the manner specified in the notice, documents that substantiate the explanation set out in the statement.
- (3) A notice under subsection (2) is to be known as a **carbon tax removal substantiation notice**.
- (4) A period specified in a carbon tax removal substantiation notice must be 21 days after the notice is given.
- (5) A carbon tax removal substantiation notice must explain the effect of:
 - (a) section 60FB; and
 - (b) section 60FC; and
 - (c) sections 137.1 and 137.2 of the *Criminal Code*.

Section does not limit section 60H

- (6) This section does not limit section 60H (which is about the price-related information-gathering powers of the Commission).

Section does not limit section 155

- (7) This section does not limit section 155 (which is about the general information-gathering powers of the Commission).

Extending periods for complying with carbon tax removal substantiation notices

- (1) An entity that has been given a carbon tax removal substantiation notice may, at any time within 14 days after the notice was given,

notice may, at any time within 14 days after the notice was given to the entity by the Commission, apply in writing to the Commission for an extension of the period for complying with the notice.

- (2) The Commission may, by written notice given to the entity, extend the period within which the entity must comply with the notice, so long as the extension is for a period of not more than 14 days.

Compliance with carbon tax removal substantiation notices

- (1) An entity that is given a carbon tax removal substantiation notice must comply with it within the applicable compliance period for the notice.
- (2) The **applicable compliance period** for a carbon tax removal substantiation notice is:
 - (a) the period of 21 days specified in the notice; or
 - (b) if the period for complying with the notice has been extended under section 60FB—the period as so extended;and includes (if an application has been made under section 60FB for an extension of the period for complying with the notice) the period up until the time when the applicant is given notice of the Commission's decision on the application.
- (3) An entity commits an offence if:
 - (a) the entity is subject to a requirement under subsection 60FB(1) and
 - (b) the entity is capable of complying with the requirement
 - (c) the entity omits to do an act; and
 - (d) the omission breaches the requirement.

Penalty: 200 penalty units.

- (4) Subsection (3) is an offence of strict liability.

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

- (5) If subsection (3) of this section applies to an individual (whether or not because of subsection 6(2)), subsection (3) of this section has effect, in relation to the individual, as if the reference to 200 penalty units were a reference to 40 penalty units.
- (6) If subsection (1) of this section applies to an individual (whether or not because of subsection 6(2)), the individual is excused from giving information or producing a document in accordance with a carbon tax removal substantiation notice on the ground that the giving of the information or the production of the document might tend to incriminate the individual or expose the individual to a penalty.

Division 2B—Carbon tax removal substantiation statements

Carbon tax removal substantiation statements

Scope

- (1) This section applies to an entity if the entity:
 - (a) is an electricity retailer that sells electricity to electricity customers; or
 - (b) is a natural gas retailer that sells natural gas to natural gas customers; or
 - (c) is a bulk SGG importer that sells synthetic greenhouse gas to SGG customers.

Carbon tax removal substantiation statement

- (2) Within 30 days after the Royal Assent day, the entity must give the Commission:
- (a) a written statement that sets out:
 - (i) if the entity has electricity customers—the entity’s estimate, on an average annual percentage price basis or an average annual dollar price basis, of the entity’s cost savings that have been, are, or will be, directly or indirectly attributable to the carbon tax repeal and that have been, are being, or will be, passed on to each class of electricity customers during the financial year that began on 1 July 2014; and
 - (ii) if the entity has natural gas customers—the entity’s estimate, on an average annual percentage price basis or an average annual dollar price basis, of the entity’s cost savings that have been, are, or will be, directly or indirectly attributable to the carbon tax repeal and that have been, are being, or will be, passed on to each class of natural gas customers during the financial year that began on 1 July 2014; and
 - (iii) if the entity has SGG customers—the entity’s estimate, on an average annual percentage price basis, or an average annual dollar price basis, of the entity’s cost savings that have been, are, or will be, directly or indirectly attributable to the carbon tax repeal and that have been, are being, or will be, passed on to each class of SGG customers during the financial year that began on 1 July 2014; and
 - (b) information that substantiates the estimate or estimates set out in the statement.

Note: Section 137.1 of the *Criminal Code* creates an offence of providing false or misleading information.

- (3) A statement under paragraph (2)(a) is to be known as a **carbon tax removal substantiation statement**.
- (4) If the entity has given a carbon tax removal substantiation statement to the Commission, the entity must ensure that a copy of the statement is available on the entity’s website, in a way that is readily accessible by the public, until the end of 30 June 2015.

Compliance

- (5) An entity commits an offence if:
- (a) the entity is subject to a requirement under subsection (2) or (4); and
 - (b) the entity is capable of complying with the requirement;
 - (c) the entity omits to do an act; and
 - (d) the omission breaches the requirement.

Penalty: 500 penalty units.

- (6) Subsection (5) is an offence of strict liability.

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

- (7) If subsection (5) of this section applies to an individual (whether or not because of subsection 6(2)), subsection (5) of this section has effect, in relation to the individual, as if the reference to 500 penalty units were a reference to 40 penalty units.

- (8) If subsection (2) of this section applies to an individual (whether or not because of subsection 6(2)), the individual is excused from

or not because of subsection 6(2)), the individual is excused from giving an estimate or information under subsection (2) of this section on the ground that the estimate or information might tend to incriminate the individual or expose the individual to a penalty or forfeiture.

Section does not limit section 60H

- (9) This section does not limit section 60H (which is about the price-related information-gathering powers of the Commission).

Section does not limit section 155

- (10) This section does not limit section 155 (which is about the general information-gathering powers of the Commission).

Report to Parliament

- (11) Within 13 months after the Royal Assent day, the Commission must report to Parliament in respect of compliance by all entities with this section.

Section 2C—Statements for customers

Section 2C—Statements for customers

Scope

- (1) This section applies to an entity if the entity:
- (a) is an electricity retailer that sells electricity to electricity customers; or
 - (b) is a natural gas retailer that sells natural gas to natural gas customers.

Preparation of statement

- (2) Within 30 days after the Royal Assent day, the entity must prepare a statement that:
- (a) if the entity has electricity customers—identifies, on an average annual percentage price basis, or an average annual dollar price basis, the estimated cost savings, to each class of electricity customers, that:
 - (i) have been, are, or will be, directly or indirectly attributable to the carbon tax repeal; and
 - (ii) are for the financial year that began on 1 July 2011 and
 - (b) if the entity has natural gas customers—identifies, on an average annual percentage price basis, or an average annual dollar price basis, the estimated cost savings, to each class of natural gas customers, that:
 - (i) have been, are, or will be, directly or indirectly attributable to the carbon tax repeal; and
 - (ii) are for the financial year that began on 1 July 2011 and

Communication of contents of statement to customers

- (3) During the period:
- (a) beginning 30 days after the Royal Assent day; and
 - (b) ending 60 days after the Royal Assent day;
- the entity must ensure that the contents of the statement prepared by it under subsection (2) that relates to a class of electricity customers or natural gas customers is communicated to each customer of that class.

Note: Section 137.1 of the *Criminal Code* creates an offence of providing false or misleading information.

Compliance

(4) An entity commits an offence if:

- (a) the entity is subject to a requirement under subsection (2) or (3); and
- (b) the entity is capable of complying with the requirement;
- (c) the entity omits to do an act; and
- (d) the omission breaches the requirement.

Penalty: 400 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

(6) If subsection (4) of this section applies to an individual (whether or not because of subsection 6(2)), subsection (4) of this section has effect, in relation to the individual, as if the reference to 400 penalty units were a reference to 40 penalty units.

(7) If subsection (2) or (3) of this section applies to an individual (whether or not because of subsection 6(2)), the individual is excused from:

- (a) preparing a statement under subsection (2) of this section; or
- (b) communicating the contents of a statement under subsection (3) of this section;

on the ground that the information in the statement might tend to incriminate the individual or expose the individual to a penalty.

Section 3—Price monitoring in relation to the carbon tax repeal etc.

Commission may monitor prices in relation to the carbon tax repeal etc.

Price monitoring—carbon tax repeal transition period

(1) The Commission may monitor prices to assess the general effect of the carbon tax repeal on prices charged by entities for supplies in the carbon tax repeal transition period, of relevant goods.

Note: For **relevant goods**, see subsection (11).

(2) The Commission may monitor prices to assess the general effect of the carbon tax repeal on prices:

- (a) advertised; or
- (b) displayed; or
- (c) offered;

for supplies, in the carbon tax repeal transition period, of relevant goods by entities.

Note: For **relevant goods**, see subsection (11).

(3) The Commission may monitor prices to assess the general effect of the carbon tax repeal on prices charged for supplies, in the carbon tax repeal transition period, of goods by an entity for which there is an entry in the Information Database (within the meaning of the *Clean Energy Act 2011*).

(4) The Commission may monitor prices to assess the general effect of the carbon tax repeal on prices:

- (a) advertised; or
- (b) displayed; or
- (c) offered;

for supplies, in the carbon tax repeal transition period, of relevant

for supplies, in the carbon tax repeal transition period, or goods by an entity for which there is an entry in the Information Database (within the meaning of the *Clean Energy Act 2011*).

Price monitoring—price exploitation

- (5) The Commission may monitor prices to assist the Commission in its consideration of whether an entity has engaged, is engaging, or may in the future engage, in price exploitation in relation to the carbon tax repeal.

Price monitoring—pre-repeal transition period

- (6) The Commission may monitor prices to assess the general effect of the carbon tax scheme on prices charged by entities for supplies, in the pre-repeal transition period, of relevant goods.

Note 1: For **pre-repeal transition period**, see subsection (13).

Note 2: For **relevant goods**, see subsection (11).

- (7) The Commission may monitor prices to assess the general effect of the carbon tax scheme on prices:

- (a) advertised; or
- (b) displayed; or
- (c) offered;

for supplies, in the pre-repeal transition period, of relevant goods by entities.

Note 1: For **pre-repeal transition period**, see subsection (13).

Note 2: For **relevant goods**, see subsection (11).

- (8) The Commission may monitor prices to assess the general effect of the carbon tax scheme on prices charged for supplies, in the pre-repeal transition period, of goods by an entity for which there is an entry in the Information Database (within the meaning of the *Clean Energy Act 2011*).

Note: For **pre-repeal transition period**, see subsection (13).

- (9) The Commission may monitor prices to assess the general effect of the carbon tax scheme on prices:

- (a) advertised; or
- (b) displayed; or
- (c) offered;

for supplies, in the pre-repeal transition period, of goods by an entity for which there is an entry in the Information Database (within the meaning of the *Clean Energy Act 2011*).

Note: For **pre-repeal transition period**, see subsection (13).

Section does not limit Part VIIA

- (10) This section does not limit Part VIIA (which is about prices surveillance).

Relevant goods

- (11) For the purposes of this section, the following are **relevant goods**:

- (a) regulated goods;
- (b) other goods of a kind specified in a legislative instrument under subsection (12).

- (12) The Minister may, by legislative instrument, specify one or more kinds of goods for the purposes of paragraph (11)(b).

(13) For the purposes of this section, ***pre-repeal transition period*** means the period:

- (a) beginning at the commencement of this section; and
- (b) ending at the end of 30 June 2014.

Information-gathering powers

(1) A member of the Commission may, by written notice given to a person, require the person:

- (a) to give the Commission specified information in writing signed by:
 - (i) the person; or
 - (ii) if the person is a body corporate—a competent officer of the body corporate; or

(b) to produce to the Commission specified documents;

if:

- (c) the information, or information contained in the documents, relates to prices or the setting of prices; and
- (d) the member reasonably believes that the information, or information contained in the documents, will or may be used to the Commission in monitoring prices as mentioned in subsections 60G(1) to (9).

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

(2) Information or documents that may be required under subsection (1) may relate to prices, or the setting of prices:

- (a) before or after the carbon tax repeal; and
- (b) before or after the start of the carbon tax repeal transition period; and
- (c) in a situation, or during a period, specified in the notice.

(3) Subsection (2) does not limit subsection (1).

(4) A person commits an offence if:

- (a) the person is subject to a requirement under subsection (1); and
- (b) the person is capable of complying with the requirement; and
- (c) the person omits to do an act; and
- (d) the omission breaches the requirement.

Penalty: 20 penalty units.

(5) An individual is excused from giving information or producing a document in accordance with a requirement under subsection (1) on the ground that the information or the production of the document might tend to incriminate the individual or expose the individual to a penalty.

Section does not limit section 60FA

(5A) This section does not limit section 60FA (which is about carbon tax removal substantiation notices).

Section does not limit section 155

(6) This section does not limit section 155 (which is about the general information-gathering powers of the Commission).

- (1) The Commission must, within 28 days after the end of each quarter, give the Minister a written report about the operation of the Commission under this Part during the quarter.
- (2) A report under subsection (1) must include particulars of:
 - (a) all notices given under section 60E during the quarter;
 - (b) all variations or revocations during the quarter of notices given under section 60E.
- (3) Subsection (2) does not limit subsection (1).
- (4) For the purposes of this section, a **quarter** is a period of 3 months:
 - (a) that occurs wholly or partly during the carbon tax repeal transition period; and
 - (b) that starts on any of the following days in a year:
 - (i) 1 January;
 - (ii) 1 April;
 - (iii) 1 July;
 - (iv) 1 October.
- (5) As soon as practicable after the Minister receives a report under subsection (1), the Minister must make the report public by such means as the Minister considers appropriate.
- (6) If this section commences during a quarter (but not on the first day of a quarter):
 - (a) no report is to be made at the end of the quarter; but
 - (b) the report made at the end of the next quarter is also to include the information required by subsections (1) and (2) in relation to the previous quarter.

Section 4—False or misleading representations about the effect of the carbon tax repeal etc. on prices

False or misleading representations about the effect of the carbon tax repeal etc. on prices

An entity must not, in trade or commerce, in connection with

- (a) the supply or possible supply of goods or services; or
- (b) the promotion by any means of the supply or use of goods or services;

make a false or misleading representation, during the carbon tax repeal transition period, concerning the effect of:

- (c) the carbon tax repeal or a part of the carbon tax repeal;
- (d) the carbon tax scheme or a part of the carbon tax scheme.

on the price for the supply of the goods or services.

Section 5—Infringement notices

Issuing an infringement notice

Issuing an infringement notice

- (1) If the Commission has reasonable grounds to believe that a person has contravened an infringement notice provision, the Commission may issue an infringement notice to the person.
- (2) The Commission must not issue more than one infringement notice to the person for the same alleged contravention of the infringement notice provision.
- (3) The infringement notice does not have any effect if the notice

- (a) is issued more than 12 months after the day on which the contravention of the infringement notice provision is alleged to have occurred; or
- (b) relates to more than one alleged contravention of an infringement notice provision by the person.

Matters to be included in an infringement notice

- (4) An infringement notice must:
- (a) be identified by a unique number; and
 - (b) state the day on which it is issued; and
 - (c) state the name and address of the person to whom it is issued; and
 - (d) identify the Commission; and
 - (e) state how the Commission may be contacted; and
 - (f) give details of the alleged contravention by the person, including:
 - (i) the date of the alleged contravention; and
 - (ii) the particular infringement notice provision that was allegedly contravened; and
 - (g) state the maximum pecuniary penalty that the court could order the person to pay under section 76 for the alleged contravention; and
 - (h) specify the penalty that is payable in relation to the alleged contravention; and
 - (i) state that the penalty is payable within the infringement notice compliance period for the notice; and
 - (j) state that the penalty is payable to the Commission on behalf of the Commonwealth; and
 - (k) explain how payment of the penalty is to be made; and
 - (l) explain the effect of sections 60M, 60N, 60P and 60Q.

Amount of penalty

- (5) The penalty to be specified in an infringement notice that is issued to a person in relation to an alleged contravention of an infringement notice provision must be:
- (a) if the person is a listed corporation—600 penalty units;
 - (b) if the person is a body corporate other than a listed corporation—60 penalty units; or
 - (c) if the person is not a body corporate—12 penalty units.

Effect of compliance with an infringement notice

Scope

- (1) This section applies if:
- (a) an infringement notice for an alleged contravention of an infringement notice provision is issued to a person; and
 - (b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 60Q.

Effect

- (2) The person is not, merely because of the payment, regarded as:
- (a) having contravened the infringement notice provision; or
 - (b) having been convicted of an offence constituted by the conduct that constituted the alleged contravention of the infringement notice provision.

- (3) No proceedings (whether criminal or civil) may be started or continued against the person, by or on behalf of the Commonwealth, in relation to:
- (a) the alleged contravention of the infringement notice provision; or
 - (b) an offence constituted by the same conduct that constitutes the alleged contravention.

Effect of failure to comply with an infringement notice

If:

- (a) an infringement notice for an alleged contravention of an infringement notice provision is issued to a person; and
- (b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
- (c) the infringement notice is not withdrawn under section 100, the person is liable to proceedings under Part VI in relation to the alleged contravention of the infringement notice provision.

Infringement notice compliance period for infringement notice

- (1) The ***infringement notice compliance period*** for an infringement notice is the period of 28 days beginning on the day after the day on which the infringement notice is issued by the Commission.
- (2) Subsection (1) has effect subject to subsection (7).
- (3) The Commission may extend, by notice in writing, the infringement notice compliance period for the notice if the Commission is satisfied that it is appropriate to do so.
- (4) Only one extension may be given, and the extension must not be for longer than 28 days.
- (5) Notice of the extension must be given to the person to whom the infringement notice was issued.
- (6) A failure to comply with subsection (5) does not affect the validity of the extension.
- (7) If the Commission extends the infringement notice compliance period for an infringement notice, a reference in this Division to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

Withdrawal of an infringement notice

Representations to the Commission

- (1) A person to whom an infringement notice has been issued for an alleged contravention of an infringement notice provision may make written representations to the Commission seeking the withdrawal of the infringement notice.
- (2) Evidence or information that the person, or a representative of the person, gives to the Commission in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by the Commission

- (3) The Commission may, by written notice (the **withdrawal notice**) given to the person to whom an infringement notice was issued, withdraw the infringement notice if the Commission is satisfied it is appropriate to do so.
- (4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

- (5) The withdrawal notice must state:
- (a) the name and address of the person; and
 - (b) the day on which the infringement notice was issued to the person; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that proceedings under Part VI may be started or continued against the person in relation to:
 - (i) the alleged contravention the infringement notice provision; or
 - (ii) an offence constituted by the same conduct that constituted the alleged contravention.

Time limit for giving withdrawal notices

- (6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

- (7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, the Commission must, on behalf of the Commonwealth, refund to the person an amount equal to the amount paid.

Note: For the appropriation for the refund, see section 77 of the *Public Governance, Performance and Accountability Act 2013*.

Effect of this Division

This Division does not:

- (a) require an infringement notice to be issued to a person for an alleged contravention of an infringement notice provision; or
- (b) affect the liability of a person to proceedings under Part VI in relation to an alleged contravention of an infringement notice provision if:
 - (i) an infringement notice is not issued to the person for the alleged contravention; or
 - (ii) an infringement notice issued to a person for the alleged contravention is withdrawn under section 60C;
- (c) prevent a court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

VI—Enforcement and remedies

Interpretation

- (1) A reference in this Part to a person involved in a contravention of a provision of Part IV or IVB, or of section 55B, subsection 56F

56BO(1), 56BU(1) or 56CC(1), section 56CD, 60C, 60K or 92 of the consumer data rules, shall be read as a reference to a person who:

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

(2) In this Part, unless the contrary intention appears:

- (a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;
- (b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
- (c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

pecuniary penalties

(1) If the Court is satisfied that a person:

- (a) has contravened any of the following provisions:
 - (i) a provision of Part IV (other than section 45AF or 45AG);
 - (ia) section 55B;
 - (ib) subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules;
 - (ii) section 60C;
 - (ia) section 60K;
 - (iii) section 92;
 - (iv) a civil penalty provision of an industry code; or
- (b) has attempted to contravene such a provision; or
- (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person or persons in contravention of such a provision; or
- (f) has conspired with others to contravene such a provision.

If the Court is satisfied that a person has contravened, attempted to contravene, aided, abetted, counselled or procured a person to contravene, induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene, or has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person or persons in contravention of, or has conspired with others to contravene, such a provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (**Boycott conduct** is defined in subsection 87AA(2).)

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

- (aa) for each act or omission to which this section applies that relates to section 45AJ or 45AK—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the court can determine the total value of the benefits that have been obtained (within the meaning of Division 1 of Part IV) by one or more persons and that are reasonably attributable to the act or omission—3 times the total value;
 - (iii) if the Court cannot determine the total value of the benefits—10% of the annual turnover (within the meaning of Division 1 of Part IV) of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the act or omission occurred; and
- (a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—\$750,000; and
- (b) for each act or omission to which this section applies that relates to any other provision of Part IV, or that relates to subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules not covered by paragraph (cb) of this subsection—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the Court can determine the value of the benefit obtained by the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly as a result of that act or omission—that is reasonably attributable to the act or omission—times the value of that benefit;
 - (iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the act or omission occurred; and
- (ba) for each act or omission to which this section applies that relates to section 55B, 60C or 60K—6,471 penalty units; and
- (c) for each act or omission to which this section applies that relates to section 92—\$33,000; and
- (ca) for each act or omission to which this section applies that relates to a civil penalty provision of an industry code—the amount set out in the civil penalty provision of the industry code; and
- (cb) for each act or omission to which this section applies that relates to a civil penalty provision of the consumer data rules that sets out at its foot a pecuniary penalty for a body corporate indicated by the words “Civil penalty”—the amount of that pecuniary penalty; and
- (d) for each other act or omission to which this section applies—\$10,000,000.

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

- (1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:
- (aa) for each act or omission to which this section applies that relates to section 55B, 60C or 60K—1,295 penalty units; and
 - (ab) for each act or omission to which this section applies that relates to subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules not covered by paragraph (aab) of this subsection—\$500,000; and

- (a) for each act or omission to which this section applies that relates to section 92—\$6,600; and
 - (aaa) for each act or omission to which this section applies that relates to a civil penalty provision of an industry code—the amount set out in the civil penalty provision of the industry code; and
 - (aab) for each act or omission to which this section applies that relates to a civil penalty provision of the consumer data rule that sets out at its foot a pecuniary penalty for a person other than a body corporate indicated by the words “Civil penalty” the amount of that pecuniary penalty; and
 - (b) for each other act or omission to which this section applies—\$500,000.
- (2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of section 45D, 45DA, 45DB, 45E or 45EA.
- (3) If conduct constitutes a contravention of two or more provisions of Part IV (other than section 45AF or 45AG), a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.
- (4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which 2 or more of the limits in paragraphs (1A)(a) and (b) apply is an amount up to the highest of those limits.

Annual turnover

- (5) For the purposes of this section, the **annual turnover** of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make during that period, other than:
- (a) supplies made from any of those bodies corporate to another 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 *New Tax System (Goods and Services Tax) Act 1999* have the meaning as in that Act.

Reference to proceedings under section 76 relating to a contravention of section 92

- (1) In this section:
- contravention**, in relation to a section, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section.
- (2) In proceedings against a person (the **respondent**) under section 76 in relation to an alleged contravention of section 92

a defence if the respondent establishes:

- (a) that the contravention in respect of which the proceedings were instituted was due to reasonable mistake; or
- (b) that the contravention in respect of which the proceedings were instituted was due to reasonable reliance on information supplied by another person; or
- (c) that:
 - (i) the contravention in respect of which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the respondent's control; and
 - (ii) the respondent took reasonable precautions and exercised due diligence to avoid the contravention.

(3) In paragraphs (2)(b) and (c), **another person** does not include a person who was:

- (a) a servant or agent of the respondent; or
- (b) if the respondent is a body corporate—a director, servant or agent of the respondent;

at the time when the alleged contravention occurred.

Consequences in some cases if substantially the same conduct contravenes a provision of this Act and is an offence

(1) In this section:

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

pecuniary penalty order means an order under section 76 for the payment of a pecuniary penalty.

(2) The Court must not make a pecuniary penalty order against a person in relation to a contravention of Part IV, subsection 56BO(1) or section 56CD or 92 if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

(3) Proceedings for a pecuniary penalty order against a person in relation to a contravention of Part IV, subsection 56BO(1) or section 56CD or 92 are stayed if:

- (a) criminal proceedings are started or have already been started against the person for an offence; and
- (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.

The proceedings for the pecuniary penalty order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings are dismissed.

(4) Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of Part IV, subsection 56BO(1) or section 56CD regardless of whether a pecuniary penalty order has been made against the person in respect of the contravention.

(5) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order

documents in proceedings for a pecuniary penalty order against the individual for a contravention of Part IV, subsection 56BO(1) or section 56CD or 92 (whether or not an order was made); and

- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

- (6) In this section:

offence means an offence against a law of the Commonwealth, a State or a Territory.

Civil action for recovery of pecuniary penalties

- (1) The Commission may institute a proceeding in the Court for recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.
- (2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

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 by 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 includes 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 or Part V.

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

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.

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 fine not exceeding 5 penalty units.

Criminal proceedings not to be brought for contraventions of Part IV

Criminal proceedings do not lie against a person by reason of that the person:

- (a) has contravened a provision of Part IV (other than section 45AF or 45AG); or
- (b) has attempted to contravene such a provision;
- (c) has aided, abetted, counselled or procured a person to contravene such a provision;
- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision.

Contraventions against section 45AF or 45AG

(1) A person who:

- (aa) attempts to contravene; or
- (a) aids, abets, counsels or procures a person to contravene;
- (b) induces, or attempts to induce, a person (whether by threats or promises or otherwise) to contravene; or
- (c) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
- (d) conspires with others to contravene;

a cartel offence provision is taken to have contravened that provision and is punishable:

- (e) in a case where:
 - (i) the provision is a cartel offence provision; and
 - (ii) the person is not a body corporate;by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both; or
- (f) in any other case—accordingly.

(1AA) For the purposes of the application of subsection (1) to a case where:

- (a) the provision is a cartel offence provision; and
 - (b) the person is a body corporate other than a corporation,
- assume that each reference in paragraph 45AF(3)(c) or 45AG(3)(c) to a corporation were read as a reference to a body corporate.

(1AB) Subsections 11.1(2) to (6) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(aa) in the same way that they apply in relation to the offence of attempt under subsection 11.1(1) of the *Criminal Code*.

(1A) Subsections 11.2(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(a) in the same way that they apply in relation to subsection 11.2(1) of the *Criminal Code*.

(1B) Subsections 11.5(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(d) in the same way that they apply

in relation to paragraph (1)(a) in the same way that they apply in relation to the offence of conspiracy under subsection 11.5(1) of the *Criminal Code*.

(5) Subsections 11.1(1), 11.2(1), 11.2A(1), 11.4(1) and 11.5(1) of the *Criminal Code* do not apply in relation to an offence against a provision of the *Criminal Code*.

(7) In this section:

cartel offence provision means section 45AF or 45AG.

Enforcement and recovery of certain fines

(1) If:

(a) a fine has been imposed on a person for:

(i) an offence against section 44AAFB, 45AF or 45AG of the *Criminal Code*, subsection 56BN(1) or 56CC(1) or section 154Q or 154R of the *Criminal Code*;

(ii) an offence against section 149.1 of the *Criminal Code* that relates to Part XIX;

(b) the person defaults in payment of the fine;

a Court may:

(c) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of a fine imposed by the Court; or

(d) make an order, on the application of the Minister, the Commission or (in the case of an offence against section 44AAFB) the AER declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

(2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

(3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

(a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment before the time when it becomes payable, as the case may be; and

(b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.

(4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:

(a) on payment of the fine; or

(b) if the fine is not paid—on full compliance with the order.

(5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* (including an order described in subsection 15A(1AA) of that Act) in respect of a fine shall be calculated at the rate of one day's imprisonment for each \$25 amount of the fine that is from time to time unpaid.

(6) Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of

imprisonment shall be served consecutively.

(7) Subject to subsection (8), where:

- (a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and
- (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

(8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within two or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.

(9) For the purposes of subsection (8), the Court may vary or rescind an order made under subsection (7).

(11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

Preference must be given to compensation for victims

If the Court considers that:

- (a) it is appropriate to order a person (the **defendant**):
 - (i) to pay a pecuniary penalty under section 76; or
 - (ii) to impose a fine under section 45AF or 45AG or subsection 56BN(1) or 56CC(1);

in respect of a contravention, or an involvement in a contravention, of this Act or the consumer data rules; and

- (b) it is appropriate to order the defendant to pay compensation to a person who has suffered loss or damage in respect of the contravention or the involvement; and

- (c) the defendant does not have sufficient financial resources to pay both the pecuniary penalty or fine and the compensation;

the Court must give preference to making an order for compensation.

Provisions

(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage in, conduct that constitutes or would constitute:

- (a) a contravention of any of the following provisions:

- (i) a provision of Part IV;

- (ii) a provision of Division 2 or 5 of Part IVB;

- (iia) section 55B;

- (iib) subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD or a civil penalty provision of the consumer data rules;

- (iii) section 60C;

(iv) section 60K; or

(b) attempting to contravene such a provision; or

(c) aiding, abetting, counselling or procuring a person to contravene such a provision; or

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the Court determines to be appropriate.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (**Boycott conduct** is defined in subsection 87AA(2).)

(1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

(1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that the person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50, 60C or 60K.

(1AAA) Subject to subsection (1B), a person other than the Minister or the Commission may not apply for an injunction on the ground of:

(a) a person's actual, attempted or proposed contravention of section 50A; or

(b) a person's actual or proposed involvement in a contravention of section 50A.

(1B) Where the Tribunal has, on the application of a person (in this subsection referred to as the **applicant**) other than the Minister or the Commission, made a declaration under subsection 50A(1) in relation to the acquisition by a person of a controlling interest in a corporation, the applicant is entitled to make an application under subsection (1) for an injunction by reason that the corporation has contravened or attempted to contravene or is proposing to contravene subsection 50A(6) in relation to that declaration.

(2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

(3) The Court may rescind or vary an injunction granted under subsection (1) or (2).

(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;

(b) whether or not the person has previously engaged in conduct of that kind; and

- (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engaged in conduct of that kind.
- (5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail to do that act or thing;
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.
- (6A) Subsection (6) does not apply to an application by the Minister for an injunction relating to Part IV.
- (7) Where:
- (a) in a case to which subsection (6) does not apply the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and
 - (b) the Minister gives the undertaking;
- the Court shall accept the undertaking by the Minister and shall not require a further undertaking from any other person.
- (8) Subsection (7) does not apply in relation to an application for an injunction relating to Part IV.
- (9) If the Director of Public Prosecutions makes an application to the Court for the grant of an injunction under this section in relation to
- (a) a person's contravention, or proposed contravention, of section 45AF or 45AG or subsection 56BN(1) or 56CC(1);
 - (b) a person's involvement, or proposed involvement, in a contravention of section 45AF or 45AG or subsection 56BN(1) or 56CC(1);
- the Court must not require the Director of Public Prosecutions or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

Price exploitation in relation to the carbon tax repeal—orders limiting prices or requiring refunds of money

- (1) If, on the application of the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of section 60C, the Court may make either or both of the following orders:
- (a) an order requiring that person, or a person involved in the contravention, not to make a regulated supply of a kind specified in the order for a price in excess of the price specified in the order while the order remains in force;
 - (b) an order requiring that person, or a person involved in the contravention, to refund money to a person specified in the order.

Note: Section 60C is about price exploitation in relation to the carbon tax

repeal.

(2) This section does not limit section 80.

(3) In this section:

price has the same meaning as in Part V.

regulated supply has the same meaning as in Part V.

Stay of injunctions

(1) The Court may stay the operation of an injunction granted under section 80 if:

(a) the injunction is in respect of conduct that constitutes or would constitute a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA or an associated contravention; and

(b) there is a proceeding in respect of a dispute relating to conduct pending before a court, tribunal or authority of a State or Territory under a prescribed provision of a law of the State or Territory; and

(c) the conduct relates to the supply of goods or services to the acquisition of goods or services from, a person who is or becomes a party to the proceeding referred to in paragraph (b); and

(d) any of the following has applied for the stay:

(i) a Minister of the Commonwealth;

(ii) if subparagraph (b)(ii) applies—a Minister of the State or Territory concerned;

(iii) a party to the proceeding for the injunction; and

(e) the Court considers that granting the stay:

(i) would be likely to facilitate the settlement of the dispute by conciliation; and

(ii) would, in all the circumstances, be just.

(2) An order staying the operation of the injunction may be expressed to have effect for a specified period and may be varied or rescinded by the Court at any time.

(3) If the proceeding referred to in paragraph (1)(b) is terminated because the State or Territory court, tribunal or authority has settled the dispute to which the conduct relates by conciliation, the Court must not make any order in relation to the costs of the proceedings in respect of the granting of the injunction or in relation to the costs of any proceedings for the rescission of the injunction.

(4) Nothing in this section affects other powers of the Court.

(5) In this section:

associated contravention means:

(a) attempting to contravene subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or

(b) aiding, abetting, counselling or procuring a person to contravene any of those provisions; or

(c) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene any of those provisions; or

(d) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of any of those provisions; or

- (e) conspiring with others to contravene any of those provisions.

injunction includes an interim injunction.

injunctions to prevent mergers if authorisation granted on the basis of false or misleading information

If, on the application of the Commission, the Court is satisfied that:

- (a) a person is proposing to acquire shares in the capital of a body corporate or assets of a person; and
- (b) the person was granted a merger authorisation for the proposed acquisition on the basis of information that was false or misleading in a material particular; and
- (c) that information was given by the person or a body corporate that was related to the person; and
- (d) if that information had not been given, the authorisation would not have been granted; and
- (e) apart from the authorisation, the acquisition would contravene section 50 if it occurred;

then the Court may grant an injunction in such terms as the Court determines to be appropriate.

proceeding where merger contravenes section 50 or 50A

- (1) The Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, order, give directions for the purpose of securing the disposal to the person of all or any of the shares or assets acquired in contravention of that section.

(1A) Where:

- (a) the Court finds, in a proceeding instituted under this Part, that a person (in this subsection referred to as the ***acquirer***) has acquired shares in the capital of a body corporate or assets of a person in contravention of section 50;
- (b) the Court finds, whether in that proceeding or any other proceeding instituted under this Part, that the person (in this section referred to as the ***vendor***) from whom the acquirer acquired those shares or those assets, as the case may be, was involved in the contravention; and
- (c) at the time when the finding referred to in paragraph (b) was made, any of those shares or those assets, as the case may be, are vested in the acquirer or, if the acquirer is a body corporate, in any body corporate that is related to the acquirer;

the Court may, on the application of the Commission, declare that the acquisition, in so far as it relates to the shares or assets referred to in paragraph (c), is void as from the day on which it took place and, where the Court makes such a declaration:

- (d) the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and
- (e) the vendor shall refund to the acquirer any amount paid by the vendor in respect of the acquisition of the shares or assets to which the declaration relates.

- (1B) Where a declaration has been made under subsection 50A(1) in relation to the obtaining of a controlling interest in a corporation,

or in each of 2 or more corporations, the Court may, on the application of the Minister or the Commission, if it finds, or has proceeded to find, that that corporation or any of those corporations, as the case may be (in this subsection referred to as the **relevant corporation**), has contravened subsection 50A(6), by order, for the purpose of ensuring that the obtaining of that controlling interest ceases to have the result referred to in paragraph 50A(1)(a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.

- (1C) Where an application is made to the Court for an order under subsection (1) or a declaration under subsection (1A), the Court may, instead of making an order under subsection (1) for the purpose of securing the disposal by a person of shares or assets, make an order under subsection (1A) that the acquisition by a person of shares or assets is void, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of those shares or assets owned by the person.
- (2) An application under subsection (1), (1A) or (1B) may be made at any time within 3 years after the date on which the contravention occurred.
- (3) Where an application for directions under subsection (1) or a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsections (1) and (1A).

Divestiture where merger done under 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 a merger 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 92 or Part 7.3 of the *Criminal Code* by giving that information; and
 - (e) if that information had not been given, the authorisation would not have been granted; and
 - (f) apart from the authorisation, the acquisition would have contravened section 50; and
 - (g) any or all of those shares or assets are vested in the acquirer, the related body corporate or any other body corporate that is related to the acquirer.

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 part of those shares or assets by the acquirer, the related body corporate or any other body corporate that is related to the

acquirer.

Declaration that acquisition void—when vendor involved

- (4) In addition to being satisfied of the matters in subsection (1) 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 the acquisition, in so far as it relates to those shares or assets, 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 by the vendor for acquiring the shares or assets.

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

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

Actions for damages

- (1) A person who suffers loss or damage by conduct of another person that was done in contravention of:
- (a) a provision of Part IV or IVB; or
 - (b) section 55B, 60C or 60K; or
 - (c) subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1) or section 56CD; or
 - (d) a civil penalty provision of the consumer data rules;
- may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

No adverse costs orders

- (3) A person who brings an action under subsection (1) in relation to a contravention of a provision of Part IV may at any time during the proceedings on the matter seek an order under subsection (4) that the costs of the action be paid by the other party.

proceedings on the matter even if that order under subsection (4) is made at the court hearing, or that will hear, the matter.

- (4) The court may order that the applicant is not liable for the costs of any respondent to the proceedings, regardless of the outcome or the likely outcome of the proceedings.
- (5) The court may only make an order under subsection (4) if the court is satisfied that:
 - (a) the action raises a reasonable issue for trial; and
 - (b) the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons; and
 - (c) the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the possibility of a costs order that does not favour the applicant might deter the applicant from pursuing the action.
- (6) The court may satisfy itself of the matters in subsection (5) by having regard only to the documents filed with the court in the proceedings.
- (7) A person who appeals a decision of the court under subsection (4) is liable for any costs in relation to the appeal.

Findings and admissions of fact in proceedings to be evidence

- (1) In a proceeding against a person under section 82 or in an application under subsection 51ADB(1) or 87(1A) for an order against a person, a finding of any fact made by a court, or an admission of any fact made by the person, is prima facie evidence of that fact if the finding or admission is made in proceedings:
 - (a) that are proceedings:
 - (i) under section 77, 80, 81, 86C, 86D or 86E; or
 - (ii) for an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1); and
 - (b) in which that person has been found to have contravened or to have been involved in a contravention of:
 - (i) a provision of Part IV or IVB; or
 - (ii) section 55B, 60C or 60K; or
 - (iii) subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules.
- (2) The finding or admission may be proved by production of:
 - (a) in any case—a document under the seal of the court from which the finding or admission appears; or
 - (b) in the case of an admission—a document from which the admission appears that is filed in the court.

Conduct by directors, employees or agents

- (1) If, in:
 - (a) a prosecution for an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1) in respect of conduct engaged in by a body corporate; or
 - (b) a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 45AJ, 45AK, 46 or 46A, Part IVB, section 55B, Part IVB, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD or a civil penalty provision of the consumer data rules applies;

it is necessary to establish the state of mind of the body corporate
it is sufficient to show that:

- (c) a director, employee or agent of the body corporate engaged in that conduct; and
- (d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
- (e) the director, employee or agent had that state of mind.

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

- (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

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

(3) If, in:

- (a) a prosecution for an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1) in respect of conduct engaged in by a person other than a body corporate; or
- (b) a proceeding under this Part in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which section 45AJ or 45AK, Part IVB, section 45AL, Part V, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD or a civil penalty provision of the consumer data rules applies;

it is necessary to establish the state of mind of the person, it is sufficient to show that:

- (c) an employee or agent of the person engaged in that conduct; and
- (d) the employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
- (e) the employee or agent had that state of mind.

(4) Conduct engaged in on behalf of a person other than a body corporate:

- (a) by an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

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

(4A) If:

- (a) a person other than a body corporate is convicted of an offence; and
- (b) subsection (3) or (4) applied in relation to the conviction on the basis that the person was the person first mentioned in that subsection; and

- (c) the person would not have been convicted of the offence if that subsection had not been enacted;

the person is not liable to be punished by imprisonment for the offence.

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

ences

If, in any proceedings under this Part against a person other than a body corporate, it appears to the Court that the person has or may have:

- (a) engaged in conduct in contravention of a provision of Part IV; or
- (aa) engaged in conduct in contravention of section 60C or section 60D; or
- (b) engaged in conduct referred to in paragraph 76(1)(b), paragraph 76(1)(c), paragraph 76(1)(d), (e) or (f);

but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit.

sdiction of courts

- (1AA) A reference in this section to this Act, or to a Part, Division or section of this Act, is a reference to this Act, or to that Part, Division or section, as it has effect as a law of the Commonwealth.

- (1) Jurisdiction is conferred on the Federal Court in any matter arising under this Act or the consumer data rules in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part.

- (1A) Jurisdiction is conferred on the Federal Circuit Court in any matter arising under section 46, Part IVB, section 55B, subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules in respect of which a civil proceeding is instituted by a person other than the Minister.

- (2) The several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise, and subject to the Constitution, jurisdiction is conferred on the several courts of the Territories, with respect to any matter arising under Part IVB, section 55B, subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer data rules in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.

- (3) Nothing in subsection (2) shall be taken to enable an inferior court of a State or Territory to grant a remedy other than a remedy of a kind that the court is able to grant under the law of that State or Territory.

- (3A) The Supreme Court of a State is invested with federal jurisdiction with respect to any matter in respect of which a civil proceeding covered by section 45AI is instituted in that Court.

- (3B) Subject to the Constitution, the Supreme Court of a Territory

(3B) Subject to the Constitution, the Supreme Court of a Territory conferred with jurisdiction with respect to any matter in respect of which a civil proceeding covered by section 45AI is instituted in that Court.

- (4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:
- (a) the jurisdiction of the Federal Circuit Court under subsection (1A); and
 - (b) the jurisdiction of the several courts of the States and Territories under subsection (2); and
 - (ba) the jurisdiction of the Supreme Courts of the States under subsection (3A); and
 - (bb) the jurisdiction of the Supreme Courts of the Territories under subsection (3B); and
 - (c) the jurisdiction of the High Court under section 75 of the Constitution.

Limit on jurisdiction of Federal Circuit Court

If proceedings under section 82 are instituted in, or transferred to, the Federal Circuit Court, the Federal Circuit Court does not have jurisdiction to award an amount for loss or damage that exceeds:

- (a) \$750,000; or
- (b) if another amount is specified in the regulations—that amount.

Note: For transfers from the Federal Court to the Federal Circuit Court, see section 32AB of the *Federal Court of Australia Act 1976*. For transfers from the Federal Circuit Court to the Federal Court, see section 39 of the *Federal Circuit Court of Australia Act 1999*.

Transfer of matters

- (1) Where:
- (a) a civil proceeding instituted (whether before or after the commencement of this section) by a person other than the Minister or the Commission is pending in the Federal Court; and
 - (b) a matter for determination in the proceeding arose under Part IVB, section 55B, subsection 56BO(1) or 56BU(1), section 56CD or a civil penalty provision of the consumer rules;
- the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Court's own motion, transfer to a court of a State or Territory the matter referred to in paragraph (b) and may also transfer to that court any other matter for determination in the proceeding.
- (2) The Federal Court shall not transfer a matter to another court under subsection (1) unless the other court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:
- (a) the matter arises out of or is related to a proceeding then pending in the other court; or
 - (b) it is otherwise in the interests of justice that the matter be determined by the other court.
- (3) Where the Federal Court transfers a matter to another court under subsection (1):
- (a) further proceedings in the matter shall be as directed by the Federal Court.

other court; and

- (b) the judgment of the other court in the matter is enforced throughout Australia and the external Territories as if it were a judgment of the Federal Court.

Non-punitive orders

- (1) The Court may, on application by the Commission, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
- (1A) The Court may, on application by the Director of Public Prosecutions, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct that is:
 - (a) a contravention of section 45AF or 45AG; or
 - (b) an involvement in a contravention of section 45AF or 45AG.
- (2) The orders that the Court may make in relation to the person are:
 - (a) except in the case of contravening conduct that relates to section 60C or 60K—a community service order; and
 - (b) except in the case of contravening conduct that relates to section 60C or 60K—a probation order for a period of not more than 3 years; and
 - (c) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is specified, being information that the person has possession of or access to; and
 - (d) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) This section does not limit the Court's powers under any other provision of this Act.
- (4) In this section:

community service order, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:

- (a) is specified in the order; and
- (b) relates to the conduct;

for the benefit of the community or a section of the community.

Example: The following are examples of community service orders:

- (a) an order requiring a person who has made false representation to make available a training video which explains advertising obligations under this Act; and
- (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.

contravening conduct means conduct that:

- (a) contravenes Part IV or IVB, section 55B, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD, section 60C, 60K or 92 or a civil penalty provision of the consumer data rules; or
- (b) constitutes an involvement in a contravention of any of those provisions.

probation order, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in contravening conduct, similar conduct or related conduct during the period of the order.

the period of the order, and includes:

- (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure the awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (b) an order directing the person to establish an education or training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

Adverse publicity orders—adverse publicity

- (1) The Court may, on application by the Commission, make an adverse publicity order in relation to a person who:
 - (a) has been ordered to pay a pecuniary penalty under section 76; or
 - (b) is guilty of an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1).

(1A) The Court may, on application by the Director of Public Prosecutions, make an adverse publicity order in relation to a person who is guilty of an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1).

- (2) In this section, an **adverse publicity order**, in relation to a person, means an order that:
 - (a) requires the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession or access to; and
 - (b) requires the person to publish, at the person's expense in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

- (3) This section does not limit the Court's powers under any other provision of this Act.

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, attempted to contravene or has been involved in a contravention of Part IV, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD or a civil penalty provision of the consumer data rules; and
 - (b) the Court is satisfied that the disqualification is justified.

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

(1A) On application by the Director of Public Prosecutions, the Court

- (2) On application by the Director of Public Prosecutions, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate:
- (a) the Court is satisfied that the person has contravened or been involved in a contravention of section 45AF or 45AG, subsection 56BN(1) or 56CC(1); and
 - (b) the Court is satisfied that the disqualification is justified.

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

- (2) In determining under subsection (1) or (1A) whether the disqualification is justified, the Court may have regard to:
- (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.

- (3) The Commission must notify ASIC if the Court makes an order under subsection (1). The Commission must give ASIC a copy of the order.

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

- (3A) The Director of Public Prosecutions must notify ASIC if the Court makes an order under subsection (1A). The Director of Public Prosecutions must give ASIC a copy of the order.

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

- (3B) For the purposes of this Act (other than this section or section 86F), an order under this section is not a penalty.

- (4) In this section:

ASIC means the Australian Securities and Investments Commission.

Privilege against exposure to penalty—disqualification from managing corporations

Court proceeding

- (1) In a civil or criminal proceeding under, or arising out of, this Act or the consumer data rules, a person is not entitled to refuse or fail to comply with a requirement:
- (a) to answer a question or give information; or
 - (b) to produce a document or any other thing; or
 - (c) to do any other act;

on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

- (2) Subsection (1) applies whether or not the person is a defendant in the proceeding or in any other proceeding.

Statutory requirement

- (3) A person is not entitled to refuse or fail to comply with a requirement under this Act or the consumer data rules:
- (a) to answer a question or give information; or
 - (b) to produce a document or any other thing; or

(c) to do any other act;
on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

Definition

(4) In this section:

penalty includes forfeiture.

Interim orders

(1) Without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against section 45AF or 45AG or subsection 56BN(1) or 56CC(1), the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person who was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV or Division 2 of Part IVB, or of section 55B, subsection 56BO(1) or 56BU(1), section 56CD, 60C or 60K or a civil penalty provision of the consumer data rules, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 86C, 86D or 86E, make such order or orders as it thinks appropriate against the person who engaged in the conduct or person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of sections 51ADB and 80, the Court may:

(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Division 2 of Part IVB, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD, 60C or 60K or a civil penalty provision of the consumer data rules; or

(b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), Division 2 of Part IVB, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD, 60C or 60K or a civil penalty provision of the consumer data rules; or

(baa) on the application of the Commission in accordance with subsection (1BAA) on behalf of a class of persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 55B, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56CD or a civil penalty provision of the consumer data rules; or

(ba) on the application of the Director of Public Prosecution in accordance with subsection (1BA) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 45AF or 45AG or subsection 56BN(1) or 56CC(1):

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the orders or orders concerned will:

- (c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or
- (d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(1B) The Commission may make an application under paragraph (b) on behalf of one or more persons identified in the application who:

- (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision referred to in that paragraph
- (b) have, before the application is made, consented in writing to the making of the application.

(1BAA) The Commission may make an application under paragraph (baa) on behalf of a class of persons identified in the application who have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision referred to in that paragraph.

(1BA) The Director of Public Prosecutions may make an application under paragraph (1A)(ba) on behalf of one or more persons identified in the application who:

- (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision referred to in that paragraph
- (b) have, before the application is made, consented in writing to the making of the application.

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IV, Division 2 of Part IVB, subsection 56BN(1), 56BO(1), 56BU(1) or 56CC(1), section 56C or 60K or a civil penalty provision of the consumer data rules even if a proceeding has not been instituted under another provision in relation to that contravention.

(1CA) An application under subsection (1A) may be made at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

(2) The orders referred to in subsection (1) and (1A) are:

- (a) an order declaring the whole or any part of a contract or arrangement between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or the person who was involved in the contravention constituted the conduct, or of a collateral arrangement relating to such contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order
- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions

such a contract;

- (c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;
- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and
- (g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

(3) Where:

- (a) a provision of a contract made, whether before or after commencement of the *Trade Practices Amendment Act 1977* is unenforceable because of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or
- (b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47;

the Court may, on the application of a party to the contract, make an order:

- (c) varying the contract, or a collateral arrangement relating to the contract, in such manner as the Court considers just and equitable; or
- (d) directing another party to the contract to do any act in relation to the first-mentioned party that the Court considers just and equitable.

(4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.

(5) The powers conferred on the Court under this section in relation to a contract do not affect any powers that any other court may have in relation to the contract in proceedings instituted in that other court in respect of the contract.

(6) In subsection (2), **interest**, in relation to land, means:

- (a) a legal or equitable estate or interest in the land; or
- (b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
- (c) a right, power or privilege over, or in connection with, land.

Special provision relating to Court's exercise of powers under this Part in relation to boycott conduct

(1) In exercising its powers in proceedings under this Part in relation to boycott conduct, the Court is to have regard to any action that an applicant in the proceedings has taken, or could take, before a relevant industrial authority in relation to the boycott conduct. In particular, the Court is to have regard to any application for conciliation that the applicant has made or could make.

(2) In this section:

boycott conduct means conduct that constitutes or would constitute:

- (a) a contravention of subsection 45D(1), 45DA(1), 45DB(1), 45E(2) or 45E(3) or section 45EA; or
- (b) attempting to contravene one of those provisions; or
- (c) aiding, abetting, counselling or procuring a person to contravene one of those provisions; or
- (d) inducing, or attempting to induce, a person (whether by threats, promises or otherwise) to contravene one of those provisions; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of one of those provisions; or
- (f) conspiring with others to contravene one of those provisions.

industrial authority means:

- (a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a law of a State to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or
- (b) a special board constituted under a law of a State relating to factories; or
- (c) any other State board, court, tribunal, body or official prescribed by the regulations for the purposes of this definition.

Enforcement of undertakings

(1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X) or the consumer data rules.

(1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter with the authorisation of the Commission.

(2) The person may withdraw or vary the undertaking at any time but only with the consent of the Commission.

(3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may

undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).

- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
- (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.

Enforcement of undertakings—Secretary of the Department

- (1) The Secretary of the Department may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Secretary has power or function under this Act.
- (2) The person may withdraw or vary the undertaking at any time but only with the consent of the Secretary of the Department.
- (3) If the Secretary of the Department considers that the person who gave the undertaking has breached any of its terms, the Secretary may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
- (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.

Intervention by Commission

- (1) The Commission may, with the leave of the Court and subject to any conditions imposed by the Court, intervene in any proceeding instituted under this Act.
- (2) If the Commission intervenes in a proceeding, the Commission is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

Part 7A—Proportionate liability for misleading and deceptive conduct

Application of Part

- (1) This Part applies to a claim (an **apportionable claim**) if the claim is a claim for damages made under section 236 of the Australian Consumer Law for:

(a) economic loss; or

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 52 of the Australian Consumer Law.

(2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Part, a **concurrent wrongdoer**, in relation to a claim, means a person who is one of 2 or more persons whose acts or omissions (or any act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

Certain concurrent wrongdoers not to have benefit of apportionment

(1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an **excluded concurrent wrongdoer**) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim;

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting the proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for no more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent

under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rule 19.1 of the Rules of Court or otherwise.

Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

(1) If:

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (**other person**) may be a concurrent wrongdoer in relation to the claim; and

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:

(i) the identity of the other person; and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part in respect of a concurrent wrongdoer in relation to an apportionable claim:

(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant) and

(b) cannot be required to indemnify any such wrongdoer.

Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

Application of Part

Nothing in this Part:

- (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

PART 1B—Claims for damages or compensation for death or personal injury

Division 1—Introduction

Definitions

In this Part, unless the contrary intention appears:

applicable percentage has the meaning given by subsection 87Q(2).

average weekly earnings has the meaning given by section 87R.

capable parent or guardian, of a minor, means a person who is a parent or guardian of the minor, and who is not under a disability.

date of discoverability has the meaning given by section 87S.

gratuitous attendant care services has the meaning given by subsection 87W(5).

incapacitated person means a person who is incapable of, or substantially impeded in, the management of his or her affairs in relation to a proceeding under this Act because of:

- (a) any disease, or any impairment of his or her mental condition; or
- (b) restraint of his or her person, lawful or unlawful, including detention or custody under a law of a State or Territory relating to mental health; or
- (c) war or warlike operations, or circumstances arising out of war or warlike operations.

index number has the meaning given by section 87N.

long-stop period has the meaning given by section 87H.

maximum amount of damages for non-economic loss has the meaning given by section 87M.

minor means a person under 18.

most extreme case has the meaning given by subsection 87F(2).

non-economic loss means any one or more of the following:

- (a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of expectation of life;
- (d) disfigurement.

personal injury damages means damages or compensation for loss or damage that is, or results from, the death of or personal injury to a person.

plaintiff, in relation to a proceeding, means:

- (a) if the proceeding is a proceeding that the Commission commences under paragraph 87(1A)(b), or under section 237(1)(b) of the Australian Consumer Law—a person on whose behalf the Commission commences the proceeding; or
- (aa) if the proceeding is a proceeding that the Director of Public Prosecutions commences under paragraph 87(1A)(ba)—a person on whose behalf the Director of Public Prosecutions commences the proceeding; or
- (b) in any other case—the person by whom the proceeding is brought (however described).

proceeding to which this Part applies means a proceeding referred to in section 87E.

quarter means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

smoking has the same meaning as in the *Tobacco Advertising Prohibition Act 1992*.

tobacco product has the same meaning as in the *Tobacco Advertising Prohibition Act 1992*.

Proceedings to which this Part applies

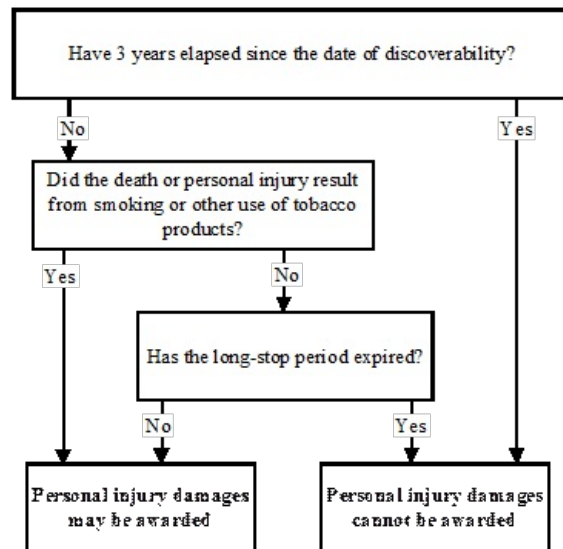
- (1) This Part applies to proceedings taken under the Australian Consumer Law:
 - (a) that relate to Part 2-2, 3-3, 3-4 or 3-5, or Division 2 of Part 5-4, of the Australian Consumer Law; and
 - (b) in which the plaintiff is seeking an award of personal injury damages; and
 - (c) that are not proceedings in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.
- (2) However, for the purposes of Divisions 2 and 7, paragraph (1) does not apply.

Division 2—Limitation periods

Basic rule

- (1) A court must not award personal injury damages in a proceeding to which this Part applies if the proceeding was commenced:
 - (a) after the end of the period of 3 years after the date of discoverability for the death or injury to which the personal injury damages would relate; or
 - (b) after the end of the long-stop period for that death or injury.
- (1A) However, paragraph (1)(b) does not apply in relation to a proceeding in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.

- (2) This diagram shows when this Division prevents an award of personal injury damages.



ate of discoverability

Definition

- (1) The **date of discoverability** for the death or injury is the first date when the plaintiff in the proceeding knows or ought to know each of the following:
- that the death or personal injury has occurred;
 - that the death or personal injury was attributable to a contravention of this Act;
 - that in the case of a personal injury—the injury was significant enough to justify bringing an action.

Constructive knowledge

- (2) For the purposes of subsection (1), the plaintiff **ought to know** a fact if the plaintiff would have ascertained the fact had the plaintiff taken all reasonable steps before the date in question to ascertain the fact.

Use of the plaintiff's conduct and statements

- (3) In determining what the plaintiff knows or ought to have known, the court may have regard to the plaintiff's conduct, and to the plaintiff's oral or written statements.

Minors

- (4) If the plaintiff is a minor, facts that a capable parent or guardian of the plaintiff knows or ought to know are taken for the purposes of subsection (1) to be facts that the plaintiff knows or ought to know.

Incapacitated persons

- (5) If:
- the plaintiff is an incapacitated person; and
 - there is a guardian of the plaintiff, or other person to manage all or part of the plaintiff's estate, under a law of the State or Territory relating to the protection of incapacitated persons;

facts that the guardian or other person knows or ought to know are taken for the purposes of subsection (1) to be facts that the plaintiff knows or ought to know.

- (6) Despite subsection (1), if the plaintiff brings the proceeding on the capacity of the personal representative of a deceased person, the ***date of discoverability*** for the death or injury is the earlier of:
- (a) if, had the deceased person commenced a proceeding, in relation to the contravention to which the death or injury relates, before his or her death, the date of discoverability under subsection (1) would have occurred more than 3 years before the death—that date; or
 - (b) if, at the time of the plaintiff's appointment as personal representative, the plaintiff knew, or ought to have known, of the matters referred to in paragraphs (1)(a), (b) and (c)—the date of the appointment; or
 - (c) if the first time at which the plaintiff knew, or ought to have known, all of the matters referred to in paragraphs (1)(a), (b) and (c) was after the date of appointment—the date of that time.

Long-stop period

- (1) The ***long-stop period*** for the death or injury of a person is:
- (a) the period of 12 years following the act or omission alleged to have caused the death or injury; or
 - (b) that period as extended by the court.
- (2) The court must not extend the period by more than 3 years beyond the date of discoverability for the death or injury.
- (3) In considering whether to extend the period, the court must regard to the justice of the case, and, in particular, must have regard to:
- (a) whether the passage of time has prejudiced a fair trial;
 - (b) the nature and extent of the person's loss or damage; and
 - (c) the nature of the defendant's conduct alleged to have caused the death or injury; and
 - (d) the nature of the defendant's conduct since the alleged act or omission.

The effect of minority or incapacity

In working out whether the period of 3 years after the date of discoverability, or the long-stop period, has expired, disregard the period during which the plaintiff has been:

- (a) a minor who is not in the custody of a capable parent or guardian; or
- (b) an incapacitated person in respect of whom there is no guardian, and no other person to manage all or part of the person's estate, under a law of a State or Territory relating to the protection of incapacitated persons.

The effect of close relationships

- (1) If:
- (a) a cause of action to which the proceeding relates is founded on the death or injury to a person (the ***victim***) who was a minor at the time of the act or omission alleged to have caused the death or injury; and
 - (b) the proceeding is taken against a person who was at the time:

- (i) a parent or guardian of the victim; or
- (ii) a person in a close relationship with a parent or guardian of the victim;

in working out whether the period of 3 years after the date of discoverability, or the long-stop period, has expired, disregard period:

- (c) before the victim turns 25; or
- (d) if the victim dies before turning 25—before the victim's death.

(2) For the purposes of subparagraph (1)(b)(ii), a person is taken to be in a **close relationship** with a parent or guardian of the victim if the person's relationship with the parent or guardian is such that:

- (a) the person might influence the parent or guardian not to bring a claim on behalf of the victim against the person; or
- (b) the victim might be unwilling to disclose to the parent or guardian the acts, omissions or events in respect of which the cause of action is founded.

Division 3—Limits on personal injury damages for non-economic loss

Section 86—Limits on damages for non-economic loss

A court must not, in a proceeding to which this Part applies, award as personal injury damages for non-economic loss an amount that exceeds the amount (if any) permitted under this Division.

Section 87—Maximum amount of damages for non-economic loss

- (1) The **maximum amount of damages for non-economic loss** is:
- (a) during the year in which this Part commences—\$250,000;
 - (b) during a later year—the amount worked out (to the nearest multiple of \$10) as follows:

$$\text{Previous maximum amount} \times \frac{\text{Current September CPI number}}{\text{Previous September CPI number}}$$

where:

current September CPI number is the index number for the quarter ending on 30 September in the year immediately preceding that later year.

previous maximum amount is the maximum amount of damages for non-economic loss during the year immediately preceding that later year.

previous September CPI number is the index number for the quarter ending on the 30 September immediately preceding the 30 September referred to in the definition of **current September CPI number**.

- (2) If an amount worked out under paragraph (1)(b) is a multiple of \$5 (but not a multiple of \$10), round the amount up to the nearest multiple of \$10.
- (3) This section does not affect the operation of section 86AA.

Section 88—Index numbers

- (1) The **index number** for a quarter is the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.
- (2) Subject to subsection (3), if, at any time before or after the

commencement of this Act:

- (a) the Australian Statistician has published or publishes a index number in respect of a quarter; and
- (b) that index number is in substitution for an index number previously published by the Australian Statistician in respect of that quarter;

disregard the publication of the later index number for the purposes of this section.

(3) If, at any time, the Australian Statistician has changed or changes the index reference period for the Consumer Price Index, then, in applying this section after the change took place or takes place, have regard only to index numbers published in terms of the new index reference period.

(4) In this section:

Australian Statistician means the Australian Statistician referred to in subsection 5(2) of the *Australian Bureau of Statistics Act 1975*.

Most extreme cases

- (1) The court must not award as personal injury damages for non-economic loss the maximum amount of damages for non-economic loss except in a most extreme case.
- (2) A **most extreme case** is a case in which the plaintiff suffers non-economic loss of the gravest conceivable kind.

Cases of 33% or more (but not 100%) of a most extreme case

- (1) If the non-economic loss the plaintiff suffers is at least 33%, less than 100%, of a most extreme case, the court must not award as personal injury damages for non-economic loss an amount that exceeds the applicable percentage of the maximum amount of damages for non-economic loss.
- (2) The **applicable percentage** is the extent of the non-economic loss the plaintiff suffers, expressed as a percentage of a most extreme case.

Cases of 15% or more (but less than 33%) of a most extreme case

If the non-economic loss the plaintiff suffers is at least 15%, less than 33%, of a most extreme case, the court must not award personal injury damages for non-economic loss an amount that exceeds the amount set out in the following table:

| Cases of 15% or more (but less than 33%) of a most extreme case | | |
|---|--|--|
| Item | Severity of the non-economic loss (as a proportion of a most extreme case) | Damages for non-economic loss (as a proportion of the maximum amount of damages for non-economic loss) |
| 1 | 15% | 1% |
| 2 | 16% | 1.5% |
| 3 | 17% | 2% |
| 4 | 18% | 2.5% |
| 5 | 19% | 3% |
| 6 | 20% | 3.5% |
| 7 | 21% | 4% |
| 8 | 22% | 4.5% |
| 9 | 23% | 5% |
| 10 | 24% | 5.5% |

| | | |
|----|-----|------|
| 11 | 25% | 6.5% |
| 12 | 26% | 8% |
| 13 | 27% | 10% |
| 14 | 28% | 14% |
| 15 | 29% | 18% |
| 16 | 30% | 23% |
| 17 | 31% | 26% |
| 18 | 32% | 30% |

ases of less than 15% of a most extreme case

If the non-economic loss the plaintiff suffers is less than 15% of a most extreme case, the court must not award personal injury damages for non-economic loss.

Referring to earlier decisions on non-economic loss

- (1) In determining personal injury damages for non-economic loss, the court may refer to earlier decisions of the court or of other courts for the purpose of establishing the appropriate award in the proceeding.
- (2) For that purpose, the parties to the proceeding or their counsel may bring the court's attention to awards of personal injury damages for non-economic loss in those earlier decisions.
- (3) This section does not affect the rules for determination of other damages or compensation.

Part 4—Limits on personal injury damages for loss of earning capacity

Personal injury damages for loss of earning capacity

In determining, in a proceeding to which this Part applies, personal injury damages for:

- (a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
- (b) future economic loss due to the deprivation or impairment of earning capacity; or
- (c) the loss of expectation of financial support;

a court must disregard the amount by which the plaintiff's gross weekly earnings during any quarter would (but for the personal injury or death in question) have exceeded:

- (d) if, at the time the award was made, the amount of average weekly earnings for the quarter was ascertainable—an amount that is twice the amount of average weekly earnings for that quarter; or
- (e) if:
 - (i) at the time the award was made, the amount of average weekly earnings for the quarter was not ascertainable; or
 - (ii) the award was made during, or before the start of, a quarter;

an amount that is twice the amount of average weekly earnings for the quarter that, at the time the award was made, was the most recent quarter for which the amount of average weekly earnings was ascertainable.

Average weekly earnings

- (1) **Average weekly earnings**, for a quarter, means the amount
 - (a) published by the Australian Statistician as the average

weekly earnings for all employees (total earnings, seasonal adjusted) for the reference period in that quarter; or

(b) if the Australian Statistician fails or ceases to publish the amount referred to in paragraph (a)—the amount determined in the manner specified in the regulations.

(2) Regulations made for the purposes of paragraph (1)(b) may specify matters by reference to which an amount is to be determined.

(3) In this section:

reference period, in a quarter, is the period described by the Australian Statistician as the pay period ending on or before a specified day that is the third Friday of the middle month of the quarter.

Division 5—Limits on personal injury damages for gratuitous attendant care services

Personal injury damages for gratuitous attendant care services for plaintiff

(1) A court must not, in a proceeding to which this Part applies, award personal injury damages for gratuitous attendant care services for the plaintiff, except in accordance with this section.

(2) The court must be satisfied that:

- (a) there is (or was) a reasonable need for the services to be provided; and
- (b) the need has arisen (or arose) solely because of personal injury to which the personal injury damages relate; and
- (c) the services would not be (or would not have been) provided to the plaintiff but for the injury; and
- (d) the services are provided (or are to be provided) for at least 6 hours per week; and
- (e) the services are provided (or are to be provided) over a period of at least 6 months.

(3) If the services were provided during a quarter for which, at the time the award was made, the amount of average weekly earnings was ascertainable, the court must not award as personal injury damages for the services:

- (a) if the services were provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for that quarter; or
- (b) if the services were provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.

(4) If the services:

- (a) were provided during a quarter for which, at the time the award was made, the amount of average weekly earnings was not ascertainable; or

(b) are to be provided after the time the award was made; the court must not award as personal injury damages for the services:

- (c) if the services were provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for the quarter that, at the time the award was made, was the most recent quarter for which the amount of average weekly earnings was ascertainable; or

(d) if the services were provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.

(5) **Gratuitous attendant care services** are services that one person provides to another person:

(a) that:

(i) are of a domestic nature; or

(ii) relate to nursing; or

(iii) aim to alleviate the consequences of a personal injury and

(b) for which the other person has not paid or is not liable to pay.

Personal injury damages for loss of plaintiff's capacity to provide gratuitous attendant care services

(1) A court must not, in a proceeding to which this Part applies, award personal injury damages for loss of the plaintiff's capacity to provide gratuitous attendant care services to other persons, except in accordance with this section.

(2) The court must be satisfied that:

(a) prior to his or her loss of capacity to provide the services the plaintiff had provided the services:

(i) for at least 6 hours per week; and

(ii) over a period of at least 6 months; and

(b) the other person would have been entitled, if the plaintiff had died as a result of the contravention of this Act to which the award relates, to recover damages under a law of a State or Territory for loss of the plaintiff's services.

(3) If the plaintiff would have provided the services during a quarter for which, at the time the award was made, the amount of average weekly earnings was ascertainable, the court must not award personal injury damages for the services:

(a) if the services would have been provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for that quarter; and

(b) if the services would have been provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.

(4) If the plaintiff:

(a) would have provided the services during a quarter for which, at the time the award was made, the amount of average weekly earnings was not ascertainable; or

(b) would have provided the services after the time the award was made;

the court must not award as personal injury damages for the services:

(c) if the services were provided for at least 40 hours per week—an amount per week that exceeds average weekly earnings for the quarter that, at the time the award was made, was the most recent quarter for which the amount of average weekly earnings was ascertainable; or

(d) if the services were provided for less than 40 hours per week—an amount per hour that exceeds $\frac{1}{40}$ of average weekly earnings for that quarter.

Part 6—Other limits on personal injury damages

Damages for future economic loss—discount rate

- (1) If an award of personal injury damages in a proceeding to which this Part applies is to include any component, assessed as a lump sum, for future economic loss of any kind, the present value of future economic loss is to be determined by applying:
 - (a) a discount rate of the percentage prescribed by the regulations; or
 - (b) if no percentage is prescribed—a discount rate of 5%.
- (2) A regulation made for the purposes of paragraph (1)(a) does not commence before the end of the period of 6 months starting:
 - (a) if the regulation is laid before each House of the Parliament under section 38 of the *Legislation Act 2003* on the same day on that day; or
 - (b) if it is laid before each House of the Parliament under that section on different days—on the later of those days.
- (3) Except as provided by this section, this section does not affect any other law relating to the discounting of sums awarded as damages or compensation.

Damages for loss of superannuation entitlements

A court must not, in a proceeding to which this Part applies, award personal injury damages for economic loss due to the loss of employer superannuation contributions an amount that exceeds the following amount:

$$\text{Superannuation percentage} \times \text{Damages for earnings loss}$$

where:

damages for earnings loss are the personal injury damages payable (in accordance with this Part) for:

- (a) any past economic loss due to loss of earnings, or the deprivation or impairment of earning capacity, on which the entitlement to those contributions is based; and
- (b) any future economic loss due to the deprivation or impairment of earning capacity on which the entitlement to those contributions would be based.

superannuation percentage is the highest employer's charge percentage for a quarter under section 19 of the *Superannuation Guarantee (Administration) Act 1992*.

Interest on damages

- (1) A court must not, in a proceeding to which this Part applies, order the payment of interest on personal injury damages for:
 - (a) non-economic loss; or
 - (b) gratuitous attendant care services for the plaintiff; or
 - (c) loss of the plaintiff's capacity to provide gratuitous attendant care services to other persons.
- (2) If, in a proceeding to which this Part applies, a court is satisfied that interest is payable on personal injury damages of another kind, the rate of interest to be used in working out the interest is:
 - (a) the rate of interest prescribed by the regulations; or
 - (b) if no rate is prescribed—the 10-year benchmark bond rate on the day on which the court determines the personal injury damages.
- (3) This section does not affect the payment of interest on a debt.

under a judgment or order of a court.

(4) In this section:

10-year benchmark bond rate, on a day, means:

- (a) if the day occurs on or after 1 March in a particular year and before 1 September in that year—the Commonwealth Government 10-year benchmark bond rate:
 - (i) as published by the Reserve Bank of Australia in the Reserve Bank of Australia Bulletin (however described) and
 - (ii) applying on the first business day of January in the year; or
- (b) otherwise—the Commonwealth Government 10-year benchmark bond rate, as so published, applying on the first business day of July in the preceding year.

business day means a day other than a Saturday, a Sunday or public or bank holiday in any State, the Australian Capital Territory or the Northern Territory.

Exemplary and aggravated damages

- (1) A court must not, in a proceeding to which this Part applies, award exemplary damages or aggravated damages in respect of death or personal injury.
- (2) This section does not affect whether a court has power to award exemplary damages or aggravated damages:
 - (a) otherwise than in respect of death or personal injury; or
 - (b) in a proceeding other than a proceeding to which this Part applies.

Part 7—Structured settlements

Court may make orders under section 87 for structured settlements

- (1) In a proceeding to which this Part applies, a court may, on the application of the parties, make an order under section 87 approving a structured settlement, or the terms of a structured settlement, even though the payment of damages is not in the form of a lump sum award of damages.
- (2) This section does not limit the powers of a court to make an order under section 87 in a proceeding that is not a proceeding to which this Part applies.
- (3) In this section:

structured settlement means an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

Part II—Authorisations and notifications

Division 1—Authorisations

Definitions

- (1) In this Division:

industry code of practice means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

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

- (2) A reference in this Division to a proposal of the Commission is a reference to a notice of the Commission:
- (a) so far as the revocation of an authorization is concerned under subsection 91B(3); and
 - (b) so far as the revocation of an authorization and the substitution of another—under subsection 91C(3).

Commission may grant authorisations

Granting an authorisation

- (1) Subject to this Part, the Commission may, on an application from a person, grant an authorisation to a person to engage in conduct specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

Note: For an extended meaning of engaging in conduct, see subsection 91A(1).

Effect of an authorisation

- (2) While the authorisation remains in force, the provisions of Part IV specified in the authorisation do not apply in relation to conduct to the extent that it is engaged in by:
- (a) the applicant; and
 - (b) any other person named or referred to in the authorisation as a person who is engaged in, or who is proposed to be engaged in, the conduct; and
 - (c) any particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct.

Conditions

- (3) The Commission may specify conditions in the authorisation. Subsection (2) does not apply if any of the conditions are not complied with.
- (4) Without limiting subsection (3), the Commission may grant a merger authorisation on the condition that a person must give and comply with, an undertaking to the Commission under section 91.

Single authorisation may deal with several types of conduct

- (5) The Commission may grant a single authorisation for all the conduct specified in an application for authorisation, or may grant separate authorisations for any of the conduct.

Past conduct

- (6) The Commission does not have power to grant an authorisation for conduct engaged in before the Commission decides the application for the authorisation.

Withdrawing an application

- (7) An applicant for an authorisation may at any time, by written notice to the Commission, withdraw the application.

Procedure for applications and the keeping of a register

- (1) To be valid, an application for an authorisation, a minor variation of an authorisation, a revocation of an authorisation, or a revocation of an authorisation and the substitution of another authorisation, must:

- (a) be in a form approved by the Commission in writing and contain the information required by the form; and
- (b) be accompanied by any other information or document prescribed by the regulations; and
- (c) be accompanied by the fee (if any) prescribed by the regulations.

(1AA) Without limiting paragraph (1)(a), the form may require an application for a merger authorisation to contain an undertaking under section 87B that the applicant will not make the acquisition to which the authorisation relates while the Commission is considering the application.

(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;
- (b) giving reasons why the purported application does not comply with this Division.

(1B) For the purposes of subsection (1A), **business day** means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

(2) If the Commission receives an application referred to in subsection (1), the Commission must cause notice of the receipt of that application to be made public in such manner as it thinks fit.

(3) The Commission must keep a register of:

- (a) applications for authorizations; and
- (b) applications for minor variations of authorizations; and
- (c) applications for, or the Commission's proposals for, the revocation of authorizations; and
- (d) applications for, or the Commission's proposals for, the revocation of authorizations and the substitution of other authorizations;

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

(4) Subject to this section, the register kept under subsection (3) shall include:

- (a) any document furnished to the Commission in relation to an application or proposal referred to in subsection (3);
- (aa) any draft determination, and any summary of reasons, given by the Commission that is furnished to a person under section 90A, or under that section as applied by section 90B;
- (ab) any record of a conference made in accordance with subsection 90A(8), or with that subsection as applied by section 91C, and any certificate in relation to a conference given under subsection 90A(9), or under that subsection as applied;
- (b) particulars of any oral submission made to the Commission in relation to such an application or proposal; and
- (c) the determination of the Commission on such an application or proposal and the statement of the reasons given by the Commission for that determination.

(5) Where a person furnishes a document to the Commission in relation to an application or proposal referred to in subsection (3) or makes an oral submission to the Commission in relation to:

an application or proposal, he or she may, at the time when the document is furnished or the submission is made, request that document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (3) by reason of the confidential nature of any of the matters contained in the document or submission.

(5A) Where such a request is made:

(a) if the document or the part of the document, or the submission or the part of the submission, to which the request relates contains particulars of:

(i) a secret formula or process;

(ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or

(iii) the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (3); and

(b) in any other case—the Commission may, if it is satisfied it is desirable to do so by reason of the confidential nature of the matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(5B) If the Commission refuses a request to exclude a document or part of a document from the register kept under subsection (3), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (4)(a) does not apply in relation to the document or part of the document.

(5C) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (3), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (4)(b) does not apply in relation to the submission or that part of the submission, as the case may be.

(5D) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (4)(a) or particulars referred to in paragraph (4)(b) from the register kept under subsection (3).

(5E) If a person requests, in accordance with subsection (5) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (3), the document or part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

(6) A document shall not be included in the register kept under subsection (3) if a direction in relation to that document was issued

force under paragraph 22(1)(b) of this Act immediately before commencement of the *Trade Practices Amendment Act 1977*.

- (7) The Commission may disclose information excluded under this section from the register kept under subsection (3) to such person and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application concerned.

Termination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorisation:
- (a) make a determination in writing granting such authorisation as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.

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

- (5) Before making a determination in respect of an application for authorisation other than a merger authorisation the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (6) Before making a determination in respect of an application for authorisation, the Commission may do any one or more of the following:

- (a) give any persons who appear to the Commission to be interested a written notice inviting submissions in respect of the application within a specified period;
- (b) give the applicant a written notice requesting the applicant to give the Commission, within a specified period, additional information relevant to making its determination in respect of the application;
- (c) give a person a written notice requesting the person to give the Commission, within a specified period, particular information relevant to making its determination in respect of the application;
- (d) consult with such persons as it considers reasonable and appropriate for the purposes of making its determination in respect of the application.

- (6A) In making a determination in respect of an application for authorisation, the Commission must take into account:

- (a) any submissions or information received under paragraph (6)(a), (b) or (c) within the period specified in the notice mentioned in that paragraph; and
- (b) any information obtained from consultations under paragraph (6)(d)).

The Commission may, but need not, take into account any submissions or information received after the end of those periods.

Note: Unless the application is for a merger authorisation, the Commission may instead rely on consultations undertaken by the AEMC: see section 90B.

- (7) The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless the Commission is satisfied in all the circumstances:

- (a) that the conduct would not have the effect, or would not

likely to have the effect, of substantially lessening competition or

(b) that:

(i) the conduct would result, or be likely to result, in a benefit to the public; and

(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

(8) Paragraph (7)(a) does not apply to the extent that any of the following provisions would (apart from an authorisation under section 88) apply to the conduct:

(a) one or more provisions of Division 1 of Part IV (cartel conduct);

(b) one or more of sections 45D to 45DB (secondary boycotts);

(ba) one or more provisions of section 45E or 45EA (contractual arrangements etc. affecting the supply or acquisition of goods or services);

(c) section 48 (resale price maintenance).

(9A) In relation to the Commission's consideration of an application for an authorisation to engage in conduct to which section 49 would not apply, or for a merger authorisation, in determining whether the conduct amounts to a benefit to the public for the purposes of paragraph (b):

(b):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of the Australian industry.

(10) If the Commission does not determine an application for an authorisation (other than an application for a merger authorisation) within the relevant period, then it is taken to have granted the application at the end of that period.

(10A) For the purposes of subsection (10), the **relevant period** is a 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;

(c) the applicant agrees to that period being so extended; the **relevant period** is that period as so extended.

(10B) Subject to subsections (12) and (13), if:

(a) the Commission does not determine an application for a merger authorisation within the 90-day period beginning on the day the Commission received the application; and

(b) the application is not an application for an overseas merger authorisation;

the Commission is taken to have refused, at the end of that period, to grant the authorisation applied for.

(11) Subject to subsections (12) and (13), if the Commission does not determine an application for an overseas merger authorisation within the relevant period, then it is taken to have granted the application at the end of that period.

- (a) 30 days from the day on which the application is received by the Commission; or
 - (b) if the Commission, before the end of that period of 30 days, gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application—the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide;
- the Commission shall be deemed to have granted, at the end of that period, the authorisation applied for.

(11A) The Commission may, within the 30 day period mentioned in subsection (11), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (11) to 30 days are to be treated as references to 45 days.

(12) If the applicant for an authorization informs the Commission in writing before the expiration of the period referred to in subsection (10B) or (11) (the **base period**) that the applicant agrees to the Commission taking a specified longer period for determination of the application, a reference to that longer period shall be deemed for the purposes of that application to be substituted in that subsection for the reference in that subsection to the base period.

(13) For the purposes of any application of subsection (12), a reference in that subsection to the base period shall, if a reference to another period is deemed by any other application or applications of that subsection to have been substituted in subsection (10B) or (11) for the reference in subsection (10B) or (11) to the base period, be construed as a reference to that other period.

(14) If a person to whom a notice has been sent under subsection 90A(2) in relation to a draft determination in respect of an application for an authorization notifies the Commission in accordance with subsection 90A(6) that he or she wishes the Commission to hold a conference in relation to the draft determination, the relevant period (worked out under subsection (10A) of this section) shall be deemed to be increased to a period equal to the period commencing on the day on which the first notification in relation to the draft determination was received by the Commission and ending on the seventh day after the day specified in the certificate given by a member of the Commission pursuant to subsection 90A(9) as the day on which the conference is terminated.

(15) Where a party to a joint venture makes at the one time two or more applications for authorizations (other than an application for a merger authorisation), being applications each of which deals with a matter relating to the joint venture:

- (a) the Commission shall not make a determination in respect of any one of those applications unless it also makes a determination or determinations at the same time in respect of the other application or other applications; and

- (b) if the Commission does not make a determination in relation to any one of the applications within the relevant period (worked out under subsection (10A)) in relation to that application, the Commission shall be deemed to have granted at the expiration of that period, all the authorizations applicable for.

Commission to afford opportunity for conference before determining application for authorisation

- (1) Before determining an application for an authorization (other than an application for a merger authorisation), the Commission shall prepare a draft determination in relation to the application.
- (2) The Commission shall, by notice in writing sent to the applicant and to each other interested person, invite the applicant or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.
- (3) If:
 - (a) the draft determination provides for the granting of the application unconditionally; and
 - (b) no person has made a written submission to the Commission opposing the application;each notice by the Commission under subsection (2) shall inform the person to whom the notice is sent that the draft determination so provides.
- (4) If:
 - (a) the draft determination does not provide for the granting of the application or provides for the granting of the application subject to conditions; or
 - (b) the draft determination provides for the granting of the application unconditionally but a written submission has, or written submissions have, been made to the Commission opposing the application;the Commission shall send with each notice under subsection (2) a copy of the draft determination and:
 - (c) in a case to which paragraph (a) applies—a summary of reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or
 - (d) in a case to which paragraph (b) applies—a summary of reasons why it is satisfied that the application should be granted unconditionally.
- (5) If each of the persons to whom a notice was sent under subsection (2):
 - (a) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the Commission to hold a conference in relation to the draft determination; or
 - (b) does not notify the Commission within that period that she wishes the Commission to hold such a conference;the Commission may make the determination at any time after the expiration of that period.
- (6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the Commission to hold a conference in relation to the draft determination, the Commission may make the determination at any time after the expiration of that period.

subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (being not more than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(7) At the conference:

- (a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft determination or nominated by the Chairperson; and
- (b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, by persons each of whom, is a director, officer or employee of the body corporate; and
- (c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and
- (e) no other person is entitled to be present.

(8) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(9) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

- (a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;
- (b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and
- (c) shall give a certificate certifying the day on which the first notification under subsection (6) in relation to the draft determination was received by the Commission and the day on which the conference terminated;

and any such certificate shall be received in all courts as prima facie evidence of the matters certified.

(10) A document purporting to be a certificate referred to in subsection (9) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(11) The Commission shall take account of all matters raised at the conference and may at any time after the termination of the conference make a determination in respect of the application.

(12) For the purposes of this section, **interested person** means a person who has notified the Commission in writing that he or she

or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that, in the opinion of the Commission, is real and substantial.

- (13) Where the Commission is of the opinion that two or more applications for authorizations that are made by the same person or by persons being bodies corporate that are related to each other involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application and may prepare one draft determination in relation to the applications and hold one conference in relation to that draft determination.

Commission may rely on consultations undertaken by the AEMC

- (1) This section applies if:
- (a) an application under section 88, 91A, 91B or 91C is made in relation to the National Electricity Rules or a provision of the Rules; and
 - (b) the AEMC has done the following:
 - (i) published the Rules or the provision and invited persons to make submissions to it on the Rules or the provision;
 - (ii) specified the effect of subsection (2) when it published the Rules or the provision;
 - (iii) considered any submissions that were received within the time limit specified by it when it published the Rules or the provision.
- (2) In making a determination under section 90, 91A, 91B or 91C:
- (a) the Commission may rely on the process mentioned in paragraph (1)(b), instead of undertaking the process mentioned in section 90A, subsection 91A(2), 91B(2) or 91C(2) or (5); and
 - (b) the Commission may take into account:
 - (i) any submissions mentioned in subparagraph (1)(b) and
 - (ii) any submissions, in respect of the application, made to the AEMC; and
 - (c) despite subsection 90(6A), the Commission may disregard any submissions, in relation to the application, made by the Commonwealth, by a State or Territory, or by any other person (other than the AEMC).

- (3) In this section:

National Electricity Rules means:

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

Term and variation of authorisations

- (1) An authorization may be expressed to be in force for a period specified in the authorization and, if so expressed, remains in force for that period only.

- (1A) An authorisation, other than an authorisation deemed to have been granted under subsection 90(10) or (11), comes into force on the day specified for the purpose in the authorisation, not being a day earlier than, and an authorisation deemed to have been granted under subsection 90(10) or (11) comes into force on:
- (a) where paragraph (b) or (c) does not apply—the end of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation;
 - (b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review;
 - (c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.
- (1B) A minor variation of an authorization comes into force on a day specified by the Commission in the determination making the variation, not being a day earlier than:
- (a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of the determination of the Commission in respect of the application for the minor variation; or
 - (b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or
 - (c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.
- (1C) If an authorization (the **prior authorization**) is revoked and another authorization is made in substitution for it, that other authorization comes into force on the day specified for the purpose in that other authorization, not being a day earlier than:
- (a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of an application, or the Commission's proposal, the revocation of the prior authorization and the substitution of that other authorization; or
 - (b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or
 - (c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.
- (2) If the Commission considers that it is appropriate to do so:
- (a) for the purpose of enabling due consideration to be given to:
 - (i) an application for an authorization; or
 - (ii) an application for a minor variation of an authorization; or
 - (iii) an application for the revocation of an authorization and the substitution of a new one; or
 - (b) pending the expiration of the time allowed for the making of an application to the Tribunal for review of a determination of the Commission of an application referred to in paragraph (a), and, if such an application for a review is made, pending the making of a determination by the Tribunal on the review;
 - (c) for any other reason;

the Commission may at any time:

- (d) in the case of an application for an authorization—grant an authorization that is expressed to be an interim authorization and
- (e) in the case of an application for a minor variation of an authorization—grant an authorization that is expressed to be an interim authorization dealing only with the matter the subject of the application for a variation; and
- (f) in the case of an application for the revocation of an authorization and the substitution of another—suspend the operation of the authorization sought to be revoked and grant an authorization that is expressed to be an interim authorization in substitution for the authorization suspended.

(2AA) An authorization granted under paragraph 91(2)(d), (e) or (f) expressed to be an interim authorization comes into force on the date, not being a date before the grant of the interim authorization, as is specified by the Commission in the interim authorization.

(2AB) The Commission may, at any time, revoke an authorization that is expressed to be an interim authorization and, where that interim authorization is in substitution for an authorization the operation of which has been suspended, the revocation of the interim authorization has the effect of reviving the operation of the suspended authorization.

(2A) Subsections 90(4) to (7), inclusive, do not apply in relation to an authorization that is expressed to be an interim authorization.

Minor variations of authorizations

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a minor variation of the authorization.

(2) On receipt of an application, the Commission must, if it is satisfied that the variation sought in the application is a minor variation, by notice in writing given to any persons who appear to the Commission to be interested:

- (a) indicate the nature of the variation applied for; and
- (b) invite submissions in respect of the variation within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken under the AEMC: see section 90B.

(2A) Subsection 90(6) (other than paragraph 90(6)(a)) applies in relation to an application for a minor variation of an authorization in a corresponding way to the way in which it applies in relation to an application for an authorisation.

(3) The Commission may make a determination in writing varying the authorisation or dismissing the application after taking into account the following:

- (a) the application;
- (b) any submissions that are received within the period specified under paragraph (2)(b);
- (c) any information received under paragraph 90(6)(b) or (c) (as that paragraph applies because of subsection (2A) of this section) within the period specified in the notice mentioned in that paragraph;
- (d) any information obtained from consultations under paragraph 90(6)(d) (as that paragraph applies because of

paragraph 90(9)(a) (as that paragraph applies because of subsection (2A) of this section).

The Commission may, but need not, take into account any submissions or information received after the end of those periods.

(4) The Commission must not make a determination varying an authorisation in relation to conduct unless the Commission is satisfied in all the circumstances that:

(a) if, in making the determination to grant the authorisation in relation to conduct, the Commission was satisfied that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition—the variation would not have the effect, or would not be likely to have the effect, of increasing the extent to which the conduct lessens competition; or

(b) if paragraph (a) does not apply—the variation would not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

(4A) For the purposes of subsection (4), the Commission need not regard to conduct that is unaffected by the variation.

(5) Subsections 90(10B), (12) and (13) apply in relation to an application for a minor variation of a merger authorisation that is not an overseas merger authorisation in a corresponding way that way those subsections apply in relation to an application for a merger authorisation that is not an overseas merger authorisation.

Note: Those subsections deem the Commissioner to have refused to grant an application if the Commission does not determine the application within 14 days (or an extended period in some cases).

(6) Nothing in this section prevents a person from applying for more variations in the same application.

(7) If:

(a) a person applies for 2 or more variations:

(i) at the same time; or

(ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and

(b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorization;

the Commission may deal with all of those variations together as if they were a single minor variation.

(8) An application for a minor variation may be withdrawn by notice in writing to the Commission at any time.

Revocation of an authorization

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization.

(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorization has been applied for; and

(b) indicate the basis on which the revocation has been applied for.

for; and

- (c) invite submissions in respect of the revocation within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (3) If, at any time after granting an authorization, it appears to the Commission that:

- (a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or
- (b) a condition to which the authorization was expressed to be subject has not been complied with; or
- (c) there has been a material change of circumstances since the authorization was granted;

the Commission may, by notice in writing given to any persons who appear to the Commission to be interested:

- (d) inform those persons that it is considering the revocation of the authorization; and
- (e) indicate the basis on which the revocation is being proposed; and
- (f) invite submissions in respect of the revocation within a period specified by the Commission.

- (3A) Subsection 90(6) (other than paragraph 90(6)(a)) applies in relation to an application for a revocation of an authorisation in a corresponding way to the way in which it applies in relation to an application for an authorisation.

- (3B) Subsection 90(6) (other than paragraphs 90(6)(a) and (b)) applies in relation to a proposal for a revocation of an authorisation in a corresponding way to the way in which it applies in relation to an application for an authorisation.

- (4) The Commission may make a determination in writing revoking the authorisation, or deciding not to revoke the authorisation, taking into account the following:

- (a) if subsection (2) applies—the application;
- (b) any submissions that are received within the period specified under paragraph (2)(c) or (3)(f);
- (c) any information received under paragraph 90(6)(b) (as it applies because of subsection (3A) of this section) within the period specified in the notice mentioned in that paragraph;
- (d) any information received under paragraph 90(6)(c) (as it applies because of subsection (3A) or (3B) of this section) within the period specified in the notice mentioned in that paragraph;
- (e) any information obtained from consultations under paragraph 90(6)(d) (as it applies because of subsection (3A) or (3B) of this section).

The Commission may, but need not, take into account any submissions or information received after the end of those periods.

- (5) If an objection to revoking the authorisation is included in a submission or information:

- (a) referred to in subsection (4); and
- (b) received by the Commission within the period (if any) referred to in that subsection;

the Commission must not make a determination revoking the authorisation unless the Commission is satisfied that it would

authorisation unless the Commission is satisfied that it would, authorisation had not already been granted, be prevented under subsection 90(7) from granting the authorisation.

- (5A) Subsections 90(10B), (12) and (13) apply in relation to an application for a revocation of a merger authorisation that is not an overseas merger authorisation in a corresponding way to the way those subsections apply in relation to an application for a merger authorisation that is not an overseas merger authorisation.

Note: Those subsections deem the Commissioner to have refused to grant an application if the Commission does not determine the application within 14 days (or an extended period in some cases).

- (6) An application for revocation may be withdrawn by notice in writing to the Commission at any time.
- (7) The Commission may disregard any objection that, in its opinion, is either vexatious or frivolous.

Revocation of an authorization and substitution of a replacement

- (1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization and the substitution of a new authorization for the one revoked.
- (2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:
- (a) indicate that the revocation of the authorization, and the substitution of another authorization for it, has been applied for; and
 - (b) indicate the basis upon which the revocation and substitution has been applied for and the nature of the substituted authorization so applied for; and
 - (c) invite submissions in respect of the revocation and substitution within a period specified by the Commission.

Note: Alternatively, the Commission may rely on consultations undertaken with the AEMC: see section 90B.

- (3) If, at any time after granting an authorization, it appears to the Commission that:
- (a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or
 - (b) a condition to which the authorization was expressed to be subject has not been complied with; or
 - (c) there has been a material change of circumstances since the authorization was granted;
- the Commission may, by notice in writing given to any persons who appear to be interested:
- (d) inform those persons that it is considering the revocation of the authorization and the substitution of a new authorization; and
 - (e) indicate the basis on which the revocation and substitution is being proposed and the nature of the substituted authorization proposed; and
 - (f) invite submissions in respect of the proposed action within a period specified by the Commission.

- (3A) Subsection 90(6) (other than paragraph 90(6)(a)) applies in

relation to an application for a revocation and substitution of an authorisation in a corresponding way to the way in which it applies in relation to an application for an authorisation.

(3B) Subsection 90(6) (other than paragraphs 90(6)(a) and (b)) applies in relation to a proposal for a revocation and substitution of an authorisation in a corresponding way to the way in which it applies in relation to an application for an authorisation.

(4) The Commission may make a determination in writing revoking the authorisation and granting a substitute authorisation that it considers appropriate, or deciding not to revoke the authorisation after taking into account the following:

- (a) if subsection (2) applies—the application;
- (b) any submissions that are received within the period specified under paragraph (2)(c) or (3)(f);
- (c) any information received under paragraph 90(6)(b) (as it applies because of subsection (3A) of this section) within the period specified in the notice mentioned in that paragraph;
- (d) any information received under paragraph 90(6)(c) (as it applies because of subsection (3A) or (3B) of this section) within the period specified in the notice mentioned in that paragraph;
- (e) any information obtained from consultations under paragraph 90(6)(d) (as it applies because of subsection (3A) or (3B) of this section).

The Commission may, but need not, take into account any submissions or information received after the end of those periods.

(5) Before making a determination under subsection (4) in relation to an application, or a proposal, for the revocation of an authorisation other than a merger authorisation and the substitution of another, the Commission must comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken under the AEMC: see section 90B.

(6) For the purposes of complying with section 90A in accordance with subsection (5), section 90A has effect:

- (a) as if the reference in subsection (1) to an application for an authorisation (other than an application for a merger authorisation) were a reference to an application, or to a proposal, for the revocation of an authorisation (other than a merger authorisation) and the substitution of another authorisation; and
- (b) as if references in other provisions of that section to an application, or to an application for an authorisation, were references either to an application, or to a proposal, for the revocation of an authorisation and the substitution of another authorisation; and
- (c) as if subsection 90A(2) had provided, in its operation in relation to a proposal for the revocation of an authorisation and the substitution of another, that:
 - (i) the reference to the applicant and to each other interested person were a reference only to each interested person; and
 - (ii) each reference to the applicant or other person were a reference only to the other person.

(7) The Commission must not make a determination revoking an

authorization and substituting another authorization unless the Commission is satisfied that it would not be prevented under subsection 90(7) from making a determination granting the substituted authorization, if it were a new authorization sought under section 88.

- (7A) Subsections 90(10B), (12) and (13) apply in relation to an application for a revocation and substitution of a merger authorisation that is not an overseas merger authorisation in a corresponding way to the way those subsections apply in relation to an application for a merger authorisation that is not an overseas merger authorisation.

Note: Those subsections deem the Commissioner to have refused to grant an application if the Commission does not determine the application within 30 days (or an extended period in some cases).

- (8) An application for the revocation of an authorization and the substitution of another authorization may be withdrawn by notice in writing to the Commission at any time.

Providing false or misleading information

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

- (a) an application for a merger authorisation;
- (b) an application for a minor variation of a merger authorisation;
- (c) an application for, or the Commission's proposal for, the revocation of a merger authorisation;
- (d) an application for, or the Commission's proposal for, the revocation of a merger authorisation and the substitution of another merger authorisation;
- (e) a review of a determination in relation to an application or proposal referred to in paragraph (a), (b), (c) or (d).

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 81B 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.

Division 2—Notifications

Division A—Exclusive dealing and resale price maintenance

Section 47—Notification of exclusive dealing or resale price maintenance

- (1) Subject to subsection (2):
- (a) a corporation that engages, or proposes to engage, in conduct of a kind referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9); or
 - (b) a corporation or other person who engages, or proposes to engage, in conduct of a kind referred to in section 48;
- may give to the Commission a notice setting out particulars of the conduct or proposed conduct.

- (1A) To be valid, a notice under subsection (1) must:
- (a) be in a form approved by the Commission in writing and contain the information required by the form; and
 - (b) be accompanied by any other information or document prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- (2) A corporation or other person may not give a notice under subsection (1) for conduct or proposed conduct if:
- (a) the corporation or other person applied for an authorisation for the conduct or proposed conduct; and
 - (b) the Commission or the Trade Practices Commission made a determination dismissing the application; and
 - (c) either:
 - (i) the Tribunal or the Trade Practices Tribunal made a determination on an application for a review of a determination described in paragraph (b); or
 - (ii) the time for making such an application for review ended without the making of an application.

(2A) In subsection (2):

Trade Practices Commission means the Trade Practices Commission established by section 6A of this Act as in force immediately before this subsection commenced.

Trade Practices Tribunal means the Trade Practices Tribunal continued in existence by section 30 of this Act as in force immediately before this subsection commenced.

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

Definition

(2C) In subsection (2B):

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

- (3) If the Commission is satisfied that the engaging by a corporation in conduct or proposed conduct of a kind described in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9) and referred to in notice given by the corporation under subsection (1):
- (a) has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 47; and
 - (b) in all the circumstances:
 - (i) has not resulted or is not likely to result, or would result or be likely to result, in a benefit to the public;
 - (ii) has resulted or is likely to result, or would result or be likely to result, in a benefit to the public that has not, or would not outweigh the detriment to the public that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct;
- the Commission may at any time give notice in writing to the

corporation stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(3A) If:

- (a) a corporation or other person has notified the Commission under subsection (1) of conduct or proposed conduct described in section 48; and
- (b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct;

the Commission may give the corporation or other person a written notice stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(3B) If:

- (a) a corporation or other person has notified the Commission under subsection (1) of conduct or proposed conduct; and
- (b) the Commission has given the corporation or other person notice under subsection 93AAA(1) imposing conditions relating to the conduct or proposed conduct; and
- (c) the Commission is satisfied that the corporation or other person has failed to comply with those conditions;

the Commission may at any time give notice in writing to the corporation or other person stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(4) Before giving a notice under subsection (3), (3A) or (3B) the Commission shall comply with the requirements of section 93A.

(5) In satisfying itself for the purposes of subsection (3), (3A) or (3B) in relation to any conduct or proposed conduct referred to in a notice given to the Commission by a corporation or other person under subsection (1), the Commission shall seek such relevant information as it considers reasonable and appropriate and may make a decision on the basis of any information so obtained and any other information furnished to it by the corporation or other person or any other person or otherwise in its possession.

(6) A corporation or other person that has given a notice to the Commission under this section in relation to any conduct or proposed conduct may, at any time before the Commission has given to the corporation or other person a notice under subsection (3), (3A) or (3B) in relation to the conduct or proposed conduct, by notice in writing to the Commission, withdraw the first-mentioned notice.

(7) Where a corporation has given notice to the Commission under subsection (1) describing conduct or proposed conduct referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9):

- (a) in the case of a notice given before the expiration of the period of 3 months commencing on the date of commencement of the *Trade Practices Amendment Act 1977*, the engaging by the corporation in the conduct referred to in the notice or after that date and before the giving of the notice shall not be taken, for the purposes of section 47, to have had the effect of substantially lessening competition within the meaning of that section; and

- (b) in any case, the engaging by the corporation in the conduct referred to in the notice after the giving of the notice shall

be taken, for the purposes of section 47, to have the purpose or to have or be likely to have the effect, of substantially lessening competition within the meaning of that section unless:

- (i) the Commission has given notice to the corporation or other person under subsection (3) of this section in relation to the conduct and the conduct takes place more than 30 days after such longer period as the Commission by writing permits after the day on which the Commission gave the notice;
- (ii) the notice has been, or is deemed to have been, withdrawn and the conduct takes place after the day on which the notice was, or is deemed to have been, withdrawn.

(7A) A notice under subsection (1) describing conduct or proposed conduct referred to in section 48 comes into force:

- (a) at the end of the period of 60 days, or such other period as is prescribed by the regulations, starting on the day when the corporation or other person gave the Commission the notice; or
- (b) if the Commission gives notice to the corporation or other person under subsection 93A(2) during that period—when the Commission decides not to give the corporation or other person a notice under subsection (3A) or (3B) of this section.

(7B) A notice under subsection (1) describing conduct or proposed conduct referred to in section 48 does not come into force:

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

(7C) A notice under subsection (1) describing conduct referred to in section 48 ceases to be in force:

- (a) when the notice is withdrawn or deemed to be withdrawn; or
- (b) if the Commission gives the corporation or other person notice under subsection (3A)—on the 31st day after the Commission gave the notice under subsection (3A) or on a later day specified in writing by the Commission; or
- (c) if the Commission gives the corporation or other person notice under subsection (3B)—on the 31st day after the Commission gave the notice under subsection (3B) or on a later day specified in writing by the Commission.

(8) Where:

- (a) a corporation or other person gives a notice to the Commission under subsection (1) in relation to any conduct or proposed conduct;
- (b) before or after the notice is given the corporation or other person makes an application to the Commission for an authorization to engage in that conduct;
- (c) the Commission:
 - (i) makes a determination dismissing the application;
 - (ii) makes a determination granting an authorization in respect of the application; and

respect of the application; and

- (d) the Tribunal makes a determination on an application for review of the determination of the Commission or the time making such an application for review expires without an application for review having been made;

the notice shall thereupon be deemed to be withdrawn.

- (9) If an application is made to the Tribunal for a review of the giving of a notice by the Commission under subsection (3), (3A) or (3B), a reference in subsection (7) or paragraph (7C)(b) or (7C)(c) to the day on which the Commission gave the notice shall be read as a reference to:

- (a) if the application is withdrawn—the day on which the application is withdrawn;
- (b) if the Tribunal, 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, declares that the application for the review is not being proceeded with by the applicant with due diligence—the day on which the Tribunal makes the declaration; or
- (c) in any other case—the day on which the Tribunal makes a determination on the review.

- (10) Where:

- (a) a corporation or other person has given a notice to the Commission under subsection (1) in relation to conduct or proposed conduct and the Commission has given notice to the corporation or other person in writing under subsection (3), (3A) or (3B) in relation to the conduct or the proposed conduct; or
- (b) a notice given by a corporation or other person to the Commission under subsection (1) in relation to conduct or proposed conduct is withdrawn or deemed to be withdrawn; the corporation or other person is not entitled to give a further notice under subsection (1) to the Commission in relation to the same conduct or proposed conduct or in relation to conduct or proposed conduct to the like effect.

Imposing conditions relating to notifications

- (1) If:

- (a) a corporation or other person gives the Commission a notice under subsection 93(1) relating to particular conduct, or proposed conduct, of a kind referred to in section 48; and
- (b) the Commission reasonably believes that:
 - (i) apart from this section, the Commission would have grounds to give the corporation or other person a notice under subsection 93(3A) relating to that notice; and
 - (ii) those grounds would not exist if particular conditions relating to the conduct or proposed conduct were connected with;

the Commission may give the corporation or other person a written notice imposing those conditions.

- (2) The Commission must, at the time it gives the corporation or other person the notice under subsection (1), give the corporation or other person a written statement of its reasons for giving the notice.

Division B—Collective bargaining

Definitions

In this Subdivision:

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

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

contract means a contract, arrangement or understanding.

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

Notification of collective bargaining

Notice to Commission—cartel provisions

(1A) A corporation that:

(a) has made, or proposes to make, a contract (the **initial contract**) that contains a cartel provision that:

(i) has the purpose; or

(ii) has or is likely to have the effect;
mentioned in subsection 45AD(2); or

(b) has made, or proposes to make, a contract (the **initial contract**) that contains a cartel provision that has the purpose mentioned in a paragraph of subsection 45AD(3) other than paragraph (c); or

(c) proposes to give effect to a provision of a contract (the **initial contract**) where the provision is a cartel provision

(i) has the purpose; or

(ii) has or is likely to have the effect;
mentioned in subsection 45AD(2); or

(d) proposes to give effect to a provision of a contract (the **initial contract**) where the provision is a cartel provision that has the purpose mentioned in a paragraph of subsection 45AD(3) other than paragraph (c);

may give the Commission a notice (the **collective bargaining notice**) setting out particulars of the contract or proposed contract but only if the 3 requirements set out in subsections (2), (3) are satisfied.

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

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

Notice to Commission—competition provisions

(1) A corporation that:

(a) has made, or proposes to make, a contract (the **initial contract**) containing a provision of the kind referred to in paragraph 45(1)(a); or

(b) proposes to give effect to a provision of a contract (the **initial contract**) where the provision is of the kind referred to in paragraph 45(1)(b);

may give the Commission a notice (the **collective bargaining notice**) setting out particulars of the contract or proposed contract but only if the 3 requirements set out in subsections (2), (3) 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, initial contract with 1 or more persons (the **contracting parties**) about:
- (a) the supply of particular goods or services to; or
 - (b) the acquisition of particular goods or services from; one or more other persons (the **target** or **targets**) by the corporation and the contracting parties.

Second—making of contracts

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

Third—price of contracts

- (4) Third, the corporation must reasonably expect that:
- (a) in the case where the corporation reasonably expects to make only 1 contract with the target or targets—the price for the supply or acquisition of those goods or services under that contract; or
 - (b) in the case where the corporation reasonably expects to make 2 or more contracts with the target or targets—the average 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 approved by the Commission in writing and contain the information required by the form; and
 - (b) be accompanied by any other information or document 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 the parties could have given the notice on their own behalf. If the notice is so expressed, then it is also taken to have been given by those parties.
- (7A) A collective bargaining notice for a group of contracting parties may be expressed to be given on behalf of persons who become members of the group after the notice is given, but only if the

members of the group after the notice is given, but only if those persons could have given the notice on their own behalf at the time they became members of the group. If the notice is so expressed then it is also taken to have been given by those persons.

When a notice may not be given

- (8) A corporation may not give a collective bargaining notice in relation to a contract or proposed contract if:
- (a) it has applied for an authorisation in relation to the contract or proposed contract; and
 - (b) the Commission has made a determination dismissing the application; and
 - (c) either:
 - (i) the Tribunal has made a determination on an application for a review of the Commission's determination; or
 - (ii) the time for making such an application for review has ended without the making of an application.

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

- (9) A notice given by a corporation under subsection (1) is not a 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.

Purpose/effect of a provision

- (10B) Subsections 45AD(6), (7), (8) and (10) apply for the purpose of paragraphs (1A)(a) and (c) in a corresponding way to the way in which they apply for the purposes of Division 1 of Part IV.

Purpose of a provision

- (10C) Subsections 45AD(7), (9) and (11) apply for the purposes of paragraphs (1A)(b) and (d) in a corresponding way to the way in which they apply for the purposes of Division 1 of Part IV.

Definition

- (11) In this section:

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

trade union means the following:

- (a) an association of employees that is registered as an

organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009*;

- (b) an association of employees that is registered or recognised as a trade union (however described) under the law of a State or Territory;
- (c) an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

Commission's objection notice

Commission's objection notice—cartel provisions

(1) If:

- (a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a contract or proposed contract, containing a cartel provision of the kind referred to in that subsection; and
- (b) the Commission is satisfied that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision does not or would not outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision;

the Commission may give the corporation a written notice (the **objection notice**) stating that it is so satisfied.

Commission's objection notice—competition provisions

(2) If a corporation gives the Commission a collective bargaining notice under subsection 93AB(1) in relation to a contract, or proposed contract, containing a provision of the kind referred to in paragraph 45(1)(a) or (b), then the Commission may, if it is satisfied that:

- (a) the provision has or would have the purpose, or has or is likely to have or would have or be likely to have the effect of substantially lessening competition (within the meaning of section 45); and
- (b) in all the circumstances, either:
 - (i) the provision has not resulted or is not likely to result, or would not result or be likely to result, in a benefit to the public; or
 - (ii) any benefit to the public that has resulted or is likely to result, or would result or be likely to result, from the provision does not or would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;

the Commission may give the corporation a written notice (the **objection notice**) stating that it is so satisfied.

Commission's objection notice—non-compliance with conditions

(2A) If:

- (a) a corporation gives the Commission a collective bargaining notice that relates (wholly or partly) to collective boycott conduct or proposed collective boycott conduct; and
- (b) the Commission has given the corporation a notice under subsection 93ACA(1) imposing conditions relating to the conduct or proposed conduct; and
- (c) the Commission is satisfied that the corporation has failed

comply with those conditions;

the Commission may give the corporation a written notice (the **objection notice**) stating that the Commission is so satisfied.

Reasons for objection notice

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

Conference before objection notice

- (4) The Commission must comply with section 93A (conference 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.

Imposing conditions relating to collective boycott conduct

- (1) If:
- (a) a corporation gives the Commission a collective bargaining notice that relates (wholly or partly) to collective boycott conduct or proposed collective boycott conduct; and
 - (b) the Commission reasonably believes that:
 - (i) apart from this section, the Commission would have grounds to give the corporation an objection notice relating to the collective bargaining notice; and
 - (ii) those grounds would not exist if particular conditions relating to the conduct or proposed conduct were connected with;
- the Commission may give the corporation a written notice imposing those conditions.
- (2) The Commission must, in or with the notice under subsection (1), give the corporation a written statement of its reasons for giving the notice.

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

When collective bargaining notice comes into force

- (1) A collective bargaining notice comes into force:
- (a) at the end of the period which is:
 - (i) if the notice relates (wholly or partly) to collective boycott conduct or proposed collective boycott conduct, 60 days or such other period as is prescribed by the regulations; or
 - (ii) otherwise—14 days or such other period as is prescribed by the regulations;
- starting on the day the corporation gave the Commission the notice.

the notice; or

- (b) if the Commission gives the corporation a conference not during the period referred to in paragraph (a) and then does 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 not 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

When collective bargaining notice ceases to be in force

(3) A collective bargaining notice ceases to be in force at the end of the following times:

- (a) when it is withdrawn or taken to be withdrawn;
- (b) if the Commission gives the corporation an objection notice—on the 31st day after the relevant day or on a later day specified in writing by the Commission;
- (c) at the end of:
 - (i) if subparagraph (ii) does not apply—the period of 3 years beginning on the day the corporation gave the collective bargaining notice; or
 - (ii) the period determined under subsection (5).

Note 1: A collective bargaining notice is not in force, to the extent that it relates to collective boycott conduct, while a stop notice is in force in relation to the collective bargaining notice: see section 93AG.

Note 2: Section 93AE deals with the withdrawal of a collective bargaining

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

| Relevant day | |
|--|--|
| In this situation: | the relevant day is: |
| 1 If an application is not made to the Tribunal for a review of the Commission's decision to give the objection notice | the day the Commission gave the notice. |
| 2 If an application is made to the Tribunal for a review of the Commission's decision to give the objection notice | <ul style="list-style-type: none">(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. |

Commission may determine expiry of collective bargaining notice

(5) If the Commission is satisfied that

- (5) If the Commission is satisfied that:
- (a) the period provided for in subparagraph (3)(c)(i) is not appropriate in all the circumstances; and
 - (b) another period, ending no later than the end of the period 10 years beginning on the day the corporation gave the collective bargaining notice, is appropriate in all the circumstances;
- the Commission may give to the corporation a written notice determining that other period for the purposes of subparagraph (c)(ii).
- (6) The Commission must, in or with the notice under subsection 93AB(1A), give the corporation a written statement of its reasons for giving the notice.

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 applied 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.

Only 1 collective bargaining notice under subsection 93AB(1A) may be given

If:

- (a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a contract or proposed contract; and
- (b) either:
 - (i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or
 - (ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then a further collective bargaining notice under subsection 93AB(1A) cannot be given by any person in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

Only 1 collective bargaining notice under subsection 93AB(1) may be given

If:

- (a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1) in relation to a contract proposed contract; and
- (b) either:
 - (i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract
 - (ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

then the corporation may not give the Commission a further collective bargaining notice under subsection 93AB(1) in relation to the same contract or proposed contract or in relation to a contract or proposed contract to the like effect.

Stop notice for collective boycott conduct

- (1) The Commission may give a corporation a written notice (a **stop notice**) if:
 - (a) the corporation has given the Commission a collective bargaining notice that relates (wholly or partly) to collective boycott conduct; and
 - (b) the collective bargaining notice is in force under section 93AD; and
 - (c) there has been a material change of circumstances since the collective bargaining notice was given:
 - (i) if the Commission has previously given the corporation a stop notice under this subsection in relation to the collective boycott conduct—that notice was given; or
 - (ii) in any other case—the collective bargaining notice came into force; and
 - (d) the Commission reasonably believes that:
 - (i) the collective boycott conduct has resulted in serious detriment to the public; or
 - (ii) serious detriment to the public is imminent as a result of the collective boycott conduct.
- (2) The Commission must, in or with the stop notice, give the corporation a written statement of its reasons for giving the stop notice.
- (3) While the stop notice is in force, the collective bargaining notice is taken, for the purposes of this Act, not to be in force under section 93AD to the extent that the collective bargaining notice relates to collective boycott conduct.
- (4) The stop notice comes into force at the time the Commission gives the corporation the stop notice.
- (5) The stop notice ceases to be in force at the earliest of the following times:
 - (a) at the end of the period provided under subsection (6);
 - (b) if, before the end of that period, the Commission gives the corporation an objection notice under subsection 93AC(1) that relates to the collective bargaining notice—when the objection notice is given;
 - (c) if, before the end of that period, the Commission gives the corporation a notice under subsection 93ACA(1) imposing conditions relating to conduct or proposed conduct that relate to the collective bargaining notice—when that notice under

- subsection 93ACA(1) is given;
- (d) if the Commission withdraws the stop notice—when it is withdrawn.
- (6) For the purposes of paragraph (5)(a), the period is:
 - (a) the period of 90 days beginning on the day the Commission gives the corporation the stop notice; or
 - (b) if the Commission extends it under subsection (7)—that period as so extended.
- (7) Before the end of the period referred to in paragraph (6)(a), the Commission may extend the period by up to a further 90 days:
 - (a) if satisfied that in all the circumstances it is reasonable to do so; and
 - (b) by giving written notice of the extended period to the corporation.
- (8) The Commission must, in or with the notice under subsection (6), give the corporation a written statement of its reasons for giving the notice.

Division C—Conferences

Commission to afford opportunity for conference before giving notice

- (1) Before giving a notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A) in relation to any conduct or proposed conduct, the Commission shall prepare a draft notice in relation to that conduct or proposed conduct.
- (2) The Commission shall, by notice in writing sent to the corporation or other person to whose conduct or proposed conduct the draft notice relates and to each other interested person, invite the corporation or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the corporation or other person wishes the Commission to hold a conference in relation to the draft notice.
- (3) The Commission shall send with each notice under subsection (2) a copy of the draft notice and a summary of the reasons why it proposes to give the notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A).
- (4) If each of the persons to whom a notice was sent under subsection (2):
 - (a) notifies the Commission in writing within the period of 14 days mentioned in that subsection that the person does not wish the Commission to hold a conference in relation to the draft notice; or
 - (b) does not notify the Commission within that period that she wishes the Commission to hold such a conference;
 the Commission must decide after the end of that period whether or not to give the notice under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A).
- (5) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft notice, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of

conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(6) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft notice) nominated by the Chairperson; and

(b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who is authorised by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and

(e) no other person is entitled to be present.

(7) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(8) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

(a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;

(b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

(c) shall give a certificate certifying the day on which the first notification under subsection (5) in relation to the draft notice was received by the Commission and the day on which the conference terminated;

and any such certificate shall be received in all courts as prima facie evidence of the matters certified.

(9) A document purporting to be a certificate referred to in subsection (8) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

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

(10A) After the conference, the Commission must decide whether or not to give a notice under subsection 93(3), (3A) or (3B) or 93AC(3) or (2A).

(11) For the purposes of this section, **interested person** means a person who has notified the Commission in writing that he or she or a specified unincorporated association of which he or she is a member, claims to have an interest in the matter, being an interest

that, in the opinion of the Commission, is real and substantial.

- (12) Where the Commission is of the opinion that two or more notices given to the Commission under subsection 93(1) or 93AB(1A) or by the same person, or by persons being bodies corporate that are related to each other, deal with substantially similar conduct or proposed conduct, the Commission may treat the notices as if constituted a single notice and may prepare one draft notice in relation to the notices so given to the Commission and hold on conference in relation to that draft notice.

Division D—Register of notifications

Register of notifications

- (1) The Commission shall keep a register containing:
- (aa) notices relating to voluntary industry codes given to the Commission pursuant to regulations made under section 93AB(1A) (including notices that have been withdrawn pursuant to those regulations); and
 - (a) draft notices, and summaries of reasons, by the Commission furnished to any person under section 93A; and
 - (b) records of conferences made in accordance with subsection 93A(7) and certificates in relation to conferences given under subsection 93A(8); and
 - (c) notices (including notices that have been withdrawn) given to the Commission under section 93 or 93AB; and
 - (d) documents furnished to the Commission in relation to such notices; and
 - (e) particulars of any oral submissions made to the Commission in relation to such notices; and
 - (f) particulars of notices given by the Commission to corporations in relation to notices given by corporations under section 93 or 93AB; and
 - (g) particulars of any permits given by the Commission under subparagraph 93(7)(b)(i); and
 - (ga) details of the specification of any day by the Commission under paragraph 93(7C)(b) or (c); and
 - (gb) details of the specification of any day by the Commission under paragraph 93AD(3)(b).
- (2) Where a person furnishes a document to the Commission:
- (a) in relation to a notice given to the Commission under section 93 or 93AB; or
 - (b) in relation to a conference held under Division 3 of Part 3 or makes an oral submission to the Commission in relation to a notice or the conference, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (1) by reason of the confidential nature of any of the matters contained in the document or submission.
- (3) Where such a request is made:
- (a) if the document or part of the document, or the submission or part of the submission, to which the request relates contains particulars of:
 - (i) a secret formula or process;
 - (ii) the cash consideration offered for the acquisition

shares in the capital of a body corporate or of assets of a person; or

(iii) the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (1); and

(b) in any other case—the Commission may, if it is satisfied it is desirable to do so by reason of the confidential nature of matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(4) If the Commission refuses a request to exclude a document or part of a document from the register kept under subsection (1), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (1)(d) does not apply in relation to the document or part of the document.

(5) Subsection (4) does not apply in relation to a document that was produced to the Minister or the Commission in pursuance of a notice under section 65Q or 155.

(6) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (1), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (1)(e) does not apply in relation to the submission or that part of the submission, as the case may be.

(7) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (1)(c) or particulars referred to in paragraph (1)(e) from the register kept under subsection (1).

(8) If a person requests in accordance with subsection (2) that a document or part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (1), the document or the part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

Division 3—Class exemptions

Commission may determine class exemptions

(1) The Commission may, by legislative instrument, determine that one or more specified provisions of Part IV do not apply to a kind of conduct specified in the determination, if the Commission is satisfied in all the circumstances:

(a) that conduct of that kind would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or

(b) that conduct of that kind would result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from the conduct.

result, from conduct of that kind.

Note: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) The Commission may specify in the determination any one or more of the following limitations:
 - (a) a limitation to persons of a specified kind;
 - (b) a limitation to circumstances of a specified kind;
 - (c) a limitation to conduct that complies with specified conditions.
- (3) The determination must specify the period, ending no later than the end of the period of 10 years beginning on the day it is made for which it is to be in force.
- (4) The determination:
 - (a) enters into force on the day it is made or on such later day (if any) as is specified in the determination; and
 - (b) ceases to be in force at the earlier of the following times:
 - (i) if the determination is revoked—at the time the revocation takes effect;
 - (ii) at the end of the period specified under subsection (3) of this section.
- (5) While the determination remains in force, but subject to section 95AB and any limitations specified under subsection (2), the provisions of Part IV specified in the determination do not apply in relation to conduct of the kind specified in the determination.
- (6) Despite subsection 44(1) of the *Legislation Act 2003*, section 44 (disallowance) of that Act applies to a legislative instrument made under subsection (1) of this section.

Commission may withdraw the benefit of class exemption in particular case

- (1) The Commission may give a person a written notice if:
 - (a) a determination in force under section 95AA specifies a kind of conduct; and
 - (b) the Commission is satisfied that particular conduct of that kind engaged in by the person:
 - (i) would have the effect, or would be likely to have the effect, of substantially lessening competition; and
 - (ii) would not result or be likely to result in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from the conduct.

Note: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) The Commission must, in or with the notice under subsection (1), give the person a written statement of its reasons for giving the notice.
- (3) While a notice under subsection (1) is in force, the determination does not apply to the conduct specified in the notice engaged in by the person.
- (4) The notice under subsection (1):
 - (a) comes into force at the time the Commission gives the person the notice; and
 - (b) ceases to be in force at the earliest of the following times:
 - (i) if the Tribunal sets it aside under subsection 102(1) of the *Legislation Act 2003*;

at the end of the day on which the Tribunal sets it aside;

(ii) if the Commission revokes the notice—when it is revoked;

(iii) the time the determination under section 95AA ceases to be in force.

Part VIIA—Prices surveillance

Part 1—Preliminary

Interpretation

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

applicable period, in relation to a locality notice, has the meaning given by section 95ZB.

body means any organisation or body, whether incorporated or unincorporated, and includes a group of 2 or more individuals

business notice means a notice under subsection 95L(3).

Commonwealth authority means:

- (a) the Commonwealth; or
- (b) an authority, institution or other body (other than a society, association or incorporated company) established for a particular purpose by or under a law of the Commonwealth; or
- (c) a society, association or incorporated company in which the Commonwealth, or an authority, institution or other body of the kind referred to in paragraph (b), has a controlling interest.

declared person, in relation to goods or services of a particular description, means a person in relation to whom a declaration under subsection 95X(2) in relation to goods or services of that description is in force.

exempt supply, in relation to goods or services of a particular description, means a supply of goods or services of that description in relation to which a declaration under section 95B is in force

external inquiry means an inquiry by a body other than the Commission.

goods includes:

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

inquiry means an inquiry held in accordance with this Part in relation to a matter or matters relating to prices for the supply of goods or services.

inquiry body means:

- (a) in relation to an inquiry to be held, or being held, by the Commission—the Commission; or
- (b) in relation to an inquiry to be held, or being held, by a body other than the Commission—the other body.

inquiry Chair means:

- (a) in relation to an inquiry to be held, or being held, by the Commission—the member of the Commission presiding at

Commission—the member of the Commission presiding at inquiry; or

- (b) in relation to an inquiry to be held, or being held, by a other than the Commission—the person presiding at the inquiry.

inquiry notice means a notice under section 95H.

law of the Commonwealth does not include:

- (a) the *Northern Territory (Self-Government) Act 1978*; or
- (b) the *Norfolk Island Act 1979*; or
- (c) a law made under, or continued in force by, an Act referred to in paragraph (a) or (b).

locality notice means a notice under subsection 95Z(5).

member of the staff of the Commission means a person referred to in subsection 27(1) or a person engaged under section 27A.

notified goods or services means goods or services of a particular description in relation to which a declaration under subsection 95X(1) is in force.

person includes a Commonwealth authority and a State or Territory authority.

price includes:

- (a) a charge of any description; and
- (b) in relation to goods or services—any pecuniary benefit, whether direct or indirect, received or to be received by a person for or in connection with the supply by the person of the goods or services.

response notice means a notice under subparagraph 95Z(6)(

services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and includes, but is not limited to, the right to benefits, privileges or facilities that are, or are to be, provided or granted or conferred under:

- (a) a contract for or in relation to:
 - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods; or
 - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or

- (b) a contract of insurance; or

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

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

State or Territory authority means:

- (a) a State, the Australian Capital Territory or the Northern Territory; or

- (b) an authority, institution or other body (except a society, association or incorporated company) established for a purpose by or under a law of a State, the Australian Capital Territory or the Northern Territory; or
- (c) a society, association or incorporated company in which a State, the Australian Capital Territory or the Northern Territory, or an authority, institution or other body of the kind referred to in paragraph (b), has a controlling interest.

supply includes:

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

(2) In this Part, unless the contrary intention appears:

- (a) a reference to the supply of goods or services includes a reference to agreeing to supply goods or services; and
- (b) a reference to the supply of goods includes a reference to the supply of goods together with other property or services or both; and
- (c) a reference to the supply of services includes a reference to the supply of services together with property or other services or both; and
- (d) a reference to the supply of goods does not include a reference to:
 - (i) a supply for use outside Australia; or
 - (ii) a supply for which a price is not charged; or
 - (iii) any other supply prescribed by the regulations; and
- (e) a reference to the supply of services does not include a reference to:
 - (i) a supply outside Australia; or
 - (ii) a supply for which a price is not charged; or
 - (iii) any other supply prescribed by the regulations.

(3) For the purposes of this Part, a supply by way of retail sale is taken not to be a supply on terms and conditions that are the same as, or substantially similar to, the terms and conditions of a supply by way of wholesale sale.

Exempt supplies

- (1) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* declare a supply of goods or services of a specified description, that is a supply in a specified manner, of a specified kind or in specified circumstances to be an exempt supply for the purposes of this Part.
- (2) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* vary or revoke a declaration under subsection (1).

Application of Part

- (1) This Part applies in relation to the supply of goods or services:
 - (a) by a Commonwealth authority; or
 - (b) by a foreign corporation; or
 - (c) by a trading corporation in the course of, or for the purposes of, its trading operations; or
 - (d) by a financial corporation in the course of, or for the purposes of, its business operations; or
 - (e) by a body corporate incorporated in a Territory (other than the Northern Territory).

- the Northern Territory or Norfolk Island); or
- (f) in an internal Territory (other than the Northern Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands); or
- (g) in the course of, or in connection with, trade or commerce
 - (i) among the States; or
 - (ii) between a State and an internal Territory; or
 - (iii) between a State and the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or
 - (iv) between an internal Territory and the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or
 - (v) between the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands; or
 - (vi) between 2 internal Territories;

and not otherwise.

- (2) However, this Part does not apply in relation to the supply of goods or services by:
 - (a) an authority, institution or other body (except a society, association or incorporated company) established for a particular purpose by or under a law of Norfolk Island; or
 - (b) a society, association or incorporated company in which a controlling interest is held by Norfolk Island, or an authority, institution or other body covered by paragraph (a).

Crown to be bound

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

Object of this Part

The object of this Part is to have price surveillance applied in those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers.

Simplified overview of this Part

- (1) This Part deals with 3 main things.
 - Price inquiries*
 - (2) First, it provides for the Commission or another body to hold price inquiries in relation to the supply of goods or services.
 - (3) These inquiries may relate to the supply of goods or services to a particular person. If so, the person’s ability to increase the price of those goods or services during a particular period is restricted. However, there is a way for the person to increase prices during that period.
 - Price notifications*
 - (4) Second, this Part allows the Minister or the Commission to

declare goods or services to be notified goods or services and declare a person to be a declared person in relation to such goods or services.

- (5) If this happens, the person's ability to increase the prices of goods or services during a particular period is restricted. However, there is a way for the person to increase prices during that period.

Price monitoring

- (6) Third, this Part allows the Minister to direct the Commission to undertake price monitoring.
- (7) This may be in relation to supplies of goods or services in a particular industry or in relation to supplies of goods or services to particular persons.

Part 2—Commission's functions under this Part

Commission's functions under this Part

- (1) The Commission's functions under this Part are set out in this section.

Price inquiries

- (2) The Commission is to hold such inquiries as it is required to hold under section 95H.
- (3) The Commission may, with the Minister's approval under section 95H, hold such other inquiries as it thinks fit.
- (4) The Commission is to give the Minister a report on the results of each inquiry it holds.

Price notifications

- (5) The Commission is to consider locality notices and to take, in relation to such notices, such action in accordance with this Part as it considers appropriate.

Price monitoring

- (6) The Commission is to monitor prices, costs and profits in an industry or business that the Minister directs it to monitor and give the Minister a report on the results of such monitoring.

General

- (7) In exercising its powers and performing its functions under this Part, the Commission must, subject to any directions given under section 95ZH, have particular regard to the following:
- (a) the need to maintain investment and employment, including the influence of profitability on investment and employment;
 - (b) the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices;
 - (c) the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

Part 3—Price inquiries

Division A—Holding of inquiries

Price inquiries

Inquiries by Commission

Inquiries by Commission

- (1) The Minister may, by notice in writing given to the Chairperson, require the Commission to hold an inquiry into a specified matter or specified matters.
- (2) The Minister may, by notice in writing given to the Chairperson, approve the Commission holding an inquiry into a specified matter or specified matters.

Inquiries by other bodies

- (3) The Minister may, by notice in writing, request a body other than the Commission to hold an inquiry into a specified matter or specified matters.
- (4) The other body must, if it agrees to hold the inquiry, appoint a person to preside at the inquiry. The appointment must be in writing.
- (5) However, if the other body is a group of 2 or more individuals, the Minister must, by writing, appoint one of those individuals to preside at the inquiry.
- (5A) The Minister must, as soon as practicable after confirmation that the other body will hold the inquiry, table a statement in each House of the Parliament:
 - (a) specifying that the body will hold the inquiry; and
 - (b) giving the Minister's reasons for requesting the body, rather than the Commission, to hold the inquiry.

No inquiry in relation to exempt supply

- (6) A notice under this section must not authorise the holding of an inquiry into a supply of goods or services of a particular description that is an exempt supply in relation to goods or services of that description.

No inquiry in relation to a State or Territory authority

- (7) A notice under this section must not authorise the holding of an inquiry into the supply by a State or Territory authority of goods or services.

Content of inquiry notices

Description of goods or services

- (1) An inquiry notice must specify the description of the goods or services in relation to which the inquiry is to be held.

Supply of goods or services by particular persons

- (2) An inquiry notice must also specify whether the inquiry is to be held in relation to the supply of goods or services of that description by a particular person or persons.
- (3) If such an inquiry is to be held, the notice may also specify that person or persons. If it does not, the inquiry body must, by writing, determine that person or persons.
- (4) The inquiry Chair must give the Minister notice in writing of the determination.

No inquiry in relation to a State or Territory authority

- (5) The inquiry body must not determine a State or Territory authority as a person in relation to whom an inquiry will be held.

Ministerial directions

- (6) The Minister may, in an inquiry notice, give such directions or she thinks fit as to the holding of the inquiry and the matters to be taken into consideration in the inquiry.
- (7) The inquiry body must comply with any such directions.

Period for completing inquiry

Inquiry period

- (1) An inquiry notice must specify the period within which the inquiry is to be completed and a report on the inquiry is to be given to the Minister.
- (2) The inquiry body must complete the inquiry and give the report to the Minister within that period.

Extensions

- (3) The Minister may, before the end of the completion period, extend or further extend that period by notice in writing given to the inquiry Chair.

Example: A notice under subsection (1) specifies that an inquiry is to be completed and a report given by 1 August.

On 30 July the Minister gives a notice under subsection (3) extending the deadline to 8 August.

On 6 August the Minister gives another notice under subsection (3) further extending the deadline to 12 August.

- (4) If the Minister does so, the inquiry body must complete the inquiry and give its report within the completion period as so extended or further extended.
- (5) In this section:

completion period means the period within which the inquiry body is required by this section to complete an inquiry and to give its report on the inquiry.

Notice of holding of inquiry

General notice

- (1) An inquiry body must, by notifiable instrument, give notice of the inquiry it is to hold.

Notice to particular person or persons

- (3) If the inquiry is to be held in relation to the supply of goods or services by a particular person or persons, the inquiry body must, as soon as practicable, give the person, or each of the persons, notice in writing.

Content of notice

- (4) A notice under this section must:
 - (a) state that the inquiry body is to hold the inquiry; and
 - (b) specify the matter or matters in relation to which the inquiry is to be held; and
 - (c) specify the time and place at which the inquiry is to start and end; and
 - (d) in the case of a notice under subsection (3)—set out the effect of section 95N; and

- (e) specify any other matter prescribed by the regulations.

Notice of extension of period for completing inquiry

If:

- (a) an inquiry is being held in relation to the supply of goods or services of a particular description by a particular person or persons; and
- (b) the Minister extends, or further extends, the period within which the inquiry is required to be completed and a report on the inquiry given to the Minister;

the inquiry body must, as soon as possible, give the person, or each of the persons, a notice in writing giving details of the extension and of any further extension.

Offence restrictions

- (1) This section applies if an inquiry body gives a person a business notice stating that it is to hold an inquiry in relation to the supply of goods or services of a particular description.

Offence: previous local supply

- (2) The person commits an offence if:
 - (a) before the applicable day in relation to the business notice the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions; and
 - (b) the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
 - (c) the current supply is at a price that exceeds the highest price at which the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in that period; and
 - (d) in a case where a notice has been given to the person under subsection (5)—the current supply is not in accordance with the notice.

Penalty: 100 penalty units.

Offence: no previous local supply

- (3) The person commits an offence if:
 - (a) before the applicable day in relation to the business notice the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions; and
 - (b) the person has not supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply, but has supplied goods or services of that description elsewhere in Australia on the same or substantially similar terms and conditions in that period; and
 - (c) the current supply is at a price that exceeds the highest price at which the person has supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in that period; and
 - (d) in a case where a notice has been given to the person under subsection (5)—the current supply is not in accordance with the notice.

Penalty: 100 penalty units.

Offence: no previous supply in Australia

- (4) The person commits an offence if:
- (a) before the applicable day in relation to the business notice, the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions; and
 - (b) the person has not supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
 - (c) in a case where a notice has been given to the person under subsection (5)—the current supply is not in accordance with the notice.

Penalty: 100 penalty units.

Approval to increase prices

- (5) The Commission may give the person a notice in writing stating that the person is permitted, during the period:
- (a) beginning on a specified day; and
 - (b) ending at the beginning of the applicable day in relation to the business notice;
- to supply goods or services of a specified description in a specified locality on specified terms and conditions at a price not exceeding a specified price.
- (6) The Commission may give a notice under subsection (5) on its own initiative or on the application of the person.

Consultation

- (7) In an external inquiry, the Commission must consult the body holding the inquiry before giving a notice under subsection (5).

Definition

- (8) In this section:

applicable day, in relation to a business notice, means the 14th day after whichever is the earlier of the following days:

- (a) the day on which the person given the notice receives a copy of the report by the inquiry body on the inquiry to which the notice relates;
- (b) the last day of the period within which the inquiry body is required to complete the inquiry to which the notice relates, and to give the Minister a report on the inquiry.

Division B—Reports on inquiries

Copies of report to be made available

Inquiry into supply of goods or services by particular persons

- (1) For an inquiry held in relation to the supply of goods or services by a particular person or persons, the inquiry body must send the person, or each of the persons, a copy of the report on the inquiry on the day on which it gives the Minister the report.
- (2) A copy of a report sent to a person must be accompanied by a notice in writing setting out the effect of section 95Q.

All inquiries

- (3) For any inquiry, the inquiry body must, unless the Minister directs otherwise, make copies of the report on the inquiry available for public inspection as soon as practicable after the period of 28 days beginning on the day on which it gives the Minister the report.

Notification of proposed prices after receipt of report

- (1) This section applies if a person receives a copy of a report on an inquiry held in relation to the supply by the person of goods or services of a particular description.

Price notification

- (2) The person must, within 14 days after receiving the copy, give the Commission a notice in writing specifying the price or prices at which the person is supplying, or proposing to supply, goods or services of that description.

Offence

- (3) A person commits an offence if the person contravenes subsection (2).

Penalty: 10 penalty units.

Public notification

- (4) The Commission must, within 14 days after it receives the notice under subsection (2), make publicly available details of the prices specified in the notice.

Division C—Procedure at inquiries

Public inquiries etc.

Public inquiries

- (1) An inquiry body must hold an inquiry in public, unless the Minister directs otherwise.

Taking of evidence

- (2) The inquiry body may take evidence in private at an inquiry in public if:
 - (a) a witness objects to giving, in public, evidence that the inquiry body is satisfied is of a confidential nature; and
 - (b) the inquiry body considers that it is desirable to do so.
- (3) The inquiry body may permit a person appearing as a witness at the inquiry to give evidence by giving, and verifying by oath or affirmation, a written statement.
- (4) If a statement is so given in an inquiry held in public, the inquiry body must make available to the public in such manner as it thinks fit the contents of the statement other than any matter:
 - (a) that the person who gave the evidence objects to being made public; and
 - (b) the evidence of which the body is satisfied would have been taken in private if that evidence had been given orally and the person had objected to giving it in public.

Written submissions

- (5) The inquiry body may require or permit a person desiring to make a submission to the body to make the submission in writ

make a submission to the body to make the submission in writing.

- (6) If a submission is so made in an inquiry held in public, the inquiry body must make available to the public in such manner as it thinks fit the contents of the submission.

Procedure

- (7) The procedure to be followed at an inquiry is within the discretion of the inquiry Chair. The inquiry body is not bound by the rules of evidence.
- (8) Subsection (7) operates:
- (a) subject to this Part; and
 - (b) in any case—subject to any direction given to the inquiry body by the Minister; and
 - (c) in an inquiry held by the Commission and at which the inquiry Chair is not the Chairperson—subject to any direction given to the inquiry Chair by the Chairperson.

Note: See also section 95ZN (about confidentiality of information).

King of evidence on oath or affirmation

Evidence on oath or affirmation

- (1) An inquiry body may take evidence at an inquiry on oath or affirmation.
- (2) An oath or affirmation may be administered by:
- (a) in an inquiry by the Commission—a member of the Commission; or
 - (b) in an external inquiry—the person presiding at the inquiry.

Summons

- (3) The inquiry Chair may, by writing signed by him or her, summon a person to appear at an inquiry to give evidence and to produce such documents (if any) as are specified in the summons.
- (4) In an inquiry by the Commission, the power conferred on the inquiry Chair by subsection (3) may, at his or her discretion, be exercised on the application of another person.

Failure of witness to attend

- (1) A person commits an offence if:
- (a) the person is given a summons to appear as a witness at an inquiry; and
 - (b) the person fails to attend as required by the summons or fails to appear and report himself or herself from day to day and
 - (c) the person has not been excused, or released from further attendance, by:
 - (i) in an inquiry by the Commission—a member of the Commission; or
 - (ii) in an external inquiry—the person presiding at the inquiry.

Penalty: 10 penalty units.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Refusal to be sworn or to answer question

- (1) A person appearing as a witness at an inquiry must not:
 - (a) refuse or fail to swear an oath or to make an affirmation required to do so by:
 - (i) in an inquiry by the Commission—a member of the Commission; or
 - (ii) in an external inquiry—the person presiding at the inquiry; or
 - (b) refuse or fail to answer a question that he or she is required to answer by the inquiry Chair; or
 - (c) refuse or fail to produce a document that he or she was required to produce by a summons under this Part given to him or her.

Penalty: 10 penalty units.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (3) It is a reasonable excuse for the purposes of subsection (2) for a person to refuse or fail to answer a question on the ground that the answer might tend to incriminate the person or to expose the person to a penalty.
- (4) It is a reasonable excuse for the purposes of subsection (2) for a person to refuse or fail to produce a document on the ground that the production of the document might tend to incriminate the person or to expose the person to a penalty.
- (5) Subsections (3) and (4) do not limit what is a reasonable excuse for the purposes of subsection (2).

Protection of witnesses

Subject to this Part, a person summoned to attend or appear as a witness at an inquiry has the same protection, and is, in addition to the penalties provided by this Part, subject to the same liabilities, in any civil or criminal proceedings as a witness in proceedings in the High Court.

Allowances to witnesses

- (1) A witness summoned under this Part to appear at an inquiry is entitled to be paid such allowances for his or her travelling, and such other expenses, as are prescribed by the regulations.
- (2) The witness is entitled to be paid by:
 - (a) if the witness was summoned by the inquiry Chair—the Commonwealth; or
 - (b) if the witness was summoned on the application of a person—that person.
- (3) The regulations may provide for those allowances and expenses by reference to a scale of expenses for witnesses who attend before a court specified in the regulations.

Part 4—Price notifications

Declarations by Minister or Commission

Notified goods or services

- (1) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* declare good services of a specified description to be notified goods or services for the purposes of this Part.

Declared persons

- (2) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* declare a person to be, in relation to goods or services of a specified description, a declared person for the purposes of this Part.
- (3) The Commission must give the person notice in writing of a declaration under subsection (2). The notice must set out the effect of section 95Z.
- (4) A declaration under subsection (2) must specify the time when it is to cease to have effect. Such a declaration ceases to have effect at the time specified, unless it is revoked sooner.

Variation or revocation

- (5) The Minister, or the Commission with the approval of the Minister, may by notice published in the *Gazette* vary or revoke a declaration under this section.

Declarations in relation to State or Territory authorities

- (1) The Minister must not make or approve a declaration of a State or Territory authority under section 95X unless:
- (a) the appropriate Minister of the State or Territory concerned has agreed to the declaration being made; or
 - (b) the Council has, on the request (the **current request**) of the Australian government, recommended the declaration and the Minister has consulted the appropriate Minister of the State or Territory concerned.

Role of Council

- (2) The Council must not recommend a declaration of a State or Territory authority in relation to goods or services unless it is satisfied that:
- (a) at least one Australian government has notified the State or Territory concerned that the government is not satisfied that there is effective supervision of the prices charged by the authority for the supply of those goods or services; and
 - (b) there is not such effective supervision; and
 - (c) the supply of those goods or services by the authority has a significant direct or indirect impact on qualifying trade or commerce.
- (3) The Council must also not recommend a declaration of a State or Territory authority in relation to goods or services if:
- (a) in the 5 year period before it received the current request, it was not satisfied (when considering a previous request) that there was effective supervision of prices charged by the authority for the supply of those goods or services; and
 - (b) it is satisfied that there has not been a substantial change to the mechanism for that supervision since it was satisfied as mentioned in paragraph (a).
- (4) In deciding whether there is effective supervision of prices charged by a State or Territory authority, if the State or Territory concerned is a party to the Competition Principles Agreement,

Council must apply the relevant principles set out in the agreement.

Definitions

(5) In this section:

Australian government means the Commonwealth, a State, Australian Capital Territory or the Northern Territory.

qualifying trade or commerce means trade or commerce described in paragraph 95C(1)(g) or trade and commerce between Australia and another place.

ice restrictions

Offence: previous local supply

(1) A person commits an offence if:

- (a) the person is a declared person in relation to notified goods or services; and
- (b) the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions (the **actual terms**) at a particular price (the **actual price**); and
- (c) the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
- (d) the actual price exceeds the highest price at which the person has supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in that period; and
- (e) the current supply is not an exempt supply.

Penalty: 100 penalty units.

Note: Subsection (4) contains a defence to this offence.

Offence: no previous local supply

(2) A person commits an offence if:

- (a) the person is a declared person in relation to notified goods or services; and
- (b) the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions (the **actual terms**) at a particular price (the **actual price**); and
- (c) the person has not supplied goods or services of that description in that locality on the same or substantially similar terms and conditions in the period of 12 months before the current supply, but has supplied goods or services of that description elsewhere in Australia on the same or substantially similar terms and conditions in that period; and
- (d) the actual price exceeds the highest price at which the person has supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in that period; and
- (e) the current supply is not an exempt supply.

Penalty: 100 penalty units.

Note: Subsection (4) contains a defence to this offence.

Offence: no previous supply in Australia

- (3) A person commits an offence if:
- (a) the person is a declared person in relation to notified goods or services; and
 - (b) the person supplies (the **current supply**) goods or services of that description in a locality on particular terms and conditions (the **actual terms**) at a particular price (the **actual price**); and
 - (c) the person has not supplied goods or services of that description in Australia on the same or substantially similar terms and conditions in the period of 12 months before the current supply; and
 - (d) the current supply is not an exempt supply.

Penalty: 100 penalty units.

Note: Subsection (4) contains a defence to this offence.

Defence

- (4) Subsection (1), (2) or (3) does not apply if the following 4 requirements are satisfied.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Locality notice

- (5) The first requirement is that the person has given the Commission a notice (a **locality notice**) in writing stating that the person proposes to supply goods or services of that description in that locality on specified terms and conditions (the **proposed terms**) at a specified price (the **proposed price**).

Note: The person may give further notices modifying the locality notice: section 95ZA.

Response to locality notice

- (6) The second requirement is that:
- (a) the applicable period in relation to the locality notice has ended; or
 - (b) the Commission has given the person a notice in writing stating that it has no objection to the person supplying goods or services of that description in that locality on the proposed terms at the proposed price; or
 - (c) both of the following apply:
 - (i) the Commission has given the person a notice (the **response notice**) in writing stating that it would have no objection to the person supplying goods or services of that description in that locality on the proposed terms at a specified price (the **approved price**) that is less than the proposed price;
 - (ii) the person has, not later than 7 days after being given the response notice, given the Commission a notice in writing stating that the person proposes to supply goods or services of that description in that locality on the proposed terms at a price not exceeding the approved price.

Actual terms

- (7) The third requirement is that the actual terms are the same or substantially similar to, the proposed terms.

Actual price

- (8) The fourth requirement is that the actual price does not exceed—
- (a) if paragraph (6)(a) or (b) applies—the proposed price; or
 - (b) if paragraph (6)(c) applies—the approved price.

Later notices modifying a locality notice

- (1) If a person gives the Commission a locality notice, the person may give the Commission one or more further notices in writing stating that the locality notice is to have effect as if there were substituted for the proposed price another specified price.
- (2) A price specified in a notice under subsection (1) must be:
- (a) less than the proposed price; and
 - (b) less than the price specified in any previous notice under that subsection in relation to the locality notice.
- (3) If a notice is given under subsection (1), the locality notice has effect accordingly.
- (4) In this section:

proposed price has the meaning given by subsection 95Z(5).

Applicable period in relation to a locality notice

- (1) The ***applicable period*** in relation to a locality notice is the period (the ***price-freeze period***) of 21 days starting on the day on which the notice was given.
- (2) However, the Commission may, with the consent of the person who gave the locality notice, determine, before the end of the price-freeze period, that the applicable period in relation to the notice for the purposes of this section is a specified longer period.
- (3) If the Commission so determines, that longer period is taken to become the ***applicable period*** in relation to the locality notice.
- (4) Also, if the Commission has given a response notice, the period that is the ***applicable period*** (worked out under subsections (1) and (3)) in relation to the locality notice is taken to be increased by a period of 14 days.

Example: On 1 May the person gives the Commission a locality notice.

Under subsection (1), the applicable period ends on 21 May.

On 9 May the Commission, with the consent of the person, determines under subsection (2), that the applicable period ends on 31 May.

If the Commission also gives the person a response notice, under subsection (4), the applicable period instead of ending on 31 May ends on 14 June.

Register of price notifications

Keeping of register

- (1) The Commission must keep, at such place as it thinks fit, a register for the purposes of this section.

Information on the register

- (2) If a person has given the Commission a locality notice, the Commission must, as soon as practicable after the end of the applicable period in relation to the notice, include in the register—
- (a) a copy of the notice, on which has been endorsed, or to which has been attached, a statement indicating the outcome of the Commission's consideration of the notice (including

or the Commission's consideration of the notice (including any action taken by it in relation to the notice and the outcome of any such action); and

- (b) a copy of each notice given under this Part to, or by, the Commission in relation to the locality notice; and
- (c) a statement of the reasons for the outcome of the Commission's consideration of the locality notice.

Gazette notice

(3) The Commission must, within 3 months after the end of the applicable period in relation to the locality notice, cause to be published in the *Gazette* a notice:

- (a) stating that the Commission received the locality notice specifying the date it received the notice; and
- (b) setting out such particulars (if any) relating to the outcome of the Commission's consideration of the locality notice as it considers appropriate.

Exclusion of confidential information

(4) A person who gives the Commission a document in relation to a locality notice, or who makes an oral submission to the Commission in relation to such a notice, may ask it to exclude from a document to be placed in the register any information:

- (a) that was in the document given by the person or in the submission made by the person; and
- (b) that the person claims is confidential.

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

(6) An application may be made to the Administrative Appeals Tribunal for the review of a decision under subsection (5) to refuse to exclude the information.

Inspection of register

(7) A person may, at any time during ordinary office hours in the place where the register is kept, inspect or make copies of, or extracts from, the register.

Validity of acts done

(8) The validity of an act done by the Commission in relation to a locality notice is not affected by a failure of the Commission to comply with this section.

Delegation by Commission

(1) The Commission may, by writing, delegate to a member of the Commission:

- (a) the Commission's price notification powers in relation to specified locality notices; and
- (b) the Commission's power under section 95ZJ relating to a notice given by the member exercising (as a delegate) the Commission's price notification powers.

(2) In this section:

price notification powers means the Commission's powers under paragraph 95Z(6)(b) or (c).

Part 5—Price monitoring

Directions to monitor prices, costs and profits of an industry

- (1) The Minister may give the Commission a written direction:
 - (a) to monitor prices, costs and profits relating to the supply of goods or services by persons in a specified industry; and
 - (b) to give the Minister a report on the monitoring at a specified time or at specified intervals within a specified period.

Commercial confidentiality

- (2) The Commission must, in preparing such a report, have regard to the need for commercial confidentiality.

Public inspection

- (3) The Commission must make copies of the report available for public inspection as soon as practicable after it gives the Minister the report.

Directions to monitor prices, costs and profits of a business

- (1) The Minister may give the Commission a written direction:
 - (a) to monitor prices, costs and profits relating to the supply of goods or services by a specified person; and
 - (b) to give the Minister a report on the monitoring at a specified time or at specified intervals within a specified period.

Commercial confidentiality

- (2) The Commission must, in preparing such a report, have regard to the need for commercial confidentiality.

Commission to send person a copy of the report

- (3) The Commission must send the person a copy of the report on the day it gives the Minister the report.

Public inspection

- (4) The Commission must also make copies of the report available for public inspection as soon as practicable after the person has received a copy of the report.

Exceptions to price monitoring

Exempt supplies

- (1) The Minister must not direct the Commission under this Division to monitor prices, costs and profits relating to a supply of goods or services of a particular description that is an exempt supply in relation to goods or services of that description.

State or Territory authorities

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

Division 6—Other provisions

Ministerial directions

Commission

- (1) The Minister may, by notice in writing give to the Chairpersons

direct the Commission to give special consideration to a specified matter or matters in exercising its powers and performing its functions under this Part.

- (2) The Commission must comply with any such directions.

Other bodies

- (3) The Minister may, by notice in writing given to the person presiding at an external inquiry, direct the body holding the inquiry to give special consideration to a specified matter or matters in holding the inquiry.

- (4) The body must comply with any such directions.

Inquiries by an unincorporated body or a group of 2 or more individuals

- (1) This section applies to inquiries by an unincorporated body or group of 2 or more individuals.

- (2) The regulations may make provision for and in relation to the manner in which the unincorporated body or group of individuals to:

- (a) give a notice, report or other document to a person under this Part; or
- (b) do any other thing under this Part.

Withdrawal of notices

Commission

- (1) The Commission may give a person a notice (the **withdrawal notice**) in writing withdrawing a notice it previously gave the person under this Part (other than this section).
- (2) If the Commission does so, this Part has effect, from the time which the withdrawal notice is given to the person, as if the other notice had not been given to the person.

Other bodies

- (3) The body holding an external inquiry may give a person a notice (the **withdrawal notice**) in writing withdrawing a notice it previously gave the person under this Part (other than this section).
- (4) If the body does so, this Part has effect, from the time at which the withdrawal notice is given to the person, as if the other notice had not been given to the person.

Power to obtain information or documents

Notice by Commission

- (1) If the Chairperson has reason to believe that a person is capable of giving information or producing documents relevant to:
- (a) the Commission considering the matters contained in a locality notice that the person has given it; or
 - (b) an inquiry that is being held in relation to the person; or
 - (c) a supply of goods or services by the person that is of a kind in relation to which the Commission is carrying out an inquiry; or
 - (d) a supply of goods or services by the person that is of a kind in relation to which the Commission is monitoring under section 95ZE or 95ZF;
- the Chairperson may, by notice in writing signed by him or her,

given to the person, require the person to do one or more of the following:

- (e) give the Commission, by writing signed by the person or her agent or, in the case of a Commonwealth authority or body corporate, by a competent officer of the authority or body, within the specified period and in the specified manner, specified information relating to the affairs of the person;
- (f) produce to the Commission, within the specified period and in the specified manner, specified documents relating to the affairs of the person;
- (g) if the person is a body corporate and the notice relates to the matter in paragraph (d)—give the Commission, together with the information or documents concerned, a declaration on a form approved by the Chairperson and signed by:
 - (i) the Chief Executive Officer (however described) of the body corporate; or
 - (ii) a person nominated by the Chief Executive Officer, stating that the information or documents are true and correct.

Notice by other bodies

(2) If:

- (a) an external inquiry is being held in relation to a person;
- (b) the inquiry Chair has reason to believe that the person is capable of giving information or producing documents relevant to the inquiry;

the inquiry Chair may, by notice in writing signed by him or her and given to the person, require the person:

- (c) to give the body, by writing signed by the person or his or her agent or, in the case of a Commonwealth authority or body corporate, by a competent officer of the authority or body, within the specified period and in the specified manner, specified information relating to the affairs of the person;
- (d) to produce to the body, within the specified period and in the specified manner, specified documents relating to the affairs of the person.

Period specified in notice

(3) A period specified in a notice under subsection (1) or (2) must end at least 14 days after the notice was given.

Offence: refusal or failure to comply with notice

(4) A person commits an offence if the person refuses or fails to comply with a notice given to the person under this section.

Penalty: 20 penalty units.

(5) Subsection (4) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

(6) It is a reasonable excuse for the purposes of subsection (4) if an individual to refuse or fail to give information or produce a document on the ground that the information or production of the document might tend to incriminate the individual or to expose the individual to a penalty.

(7) Subsection (6) does not limit what is a reasonable excuse for

purposes of subsection (5).

Offence: false or misleading declarations

- (8) A person must not, in a declaration made for the purposes of paragraph (1)(g), make a statement if the person knows, or is reckless as to whether, the statement is false or misleading.

Penalty: 20 penalty units.

Making information or documents publicly available

- (9) If:
- (a) a notice is given to a person under this section relating to an inquiry that is being held in public in relation to the person and
 - (b) the person gives the information concerned or produces documents concerned to the inquiry body in connection with the inquiry;
- the inquiry body must make the information or documents available to the public in such manner as it thinks fit.

Note: See also section 95ZN (about confidentiality of information).

Inspection of documents etc.

Members or staff members

- (1) A member of the Commission, or a member of the staff of the Commission, may inspect documents:
- (a) given to the Commission for the purposes of the exercise of its powers or the performance of its functions under this law or
 - (b) produced at an inquiry.
- (2) A member of the Commission, or a member of the staff of the Commission, may also make copies of, or take extracts from, those documents.

Associate members

- (3) An associate member of the Commission may inspect documents:
- (a) given to the Commission for the purposes of the exercise of its powers or the performance of its functions under this law in relation to an inquiry for the purposes of which the Chairperson has directed that the associate member be taken to be a member of the Commission; or
 - (b) produced at that inquiry.
- (4) An associate member of the Commission may also make copies of, or take extracts from, those documents.

External inquiries

- (5) In an external inquiry, the person presiding at the inquiry, or a person providing assistance in the inquiry to the body holding the inquiry, may:
- (a) inspect documents given to the body for the purposes of the inquiry; and
 - (b) make copies of, or take extracts from, those documents.

Retention of documents

- (1) The Commission, or a body other than the Commission, may retain a document given or produced to it as mentioned in section 95ZL. It may retain the document for such reasonable

period as it thinks fit.

- (2) The person otherwise entitled to possession of the document entitled to be supplied, as soon as practicable, with a copy certified by the Commission or other body, as the case may be, to be a true copy.
- (3) The certified copy must be received in all courts and tribunals as evidence as if it were the original.
- (4) Until a certified copy is supplied, the Commission or other body, as the case may be, must, at such times and places as it thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect the document, or make copies of, or take extracts from, the document.

Confidential information

- (1) This section applies if a person claims that disclosure of the following information would damage the competitive position of the person:
 - (a) information made available, or to be made available, by or on behalf of the person (whether in oral evidence or in a written statement, submission or other document) at the hearing of an inquiry by the Commission or another body;
 - (b) information given, or contained in a document produced by the person under section 95ZK to the Commission or another body.

Commission or other body to take confidentiality steps

- (2) If the Commission or other body, as the case may be:
 - (a) is satisfied that the claim is justified; and
 - (b) is not of the opinion that disclosure of the information is necessary in the public interest;it must take all reasonable steps to ensure that the information is not disclosed, without the consent of the person, in the proceedings or by it, to a person other than:
 - (c) in relation to the Commission:
 - (i) a member of the Commission or an associate member of the Commission; or
 - (ii) a member of the staff of the Commission who received the information in the course of his or her duties; or
 - (d) in relation to the other body:
 - (i) the person presiding at the inquiry concerned; or
 - (ii) a person providing assistance in the inquiry to the other body.

Interpretation

- (3) This section has effect despite anything in sections 95R and 95ZK.

Immunity

Members or associate members of the Commission

- (1) A member of the Commission, or an associate member of the Commission, has, in the performance of his or her functions or exercise of his or her powers under this Part as a member or associate member, the same protection and immunity as a Justice of the High Court.

- (2) In an external inquiry, the person presiding at the inquiry has the same protection and immunity as a Justice of the High Court in relation to the performance of his or her functions or the exercise of his or her powers under this Part in that capacity, the same protection and immunity as a Justice of the High Court.

Secrecy: members or staff members of the Commission etc.

Offence

- (1) An entrusted person commits an offence if:
- (a) the person:
 - (i) makes a copy or other record of any protected information or of all or part of any protected document;
 - (ii) discloses any protected information to another person or to a court; or
 - (iii) produces all or part of a protected document to another person or to a court; and
 - (b) in doing so, the person is not acting in the course of performing or exercising functions, powers or duties under this Act in relation to this Act.

Penalty: Imprisonment for 2 years.

Courts

- (2) An entrusted person cannot be required to:
- (a) disclose any protected information to a court; or
 - (b) produce all or part of a protected document to a court;
- unless that disclosure or production is necessary for the purpose of carrying into effect the provisions of this Act.

Definitions

- (3) In this section:

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

entrusted person means a person who is or was:

- (a) a member of the Commission or an associate member of the Commission; or
- (b) a member of the staff of the Commission; or
- (c) appointed or engaged under the *Public Service Act 1997*.

produce includes permit access to.

protected document means a document that:

- (a) is given to or otherwise acquired by the Commission for the purposes of this Part; and
- (b) has not been made available to the public by the Commission under this Part.

protected information means information that:

- (a) is disclosed to, or obtained by, an entrusted person for the purposes of this Part or as permitted by the repealed Part 5 of the *Official Information Act 1982*; and
- (b) has not been made available to the public under this Part by the Commission and is not contained in oral evidence given in public at the hearing of an inquiry.

repealed Part means Part V of the *Prices Surveillance Act 1978* as continued in operation by Schedule 2 to the *Trade Practices Legislation Amendment Act 2003*.

Disclosure of protected information to the Energy Department

- (1) An authorised entrusted person may disclose protected information to the Energy Department if the Chairperson is satisfied that the information will enable or assist an officer of Energy Department to perform or exercise any function or power under the *Petroleum and Other Fuels Reporting Act 2017*.
- (2) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (1).
- (3) An instrument under subsection (2) is not a legislative instrument.

Delegation

- (4) The Chairperson may, by writing, delegate any or all of his or her powers under subsection (1) or (2) to:
 - (a) another member of the Commission; or
 - (b) a member of the staff of the Commission who is an SES employee or an acting SES employee.

Note 1: Section 2B of the *Acts Interpretation Act 1901* contains the definition of **SES employee** and **acting SES employee**.

Note 2: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

- (5) In performing a function, or exercising a power, under a delegation, the delegate must comply with any directions of the Chairperson.
- (6) This section has effect despite anything in section 95ZN.

Definitions

- (7) In this section:

authorised entrusted person means an entrusted person authorised by the Chairperson, in writing, for the purposes of this definition.

Energy Department means the Department administered by the Minister administering the *Petroleum and Other Fuels Reporting Act 2017*.

protected information has the same meaning as in section 95ZN.

Secrecy: persons involved in inquiries by bodies other than the Commission

Offence

- (1) An external person commits an offence if:
 - (a) the person:
 - (i) makes a copy or other record of any protected information or of all or part of any protected document;
 - (ii) discloses any protected information to another person or to a court; or
 - (iii) produces all or part of a protected document to another person or to a court; and
 - (b) in doing so, the person is not acting in the course of performing or exercising functions, powers or duties under the Act in relation to this Act.

Penalty: Imprisonment for 2 years.

Courts

- (2) An external person cannot be required to:
- (a) disclose any protected information to a court; or
 - (b) produce all or part of a protected document to a court;
- unless that disclosure or production is necessary for the purpose of carrying into effect the provisions of this Act.

Definitions

- (3) In this section:

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

external person means a person who is or was:

- (a) the person presiding at an external inquiry; or
- (b) a person providing assistance in such an inquiry to the person holding the inquiry.

produce includes permit access to.

protected document means a document that:

- (a) is given to or otherwise acquired by the body holding the external inquiry concerned for the purposes of that inquiry; and
- (b) has not been made available to the public by that body under this Part.

protected information means information that:

- (a) is disclosed to, or obtained by, an external person for the purposes of the inquiry concerned; and
- (b) has not been made available to the public under this Part by the body holding that inquiry and is not contained in oral evidence given in public at the hearing of that inquiry.

VIII—Resale price maintenance

Acts constituting engaging in resale price maintenance

- (1) Subject to this Part, a corporation (in this section called **the supplier**) engages in the practice of resale price maintenance if that corporation does an act referred to in any of the paragraphs of subsection (3).
- (2) Subject to this Part, a person (not being a corporation and in this section called **the supplier**) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.
- (3) The acts referred to in subsections (1) and (2) are the following:
- (a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;
 - (b) the supplier inducing, or attempting to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier;
 - (c) the supplier entering into an agreement, or offering to

into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;

(d) the supplier withholding the supply of goods to a second person for the reason that the second person:

- (i) has not agreed as mentioned in paragraph (a); or
- (ii) has sold, or is likely to sell, goods supplied to him or her by the supplier, or goods supplied to him or her by a third person who, directly or indirectly, has obtained goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold;

(e) the supplier withholding the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the second person:

- (i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or
- (ii) has sold, or is likely to sell, goods supplied to him or her, or to be supplied to him or her, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; and

(f) the supplier using, in relation to any goods supplied, or may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold;

(4) For the purposes of subsection (3):

(a) where a price is specified by another person on behalf of the supplier, it shall be deemed to have been specified by the supplier;

(b) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier;

(c) where a formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that formula, that price shall be deemed to have been specified by the supplier; and

(d) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price ascertained by calculation from, or by reference to, a formula specified by another person in respect of those goods or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier.

(5) In subsection (4), **formula** includes a set form or method.

(6) For the purposes of subsection (3), anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.

(7) A reference in any of paragraphs (3)(a) to (e), inclusive, including a reference in negative form, to the selling of goods at a price less than a price specified by the supplier shall be construed as

including references to:

- (a) the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale;
- (b) the displaying of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be displayed for sale; and
- (c) the offering of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be offered for sale;

and a reference in paragraph (3)(d), (e) or (f) to a price below which the goods are not to be sold shall be construed as including a reference to the price below which the goods are not to be advertised for sale, to the price below which the goods are not to be displayed for sale and to the price below which the goods are not to be offered for sale.

- (8) Subsection (1) does not apply with respect to any act referred to in a paragraph of subsection (3) if the supplier and the second person referred to in that paragraph are bodies corporate that are related to each other.

Resale price maintenance in relation to services

- (1) This Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods.
- (2) For the purposes of subsection (1), this Part is to be read with appropriate modifications, including the following modifications:
 - (a) references in this Part to goods are to be read as references to services;
 - (b) references to the sale of goods are to be read as references to the re-supply of services.

Recommended prices

For the purposes of paragraph 96(3)(b), the supplier is not to be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods:

- (a) by reason only of a statement of a price being applied to goods as mentioned in paragraph 99(1)(a) or being applied to a covering, label, reel or thing as mentioned in paragraph 99(1)(b), provided that the statement is preceded by the words “recommended price”; or
- (b) by reason only of his or her having given notification in writing to the second person (not being a notification by virtue of a statement being applied as mentioned in paragraph (a)) of the price that he or she recommends as appropriate for the sale of those goods, provided that there is included in the notification, and in each writing that refers, whether expressly or by implication, to the notification, a statement to the following effect:

“The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation.”.

Withholding the supply of goods

- (1) For the purposes of paragraph 96(3)(d) or (e), the supplier shall be deemed to withhold the supply of goods to another person if:
 - (a) the supplier refuses or fails to supply those goods to, or to request by, the other person;

- (b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;
 - (c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, manner or place of delivery or otherwise, than the supplier treats persons to whom the supplier supplies the same or similar goods; or
 - (d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this subsection.
- (2) Paragraph 96(3)(d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person:
- (a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods;
 - (b) otherwise for the purpose of promoting the business of the other person.
- (3) For the purposes of subsection (2), there shall be disregarded
- (a) a genuine seasonal or clearance sale of goods that were acquired for the purpose of being sold at that sale; or
 - (b) a sale of goods that took place with the consent of the supplier.

Statements as to the minimum price of goods

- (1) For the purposes of paragraph 96(3)(f), if:
- (a) a statement is applied to goods, whether by being woven, impressed on, worked into or annexed or affixed to the goods or otherwise;
 - (b) a statement is applied to a covering, label, reel or thing with which goods are supplied; or
 - (c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to lead to the belief that it refers to goods;
- the statement shall be deemed to have been used in relation to those goods.
- (2) For the purposes of subsection (1), **covering** includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and includes a band or ticket.

Identifiary provisions

- (1) Where, in proceedings under this Act by a person (in this section referred to as **the plaintiff**) against another person (in this section referred to as **the defendant**), it is claimed that the defendant engaged in the practice of resale price maintenance and it is established that:
- (a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 98(1)(a), (b), (c) or (d);
 - (b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and
 - (c) during the period of 6 months immediately before the time when the defendant so acted, the defendant became aware

matter or circumstance capable of constituting a reason referred to in paragraph 96(3)(d) or (e) for the defendant's acting;

then, subject to subsection (2), it shall be presumed, unless the contrary is established, that that matter or circumstance was a reason for the defendant's so acting.

(2) Subsection (1) does not apply where the plaintiff establishes that the matter mentioned in paragraph 98(1)(b) or (c) but the terms of which are disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant that the plaintiff, at the time at which, or the form in which, payment was to be made, should give security as to the giving of security to secure payment.

(3) In the application of this section in proceedings by the Commission for an injunction, references to the plaintiff shall be construed as references to a person specified in the application for the injunction as the person in relation to whom the defendant is claimed to have acted as mentioned in paragraph (1)(a).

X—Review by Tribunal of Determinations of Commission

Division 1—Applications for review

Section 1—Applications for review

(1) A person dissatisfied with a determination by the Commission under Division 1 of Part VII:

(a) in relation to an application for an authorization or a minor variation of an authorization; or

(b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

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

(1AA) If:

(a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for a minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and substitution of another authorization; or

(b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

(1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consulting the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(7).

(1B) A presidential member may, on the application of a person concerned:

(a) in an application for an overseas merger authorisation;

(b) in an application for a minor variation or a revocation of such an authorization; or

(c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would be unfair to do so.

(1C) The regulations may make it a requirement that a person applying under subsection (1) for review of a determination relating to a merger authorisation give an undertaking under section 87B that the person will not make the acquisition to which the authorisation relates while the Tribunal is considering the application.

(2) A review by the Tribunal is a re-hearing of the matter, unless a review of a determination by the Commission:

(a) in relation to an application for a merger authorisation or a minor variation of a merger authorisation; or

(b) in relation to the revocation of a merger authorisation, the revocation of a merger authorisation and the substitution of another merger authorisation.

(3) Subsections 90(7), 91A(4) and (4A), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

Application for review of notices under Division 2 of Part VII

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3), (3A) or (3B), 93AAA(1), 93AC(1), (2) or (2A), 93ACA(1), 93AD(5) or 93AG(7) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

Application for review of notice under section 95AB

(1) A person dissatisfied with the giving of a notice under section 95AB may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice.

(2) If the person is the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal must review the giving of the notice.

Functions and powers of Tribunal

(1) On a review of a determination of the Commission under Division 1 of Part VII in relation to:

(a) an application for an authorization; or

(b) an application for a minor variation of an authorization

(c) an application for, or the Commission's proposal for, the revocation of an authorization; or

(d) an application for, or the Commission's proposal for, the

revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purpose of the review, may perform all the functions and exercise all the powers of the Commission.

Note: Subsections (9) and (10) contain limitations in relation to determinations relating to merger authorisations.

(1AA) If a person applies to the Tribunal for review of a determination of the Commission relating to:

(a) the grant of a merger authorisation (a **domestic merger authorisation**) that is not an overseas merger authorisation; or

(b) the minor variation, or the revocation, of a domestic merger authorisation; or

(c) the revocation of a domestic merger authorisation and the substitution of another domestic merger authorisation;

the Tribunal must make its determination on the review within the period applying under subsection (1AC) (the **relevant period**).

(1AB) If the Tribunal has not made its determination on the review within the relevant period, the Tribunal is taken to have made a determination affirming the Commission's determination.

(1AC) The period applying under this subsection is as follows:

(a) unless paragraph (b) or (c) applies—90 days;

(b) if the Tribunal allows new information, documents or evidence under subsection (9), and paragraph (c) does not apply—120 days;

(c) if an extended period is determined under subsection (9)—that extended period;

beginning on the day the Tribunal receives the application for review.

(1AD) Before the end of the period (the **initial period**) otherwise applying under paragraph (1AC)(a) or (b) for the review, the Tribunal may determine in writing that:

(a) the matter cannot be dealt with properly within the initial period, either because of its complexity or because of other special circumstances; and

(b) an extended period applies for the review, which consists of the initial period and a further specified period of not more than 90 days.

The Tribunal must, before the end of the initial period, notify the applicant and the Commission of any determination under this subsection.

(1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:

(a) the grant of an overseas merger authorisation; or

(b) the minor variation, or the revocation, of an overseas merger authorisation; or

(c) the revocation of an overseas merger authorisation and the substitution of another overseas merger authorisation;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

(1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly

Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity because of other special circumstances.

(1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.

(2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission under Division 1 of Part VII in relation to:

- (a) an application for an authorization; or
- (b) an application for a minor variation of an authorization
- (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
- (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

(4) Upon a review of the giving of a notice by the Commission under subsection 93(3):

- (a) if the person who applied for the review satisfies the Tribunal that:
 - (i) the conduct or proposed conduct does not and would not have the purpose, and does not and is not likely to have 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 that has resulted or is likely to result, or would result or be likely to result, from the conduct or proposed conduct;

the Tribunal must make a determination setting aside the notice; or

- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had given the notice.

(5AAA) Upon a review of the giving of a notice by the Commission under subsection 93(3B):

- (a) if the person who applied for the review satisfies the Tribunal that the corporation or other person on whom the conditions relating to the conduct or proposed conduct have been imposed has not failed to comply with those conditions the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

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

- (a) if the person who applied for the review satisfies the Tribunal that:
 - (i) apart from section 93AAA, the Commission would have had grounds referred to in subparagraph 93AAA(i); or
 - (ii) compliance with the conditions imposed by the notice would not ensure those grounds would not exist; the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

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

- (a) if the person who applied for the review satisfies the Tribunal that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision outweighs or would outweigh the detriment to the public that has resulted or is likely to result or would result 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 or would not be likely to have the effect, of substantially lessening competition (within the meaning of section 46); or
 - (ii) in all the circumstances:
 - (A) the provision has resulted or is likely to result or would result or be likely to result, in a benefit to the public; and
 - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result or would result or be likely to result, from the provision;the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

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

- (a) if the person who applied for the review satisfies the Tribunal that the corporation on whom the conditions relating to the conduct or proposed conduct have been imposed has failed to comply with those conditions—the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AC) If the Tribunal sets aside a notice (the **objection notice**) given by the Commission under subsection 93AC(1), (2) or (2A), then:

(a) if the Commission gave the objection notice as part of a process starting when the Commission gave a notice under subsection 93A(2) (conference notice) during the period described in paragraph 93AD(1)(a)—the Commission is taken for the purposes of paragraph 93AD(1)(b) to have decided not to give the objection notice at the time the Tribunal set it aside; and

(b) for the purposes of subsections 93AD(2) and (3), the objection notice is taken not to have been given.

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

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

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

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

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

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

(a) if the person who applied for the review satisfies the Tribunal that:

(i) apart from section 93ACA, the Commission would have had grounds referred to in subparagraph 93ACA(1)(i); or

(ii) compliance with the conditions imposed by the notice would not ensure those grounds would not exist; the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5E) Upon a review of the giving of a notice by the Commission under subsection 93AD(5):

(a) if the person who applied for the review satisfies the Tribunal that:

(i) the period provided for in subparagraph 93AD(3)(b) in relation to the relevant collective bargaining notice

- appropriate in all the circumstances; or
 - (ii) the other period determined by the Commission under subsection 93AD(5) is not appropriate in all the circumstances;

the Tribunal must make a determination setting aside notice under subsection 93AD(5); or
 - (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.
- (5F) Upon a review of the giving of a notice by the Commission under subsection 93AG(7) extending a period for a further period:
- (a) if the person who applied for the review satisfies the Tribunal that in all the circumstances it is not reasonable to extend the period for the further period, 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.
- (5G) Upon a review of the giving of a notice under section 95AB:
- (a) if the person who applied for the review satisfies the Tribunal that conduct of the kind specified in the notice:
 - (i) would not have the effect, or would not be likely to have the effect, of substantially lessening competition
 - (ii) would result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from conduct of that kind;

the Tribunal must make a determination setting aside notice under section 95AB; 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.
- (6) For the purposes of a review by the Tribunal under this Division, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.
- (7) For the purposes of a review under this Division, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.
- (8) Subsections (9) and (10) apply to a review of a determination of the Commission in relation to:
- (a) an application for a merger authorisation; or
 - (b) an application for a minor variation of a merger authorisation; or
 - (c) an application for, or the Commission's proposal for, the revocation of a merger authorisation; or
 - (d) an application for, or the Commission's proposal for, the revocation of a merger authorisation and the substitution of another merger authorisation.
- (9) For the purposes of the review, the Tribunal may allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the

Commission made the determination.

- (10) Despite subsection (1), the Tribunal must not, for the purpose of the review, have regard to any information, documents or evidence other than:
- (a) information that was referred to in the Commission's reasons for making the determination; and
 - (b) any information or report given to the Tribunal under subsection (6); and
 - (c) the information, documents or evidence referred to in subsection (7); and
 - (d) information given to the Tribunal as a result of the Tribunal seeking such relevant information, and consulting with such persons, as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence referred to in subsection (7); and
 - (e) any information, documents or evidence referred to in subsection (9).

Part 2—Procedure and Evidence

Procedure generally

- (1) In proceedings before the Tribunal:
- (a) the procedure of the Tribunal is, subject to this Act and regulations, within the discretion of the Tribunal;
 - (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence.
- (2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by a presidential member.
- (3) The powers mentioned in subsection (2) may be exercised by a presidential member:
- (a) whether or not the Tribunal has been constituted under section 37 in relation to the proceedings; and
 - (b) once the Tribunal is so constituted—whether or not the member is part of the Division of the Tribunal so constituted.

Regulations as to certain matters

The regulations may make provision:

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that the material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and
- (aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and
- (b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

Power to take evidence on oath

- (1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath

that purpose a member of the Tribunal may administer an oath or affirmation.

- (2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

Hearings to be in public except in special circumstances

- (1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.
- (2) Where the Tribunal is satisfied that it is desirable to do so because of the confidential nature of any evidence or matter or any other reason, the Tribunal may:
 - (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or
 - (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.
- (3) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

Evidence in form of written statement

The Tribunal may permit a person appearing as a witness before the Tribunal to give evidence by tendering, and, if the Tribunal thinks fit, verifying by oath or affirmation, a written statement which shall be filed with the Registrar.

Taking of evidence by single member

The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on behalf, with such limitations (if any) as the Tribunal so constituted directs, and, where such an authority is given:

- (a) that member may take evidence accordingly; and
- (b) for the purposes of this Act, that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

Participants in proceedings before Tribunal

- (1) A person to whom an authorization under Division 1 of Part 3 was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorization.
- (1A) A person to whom a notice was given by the Commission under subsection 93(3), (3A) or (3B) or 93AC(1), (2) or (2A) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.
- (2) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

Representation

In proceedings before the Tribunal:

- (a) a natural person may appear in person:

(a) a natural person may appear in person;

(aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;

(b) a body corporate may be represented by an employee, director or other officer, of the body corporate approved by the Tribunal;

(c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by a member or officer of the association approved by the Tribunal and

(d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.