

外國消費者保護法

第 六 輯

行政院消費者保護委員會 編印

序言

消費者保護涉及層面非常廣泛，涵蓋每一個人之食、衣、住、行、育、樂等各方面，消費者保護法是保障消費生活之基本法，攸關全體國民生活福利。對於消費者保護工作，我國已逐步推動，歷經個別立法保護時期及消費者保護方案時期，於八十三年一月十一日公布消費者保護法後，即正式進入「消費者保護法」時期。

值此保障消費者之思想已蔚為世界潮流之際，我國消費者保護法之制定公布施行，已為我國法制建設及提昇國民消費生活品質樹立了一個新的里程碑，對於保障我國消費者權益有其正面意義。鑒於消費者保護法為一嶄新的法律領域，為健全我國有關消費者保護之法制，本會業已函請外交部轉請駐外單位代為蒐集外國消費者保護法規，並正逐步將所蒐集的外國消費者保護法規進行翻譯工作，彙編為外國消費者保護法規選輯，作為進一步瞭解消費者保護法有關規定及比較研究之參考資料。

本書為本會翻譯編印外國消費者保護法第六輯，內容為澳洲交易行為規制法，是該國有關消費者保護之重要法規。另鑑於本會『消費者法規翻譯叢書』已陸續收錄有外國之消費者法規達三十一種，為方便讀者參考查閱，特於本書末加附索引。此外，本書亦採用中文翻譯與原文左右對照方式印刷，以利參閱。

本選輯之中譯本部分，係委請理律法律事務所翻譯，謹此敘明，並致謝忱。

行政院消費者保護委員會 謹識

中華民國八十五年十月

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澳大利亞

TRADE PRACTICES ACT 1974

An Act Relating To Certain Trade Practices

PART I - PRELIMINARY

Short title

1. This Act may be cited as the Trade Practices Act 1974.

Application of Act to Commonwealth and Commonwealth authorities

2A(1) Subject to this section, 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 renders the Crown in right of the

Commonwealth liable to be prosecuted for an offence.

- (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.

Repeal

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 The Restrictive Trade Practices Act 1971 and the Restrictive Trade Practices Act 1972 are repealed.

Interpretation

4. (1) In this Act, unless the contrary intention appears: “acquire” includes:
- (a) in relation to goods - acquire by way of purchase, exchange or taking on lease, on hire or on hire- purchase; and
 - (b) in relation to services - accept;
- “arrive at” , in relation to an understanding, includes reach or enter into;
- “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 [he 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;

“authorization” means an authorization under Division 1 of Part VII granted by the Commission or by the Tribunal on a review of a determination of the Commission;

“business” includes a business not carried on for profit;

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

“commencing date” means 1 October 1974;

“Commission” means the Trade Practices Commission established by section 6A, and includes a member of the Commission or a Division of the Commission performing functions of the Commission;

“competition” includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia;

“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);

“covenant” means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land), and

“proposed covenant” has a corresponding meaning;

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

“Deputy Chairman” means the Deputy Chairman 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;

“document” includes:

(a) a book, plan, paper, parchment or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them; and

(b) a disc, tape, paper or other device from which sounds or messages are capable of being reproduced;

“Family Court Judge” means a Judge of the Family Court (including the Chief judge, the Deputy Chief Judge, a judge Administrator or a Senior Judge);

“financial corporation” means a financial corporation within the meaning of paragraph 51 (xx) of the Constitution and include 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;

“give effect to” , in relation to a provision of a contract, arrangement or understanding, includes do an act or thin in pursuance of or in accordance with or enforce or purport to enforce;

“goods” includes:

(a) ships, aircraft and other vehicles;

(b) animals, including fish;

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

(d) gas and electricity;

“member of the Commission” includes the Chairman 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;

“New Zealand Commerce Commission” means the Commission established by section 8 of the Commerce Act 1986 of New Zealand;

“New Zealand Crown corporation” means a body corporate that is an instrument of the Crown in respect of the Government of New Zealand;

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

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

“President” means the President of the Tribunal and includes a person appointed to act as President of the Tribunal;

“presidential member” or “presidential member of the Tribunal” means the President or a Deputy President;

“price” includes a charge of any description;

“provision” , in relation to an understanding, means any

matter forming part of the understanding;

“Registrar” means the Registrar of the Tribunal;

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

“send” includes deliver, and “sent” and “sender” have corresponding meanings;

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

(a) a contract for or in relation to:

- (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
- (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
- (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

- (b) a contract of insurance;
- (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
- (d) any contract for or in relation to the lending of moneys;
 - but does not include rights or benefits being the supply of goods or the performance of work under a contract of service;
 - “share” includes stock;
 - “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;
 - “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;
 - “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 Trade Practices Tribunal continued in existence by this Act, and includes a member of that Tribunal or a Division of that Tribunal performing functions of that Tribunal;

“unsolicited goods” means goods sent to a person without any request made by him or on his behalf;

“unsolicited services” means services supplied to a person without any request made by him or on his behalf.

(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 requiring of the giving of, or the giving of, a covenant;

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

the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;

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

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

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

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

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

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

(b) the provision of the contract or the covenant will not or

may not have that effect at a later time.

(4) In this Act:

- (a) a reference to the acquisition of 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

4A. (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 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 might be cast at a general meeting of the firstmentioned 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 any 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 such an appointment if:

(a) a person cannot be appointed as a director without the exercise in his favour by that other body corporate of such a power; or

(b) a person' s appointment as a director follows necessarily from his 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 held 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.

(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.

(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

4B. (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 resupply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures 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 \$40M() 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 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 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 shall be deemed to be the acquisition by him of a service and any amount by which the amount paid or payable by him for the goods or services is increased by reason of his so obtaining credit shall be deemed to be paid or payable by him 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 the 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

4C. 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; and
- (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.

Exclusionary provisions

- 4D. (1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
- (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
 - (b) the provision has the purpose of preventing, restricting

or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the firstmentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any

of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

Market

4E. 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

4F. For the purposes of this Act;

- (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if;
 - (i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, 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.

Lessening of competition to include preventing or hindering competition

4G. 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

4H. In this Act:

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

to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and

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

Joint ventures

4J. In this Act:

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

constitute or constitutes, or are or is to constitute, that body corporate.

Loss or damage to include injury

4K. 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.

Severability

4L. 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 87 or 87A, 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,

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

4M. 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 Parts IV, IVA and V

5. (1)Parts IV, IVA and V extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

(1A)In addition to the extended operation that section 46A has by virtue of subsection

(1), that section extends to the engaging in conduct outside Australia by:

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

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

(c)Persons ordinarily resident within New Zealand.

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

(3) Where a claim under section 82 is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section

except with the consent in writing of the Minister.

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

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

- (a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and
- (b) it is not in the national interest that the consent be given.

Additional operation of Act

6. (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 Part X, has, by force of this subsection, the effect it would have if:

- (a) any references in this Act other than in section 55 to trade or commerce were, by express provision, confined to trade or commerce:
 - (i) between Australia and places outside Australia;
 - (ii) among the States;

- (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;
- (b) sections 45, 45B, 450, 46, 46A, 53B, 60 and 61, subsections 64 (3) and (4), section 75A and Part VIII 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:
 - (i) trade or commerce between Australia and places outside Australia;
 - (ii) trade or commerce among the States;
 - (iii) trade or commerce within a Territory, between a State and a Territory or between two Territories; or
 - (iv) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth;
- (c) any reference in Division 2 of Part V to a contract for the supply of goods or services and any reference in Division 2A of that Part or in Part VA to the supply of goods, were, by express provision, confined to a contract made, or the supply of goods, as the case may be:
 - (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia;

- (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;
 - (d) in subsection 45 (1) and subparagraph 87 (3) (a) (i) the words “in so far as it confers rights or benefits or imposes duties or obligations on a corporation” were omitted;
 - (e) in subsection 45B (1) and subparagraph 87 (3) (a) (ii) the words “in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation” were omitted;
 - (ea) paragraph 45D (1) (a) were omitted and in paragraph 45D (1) (h) the words “the fourth person is a corporation and” were omitted;
 - (g) subsection 96 (2) were omitted; and
 - (h) subject to paragraphs (d), (e), (ea) and (g), a reference in this Act to a corporation, except a reference in section 4, 48, 50, 50A or 81, included a reference to a person not being a corporation.
- (3) In addition to the effect that this Act, other than Part X, has as provided by subsection (2), the provisions of Part IVA and of Divisions 1 and 1A of Part V have, by force of this subsection, the effect they would have if:

- (a) those provisions (other than section 55) were¹ 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 those provisions to a corporation included a reference to a person not being a corporation.
- (4) In addition to the effect that this Act, other than Part X, has as provided by subsections (2) and (3), the provisions of Part IVA and of Division 1 of Part V (other than sections 53A, 55 and 61) 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 section 73 in relation to a supplier who is a natural person, that section has effect as if there were substituted for paragraph 73 (6) (a) the following paragraph:
 - “(a) the supplier had died or is an undischarged bankrupt or a

person whose affairs are being dealt with under Part X of the Bankruptcy Act 1966; or”

PART II-THE TRADE PRACTICES COMMISSION

Establishment of Commission

6A. (1) Upon the commencement of this section the Commission established by the Trade Practices Act 1974 as in force immediately before the commencement of this section ceases to exist and there is established by this section a Commission by the name of the Trade Practices Commission.

(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 sued in its corporate name.

Constitution of Commission

7. (1) The Commission shall consist of a Chairman 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) A person shall not be appointed as a member of the Commission unless he appears to the Governor-General to be qualified for appointment by virtue of his knowledge of, or experience in, industry, commerce, economics, law or public administration.

Terms and conditions of appointment

8. (1) Subject to this Part, a member of the Commission holds office for such period, not exceeding 7 years, as is specified in the instrument of his appointment and on such terms and conditions as the Governor-General determines, but is eligible for re-appointment.
- (2) A person who has attained the age of 65 years shall not be appointed or re-appointed as a member of the Commission, and a person shall not be appointed or reappointed as a member of the Commission for a period that extends beyond the date on which he will attain the age of 65 years.

Associate members

- 8A. (1) The Minister may appoint persons to be associate members of the Commission.
- (2) An associate member of the Commission shall be appointed for such period not exceeding 5 years as is specified in the instrument of his 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 Chairman may, by writing signed by him, direct that, for the purposes of the exercise of the powers of the Commission under this Act in relation to a specified matter, not being an exercise of those powers by a Division of the Commission, a specified associate member of the Commission or specified associate members of the Commission shall be deemed to be a member or members of the Commission and, in that case, unless the contrary intention appears, a reference in this Act to a member of the Commission shall, for the purposes only of the exercise of the powers of the Commission in relation to that matter, be construed as including a reference to that associate member of the Commission or each of those associate members of the Commission, as the case may be.
- (5) Associate members of the Commission shall be deemed to be members of the Commission for the purposes of section 19.
- (6) For the purpose of the determination by the Commission of an application for an authorization or the making by the Commission of any decision for the purposes of subsection 93(3), the Chairman shall consider:

- (a) whether he should give a direction under subsection (4) of this section; or
 - (b) in the case of a matter in relation to which the Chairman proposes to give a direction under subsection 19 (1), whether he should direct that the Division concerned is to include an associate member of the Commission or associate members of the Commission.
- (7) Nothing in subsection (4) or (5) deems an associate member of the Commission to be a member of the Commission for any purpose related to the preparation of a report by the Commission under section 171.

Remuneration

- 9.(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 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 Chairman

10. (1) The Governor-General may appoint a person who is, or is to be, a member of the Commission to be the Deputy

Chairman of the Commission.

- (2) A person appointed under this section holds office as Deputy Chairman until the expiration of his period of appointment as a member of the Commission or until he sooner ceases to be a member of the Commission.
- (3) Where a member of the Commission appointed as Deputy Chairman is, upon ceasing to be a Deputy Chairman by virtue of the expiration of the period of his appointment as a member, re-appointed as a member, he is eligible for re-appointment as Deputy Chairman.
- (4) The Deputy Chairman may resign his office of Deputy Chairman by writing signed by him and delivered to the Governor-General.

Acting Chairman

- 11. (1) Where there is, or is expected to be, a vacancy in the office of Chairman, the Governor-General may appoint a person to act as Chairman until the filling of the vacancy.
- (1A) A person appointed under subsection (1) to act during a vacancy shall not continue so to act for more than 12 months.
- (2) Where the Chairman is absent from duty or from Australia:
 - (a) the Deputy Chairman shall act as Chairman during the absence; or

- (b) if there is no Deputy Chairman or the Deputy Chairman is not available to act as Chairman, the Minister may appoint a member of the Commission to act as chairman during the absence of the Chairman, but any such appointment ceases to have effect if a person is appointed as Deputy Chairman or the Deputy Chairman becomes available to act as Chairman.
- (3) A person acting as Chairman shall act in that capacity on such terms and conditions as the Governor-General determines and has all the powers and duties, and shall perform all the functions, conferred on the Chairman by this Act.

Leave of absence

12. (1) Subject to section 87E of the Public Service Act 1922, 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

13. (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 his creditors or makes an assignment of his remuneration for their benefit;

(b) fails to comply with his obligations under section 17;

(c) without the consent of the Minister engages in any paid employment outside the duties of his office; or

(d) is absent from duty, except on leave of absence granted by the Minister, 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

14. (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 his creditors or makes an assignment of his remuneration for their benefit; or
- (b) fails to comply with his obligations under section 17; the Minister shall terminate the appointment of that associate member of the Commission.

Resignation

15. (1) A member of the Commission may resign his office by writing signed by him and delivered to the Governor- General.
- (2) An associate member of the Commission may resign his office by writing signed by him and delivered to the Minister.

Arrangement of business

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

Disclosure or interests by members

17. (1) Where a member of the Commission other than the Chairman is taking part, or is to take part, in the determination of a matter before the Commission and the member has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions in relation to the determination of the matter:
- (a) the member shall disclose the interest to the Chairman;

and

(b) the member shall not take part, or continue to take part, in the determination of the matter if:

(i) the Chairman gives a direction under paragraph (2) (a) in relation to the matter; or

(ii) all of the persons concerned in the matter do not consent to the member taking part in the determination of the matter.

(2) Where the Chairman becomes aware that a member of the Commission is taking part, or is to take part, in the determination of a matter and that the member has in relation to the determination of the matter such an interest:

(a) if the Chairman considers that the member should not take part, or should not continue to take part, in the determination of the matter - the Chairman shall give a direction to the member accordingly; or

(b) in any other case - the Chairman shall cause the interest of the member to be disclosed to the persons concerned in the matter.

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

(4) In this section, “member of the Commission” includes an associate member of the Commission.

Meetings of Commission

18. (1) Subject to this section, the Chairman shall convene such meetings of the Commission as he 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 Chairman determines.
- (3) The Chairman shall preside at all meetings of the Commission at which he is present.
- (4) In the absence of the Chairman from a meeting of the Commission, the Deputy Chairman shall preside.
- (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 Chairman or the Deputy Chairman) form a quorum;
 - (b) all questions shall be decided by a majority of votes of the 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.

Chairman may direct Commission to sit in Divisions

19. (1) the Chairman may, by writing signed by him, direct that the powers of the Commission under this Act in relation to a matter shall be exercised by a Division of the Commission constituted by the Chairman and such other members (not being less than two in number) as are specified in the direction.
- (2) Where the Chairman has given a direction under subsection (1), he may, by writing signed by him, 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 Chairman is not required to attend a meeting of a Division of the Commission if he does not think fit to do so.

(5) At a meeting of a Division of the Commission at which neither the Chairman nor the Deputy Chairman is present, a member of the Commission nominated for the purpose by the Chairman 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 notwithstanding that another Division of the Commission is exercising powers of the Commission at the same time.

Delegation by Commission

25. (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 this power of delegation and its powers to grant, revoke or vary an authorization.

(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.

Staff of Commission

27. (1)The staff necessary to assist the Commission shall be persons appointed or employed under the Public Service Act 1922-1973.

(2)The Chairman of the Commission has all the powers of, or exercisable by, a Secretary under the Public Service Act 1922-1973 so far as those powers relate to the branch of the Australian Public Service comprising the staff referred to in subsection (1) as if that branch were a separate Department of the Australian Public Service.

(3)For the purposes of section 26 of the Public Service Act 1922-1973, the Chairman shall be deemed to be a Secretary.

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

28. (1) In addition to any other functions conferred on the Commission by this Act, 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, or the exercise of the powers, of the Commission under this Act;
- (b) to examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in 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;
- (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws; and
- (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 the 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 laws.

(3) The Minister shall cause a copy of each report furnished to him 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.

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

29. (1) The Minister may:

- (a) give directions as to matters to be given special consideration by the Commission in determining applications for authorizations or in making decisions for the purposes of paragraph 93 (3) (a) or (b); and
- (b) give directions to the Commission in connexion with the performance of its functions or the exercise of its powers under this Act, not being directions relating to the performance of its functions or the exercise of its powers under section 65J, 65K, 65M or 65N or Part VII in relation to individual cases;

and the Commission shall comply with any directions so given.

- (2) Any direction given to the Commission under subsection (1) shall 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, the Commission shall

comply with the requirement.

PART III - THE TRADE PRACTICES TRIBUNAL

Constitution of Tribunal

30. (1)The Trade Practices Tribunal in existence immediately before the commencing date continues in existence as the Trade Practices Tribunal.

(2)The Trade Practices 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

31. (1)A person shall not be appointed as a presidential member of the Tribunal unless he 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 appears to the Governor-General to be qualified for appointment by virtue

of his knowledge of, or experience in, industry, commerce, economics, law or public administration.

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

31A. 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 tenure of office as a Judge of a Federal Court or his rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of his office as a Judge of a Federal Court and, for all purposes, his 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 office as a Judge of a Federal Court.

Terms and conditions of appointment

32. 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 appointment and on such terms and

conditions as the Governor-General determines, but is eligible for re-appointment.

Remuneration and allowances of members of Trade Practices Tribunal

33. (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 Tribunals Act 1973.

Acting appointments

34. (1) Where:

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

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

the Attorney-General 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.

(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.

- (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.
- (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 of the Tribunal 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.

Suspension and removal of members of Tribunal

35. (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 7 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 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 creditors or makes an assignment of his remuneration for their benefit, the Governor-General shall remove him 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 no longer holds office as a Judge of a Federal Court, not being the High court or a court of an external Territory.

Resignation

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

Constitution of Tribunal for particular matters

37. 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

38. 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.

Arrangement of business

39. The President may give directions as to the arrangement of the business of the Tribunal and the constitution of Divisions of the Tribunal.

Disclosure of interests by members of Tribunal

40. (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 or acquires 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; and
 - (b) the member shall not take part, or continue to take part, in the proceedings if:
 - (i) the President gives a direction under paragraph (2) (a) 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 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.

(3) In this section:

- (a) a reference to proceedings shall be read as including a reference to proceedings by way of an inquiry by the Tribunal under this Act; and
- (b) a reference to a person concerned in proceedings, being an inquiry conducted by the Tribunal under section 132, shall be read as a reference to a person entitled, or granted leave, to be represented in the inquiry.

Presidential member to preside

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

Decision of questions

42.(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 or Tribunal ceasing to be available

43. (1) This section applies where the hearing of any proceedings has been commenced or completed by the Tribunal, 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 and 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 (3), he 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 may have regard to any record of the proceedings before the Tribunal as previously constituted.

Staff of Tribunal

44. (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 appointed or employed under the Public Service Act 1922-1973.

Acting appointments

- 44A. (1) The Minister may appoint a person who is an officer or

employee for the purposes of the Public Service Act 1922 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 office; or

(b) there is a vacancy in the office of Registrar or in that office of Deputy Registrar, as the case may be.

(2) A person acting as the Registrar or as a Deputy Registrar by reason of a vacancy in the office of Registrar or of that Deputy Registrar shall not continue so to act after the expiration of 12 months after the occurrence of the vacancy.

(3) A person appointed to act as the Registrar or as a Deputy Registrar has, while acting as the Registrar or as that Deputy Registrar, as the case may be, all the duties and functions of the Registrar or of that Deputy Registrar, and references in this Act to the Registrar or to a Deputy Registrar shall:

(a) if a person is acting as the Registrar - be read as a reference to the person so acting; or

(b) if a person is acting as a Deputy Registrar - be read as including a reference to the person so acting.

(4) The Minister may at any time terminate an appointment of a person to act as the Registrar or as a Deputy Registrar.

(5) A person who holds an appointment to act as the Registrar or as a Deputy Registrar may resign his appointment by writing under his hand delivered to the Minister.

(6) The validity of an act done by a person appointed to act as the Registrar or as a Deputy Registrar shall not be questioned in any proceeding on a ground arising from the fact that the occasion for the appointment, or for him to act under the appointment, had not arisen or that the appointment had ceased to have effect or the occasion for him to act under the appointment had passed.

PART IV - RESTRICTIVE TRADE PRACTICES

Contracts, arrangements or understandings that restrict dealings or affect competition

45. (1) If a provision of a contract made before the commencement of the Trade Practices Amendment Act 1977:

(a) is an exclusionary provision; or

(b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;

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

(2)A corporation shall not:

(a)make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii)a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b)give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i)is an exclusionary provision; or

(ii)has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3)For the purposes of this section and section 45A, “competition” , in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a 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.

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

(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) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B (9), would apply;

(b) a provision of a proposed contract where the provision

would constitute a covenant to which section 45B would apply or, but for subsection 45B (9), would apply; or

(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to conduct that contravenes section 48 or would contravene that section if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods are to be sold or are to be advertised, displayed or offered for sale.

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

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

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47 (2), (4), (6) or

(8), being an act done by a person at a time when:

- (i) an authorization under subsection 88 (8) is in force in relation to conduct engaged in by that person on that condition; or
- (ii) by reason of subsection 93 (7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47.

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

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

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

- (a) the contract is subject to a condition that the provision will not come into force unless and until the 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 (2).

Contracts, arrangements or understandings in relation to prices

45A. (1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of

them, or by any bodies corporate that are related to any of them, in competition with each other.

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

- (a) the joint supply by the parties to the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by those parties in pursuance of the joint venture;
- (b) the joint supply by the parties to the joint venture of services in pursuance of the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or
- (c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J (a) (ii):
 - (i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or
 - (ii) the supply by that body corporate of services in pursuance of the joint venture, not being services

supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person.

(3) Subsection (1) does not apply in relation to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, to the extent that the provision recommends or provides for recommending, or would recommend or provide for recommending, the price for, or a discount, allowance, rebate or credit in relation to, goods or services, where the parties to the contract, arrangement or understanding, or the proposed parties to the proposed contract, arrangement, or understanding, include:

(a) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who supply, in trade or commerce, goods or services to which the provision applies; or

(b) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who acquire, in trade or commerce, goods or services to which the provision applies.

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

(a)in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or

(b)for the joint advertising of the price for the re-supply of goods so acquired.

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

(a)the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or

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

(6)For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to

have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

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

proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

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

Covenants affecting competition

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

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

who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant

(3) Where a person:

(a) issues an invitation to another person to enter into a contract containing a covenant;

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

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

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

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

(a) a corporation that, or person who, is or would be, or but for subsection (1) would be, entitled to the benefit of

the firstmentioned covenant or proposed covenant; or

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

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

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

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

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

(ii) by reason of subsection 93 (7) conduct engaged in

by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47.

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

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

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

(b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A (1) (a) (ii).

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

(a)the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and

(b)the person applies for the grant of such an authorization within 14 days after the covenant is given;

but nothing in this subsection affects the application of paragraph (2) (b) or (c) in relation to the covenant.

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

(a)the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;

(b)the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution; or

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

institution.

Covenants in relation to prices

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

(2) In the application of subsection 45B (2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance,

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

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

(a)the form of the covenant or proposed covenant; or

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

(4)For the purposes of the preceding provision of this section,

but without limiting the generality of those provisions:

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

fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods by persons to whom the goods are supplied by the persons who would, or would but for subsection 45B (1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them.

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

Boycotts

45D.(1)Subject to this section. a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person). or the acquisition of goods or

services by a third person from a fourth person (not being an employer of the first-mentioned person). where:

(a) the third person is, and the fourth person is not, a corporation and:

(i) the conduct would have or be likely to have the effect of causing:

(A) substantial loss or damage to the business of the third person or of a body corporate that is related to that person; or

(B) a substantial lessening of competition in any market in which the third person or a body corporate that is related to that person supplies or acquires goods or services; and

(ii) the conduct is engaged in for the purpose, and would have or be likely to have the effect of causing:

(A) substantial loss or damage to the business of the fourth person; or

(B) a substantial lessening of competition in any market in which the fourth person acquires goods or services; or

(b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing:

(i) substantial loss or damage to the business of the fourth person or of a body corporate that is related

to that person; or

(ii) a substantial lessening of competition in any market in which the fourth person or a body corporate that is related to that person supplies or acquires goods and services.

(1A) Subject to this section, a person shall 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 (not being an employer of the first-mentioned person)

(a) between Australia and places outside Australia;

(b) among the States; or

(c) within a Territory, between a State and a Territory or between two Territories.

(1B) In a proceeding under this Act in relation to a contravention

(a) that the conduct concerned is the subject of an authorization in force under section 88;

(b) that a notice in respect of the conduct 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

(c) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him.

- (1C)The application of subsection (1A) in relation to a person in respect of his engaging in concert with another person is not affected by reason that the other person proves any of the matters mentioned in subsection (1B) in respect of that conduct.
- (2)Paragraph 4F (b) does not apply in relation to subsection (1) or (1A) of this section but a person shall be deemed to engage in conduct for a purpose mentioned in that subsection if he engages in that conduct for purposes that include that purpose.
- (3)A person shall not be taken to contravene, or to be involved in a contravention of, subsection (1) or (1A) by engaging in conduct where:
- (a)the dominant purpose for which the conduct is engaged in is substantially related to:
 - (i)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; or
 - (ii)an employer of that person having terminated, or taken action to terminate, the employment of that person or of another person employed by that employer; or
 - (b)in the case of conduct engaged in by the following persons in concert with each other (and not in concert with any other person), that is to say:

- (i)an organization or organizations of employees, or an officer or officers of such an organization, or both such an organization or organizations and such an officer or officers; and
- (ii)an employee, or 2 or more employees who are employed by the one employer;

the dominant purpose for which the conduct is engaged in is substantially related to:

- (iii) the remuneration, conditions of employment, hours of work or working conditions of the employee, or of and of the employees, referred to in subparagraph (ii); or
 - (iv)the employer of the employee, or of the employees, referred to in subparagraph (ii) having terminated, or taken action to terminated, the employment of any of his employees,
- (4)The application of subsection (1) or (1A) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that subsection (3) operates to preclude the other person from being taken to contravene, or to be involved in a contravention of, subsection (1) or (1A) in respect of that conduct.
- (5)If two or more persons (in this subsection referred to as the “participants”) each of whom is a member or officer of the

same organization of employees (being an organization that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members relation to their employment) engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with other persons, the organization shall be deemed for the purposes of this Act to engage in that conduct in concert with the participants, and so to engage in that conduct for the purpose or purposes for which that conduct is engaged in by the participants, unless the organization establishes that it took all reasonable steps to prevent the participants from engaging in that conduct.

(6) Where an organization of employees engages, or is deemed by subsection (5) to engage, in conduct in concert with members or officers of the organization in contravention of subsection (1) or (1A):

- (a) any loss or damage suffered by a person as a result of the conduct shall be deemed to have been caused by the conduct of the organization;
- (b) if the organization 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 organization; and
- (c) if the organization is not a body corporate;

- (i) a proceeding in respect of the conduct may be instituted under section 77, 80 or 82 against an officer or officers of the organization as a representative or representatives of the members of the organization and a proceeding so instituted shall be deemed to be a proceeding against all the persons who were members of the organization at the time when the conduct was engaged in;
- (ii) subsection 76 (2) does not prevent an order being made in a proceeding mentioned in subparagraph (i) that was instituted under section 77;
- (iii) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in subparagraph (ii) is the penalty applicable under section 76 in relation to a body corporate;
- (iv) except as provided by subparagraph (i), a proceeding in respect of the conduct shall not be instituted under section 77 or 82 against any of the members or officers of the organization; and
- (v) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in subparagraph (i) that is instituted under section 77 or 82, process may be issued and executed against any property of the organization or of any branch or part of the organization, or any property in which the organization or any branch or part of the

organization has, or any members of the organization or of a branch or part of the organization have in their capacity as such members, a beneficial interest whether vested in trustees or however otherwise held, as if the organization were a body corporate and the absolute owner of the property or interest but no process shall be issued or executed against any other property of members, or against any property of officers, of the organization or of a branch or part of the organization.

(7) Nothing in this section affects the operation of any other provision of this Part.

Prohibition of contracts, arrangements or understandings affecting supply or acquisition of goods or services

45K (1) Subject to this section, a person who has been accustomed, or is under an obligation, to supply goods or services to, or to acquire goods or services from, a second person shall not make a contract or arrangement, or arrive at an understanding, with a third person (being an organization of employees, an officer of such an organization, or another person acting for or on behalf of such an organization or officer) if the proposed contract, arrangement or

understanding contains a provision that:

- (a) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person or, as the case may be, from acquiring or continuing to acquire any such goods or services from the second person;
- (b) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person except subject to a condition (not being a condition to which the supply of such goods or services by the first-mentioned person to the second person has previously been subject by reason of a provision of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services; or
- (c) has the purpose of preventing or hindering the first-mentioned person from acquiring or continuing to acquire any such goods or services from the second person except subject to a condition (not being a condition to which the acquisition of such goods or services by the first-mentioned person from the second person has previously been subject by reason of a

contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services.

(2) Subsection (1) does not apply in relation to a contract, arrangement or understanding that is in writing if the second person mentioned in that subsection is a party to the contract, arrangement or understanding or has consented in writing to the contract or arrangement being made or the understanding being arrived at.

(3) In a case where the person first mentioned in subsection (1) is not a corporation, that subsection applies only if the second person mentioned in that subsection is a corporation.

(4) Paragraph 4F (a) applies in relation to subsection (1) of this section as if subparagraph 4F (a) (ii) were omitted.

(5) Subject to subsection (6), a reference in this section to a person who has been accustomed to supply goods or services to a second person shall be construed as including a reference to:

- (a) a regular supplier of any such goods or services to the second person;
- (b) the latest supplier of any such goods or services to the second person; and
- (c) a person who at any time during the immediately preceding period of 3 months supplied any such goods

or services to the second person.

(6) Where:

(a) goods or services have been supplied by a person to a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to supply such goods or services;

(b) that period has expired; and

(c) after the expiration of that period the second person has been supplied with such goods or services by another person or other persons and has not been supplied with such goods or services by the first-mentioned 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-mentioned person shall be deemed not to be a person who has been accustomed to supply such goods or services to the second person.

(7) Subject to subsection (8), a reference in this section to a person who has been accustomed to acquire goods or services from a second person shall be construed as including a reference to:

(a) a regular acquirer of any such goods or services from the second person;

(b) a person who, when he last acquired such goods or services, acquired them from the second person; and

(c) a person who at any time during the immediately preceding period of 3 months acquired any such goods or services from the second person

(8) Where:

(a) goods or services have been acquired by a person from a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to acquire such goods or services;

(b) that period has expired; and

(c) after the expiration of that period the second person has refused to supply such goods or services to the first-mentioned 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-mentioned person shall be deemed not to be a person who has been accustomed to acquire such goods or services from the second person.

(9) If:

(a) a person has, whether before or after the commencement of this section, made a contract or

arrangement, or arrived at an understanding, with another person; and

(b) by reason of a provision included in the contract, arrangement or understanding, the making of the contract or arrangement, or the arriving at the understanding, by the first-mentioned person contravened subsection (1) or would have contravened that subsection if this section had been in force at the time when the contract or arrangement was made, or the understanding was arrived at;

a person shall not give effect to that provision of the contract, arrangement or understanding.

(10) In determining for the purposes of paragraph (9) (b) whether a contract or arrangement made, or understanding arrived at, before the commencement of this section would have contravened subsection (1) if this section had been in force at the time when the contract or arrangement was made, or the understanding was arrived at, subsection (2) shall be read as if the words “that is in writing” and the words “in writing” were omitted.

(11) Nothing in this section affects the operation of any other provision of this Part.

Misuse of market power

46. (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

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

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

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

(2) If:

- (a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a 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 that corporation, together have a substantial degree of power in a market;

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

(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard 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:

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(4) In this section:

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

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

(5) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that 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, 45B, 47 and 50, by reason that an authorization is in force or by reason of the operation of section 93.
- (7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

Misuse of market power-corporation with substantial degree of power in trans-Tasman market

46A. (1) In this section:

“conduct” , in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market;

“impact market” means a market in Australia that is not a market exclusively for services;

“market power” , in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market;

“trans-Tasman market” means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

(2)A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:

- (a)eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or
- (b)preventing the entry of a person into an impact market; or
- (c)detering or preventing a person from engaging in competitive conduct in an impact market.

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

- (a)the reference in paragraph (2) (a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
- (b)the reference in paragraphs (2) (b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(3)If:

- (a)a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to

the one corporation together have, a substantial degree of market power in a trans-Tasman market; or

(b) a corporation and a body corporate that is? or a corporation and 2 or more bodies corporate each of which is, related to the corporation, together have a substantial degree of market power in a trans-Tasman market;

the corporation is taken, for the purposes of this section, to have a substantial degree of market power in the trans-Tasman market.

(4) In determining for the purposes of this section the degree of market power that a body corporate or bodies corporate has or have in a trans-Tasman market, the Federal Court is to have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate, or of any of those bodies corporate, in the trans-Tasman market; or

(b) persons to whom or from whom the body corporate, or any of those bodies corporate, supplies or acquires goods or services in the trans-Tasman market.

(5) Without extending by implication the meaning of subsection (2), a corporation is not taken to contravene

that subsection merely because it acquires plant or equipment.

- (6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, because an authorisation is in force or because of the operation of 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 States Immunities Act 1985.

No immunity from jurisdiction in relation to certain New Zealand laws

46B (1) It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 36A, 98H and 99A of the Commerce Act 1986 of New Zealand.

(2) This section applies in and outside Australia.

Exclusive dealing

47. (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 goods 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, will not re-supply the goods to any person, or will not, or will not except to a limited extent, re-supply the goods:

(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 goods 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 of a refusal in relation to the supply or proposed supply of goods, has re-supplied, or has not agreed not to re-supply, goods, or goods 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 goods of a particular kind or description, acquired from the corporation:
 - (i) to particular persons or classes of persons or to persons other than particular places or classes of

places; 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, ii 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.

(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.

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

- (a) will not or will not except to a limited extent:
 - (i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

- (ii)re-supply goods, or goods 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 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 goods 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 constituted by a corporation engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8) (a) or (b) or (9) (a), (b) or (c) unless:

(a)the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect of substantially lessening competition; or

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

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

(a)conduct engaged in by, or by a trustee for, a religious, charitable or public benevolent institution, being conduct engaged in for or in accordance with the purposes or objects of that institution; or

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

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

(13)In this section:

(a)a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equirable 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
f r o m o t h e r r e l e v a n t

circumstances;

(b)a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which;

(i)the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii)any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct supply or acquire, or be likely to supply or acquire, goods or services; and

(c)a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct supply or acquire, or be likely to supply or acquire, goods or services.

Resale price maintenance

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

Price discrimination

49. (1) A corporation shall not in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to:
- (a) the prices charged for the goods;
 - (b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of the goods;
 - (c) the provision of services in respect of the goods; or
 - (d) the making of payments for services provided in respect of the goods;
- if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.
- (2) Subsection (1) does not apply in relation to a discrimination if:
- (a) the discrimination makes only reasonable allowance for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which or quantities in which the goods are supplied to the purchasers; or

- (b) the discrimination is constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.
- (3) In any proceeding for a contravention of subsection (1), the onus of establishing that that subsection does not apply in relation to a discrimination by reason of subsection (2) is on the party asserting that subsection (1) does not so apply.
- (4) A person shall not, in trade or commerce:
 - (a) knowingly induce or attempt to induce a corporation to discriminate in a manner prohibited by subsection (1); or
 - (b) enter into any transaction that to his knowledge would result in his receiving the benefit of a discrimination that is prohibited by that subsection.
- (5) In any proceeding against a person for a contravention of subsection (4), it is a defence if that person establishes that he reasonably believed that by reason of subsection (2), the discrimination concerned was not prohibited by subsection (1).

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

50. (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 a market.

(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 a market.

(3)Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a)the actual and potential level of import competition in the market;

(b)the height of barriers to entry to the market;

(c)the level of concentration in the market;

(d)the degree of countervailing power in the market

(e)the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

- (f)the extent to which substitutes are available in the market or are likely to be available in the market;
- (g)the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h)the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i)the nature and extent of vertical integration in the market.

(4)Where:

- (a)a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;
 - (b)the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorization to acquire the shares or assets; and
 - (c)the person applied for the grant of such an authorization before the expiration of 14 days after the contract was entered into;
- the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:
- (d)the application for the authorization is disposed of; or
 - (e)the contract ceases to be subject to the condition;
- whichever first happens.

(5) For the purposes of subsection (4), an application for an authorization shall be taken to be disposed of:

(a) in a case to which paragraph (b) of this subsection does not apply — at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorization; or

(b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the authorization - at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.

(6) In this section:

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

Acquisitions that occur outside Australia

50A. (1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8) (b), a controlling interest (the “first controlling interest”) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8) (b) in relation to the first controlling interest, obtains a controlling interest (the “second controlling interest”) in a corporation or each of 2 or more corporations, the

Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:

- (a) the person's obtaining the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and
 - (b) the person's obtaining the second controlling interest would not in all the circumstances, result or be likely to result in such a benefit to the public that the obtaining should be disregarded for the purposes of this section;
- make a declaration accordingly.

(1A) Without limiting the mailers 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 mailers mentioned in subsection 50 (3) must be taken into account for that purpose.

(1B) In determining whether the obtaining of the second controlling interest would result or be likely to result in such a benefit to the public that it should be disregarded for the purposes of this section:

- (a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the

public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(2) Where an application under subsection (1) is made:

(a) the Tribunal shall give to:

(i) each corporation in relation to which the application relates; and

(ii) the Minister and the Commission;

a notice in writing stating that the application has been made; and

(b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person are entitled to appear, or be represented, at the proceedings following the application.

(3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.

(4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion,

revoke a declaration made under subsection (1).

(5)The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).

(6)After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market to which the declaration relates.

(7)Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.

(8)For the purposes of this section:

(a)a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A (1) (b)); and

(b)where a person holds a controlling interest (including a controlling interest held by virtue of another

application or other applications of this paragraph) in a body corporate and that body corporate;

(i) controls the composition of the board of directors of another body corporate;

(ii) is in a position to cast or control the casting of, any votes that might be cast at a general meeting of another body corporate; or

(iii) holds shares in the capital of another body corporate;

the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast or control the casting of, those votes or to hold those shares, as the case may be.

(9) In this section;

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

Exceptions

51. (1) In determining whether a contravention of a provision of this Part has been committed, regard shall not be had;

(a) to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act other than an Act relating to patents, trade marks, designs or copyrights;

(b) in the case of acts or things done in a State except as provided by the regulations, to any act or thing that is,

or is of a kind, specifically authorized or approved by, or by regulations under, an Act passed by the Parliament of that State; or

(c) in the case of acts or things done in a Territory - to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Ordinance of that Territory.

(2) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had:

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or

understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by the Standards Association of Australia or by a prescribed association or body;

- (d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he is, or after he ceases to be, a partner;
- (e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business - to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or
- (g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the

Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

(2A) In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

(3) A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of:

(a) the imposing of, or giving effect to, a condition of:

- (i) a licence granted by the proprietor, licensee or owner of a patent of a registered design, of a copyright or of EL rights within the meaning of the Circuit Layouts Act 1989, or by a person who has applied for a patent or for the registration of a design; or
- (ii) an assignment of a patent of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design;

to the extent that the condition relates to:

- (iii) the invention to which the patent or application for

- a patent relates or articles made by the use of that invention;
- (iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;
- (v) the work or other subject matter in which the copyright subsists; or
- (vi) the eligible layout in which the EL rights subsist;
- (b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the Trade Marks Act 1955, or the giving effect to such a provision; or
- (c) the inclusion in a contract, arrangement or understanding between:
 - (i) the registered proprietor of a trade mark other than a certification trade mark; and
 - (ii) a person registered as a registered user of that trade mark under Part IX of the Trade Marks Act 1955 or a person authorized by the contract to use the trade mark subject to his becoming registered as such a registered user;of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

- (4) This section applies in determining whether a provision of a contract is unenforceable by reason of subsection 45 (1), or whether a covenant is unenforceable by reason of subsection 45B (1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.
- (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.

PART IVA - UNCONSCIONABLE CONDUCT

Unconscionable conduct within the meaning of the unwritten law of the States and Territories

51AA. (1) A corporation must not in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 51AB.

Unconscionable conduct

51AB, (1) A corporation shall not in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the “consumer”), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
 - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.
- (3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:

(a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

(7) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

PART V - CONSUMER PROTECTION

Division 1 - Unfair Practices

Interpretation

51A. (1) For the purposes of this Division, where a corporation makes a representation with respect to any future mailer (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future mailer, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

Misleading or deceptive conduct

52. (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to

mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

False or misleading representations

53. A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;

(aa) falsely represent that services are of a particular standard, quality, value or grade;

(b) falsely represent that goods are new;

(bb) falsely represent that a particular person has agreed to acquire goods or services;

(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

(d) represent that the corporation has a sponsorship, approval or affiliation it does not have;

(e) make a false or misleading representation with respect to the price of goods or services;

(ea) make a false or misleading representation concerning the

- availability of facilities for the repair of goods or of spare parts for goods;
- (eb)make a false or misleading representation concerning the place of origin of goods;
- (f)make a false or misleading representation concerning the need for any goods or services; or
- (g)make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

False representations and other misleading or offensive conduct in relation to land

- 53A. (1)A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:
- (a)represent that the corporation has a sponsorship, approval or affiliation it does not have;
 - (b)make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or

(c)offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

(2)A corporation shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land.

(2A)Nothing in this section shall be taken as implying that other provisions of this Division do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

(3)In this section, “interest” , in relation to land, means:

(a)a legal or equitable estate or interest in the land;

(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 connexion with, the land.

Misleading conduct in relation to employment

53B. A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms

or conditions of1 or any other matter relating to, the employment.

Cash price to be stated in certain circumstances

53C. A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the corporation also specifies the cash price for the goods or services.

Offering gifts and prizes

54. A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services, offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered.

Misleading conduct to which Industrial Property Convention applies

55. A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for

theft purpose or the quantity of any goods.

Certain misleading conduct in relation to services

55A. A corporation shall not in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for theft purpose or the quantity of any services.

Bait advertising

56. (1)A corporation shall not in trade or commerce, advertise for supply at a specified price, goods or services if there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

(2)A corporation that has, in trade or commerce, advertised goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

(3) In a prosecution of a corporation under Part VI in relation to a failure to offer goods or services to a person (in this subsection referred to as the customer) in accordance with subsection (2), it is a defence if the corporation establishes that:

- (a) it offered to supply, or to procure another person to supply, goods or services of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or
- (b) it offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services to the customer in a reasonable quantity and at the price at which the first-mentioned goods or services were advertised;

and, in either case, where the offer was accepted by the customer, the corporation has so supplied, or procured another person to supply, goods or services.

Referral selling

57. A corporation shall not, in trade or commerce, induce a consumer to acquire goods or services by representing that the consumer will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission or other benefit in return for giving the corporation the names of prospective customers or otherwise assisting the corporation to

supply goods or services to other consumers, if receipt of the rebate¹ commission or other benefit is contingent on an event occurring after that contract is made.

Accepting payment without intending or being able to supply as ordered

58. A corporation shall not in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance:

(a) the corporation intends:

(i) not to supply the goods or services; or

(ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted; or

(b) there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to supply the goods or services within the period specified by the corporation or¹ if no period is specified, within a reasonable time.

Misleading representations about certain business activities

59. (1) A corporation shall not in trade or commerce, make a representation that is false or misleading in a material particular concerning the profitability or risk or any other

material aspect of any business activity that the corporation has represented as one that can be, or can be to a considerable extent, carried on at or from a persons place of residence.

- (2)Where a corporation, in trade or commerce, invites, whether by advertisement or otherwise, persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring the performance by the persons concerned of work, or the investment of moneys by the persons concerned and the performance by them of work associated with the investment, the corporation shall not make with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in a material particular.

Harassment and coercion

60. A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

Pyramid selling

61. (1)A corporation contravenes this section if:
- (a)the corporation is the promoter of, or (if there are more than one) one of the promoters of, or is a participant in,

a trading scheme to which this section applies; and

- (b) a person who is a participant in that trading scheme, or has applied or been invited to become a participant in that trading scheme, makes any payment to or for the benefit of the corporation, being a payment that he is induced to make by reason that the prospect is held out to him of receiving payments or other benefits in respect of the introduction (whether by himself or by another person) of other persons who become participants in that trading scheme.

(2) A corporation also contravenes this section if:

- (a) the corporation is the promoter of, or (if there are more than one) one of the promoters of, is a participant in, or is otherwise acting in accordance with, a trading scheme to which this section applies; and
- (b) the corporation, by holding out to any person the prospect of receiving payments or other benefits in respect of the introduction (whether by himself or by another person) of other persons who become participants in that trading scheme, attempts to induce that person:
 - (i) if he is already a participant in that trading scheme, to make any payment to or for the benefit of the promoter or any of the promoters or to or for the

benefit of a participant in that trading scheme; or

- (ii) if he is not already a participant in that trading scheme¹ to become such a participant and to make a payment of a kind mentioned in subparagraph (i).

(2A) A corporation also contravenes this section if the corporation promotes, or takes part in the promotion of, a scheme under which:

- (a) a payment is to be made by a person who participates, or who has applied or been invited to participate, in the scheme to or for the benefit of the corporation or another person who takes part in the promotion of the scheme or to or for the benefit of another person who participates in the scheme; and
- (b) the inducement for making the payment is the holding out to the person who makes or is to make the payment the prospect of receiving payments from other persons who may participate in the scheme.

(3) For the purposes of subsection (1), (2) or (2A):

- (a) a prospect of a kind mentioned in that subsection shall be taken to be held out to a person whether it is held out so as to confer on him a legally enforceable right or not;
- (b) in determining whether an inducement or attempt to induce is made by holding out a prospect of a kind mentioned in that subsection, it is sufficient if a prospect of that kind constitutes or would constitute a

substantial part of the inducement; and

(c) any reference to the making of a payment to or for the benefit of a person shall be construed as including the making of a payment partly to or for the benefit of that person and partly to or for the benefit of one or more other persons.

(4) For the purposes of this section, a scheme is a trading scheme to which this section applies if the scheme includes the following elements:

(a) goods or services, or both, are to be provided by the person promoting the scheme (in this section referred to as the “promoter”) or, in the case of a scheme promoted by two or more persons acting in concert (in this section referred to as the “promoters”), are to be provided by one or more of those persons; and

(b) the goods or services so provided are to be supplied to or for other persons under transactions arranged or effected by persons who participate in the scheme (each of whom is in this section referred to as a “participant”), being persons not all of whom are promoters.

(5) For the purposes of subsection (4):

(a) a scheme shall be taken to include the element referred to in paragraph (4) (b) whether a participant who is not a promoter acts in relation to a transaction referred to in that paragraph in the capacity of a servant or agent of

- the promoter or of one of the promoters or in any other capacity;
- (b) a scheme includes any arrangements made in connexion with the carrying on of a business, whether those arrangements are made or recorded wholly or partly in writing or not; and
- (c) any reference to the provision of goods or services by a person shall be construed as including a reference to the provision of goods or services under arrangements to which that person is a party.

Unsolicited credit and debit cards

63A. (1) A corporation shall not send a prescribed card to a person except:

- (a) in pursuance of a request in writing by the person who will be under a liability to the person who issued the card in respect of the use of the card; or
- (b) in renewal or replacement of, or in substitution for:
- (i) a prescribed card of the same kind previously sent to the first-mentioned person in pursuance of a request in writing by the person who was under a liability to the person who issued the card previously so sent in respect of the use of that card; or
- (ii) a prescribed card of the same kind previously sent to the first-mentioned person and used for a

purpose for which it was intended to be used.

(2) Subsection (1) applies only in relation to the sending of a prescribed card by or on behalf of the person who issued the card.

(2A) A corporation shall not take any action that enables a person who has a credit card or a debit card to use the card as a debit card or a credit card, as the case may be, except in accordance with a request in writing by the person.

(3) In this section:

“article” includes a token, card or document;

“credit card” means any article of a kind commonly known as a credit card or any similar article intended for use in obtaining cash, goods or services on credit, and includes any article of a kind commonly issued by persons carrying on business to customers or prospective customers of those persons for use in obtaining goods or services from those persons on credit;

“debit card” means an article intended for use by a person in obtaining access to an account held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services;

“prescribed card” means a credit card, a debit card or an article that may be used as a credit card and a debit card.

Assertion of right to payment for unsolicited goods or services or for making entry in directory

64. (1) A corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited goods unless the corporation has reasonable cause to believe that there is a right to payment.

(2A) A corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited services unless the corporation has reasonable cause to believe that there is a right to payment.

(3) A corporation shall not assert a right to payment from any person of a charge for the making in a directory of an entry relating to the person or to his profession, business, trade or occupation unless the corporation knows or has reasonable cause to believe that the person has authorized the making of the entry.

(4) A person is not liable to make any payment to a corporation, and is entitled to recover by action in a court of competent jurisdiction against a corporation any payment made by the person to the corporation, in full or part satisfaction of a charge for the making of an entry in a directory unless the person has authorized the making of the entry.

(5) For the purposes of this section, a corporation shall be taken to assert a right to a payment from a person for unsolicited

goods or services, or of a charge for the making of an entry in a directory, if the corporation:

- (a)makes a demand for the payment or asserts a present or prospective right to the payment;
 - (b)threatens to bring any legal proceedings with a view to obtaining the payment;
 - (c)places or causes to be placed the name of the person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment
 - (d)invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or
 - (e)sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment or to payment of the price or charge, as the case may be.
- (6)A person shall not be taken for the purposes of this section to have authorized the making of an entry in a directory unless:
- (a)a document authorizing the making of the entry has been signed by the person or by another person authorized by him;
 - (b)a copy of the document has been given to the person before the right to payment of a charge for the making

of the making of the entry is asserted; and

(c)the document specifies:

(i)the name of the directory;

(ii)the name and address of the person publishing the directory;

(iii)particulars of the entry; and

(iv)the amount of the charge for the making of the entry or the basis on which the charge is, or is to be, calculated.

(7)For the purposes of this section, an invoice or other document purporting to have been sent by or on behalf of a corporation shall be deemed to have been sent by that corporation unless the contrary is established.

(9)In a proceeding against a corporation in respect of a contravention of this section:

(a)in the case of a contravention constituted by asserting a right to payment from a person for unsolicited goods or unsolicited services the burden lies on the corporation of proving that the corporation had reasonable cause to believe that there was a right to payment; or

(b)in the case of a contravention constituted by asserting a right to payment from a person of a charge for the making of an entry in a directory the burden lies on the corporation of proving that the corporation knew or had reasonable cause to believe that the person had

authorised the making of the entry.

(10)In this section:

“directory” includes any publication of a similar nature to a directory- hut does not include a newspaper published in goods faith as a newspaper at regular intervals or a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission;

“making” , in relation to an entry in a directory, means including, or arranging for the inclusion of, the entry

Liability of recipient of unsolicited goods

65. (1)A person to whom unsolicited goods are supplied by a corporation, in trade or commerce, is not liable to make any payment for the goods and is not liable for the loss of or damage to the goods other than loss or damage resulting from the doing by him of a wilful and unlawful act in relation to the goods during the period specified in subsection (4).

(2)Subject to subsection (3), where, on or after the commencing date, a corporation sends, in trade or commerce, unsolicited goods to a person:

(a)neither the corporation nor any person claiming under the corporation is entitled after the expiration of the period specified in subsection (4) to take action for the recovery of the goods from the person to whom the

goods were sent; and

(b) upon the expiration of that period the goods become, by force of this section, the property of the person to whom the goods were sent freed and discharged from all liens and charges of any description.

(3) Subsection (2) does not apply to or in relation to unsolicited goods sent to a person if:

(a) the person has at any time during the period specified in subsection (4) unreasonably refused to permit the sender or the owner of the goods to take possession of the goods;

(b) the sender or the owner of the goods has within that period taken possession of the goods; or

(c) the goods were received by the person in circumstances in which the person knew, or might reasonably be expected to have known, that the goods were not intended for him.

(4) The period referred to in the foregoing subsections is:

(a) if the person who receives the unsolicited goods gives notice with respect to the goods to the sender in accordance with subsection (5):

(i) the period of 1 month next following the day on which the notice is given; or

(ii) the period of 3 months next following the day on which the person received the goods;

whichever first expires; and

(b)in any other case the period of 3 months next following the day on which the person received the goods.

(5)A notice under subsection (4) shall be in writing and shall:

(a)state the name and address of the person who received the goods;

(b)state the address at which possession may be taken of the goods if it is an address other than that of the person; and

(c)contain a statement to the effect that the goods are unsolicited goods.

Application of provisions of Division to prescribed information providers

65A. (1)Nothing in section 52, .53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:

(a)a publication of matter in connection with:

(i)the supply or possible supply of goods or services;

(ii)the sale or grant, or possible sale or grant, of interests in land;

(iii)the promotion by any means of the supply or use of goods or services;

or

(iv)the promotion by any means of the sale or grant of interests in land;

where:

(v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or

(vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:

(A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or

(B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or

(b) a publication of an advertisement.

(2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if:

(a) in any case - the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or

(b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of “prescribed information provider” in subsection (3) (whether or not the person is also a

prescribed information provider by virtue of another operation of that definition) - the publication was by way of a radio or television broadcast by the prescribed information provider.

(3)In this section:

“prescribed information, provider” means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes:

(a)the holder of a licence granted under the Broadcasting Services Act 1992;
and

(aa)a person who is the provider of a broadcasting service under a class licence under that Act; and

(ab)the holder of a licence continued in force by subsection 5 (1) of the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992; and

(b)the Australian Broadcasting Corporation; and

(c)the Special Broadcasting Service Corporation;

“relevant goods or services” , in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider;

“relevant interests in land” , in relation to a prescribed

information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

Division 1A - Product Safety and Product Information

Warning notice to public

65B. (1)The Minister may publish a notice in writing in the Gazette containing one or both of the following:

- (a)a statement that goods of a kind specified in the notice are under investigation to determine whether the goods will or may cause injury to any person;
- (b)a warning of possible risks involved in the use of goods of a kind specified in the notice.

(2)Where:

- (a)an investigation referred to in subsection (1) has been completed; and
- (b)neither a notice under section 65J inviting a supplier to notify the Commission whether the supplier wishes the Commission to hold a conference nor a notice under section 65L has been published in relation to the

goods since the commencement of the investigation;
the Minister shall, as soon as practicable after the investigation has been completed, by notice in writing published in the Gazette, announce the results of the investigation, and may announce in the notice whether, and if so, what action is proposed to be taken in relation to the goods under this Division.

Product safety standards and unsafe goods

65C. (1) A corporation shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind:

- (a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;
- (b) in respect of which there is in force a notice under this section declaring the goods to be unsafe goods; or
- (c) in respect of which there is in force a notice under this section imposing a permanent ban on the goods.

(2) The regulations may, in respect of goods of a particular kind, prescribe a consumer product safety standard consisting of such requirements as to:

- (a) performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods;
- (b) testing of the goods during, or after the completion of, manufacture or processing; and
- (c) the form and content of markings, warnings or instructions to accompany the goods;

as are reasonably necessary to prevent or reduce risk of injury to any person.

(3) A corporation shall not export goods the supply in Australia of which is prohibited by subsection (1) unless the Minister has, by notice in writing given to the corporation, approved the export of those goods.

(4) Where the Minister approves the export of goods under subsection (3), the Minister shall cause a statement setting out particulars of the approval to be laid before each House of the Parliament within 7 sitting days of that House after the approval is given.

(5) Subject to section 65J, where it appears to the Minister that goods of a particular kind will or may cause injury to any person, the Minister may, by notice in writing published in the Gazette, declare the goods to be unsafe goods.

(6) A notice under subsection (5) remains in force until the end of 18 months after the date of publication of the notice in the Gazette unless it is revoked before
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period.

(7) Subject to section 65J, where:

(a) a period of 18 months has elapsed after the date of publication of a notice in the Gazette declaring goods to be unsafe goods; and

(b) there is not a prescribed consumer product safety standard in respect of the goods;

the Minister may, by notice in writing published in the Gazette, impose a permanent ban on the goods.

(8) Where:

(a) the supplying of goods by a corporation constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods; and

(c) the person would not have suffered the loss or damage if the goods had complied with that standard;

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

(9) where:

(a) the supplying of goods by a corporation constitutes a

contravention of this section by reason that there is in force a notice under this section declaring the goods to be unsafe goods or imposing a permanent ban on the goods; and

(b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods;

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

Product information standards

65D. (1) A corporation shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the corporation has complied with that standard in relation to those goods.

(2) The regulations may, in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to:

(a) the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, brash

or packaging of the goods; and

(b) the form and manner in which that information is to be disclosed on or with the goods;

as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods.

(3) Subsection (1) does not apply to goods that are intended to be used outside Australia.

(4) If there is applied to goods:

(a) a statement that the goods are for export only; or

(b) a statement indicating by the use of words authorised by the regulations to be used for the purposes of this subsection that the goods are intended to be used outside Australia;

it shall be presumed for the purposes of this section, unless the contrary is established, that the goods are intended to be so used.

(5) For the purposes of subsection (4), a statement shall be deemed to be applied to goods if:

(a) the statement is woven in, impressed on, worked into or annexed or affixed to the goods; or

(b) the statement is applied to a covering, label, reel or thing in or with which the goods are supplied.

(6) A reference in subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and a reference in that subsection

to a label includes a reference to a hand or ticket.

(7)Where:

- (a)the supplying of goods by a corporation constitutes a contravention of this section by reason that the corporation has not complied with a prescribed consumer product information standard in relation to the goods;
- (b)a person suffers loss or damage by reason of not having particular information in relation to the goods; and
- (c)the person would not have suffered the loss or damage if the corporation had complied with that standard in relation to the goods;

the person shall be deemed, for the purposes of this Act, to have suffered the loss or damage by the supplying of the goods.

Power of Minister to declare product safety or information standards

65E. (1)The minister may, by notice in writing published in the Gazette, declare that, in respect of goods of a kind specified in the notice, a particular standard, or a particular part of a standard, prepared or approved by the Standards Association of Australia or by a prescribed association or body, or such a
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standard with additions or variations specified in the notice, is a consumer product safety standard for the purposes of section 65C or a consumer product information standard for the purposes of section 65D.

(2)Where a notice is so published, the standard, or the part of the standard, referred to in the notice, or the standard or part of a standard so referred to with additions or variations specified in the notice, as the case may be, shall be deemed to be a prescribed consumer product safety standard for the purposes of section 65C or a prescribed consumer product information standard for the purposes of section 65D, as the case may be.

(3)Subsection (1) does not authorise the publication of a notice in relation to goods of a particular kind if the standard or the part of the standard referred to in the notice, or the standard or the part of the standard so referred to with additions and variations specified in the notice, is inconsistent with a standard prescribed in relation to goods of that kind by regulations made for the purposes of section 65C or 65D.

Compulsory product recall

65F. (1)Subject to section 65J, where:

(a)a corporation (in this section referred to as the “supplier”), in trade or commerce, supplies on or after

1 July 1986 goods that are intended to be used, or are of a kind likely to be used, by a consumer;

(b) one of the following subparagraphs applies:

(i) it appears to the Minister that the goods are goods of a kind which will or may cause injury to any person;

(ii) the goods are goods of a kind in respect of which there is a prescribed consumer product safety standard and the goods do not comply with that standard;

(iii) the goods are goods of a kind in relation to which there is in force a notice under subsection 65C (5) or (7); and

(c) it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods causing injury to any person;

the Minister may, by notice in writing published in the Gazette, require the supplier to do one or more of the following:

(d) take action within the period specified in the notice to recall the goods;

(e) disclose to the public, or to a class of persons specified in the notice, in the manner and within the period specified in the notice, one or more of the following:

(i) the nature of a defect in, or a dangerous

characteristic of, the goods identified in the notice;

(ii) the circumstances, being circumstances identified in the notice, in which the use of the goods is dangerous; or

(iii) procedures for disposing of the goods specified in the notice;

(f) inform the public, or a class of persons specified in the notice, in the manner and within the period specified in the notice, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:

(i) except where the notice identifies a dangerous characteristic of the goods repair the goods;

(ii) replace the goods;

(iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods;

within the period specified in the notice.

(2) Notwithstanding subparagraph (1) (f) (iii), where the Minister, in a notice under subsection (1), requires the supplier to take action under paragraph (1) (f), the Minister may specify in the notice that, where:

(a) the supplier chooses to refund the price of the goods; and

(b) a period of more than 12 months has elapsed since a person (whether or not the person to whom the refund

is to be made) acquired the goods from the supplier;

the amount of a refund may be reduced by the supplier by an amount attributable to the use which a person has had of the goods, being an amount calculated in a manner specified in the notice.

(3) The Minister may, by notice in writing published in the Gazette, give directions as to the manner in which the supplier is to carry out a recall of goods required under subsection (1).

(4) Where the supplier, under subsection (1), undertakes to repair goods, the supplier shall cause the goods to be repaired so that

(a) any defect in the goods identified in the notice under subsection (1) is remedied; and

(b) if there is a prescribed consumer product safety standard in respect of the goods - the goods comply with that standard.

(5) Where the supplier, under subsection (1), undertakes to replace goods, the supplier shall replace the goods with like goods which:

(a) if a defect in, or a dangerous characteristic of, the first-mentioned goods was identified in the notice under subsection (1) - do not contain that defect or have that characteristic; and

(b) if there is a prescribed consumer product safety

standard in respect of goods of that kind - comply with that standard.

- (6) Where the supplier, under subsection (1), undertakes to repair goods or replace goods, the cost of the repair or replacement, including any necessary transportation costs, shall be borne by the supplier.
- (7) Where goods are recalled, whether voluntarily or in accordance with a requirement made by the Minister under paragraph (1) (d), a person who has supplied or supplies any of the recalled goods to another person outside Australia shall, as soon as practicable after the supply of those goods, give a notice in writing to that other person:
- (a) stating that the goods are subject to recall;
 - (b) if the goods contain a defect or have a dangerous characteristic setting out the nature of that defect or characteristic; and
 - (c) if the goods do not comply with a prescribed consumer product safety standard in respect of the goods - setting out the nature of the non-compliance.
- (8) Where a person is required under subsection (7) to give a notice in writing to another person, the first-mentioned person shall, within 10 days after giving that notice, provide the Minister with a copy of that notice.
- (9) A person who contravenes subsection (8) is guilty of an

offence punishable on conviction:

- (a) in the case of a person not being a body corporate - by a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months : or
- (b) in the case of a person being a body corporate - by a fine not exceeding \$10,000.

Compliance with product recall order

65G. Where a notice under subsection 65F (1) is in force in relation to a corporation, the corporation:

- (a) shall comply with the requirements and directions in the notice; and
- (b) shall not in trade or commerce:
 - (i) where the notice identifies a defect in, or a dangerous characteristic of, the goods - supply goods of the kind to which the notice relates which contain that defect or have that characteristic; or
 - (ii) in any other case - supply goods of the kind to which the notice relates.

Loss or damage caused by contravention of product recall order

65H. Where:

- (a) a corporation contravenes section 65G by:
 - (i) supplying goods of a kind in relation to which a notice under subsection 65F (1) is in force; or

- (ii) failing to comply with the requirements of such a notice; and
 - (b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods;
- the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods, or by the failure of the corporation to comply with the notice, as the case may be.

Opportunity for conference to be afforded before certain powers exercised

65J. (1) Subject to section 65L, where the Minister proposes to publish a notice under subsection 65C (5) or (7) or 65F(1) in relation to goods of a particular kind, the Minister shall prepare:

- (a) a draft of the notice proposed to be published; and
 - (b) a summary of the reasons for the proposed publication of the notice;
- and shall, by notice in writing published in the Gazette, invite any person (in this section referred to as a “supplier”) who supplied or proposes to supply goods of that kind to notify the Commission, within the period (in this section referred to as the “relevant period”) of 10 days commencing on the day
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last-mentioned notice, being not earlier than the day on which that notice is published in the Gazette, whether the supplier wishes the Commission to hold a conference in relation to the proposed publication of the first-mentioned notice.

(2) A notice published under subsection (1) shall set out a copy of the draft notice under subsection 65C (5) or (7) or 65F (1) and a copy of the summary of the reasons for the proposed publication of the notice.

(3) If no supplier notifies the Commission in writing within the relevant period or within such longer period as the Commission allows that the supplier wishes the Commission to hold a conference in relation to the proposed publication of the notice under subsection 65C (5) or (7) or 65F (1), the Commission shall notify the Minister accordingly.

(4) If a supplier notifies the Commission in writing within the relevant period or within such longer period as the Commission allows that the supplier wishes the Commission to hold a conference in relation to the proposed publication of a notice under subsection 65C (5) or (7) or 65F (1), the Commission shall appoint a day (being not later than 14 days after the end of that period), time and place for the holding of the conference, and give notice of the day, time and place so appointed to the Minister and to each supplier who so notified the

Commission.

(5) At a conference under this section:

- (a) the Commission shall be represented by a member or members nominated by the Chairman;
- (b) each supplier who notified the Commission in accordance with subsection (4) is entitled to be present or to be represented;
- (c) any other person whose presence at the conference is considered by the Commission to be appropriate is entitled to be present or to be represented;
- (d) the Minister or a person or persons nominated in writing by the Minister is or are entitled to be present; and
- (e) the procedure to be followed shall be as determined by the Commission.

(6) The Commission shall cause a record of proceedings at a conference under this section to be kept.

(7) The Commission shall, as far as is practicable, ensure that each person who¹ in accordance with subsection (5), is entitled to be present or who is representing such a person at a conference is given a reasonable opportunity at the conference to present his or her case and, in particular, to inspect any documents which the Commission proposes to consider for the purpose of making a recommendation after the conclusion of the conference, other than any document that contains particulars of a secret formula or

process, and to make submissions in relation to those documents.

Recommendation after conclusion of conference

65K. As soon as is practicable after the conclusion of a conference in relation to the proposed publication of a notice under subsection 65C(5) or (7) or 65F (1), the Commission shall:

(a) by notice in writing given to the Minister, recommend that:

(i) the Minister publish the first-mentioned notice in the same terms as the draft notice referred to in subsection 65J (1);

(ii) the Minister publish the first-mentioned notice with such modifications as are specified by the Commission; or

(iii) the Minister not publish the first-mentioned notice; and

(b) cause a copy of the notice in writing given to the Minister to be given to each supplier who was present or represented at the conference.

Exception in case of danger to public

65L. (1) Where it appears to the Minister that goods of a particular kind create an imminent risk of death, serious illness or

serious injury, the Minister may, by notice in writing published in the Gazette, certify that a notice in relation to the goods under subsection 65C (5) or 65F (1) should be published without delay.

(2) Where the Minister publishes a notice in the Gazette under subsection (1):

- (a) in a case where the notice is published before the Minister takes any action under subsection 65J (1) in relation to goods of a particular kind section 65J does not apply in relation to the action that the Minister may take under subsection 65C (5) or 65F(1) in relation to goods of that kind; or
- (b) in any other case - any action taken by the Minister under subsection 65J (1) in relation to goods of a particular kind ceases to have effect and, if a conference had, under section 65J, been arranged or such a conference had commenced or been completed without the Commission making a recommendation under section 65K, the Minister may publish the notice under subsection 65C (5) or 65F (1) without regard to the action taken under subsection 65J (1).

Conference after goods banned

65M. (1) Where:

- (a) a notice has been published under subsection 65C(5) in

relation to goods of a particular kind; and

(b) the Minister publishes a notice under section 65L in relation to goods of that kind;

the Minister shall, by notice in writing published in the Gazette, invite any person (in this section referred to as a “supplier”) who supplied or proposes to supply goods of that kind to notify the Commission within the period (in this section referred to as the “relevant period”) of 10 days commencing on the day specified in the last-mentioned notice, being not earlier than the day on which that notice is published in the Gazette, to notify the Commission whether the supplier wishes the Commission to hold a conference in relation to the notice referred to in paragraph (a).

(2) If a supplier notifies the Commission in writing within the relevant period, or within such longer period as the Commission allows, that the supplier wishes the Commission to hold a conference in relation to the notice published under subsection 65C (5), the Commission shall appoint a day (being not later than 14 days after the end of that period), time and place for the holding of the conference and give notice of the day, time and place so appointed to the Minister and to each supplier who so notified the Commission

(3) Subsections 65J (5), (6) and (7) apply in relation to a conference held under this section.

Recommendation after conclusion or conference

65N. As soon as is practicable after the conclusion of a conference in relation to a notice that has been published under subsection 65C (5), the Commission shall:

(a) by notice in writing given to the Minister, recommend that the notice under subsection 65C (5):

(i) remain in force;

(ii) be varied; or

(iii) be revoked; and

(b) cause a copy of the notice in writing given to the Minister to be given to each supplier who was present or represented at the conference.

Minister to have regard to recommendation of Commission

65P Where the Commission, under section 65K or 65N, makes a recommendation to the Minister in relation to the proposed publication of a notice under subsection 65C (5) or (7) or 65F (1) or in relation to a notice that has been published under subsection 65C (5):

(a) the Minister shall have regard to the recommendation; and

(b) where the Minister decides to act otherwise than in accordance with the recommendation, the Minister shall, by notice in writing published in the Gazette, set out the

reasons for the Minister's decision.

Power to obtain information, documents and evidence

65Q. (1) Where the Minister or an officer authorised by the Minister for the purposes of this section (in this section referred to as an "authorised officer") has reason to believe that a corporation which, in trade or commerce, supplies goods of a particular kind which are intended to be used or are of a kind likely to be used by a consumer and which will or may cause injury to any person is capable of furnishing information, producing documents or giving evidence relating to goods of that kind, the Minister or the authorised officer may, by notice in writing served on the corporation, require the corporation:

- (a) to furnish to the Minister, by writing signed by a competent officer of the corporation, in the manner, and within such reasonable time, as are specified in the notice, any such information;
- (b) to produce to the Minister, or to the authorised officer, in accordance with such reasonable requirements as are specified in the notice, any such documents; or
- (c) to cause a competent officer of the corporation to appear before the Minister or the authorised officer at

such reasonable time and place as are specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) Where an authorised officer has reason to believe that goods of a particular kind which are intended to be used or are of a kind likely to be used by a consumer will or may cause injury to a person, an authorised officer may, for the purposes of ascertaining whether goods of that kind will or may cause injury to any person, enter any premises in or from which the authorised officer has reason to believe a corporation supplies goods of that kind in trade or commerce and:

(a) inspect goods of that kind;

(b) take samples of goods of that kind;

(c) inspect any documents relating to goods of that kind and make copies of, or take extracts from, those documents; or

(d) inspect equipment used in the manufacturing, processing or storage of goods of that kind.

(3) The powers of an authorised officer under subsection (2) shall not be exercised except

(a) pursuant to a warrant issued under subsection (5); or

(b) in circumstances where the exercise of those powers is required without delay in order to protect life or public safety.

(4) An authorised officer may apply to a person who is a judge of the Court or of the Supreme Court of a State or Territory for the issue under subsection (5) of a warrant to exercise the powers of an authorised officer under subsection (2) in relation to premises.

(5) Where an application under subsection (4) is made to a person who is a judge of such a court, the person may issue a warrant authorising an authorised officer named in the warrant, with such assistance as the officer thinks necessary and if necessary by force, to enter the premises specified in the warrant and to exercise the powers of an authorised officer under subsection (2) in relation to those premises.

(6) A person who is a judge of such a court shall not issue a warrant under subsection (5) unless:

(a) an affidavit has been furnished to the person setting out the grounds on which the issue of the warrant is being sought;

(b) the applicant or some other person has given to the first-mentioned person such further information (if any) as the first-mentioned person requires concerning the grounds on which the issue of the warrant is being sought; and

(c) the first-mentioned person is satisfied that there are reasonable grounds for issuing the warrant.

(7) A warrant issued under subsection (5) shall:

- (a) specify the purpose for which the warrant is issued;
 - (b) state whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night;
 - (c) include a description of the kind of goods authorised to be inspected or sampled; and
 - (d) specify a day, not being later than 7 days after the day on which the warrant is issued, at the end of which the warrant ceases to have effect.
- (8) Where an authorised officer takes samples under paragraph (2) (b), the officer shall pay a reasonable price for the goods sampled.

(9) A person who:

- (a) refuses or fails to comply with a notice under this section to the extent that the person is capable of complying with it; or
 - (b) in purported compliance with such a notice, furnishes information or gives evidence that to the knowledge of the person, is false or misleading in a material particular;
- is guilty of an offence punishable on conviction:
- (c) in the case of a person not being a body corporate - by a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months; or

(d)in the case of a person being a body corporate- by a fine not exceeding \$10,000.

(10)A person who refuses or fails to provide an authorised officer acting in accordance with subsection (2) with all reasonable facilities and assistance for the effective exercise of the authorised officers powers under that subsection is guilty of an offence punishable on conviction:

(a)in the case of a person not being a body corporate - by a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months; or

(b)in the case of a person being a body corporate - by a fine not exceeding \$10,000.

(11)Any information furnished or evidence given by a person under this section, any document produced by a person under this section, and any information, evidence or document obtained under this section, is not admissible in evidence against the person:

(a)in any proceedings instituted by the person:or

(b)in any other proceedings, other than proceedings against the person for a contravention of a provision of this section.

Notification of voluntary recall

65R. (1)Where a corporation voluntarily takes action to recall

goods because the goods will or may cause injury to any person, the corporation shall, within 2 days after taking that action, give a notice in writing to the Minister:

- (a) stating that the goods are subject to recall; and
- (b) setting out the nature of the defect in, or dangerous characteristic of, the goods.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction.

- (a) in the case of a person not being a body corporate - by a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months ; or
- (b) in the case of a person being a body corporate - by a fine not exceeding \$10,000.

Copies of certain notices to be given to suppliers or published in certain newspapers

65S. (1) Where the Minister publishes a notice in writing in the Gazette under subsection 65B (1), 65J (1), 65L(1) or 65M(1), the Minister shall, within 2 days after the publication of that notice in the Gazette, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period, either:

- (a) cause a copy of the notice to be given to each person who, to the knowledge of the Minister, supplies goods

- of the kind to which the notice relates; or
- (b) cause a copy of the notice to be published in a newspaper circulating in each part of Australia where goods of the kind to which the notice relates are, to the knowledge of the Minister, supplied.
- (2) Any failure to comply with subsection (1) in relation to a notice does not invalidate the notice.

Certain action not to affect insurance contracts

65T. the liability of an insurer under a contract of insurance with a corporation, being a contract relating to the recall of goods supplied or proposed to be supplied by the corporation or to the liability of the corporation with respect to possible defects in goods supplied or proposed to be supplied by the corporation, shall not be affected by reason only that the corporation gives to the Minister, to the Commission, to an officer of the Australian Public Service or to an officer of an authority of the Commonwealth information relating to any goods supplied or proposed to be supplied by the corporation.

Division 2 - Conditions and Warranties in Consumer Transactions

Interpretation

66. (1) In this Division:

- (a) a reference to the quality of goods includes a reference to the state or condition of the goods;
 - (b) a reference to a contract does not include a reference to a contract made before the commencing date;
 - (c) a reference to antecedent negotiations in relation to a contract for the supply by a corporation of goods to a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person whereby the consumer was induced to make the contract or which otherwise promoted the transaction to which the contract relate; and
 - (d) a reference to the person by whom any antecedent negotiations were conducted is a reference to the person by whom the negotiations or arrangements concerned were conducted or made.
- (2) Goods of any kind are of merchantable quality within the meaning of this Division if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances,

Convention on Contracts for the International Sale of Goods

66A. The provisions of the United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna, Austria¹ on 10 April 1980, prevail over the provisions of this Division to the extent of any inconsistency.

Conflict of laws

67. Where:

- (a) the proper law of a contract for the supply by a corporation of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia; or
 - (b) a contract for the supply by a corporation of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of a State or Territory for all or any of the provisions of this Division;
- this Division applies to the contract notwithstanding that term.

Application of provisions not to be excluded or modified

68. (1) An term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another

term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Division;
- (b) the exercise of a right conferred by such a provision;
- (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
- (d) the application of section 75A;

is void.

- (2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

Limitation of liability for breach of certain conditions or warranties

68A. (1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by section 69) to:

- (a) in the case of goods, any one or more of the following:

- (i) the replacement of the goods or the supply of equivalent goods;
- (ii) the repair of the goods;
- (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
- (iv) the payment of the cost of having the goods repaired; or

(b) in the case of services:

- (i) the supplying of the services again; or
- (ii) the payment of the cost of having the service supplied again.

(2) Subsection (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.

(3) In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:

- (a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this subsection referred to as “the buyer”) relative to each other, taking into

account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

- (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services from any source of supply under a contract that did not include that term;
- (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and
- (d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

Implied undertakings as to title, encumbrances and quiet possession

69. (1) In every contract for the supply of goods by a corporation to a consumer, other than a contract to which subsection (3) applies, there is:

- (a) an implied condition that in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire- purchase agreement the supplier will have a right to sell the

goods at the time when the property is to pass;

(b)an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and

(c)in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer - an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

(2)A corporation is not in relation to a contract for the supply of goods, in breach of the implied warranty referred to in paragraph (1) (c) by reason only of the existence of a floating charge over assets of the corporation unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.

(3)In a contract for the supply of goods by a corporation to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract and intention that the supplier should transfer only

such title as he or a third person may have, there is:

(a)an implied warranty that all charges or encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and

(b)an implied warranty that:

(i)the supplier;

(ii)in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have - that person; and

(iii)anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made;

will not disturb the consumer's quiet possession of the goods.

Supply by description

70. (1)Where there is a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of

the goods corresponds with the sample if the goods do not also correspond with the description.

- (2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

Implied undertakings as to quality or fitness

71. (1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:

- (a) as regards defects specifically drawn to the consumer's attention before the contract is made; or
- (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

- (2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the

contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the corporation or of that person.

(3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a corporation as they apply to a contract for the supply of goods made by a corporation in the course of a business, except where that corporation is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

Supply by sample

72. Where in a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample:

- (a) there is an implied condition that the bulk will correspond with the sample in quality;
- (b) there is an implied condition that the consumer will have a

- reasonable opportunity of comparing the bulk with the sample; and
- (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

Liability for loss or damage from breach of certain contracts

73. (1) Where:

- (a) a corporation (in this section referred to as the “supplier”) supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a consumer enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer; or
- (b) a consumer enters into a contract with a linked credit provider of a corporation (in this section also referred to as the “supplier”) for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the consumer;
- and the consumer suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, or as a result of a breach of a condition that is implied in the contract by

virtue of section 70, 71 or 72 or of a warranty that is implied in the contract by virtue of section 74, the supplier and the linked credit provider are, subject to this section, jointly and severally liable to the consumer for the amount of the loss or damage, and the consumer may recover that amount by action in accordance with this section in a court of competent jurisdiction.

(2)Where:

- (a)a corporation (in this section also referred to as the “supplier”) supplies goods, or causes goods to be supplied, to a credit provider who is not a linked credit provider of the supplier;
 - (b)a consumer enters into a contract with the credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer;
 - (c)antecedent negotiations in relation to the contract were conducted with the consumer by or on behalf of the supplier; and
 - (d)the credit provider did not take physical possession of the goods before they were delivered to the consumer;
- or where a consumer enters into a contact with a credit provider for the provision of credit in respect of the supply of services to the consumer by a corporation (in this section also referred to as the “supplier”) of which the credit provider is not a linked credit provider, and the consumer

suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of section 70, 71 or 72 or of a warranty that is implied in the contract by virtue of section 74, the credit provider is not under any liability to the consumer for the amount of the loss or damage, but the consumer may recover that amount by action in a court of competent jurisdiction against the supplier.

(3)A linked credit provider of a particular supplier is not liable to a consumer by virtue of subsection (1) in proceedings arising under that subsection if the credit provider establishes:

(a)that the credit provided by the credit provider to the consumer was the result of an approach made to the credit provider by the consumer that was not induced by the supplier;

(b)where the proceedings relate to the supply by way of lease, hire or hire-purchase of goods by the linked credit provider to the consumer, that;

(i)after due inquiry before becoming a linked credit provider of the supplier the credit provider was satisfied that the reputation of the supplier in respect of the supplier' s financial standing and business conduct was good; and

(ii)after becoming a linked credit provider of the supplier, the credit provider
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suspect that:

(A)the consumer might be entitled to recover an amount of loss or damage suffered as a result of misrepresentation or breach of a condition or warranty referred to in subsection (1); and

(B)the supplier might be unable to meet the supplier' s liabilities as and when they fall due;

(c)where the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that:

(i)after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the suppliers financial standing and business conduct was good; and

(ii)after becoming a linked credit provider of the supplier, but before the tie loan contract was entered into, the linked credit provider had not had cause to suspect that:

(A)the consumer might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract or as a result of a breach of a condition or warranty referred to in subsection (1); and

(B)the supplier might be unable to meet the

supplier' s liabilities as and when they fall due; or

(d)where the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that having regard to:

(i)the nature and volume of business carried on by the linked credit provider;
and

(ii)such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale or of proposals for the making of the contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract, failure of consideration, breach of a condition or breach of a warranty as referred to in subsection (1).

(4)Subject to subsection (5), in any proceedings in relation to a contract referred to in paragraph (1) (a) or (b) in which a credit provider claims damages or an amount of money from a consumer, the consumer may set up the liability of the credit provider under subsection (1) in diminution or extinction of the consumer' s liability.

(5) Subject to subsection (6), a consumer may not in respect of a liability for which, by reason of this section, a supplier and a linked credit provider are jointly and severally liable:

(a) bring proceedings to recover an amount of loss or damage from the credit provider; or

(b) where proceedings are brought against the consumer by the credit provider, make a counter-claim or exercise the right conferred by subsection (4) against the credit provider;

unless the consumer brings the action against the supplier and the credit provider jointly or, in the case of a counter-claim or right conferred by subsection (4), claims in the proceedings against the supplier in respect of the liability by third-party proceedings or otherwise.

(6) Subsection (5) and paragraphs (8) (a) and (9) (a) do not apply in relation to proceedings where:

(a) the supplier has been dissolved or is commenced to be wound up; or

(b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the consumer, declared that subsection (5) and paragraphs (8) (a) and (9) (a) do not apply in relation to the proceedings.

(7) The liability of a linked credit provider to a consumer for

damages or a sum of money in respect of a contract referred to in subsection (1) does not exceed the sum of:

- (a) the amount financed under the tied loan contract, tied continuing credit contract, lease contract, contract of hire or contract of hire-purchase;
- (b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and
- (c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.

(8) Where in proceedings arising under subsection (1), judgment is given against a supplier and a linked credit provider, the judgment:

- (a) shall not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and
- (b) may be enforced against the linked credit provider only to the extent of:
 - (i) the amount calculated in accordance with subsection (7); or
 - (ii) so much of the judgment debt as has not been satisfied by the supplier;whichever is the lesser.

(9) Where in proceedings arising under subsection (1), a right conferred by subsection (4) is established against a linked

credit provider, the consumer:

(a) shall not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and

(b) may receive the benefit only to the extent of:

(i) the amount calculated in accordance with subsection (7); or

(ii) so much of the judgment debt as has not been satisfied by the supplier;

whichever is the lesser.

(10) Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit providers liability under subsection (7) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

(11) Notwithstanding any other law, where, in proceedings arising under subsection (1), judgment is given against a supplier and a linked credit provider or against

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credit provider for an amount of loss or damage, the court in which the proceedings are taken shall, on the application of the consumer, unless good cause is shown to the contrary, award interest to the consumer against the supplier and credit provider or against the credit provider, as the case may be, upon the whole or a part of the amount, from the time when the consumer became entitled to recover the amount until the date on which the judgment is given, at whichever of the following rates is the greater:

(a) where the amount payable by the consumer to the credit provider for the obtaining of credit in connection with the goods or services to which the proceedings relate may be calculated at a percentage rate per annum - that rate or, if more than one such rate may be calculated, the lower or lowest of those rates;

(b) 8% or such other rate as is prescribed.

(12) In determining whether good cause is shown against awarding interest under subsection (11) on the whole or part of an amount of loss or damage, the court shall take into account any payment made into court by the supplier or credit provider.

(13) Where a judgment given in proceedings arising under subsection (1) is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to

the extent of the judgment so enforced to any rights that the consumer would have had but for the judgment against the supplier or any other person.

(14) In this section:

“Credit provider” means a corporation providing, or proposing to provide, in the course of a business carried on by the corporation, credit to consumers in relation to the acquisition of goods or services;

“linked credit provider” , in relation to a supplier, means a credit provider:

(a) with whom the supplier has a contract, arrangement or understanding relating to:

(i) the supply to the supplier of goods in which the supplier deals;

(ii) the business carried on by the supplier of supplying goods or services;

or

(iii) the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services;

(b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit;

(c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or

(d) with whom the supplier has a contract arrangement or

understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at premises of the supplier;

“tied continuing credit contract” means a continuing credit contract under which a credit provider provides credit in respect of the payment by a consumer for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider;

“tied loan contract” means a loan contract entered into between a credit provider and a consumer where:

- (a) the credit provider knows or ought reasonably to know that the consumer enters into the loan contract wholly or partly for the purposes of payment for goods or services supplied by a supplier; and
- (b) at the time the loan contract is entered into the credit provider is a linked credit provider of the supplier.

Continuing credit contract

73A. (1) For the purposes of this section:

- (a) a reference to an agreement includes a reference to an arrangement, understanding or course of dealing; and
- (b) a person shall be deemed to agree with another person with respect to a matter if the first-mentioned person has an agreement, arrangement or understanding with

the other person, or is engaged in a course of dealing with the other person, with respect to the matter.

(2)Where:

(a)a person (in this section referred to as “the creditor”), in the course of a business carried on by the creditor, agrees with a consumer to provide credit to the consumer in respect of:

(i)payment for goods or services or cash supplied by the creditor to the consumer from time to time; or

(ii)payment by the creditor to a third person in respect of goods or services or cash supplied by that third person to the consumer from time to time; and

(b)the amounts owing to the creditor from time to time under the agreement are or are to be calculated on the basis that all amounts owing, and all payments made, by the consumer under or in respect of the agreement are entered in one or more accounts kept for the purpose of the agreement
the agreement is, for the purposes of section 73, a continuing credit contract.

(3)Where the creditor agrees to make payments to a third person in respect of
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that third person to the consumer, as mentioned in subparagraph (2) (a) (ii), then, for the purposes of this section, the creditor shall, in respect of any goods or services or cash so supplied, be deemed to have provided credit to the consumer to the extent of any payments made or to be made by the creditor to that third person.

Loan contract

73B. For the purposes of section 73, “loan contract” means a contract under which a person in the course of a business carried on by that person provides or agrees to provide, whether on one or more occasions, credit to a consumer in one or more of the following ways:

- (a) by paying an amount to or in accordance with the instructions of the consumer;
- (b) by applying an amount in satisfaction or reduction of an amount owed to the person by the consumer;
- (c) by varying the terms of a contract under which money owed to the person by the consumer is payable;
- (d) by deferring an obligation of the consumer to pay an amount to the person;
- (e) by taking from the consumer a bill of exchange or other negotiable instrument on which the consumer (whether alone or with another person or other persons) is liable as drawer, acceptor or endorser.

Warranties in relation to the supply of services

74. (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.
- (2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.
- (3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:
- (a) a contract for or in relation to the transportation or

storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or

(b)a contract of insurance.

Division 2A - Actions against Manufacturers and Importers of Goods

Interpretation

74A. (1)In this Division:

“express warranty” , in relation to goods, means an undertaking, assertion or representation in relation to:

- (a)the quality, performance or characteristics of the goods;
- (b)the provision of services that are or may at any time be required in respect of the goods;
- (c)the supply of parts that are or may at any time be required for the goods; or
- (d)the future availability of identical goods, or of goods constituting or forming part of a set of which the goods in relation to which the undertaking, assertion or representation is given or made form part;

given or made in connection with the supply of the goods or in connection with
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supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods;

“manufactured” includes grown, extracted, produced, processed and assembled.

(2)In this Division:

(a)a reference to goods shall, unless the contrary intention appears, be read as a reference to goods of a kind ordinarily acquired for personal, domestic or household use or consumption;

(aa)a reference to a person who acquires goods from a consumer does not include a reference to a person who acquires goods for the purpose of re-supply;

(b)a reference to the quality of goods includes a reference to the state or condition of the goods;

(c)a reference to antecedent negotiations in relation to the acquisition of goods by a consumer shall be read as a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person whereby the consumer was induced to acquire the goods or which otherwise promoted the acquisition of the goods by the consumer; and

(d)a reference to person by whom any antecedent negotiations were conducted shall be read as a

reference to the person by whom the negotiations or arrangements concerned were conducted or made.

(3)If:

- (a)a corporation holds itself out to the public as the manu-facturer of goods;
- (b)a corporation causes or permits the name of the corporation, a name by which the corporation carries on business or a brand or mark of the corporation to be applied to goods supplied by the corporation; or
- (c)a corporation causes or permits another person, in connexion with the supply or possible supply of goods by that other person, or in connexion with the promotion by that other person by any means of the supply or use of goods, to hold out the corporation to the public as the manufacturer of the goods;

the corporation shall be deemed, for the purposes of this Division, to have manufactured the goods.

(4)If:

- (a) goods are imported into Australia by a corporation that was not the manufacturer of the goods; and

(b)at the time of the importation the manufacturer of the goods does not have a place of business in Australia;
the corporation shall be deemed, for the purposes of this Division, to have manufactured the goods.

(5)For the purposes of paragraph (3) (b):

(a)a name, brand or mark shall be deemed to be applied to goods if it:

- (i)is woven in, impressed on, worked into or annexed or affixed to the goods; or
- (ii)is applied to a covering, label, reel or thing in or with which the goods are supplied; and

(b)if the name of a corporation, a name in which a corporation carries on business or a brand or mark of a corporation is applied to goods, it shall be presumed, unless the contrary is established, that the corporation caused or permitted the name, brand or mark to be applied to the goods.

(6)The refernce in subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and the reference in that subsection to a label includes a reference to a band or ticket.

(7)If goods are imported into Australia on behalf of a corporation, the corporation
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purposes of this Division, to have imported the goods into Australia.

- (8) For the purposes of this Division, goods shall be taken to be supplied to a consumer notwithstanding that at the time of the supply, they are affixed to land or premises.

Actions in respect of unsuitable goods

74b. (1) Where:

- (a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;
- (b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;
- (c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the corporation, either directly, or through the person from whom the consumer acquired the goods or a person by whom any antecedent negotiations in connexion with the acquisition of the goods were conducted;
- (d) the goods are not reasonably fit for that purpose.

whether or not that is a purpose for which such goods are commonly supplied; and

- (e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose;

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

- (a) if the goods are not reasonably fit for the purpose referred to in that subsection by reason of:

- (i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or
 - (ii) a cause independent of human control;

occurring after the goods have left the control of the corporation; or

- (b) where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the corporation.

Actions in respect of false descriptions

74C. (1)Where:

- (a)a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;
 - (b)a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer by description;
 - (c)the goods do not correspond with the description; and
 - (d)the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods do not correspond with the description, the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.
- (2)Subsection (1) does not apply if the goods do not correspond with the description referred to in that subsection by reason of:
- (a)an act or default of any person (not being the corporation or a servant or agent of the corporation); or

- (b)a cause independent of human control;
occurring after the goods have left the control of the corporation.
- (3)A corporation is not liable to compensate a person for loss or damage suffered by the person by reason that goods do not correspond with a description unless the description was applied to the goods:
 - (a)by or on behalf of the corporation; or
 - (b)with the consent of the corporation, whether express or implied
- (4)If the goods referred to in subsection (1) are supplied to the consumer by reference to a sample as well as by description¹ it is not a defence to an action under this section that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (5)A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

Actions in respect of goods of unmerchantable quality

74D. (1)Where:

- (a) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply;
 - (b) a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;
 - (c) the goods are not of merchantable quality; and
 - (d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality;
- the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply:

- (a) if the goods are not of merchantable quality by reason of:
 - (i) an act or default of any person (not being the corporation or a servant or agent of the corporation); or
 - (ii) a cause independent of human control;

- occurring after the goods have left the control of the corporation;
 - (b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer; or
 - (c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.
- (3) Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:
- (a) any description applied to the goods by the corporation;
 - (b) the price received by the corporation for the goods (if relevant); and
 - (c) all the other relevant circumstances.

Actions in respect of non-correspondence with samples etc.

74E. (1) Where:

- (a) a corporation, in trade or commerce, supplies goods

manufactured by the corporation to another person who acquires the goods for re-supply;

(b)a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

(c)the goods are supplied to the consumer by reference to a sample;

(d)the bulk of the goods does not correspond with the sample in quality or the goods have a defect rendering them unmerchantable, that is not or would not be, apparent on reasonable examination of the sample; and

(e)the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the bulk does not correspond with the sample in quality or by reason that the goods have that defect;

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the loss or damage by action against the corporation in a court of competent jurisdiction.

(2)Subsection (1) does not apply where:

(a)the sample is not supplied by the corporation;

(b)the supply by sample is made without the express or

- implied concurrence of the corporation; or
- (c) the failure of the bulk of the goods to correspond with the sample in quality or the existence of the defect is due to:
- (i) an act or default of any person (not being the corporation or a servant or agent of the corporation), or a cause independent of human control, occurring after the goods have left the control of the corporation; or
 - (ii) other circumstances that were beyond the control of the corporation and that it could not reasonably be expected to have foreseen.

Actions in respect of failure to provide facilities for repairs or parts

74F. (1) Where:

- (a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or
- (b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods

from the corporation) supplies the goods (otherwise than by way of sale by auction) to a Consumer;

and:

(c) at a time (in this section referred to as the “relevant time”) after the acquisition of the goods by the consumer:

(i) the goods require to be repaired but facilities for their repair are not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer; or

(ii) a part is required for the goods but the part is not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer;

(d) the corporation acted unreasonably in failing to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time; and

(e) the consumer or that other person suffers loss or damage by reason of the failure of the corporation to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to

the consumer or that other person at the relevant time;
the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2) Subsection (1) does not apply where the corporation took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he acquired the goods that:

(a) the corporation did not promise that facilities for the repair of the goods, or that parts for the goods, would be available; or

(b) the corporation did not promise that facilities for the repair of the goods, or that parts for the goods, would be available after a specified period, being a period that expired before the relevant time.

(3) Where the corporation took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he acquired the goods that the corporation did not promise that:

(a) facilities for the repair of the goods, being facilities of

a kind specified in the notice, would be available;

(b) parts for the goods, being parts of a kind specified in the notice, would be available; or

(c) facilities for the repair of the goods would be available at or parts for the goods would be available from, a place or places specified in the notice;

the corporation is not liable to compensate the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer for loss or damage suffered by the consumer or that other person by reason of the failure of the corporation to ensure that facilities of the kind specified in the notice, or parts of the kind specified in the notice, were available, or that facilities for the repair of the goods were available at or parts for the goods were available from, a place or places specified in the notice, as the case maybe.

(4) In determining whether a corporation acted unreasonably in failing to ensure that facilities for the repair of goods were, or that a part was, reasonably available to a person at the relevant time, a court shall have regard to all the circumstances of the case, and in particular to the existence, at the relevant time, of circumstances that

prevented those facilities or that part being so available, being circumstances beyond the control of the corporation.

Actions in respect of non-compliance with express warranty

74G. (1)Where:

(a)a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer;

or

(b)a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

and:

(c)the corporation fails to comply with an express warranty given or made by the corporation in relation to the goods and

(d)the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason of the failure;

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.

(2)For the purposes of any action instituted by a person against a corporation under this section, where:

(a)an undertaking, assertion or representation was given or made in connection with the supply of goods or in connection with the promotion by any means of the supply or use of goods; and

(b)the undertaking, assertion or representation would, if it had been given or made by the corporation or a person acting on its behalf, have constituted an express warranty in relation to the good;

it shall be presumed that the undertaking, assertion or representation was given or made by the corporation or a person acting on its behalf unless the corporation proves that it did not give or make, and did not cause or permit the giving or making of, the undertaking, assertion or

representation.

Right of seller to recover against manufacturer or importer

74H. Where:

- (a) a person (in this section referred to as the “seller”) is under a liability to another person (in this section referred to as the “consumer”) in respect of loss or damage suffered by the consumer as a result of a breach of a condition or warranty implied by a provision of Division 2 in a contract for the supply of goods (whether or not the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption) by the seller to the consumer; and
- (b) a third person (in this section referred to as the “manufacturer”):
 - (i) is liable to compensate the consumer in respect of the same loss or damage by reason of a provision of this Division; or
 - (ii) in a case where the goods referred to in paragraph (a) are not of a kind ordinarily acquired for personal, domestic or household use or consumption - would ,

if the provisions of sections 74B, 74C, 74D and 74E applied in relation to those goods, be liable to compensate the consumer in respect of the same loss or damage by reason of any of those provisions;

the manufacturer is liable to indemnify the seller in respect of the liability of the seller to the consumer and the seller may, in respect of the manufacturers liability to indemnify the seller, institute an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the seller could have obtained if the liability of the manufacturer to indemnify the seller had arisen under a contract of indemnity made between the manufacturer and the seller.

Time for commencing actions

74J. (1) Subject to this section, an action under a provision of this Division may be commenced at any time within 3 years after the day on which the cause of the action accrued.

(2) For the purposes of this section, a cause of action shall be deemed to have accrued:

(a) in the case of an action other than an action under section 74H, on the day on which the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer first

became aware, or ought reasonably to have become aware:

- (i) in the case of an action under section 74B - that the goods were not reasonably fit for the purpose referred to in that section;
- (ii) in the case of an action under section 74C - that the goods did not correspond with the description referred to in that section;
- (iii) in the case of an action under section 74D - that the goods were not of merchantable quality;
- (iv) in the case of an action under section 74E - that the bulk of the goods did not correspond with the sample in quality or the goods had the defect referred to in that section;
- (v) in the case of an action under section 74F - that the goods required to be repaired or that the part was required for the goods, as the case may be;
or
- (vi) in the case of an action under section 74G - of the failure of the corporation to comply with the express warranty referred to in that section; or

(b) in the case of an action under section 74H, on:

- (i) the day, or the first day, as the case may be, on which the seller referred to in that section made a payment in respect of, or otherwise discharged in whole or in part the liability of that seller to the

consumer referred to in that section; or

(ii) the day on which a proceeding was instituted by that consumer against that seller in respect of that liability or, if more than one such proceeding was instituted, the day on which the first such proceeding was instituted;

whichever was the earlier.

(3) In an action under a provision of this Division, it is a defence if the defendant proves that the action was not commenced within 10 years after the time of the first supply to a consumer of the goods to which the action relates.

Application of Division not to be excluded or modified

74K. (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying, any liability of a person to compensate or indemnify another person that may arise under this Division, is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with that provision.

(3) Nothing in this section applies to a term of contract referred to in subsection 74L (4).

Limitation in certain circumstances of liability of manufacturer to seller

74L. (1) Notwithstanding section 74H but subject to this section, in the case of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the liability under that section of a manufacturer to a seller is limited to a liability to pay to the seller an amount equal to:

- (a) the cost of replacing the goods;
 - (b) the cost of obtaining equivalent goods; or
 - (c) the cost of having the goods repaired;
- whichever is the lowest amount.

(2) Subsection (1) does not apply in relation to particular goods if the seller establishes that it is not fair or reasonable for the liability of the manufacturer in respect of those goods to be limited as mentioned in subsection (1).

(3) In determining for the purposes of subsection (2) whether or not it is fair or reasonable for the liability of a manufacturer to a seller in respect of goods to be limited as mentioned in subsection (1), a court shall have regard to all the circumstances of the case and, in particular, to:

- (a) the availability of suitable alternative sources of supply of the goods;
 - (b) the availability of equivalent goods; and
 - (c) whether the goods were manufactured, processed or adapted to the special order of the seller.
- (4) This section is subject to any term of a contract between the manufacturer and the seller imposing on the manufacturer a greater liability than the liability mentioned in subsection (1).
- (5) In this section, the expressions “manufacturer” and “seller” have the same respective meanings as in section 74H.

Division 3 - Miscellaneous

Saving of other laws and remedies

75. (1) Except as provided by subsection (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) Where an act or omission of a person is both an offence against section 79 and an offence under the law of a State or Territory and that person is convicted of either of those offences¹ he is not liable to be convicted of the other of those offences.
- (3) Except as expressly provided by this Part, nothing in this Part shall be taken to Buit, restrict or otherwise affect any

right or remedy a person would have had if this Part had not been enacted.

Rescission of contracts

75A, (1)Where:

- (a)a corporation supplies goods to a consumer in the course of a business; and
 - (b)there is a breach of a condition that is, by virtue of a provision of Division 2, implied in the contract for the supply of the goods;
- the consumer is, subject to this section, entitled to rescind the contract by:
- (c)causing to be served on the corporation a notice in writing signed by him giving particulars of the breach; or
 - (d)causing the good to be returned to the corporation and giving to the corporation, either orally or in writing, particulars of the breach.
- (2)Where a consumer purports to rescind under this section a contract for the supply of goods by a corporation, the purported rescission does not have any effect if:
- (a)the notice is not served or the goods are not returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods;

(b) in the case of a rescission effected by service of a notice¹ after the delivery of the goods to the consumer but before the notice is served:

(i) the goods were disposed of by the consumer, were lost, or were destroyed otherwise than by reason of a defect in the goods;

(ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or

(iii) the goods were damaged by abnormal use; or

(c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the consumer:

(i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or

(ii) the goods were damaged by abnormal use.

(3) Where a contract for the supply of goods by a corporation to a consumer has been rescinded in accordance with this section:

(a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the corporation - the property in the goods re-vests in the corporation upon the

- service of the notice or the return of the goods; and
- (b) the consumer may recover from the corporation, as a debt the amount or value of any consideration paid or provided by him for the good.
- (4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other Act any State Act any law of a Territory or any rule of law.

PART VA- LIABILITY OF MANUFACTURERS AND IMPORTERS FOR DEFECTIVE GOODS

Interpretation

75AA. In this Part:

“action goods” , in relation to a liability action, means the goods whose supply and defect is alleged in the action;

“Commonwealth mandatory standard” , in relation to goods, means a mandatory standard in respect of the goods imposed by a law of the Commonwealth;

“defendant” , in relation to a liability action, means a person against whom the action is brought (however described);

“liability action” means an action under section 75AD,

75AE, 75AF or 75AG and includes such an action because of paragraph 75AD

(1) (f) or section 75AH; “loss” includes damage;

“mandatory standard” , in relation to goods, means a standard:

(a) for the goods or anything relating to the goods; and

(b) that, under a law of the Commonwealth, a State or a Territory, must be complied with when the goods are supplied by their manufacturer, being a law creating an offence or liability where there is such non-compliance;

but does not include a standard which may be complied with by meeting a higher standard;

“manufactured” includes grown, extracted, produced, processed and assembled; -

“plaintiff” , in relation to a liability action, means the person by whom the action is brought (however described);

“use” includes consume.

Certain interpretation provisions (importers and others taken to be manufacturers etc.) apply to this part

75AB. Subsections 74A (3) to (8) (inclusive) operate as if references in them to Division 2A of Part V included references to this Part.

Meaning of goods having defect

75AC. (1) For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect.

(2) In determining the extent of the safety of goods, regard is to be given • to all relevant circumstances including:

(a) the manner in which, and the purposes for which, they have been marketed; and

(b) their packaging; and

(c) the use of any mark in relation to them; and

(d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and

(e) what might reasonably be expected to be done with or in relation to them; and

(f) the time when they were supplied by their manufacturer.

(3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.

(4) An inference that goods have a defect is not to be made only because:

(a) there was compliance with a Commonwealth mandatory standard for them; and

- (b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer,

Liability for defective goods causing injuries - loss by injured individual

75AD. If:

- (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
 - (b) they have a defect; and
 - (c) because of the defect an individual suffers injuries;
- then:
- (d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
 - (e) the individual may recover that amount by action against the corporation; and
 - (f) if the individual dies because of the injuries - a law of a State or Territory about liability in respect of the death of individuals applies as if:
 - (i) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
 - (ii) the defect were the corporation's wrongful act, neglect or default.

Liability for defective goods causing injuries - loss by person other than injured individual

75AE. (1) If:

(a) a corporation, in trade or commerce, supplies goods manufactured by it;
and

(b) they have a defect; and

(c) because of the defect an individual suffers injuries; and

(d) a person, other than the individual, suffers loss because of:

(i) the injuries; or

(ii) if the individual dies because of the injuries the individual's death;
and

(e) the loss does not come about because of a business relationship between
the person and the individual;

then:

(f) the corporation is liable to compensate the person for the amount of the
person's loss; and

(g) the person may recover that amount by action against the corporation.

(2) For the purposes of this section:

(a) a profession is taken to be a business; and

(b) a relationship between employer and employee or a similar relationship is
a business relationship.

Liability for defective goods - loss relating to other goods

75Af. If:

- (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
 - (b) they have a defect; and
 - (c) because of the defect, the goods of a kind ordinarily acquired for personal, domestic or household use (not being the defective goods) are destroyed or damaged; and
 - (d) a person who:
 - (i) so used; or
 - (ii) intended to so use;the destroyed or damaged goods, suffers loss as a result of the destruction or damage;
- then:
- (e) the corporation is liable to compensate the person for the amount of the loss; and
 - (f) the person may recover that amount by action against the corporation.

Liability for defective goods - loss relating to buildings etc.

75AG. If:

- (a) a corporation, in trade or commerce, supplies goods manufactured by it; and

- (b) they have a defect; and
- (c) because of the defect, land, buildings, or fixtures, ordinarily acquired for private use are destroyed or damaged; and
- (d) a person who:
 - (i) so used; or
 - (ii) intended to so use;
 the land, buildings or fixtures, suffers loss as a result of the destruction or damage; then:
- (e) the corporation is liable to compensate the person for the amount of the loss; and
- (f) the person may recover that amount by action against the corporation.

Survival of liability actions

75AH. A law of a State or Territory about the survival of causes of action vested in persons who die applies to actions under section 75AD, 75AE, 75AF or 75AG.

No liability action where workers' compensation or law giving effect to an international agreement applies

75AI Section 75AD, 75AE, 75AF or 75AG does not apply to a loss in respect of which an amount has been, or could be, recovered under a law of the Commonwealth,
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Territory that:

- (a) relates to workers' compensation; or
- (b) gives effect to an international agreement.

Unidentified manufacturer

75AJ, (1) If a person who wishes to institute a liability action does not know who manufactured the action goods, the person may serve on a supplier, or each supplier, of the action goods who is known to the person a written request to give the person particulars identifying:

- (a) the corporation which manufactured the goods (having regard to section 75AB); or
- (b) the supplier of the goods to the supplier requested.

(2) If, 30 days after the person has made the request or requests, the person still does not know who manufactured the action goods then the corporation, or each corporation, that is a supplier:

- (a) to whom a request was made; and
- (b) who did not comply with the request;

is taken, for the purposes of the action, to have manufactured the action goods.

Defences

75AK. (1) In a liability-v action, it is a defence if it is established that:

- (a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time; or
- (b) they had that defect only because there was compliance with a mandatory standard for them; or
- (c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered; or
- (d) if they were comprised in other goods (“finished goods”) - that defect is attributable only to:
 - (i) the design of the finished goods; or
 - (ii) the markings on or accompanying the finished goods; or
 - (iii) the instructions or warnings given by the manufacturer of the finished goods.

(2) In this section:

“supply time” means:

- (a) in relation to electricity- the time at which it was generated, being a time before it was transmitted or distributed; or
- (b) in relation to other goods the time when they were supplied by their actual manufacturer.

Commonwealth liability for goods that are defective only because

of compliance with Commonwealth mandatory standard

75AL. (1) If a defendant in a liability action raises the defence that the action goods had the alleged defect only because there was compliance with a Commonwealth mandatory standard for them, that defendant must, as soon as practicable after raising that defence, serve on the Commonwealth a prescribed notice of the action and of that defence together with a copy of that defendant's defence in the action.

(2) Service of the notice and defence makes the Commonwealth a defendant in the action.

(3) If, in the action, the Court finds that the plaintiff would have succeeded against the defendant who served the notice but for the action goods having the alleged defect only because there was compliance with a Commonwealth mandatory standard for them, then:

- (a) the Commonwealth, and not the defendant who served the notice, is liable to pay the plaintiff for the amount of the loss caused by the defect; and
- (b) the Court is to enter judgment against the Commonwealth for that amount; and
- (c) the Court may make such orders for costs as the Court considers just.

Liability joint and several

75AM. If 2 or more corporations are liable under section 75AD, 75AE, 75AF or 75AG for the same loss they are jointly and severally liable.

Contributory acts or omissions to reduce compensation

75AN. (1) If the loss in a liability action under section 75AD or 75AE was caused by both:

(a) an act or omission of the individual who suffers the injuries concerned;
and

(b) a defect of the action goods;

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in causing the loss.

(2) If the loss in a liability action under section 75AF or 75AG was caused by both:

(a) an act or omission of the person who suffered the loss; and

(b) a defect of the action goods;

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to the person's share in causing the loss.

(3) For the purposes of this section, the acts and omissions of a person who is responsible for another person include the acts and omissions of that other

person.

Time for commencing actions

75AO. (1) Subject to subsection (2), a person may commence a liability action at any time within 3 years after the time the person became aware, or ought reasonably to have become aware, of the alleged loss¹ the defect and the identity of the person who manufactured the action goods.

(2) A liability action must be commenced within 10 years of the supply by the manufacturer of the action goods.

Application of provisions not to be excluded or modified

75AP. (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Part; or
- (b) the exercise of a right conferred by and of those provisions; or
- (c) any liability under any of those provisions;

is void.

(2)A term of a contract is not taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

Representative actions by the Trade Practices Commission

75AQ. (1)The Commission may, by application, commence a liability action on behalf of one or more persons identified in the application who has suffered the loss for whose amount the action is commenced.

(2)The Commission may only make an application under this section if it has obtained the written consent of the person, or each of the persons, n whose behalf the application is being made.

Saving of other laws and remedies

75AR. (1)This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, in force in a State or Territory.

(2)This Part is not to be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.

Jurisdiction of courts

75AS. Subsection 75B (2) and sections 86, 86A and 86B operate in

relation to an action under this Part as if:

- (a) references in them to Part VI included references to this Part; and
- (b) references in them to Division 1 or 1A of Part V included references to this Part; and
- (c) references in them to the Minister were omitted.

PART VI- ENFORCEMENT AND REMEDIES

Interpretation

75B. (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA or V 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
h a v i n g j u r i s d i c t i o n i n t h e

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

76. (1) If the Court is satisfied that a person:

(a) has contravened a provision of Part IV;

(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 part-to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the

act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part to have engaged in any similar conduct.

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

(a) for each act or omission to which this section applies that relates to section 45D or 45E — \$250,000; and

(b) for each other act or omission to which this section applies — \$10 million,

(1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed \$500,000 for each act or omission to which this section applies.

(2) Nothing in subsection (1) authorizes the making of an order against a person not being a body corporate by reason that the person has contravened or attempted to contravene, or been involved in a contravention of, section 45D or 45E.

(3) If conduct constitutes a contravention of two or more provisions of Part IV, 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.

Civil action for recovery of pecuniary penalties

77. (1) The Minister or the Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

Criminal proceedings not to be brought for contraventions of Part IV

78. Criminal proceedings do not lie against a person by reason only that the person:

- (a) has contravened a provision of Part W;
- (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;

Offences against Part V

79. (1) A person who:

- (a) contravenes;
 - (b) aids, abets, counsels or procures a person to contravene;
 - (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene;
 - (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
 - (e) conspires with others to contravene;
- a provision of Part V other than section 52, 65Q or 65R or subsection 65F (9) is guilty of an offence punishable on conviction:
- (f) in the case of a person not being a body corporate by a fine not exceeding \$40,000; or
 - (g) in the case of a person being a body corporate — by a fine not exceeding \$200,000.

(2) Where a person is convicted of two or more offences constituted by, or relating to, contraventions of the same provision of Part V. being contraventions that appear to the Court to have been of the same nature or a substantially similar nature and to have occurred at or about the same time (whether or not the person is also convicted of an offence or offences constituted by, or relating to, another contravention or other contraventions of that provision that

were of a different nature or occurred at a different time), the Court shall not in respect of the first-mentioned offences. impose on the person fines that, in the aggregate, exceed the maximum fine that would be applicable in respect of one offence by that person against that provision.

(3)Where:

(a)a person is convicted of an offence constituted by, or relating to, a contravention of a provision of Part V; and

(b)a fine has, or fines have, previously been imposed on the person by the Court for an offence or offences constituted by, or relating to, another contravention or other contraventions of the same provision, being a contravention that, or contraventions each of which, appears to the Court to have been of the same nature as, or of a substantially similar nature to, and to have occurred at or about the same time as, the first- mentioned contravention (whether or not a fine has, or fines have, also previously been imposed on the person for an offence or offences constituted by, or relating to, a contravention or contraventions of that provision that were of a different nature or occurred at a different time);

the Court shall not, in respect of the offence mentioned in paragraph (a), impose on the person a fine that exceeds the

amount (if any) by which the maximum fine applicable in respect of that offence under subsection (1) is greater than the amount of the fine, or the sum of the amounts of the fines, first referred to in paragraph (b).

(4) In proceedings under this section against a person for contravening a provision of Part V, the Court may:

(a) grant an injunction under section 80 against the person in relation to:

(i) the conduct that constitutes, or is alleged to constitute, the contravention;

or

(ii) other conduct of that kind; or

(b) make an order under section 80A in relation to the contravention.

(5) Sections 5, 7 and 7A of the Crimes Act 1914 do not apply in relation to an offence against subsection (1).

(6) A prosecution for an offence against subsection (1) may be commenced within 3 years after the commission of the offence.

Enforcement and recovery of certain fines

79A. (1) Where a person on whom a fine has been imposed for an offence against section 65Q, 65R, 79 or 155 or subsection 65F (9) or 87A (5) defaults in payment of the fine, a Court may:

(a) exercise any power that the Court has apart from this section with respect to the enforcement and recovery

of fines imposed by the Court; or

(b) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

(2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

(3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

(a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and

(b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.

(4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect

(a) on payment of the fine; or

(b)if the fine is not paid-on full compliance with the order.

(5)The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 18A of the Crimes Act 1914 in respect of a fine shall be calculated at the rate of one day' s imprisonment for each \$ 25 of the amount of the fine that is from time to time unpaid.

(6)Subject to subscction (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 wre imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;

the Court shall, by order, declare that the order or orders

shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

(8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.

(9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).

(10) Paragraphs 18A (1) (b), (c) and (d) of the Crimes Act 1914 do not apply with respect to fines referred to in subsection (1).

(11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

Injunctions

80. (1) Subject to subsections (1A) and (1B), where, on the application of the Minister, 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 a provision of Part IV, IVA or V;
- (b) attempting to contravene such a provision;
- (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
- (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
- (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.

(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) Subject to subsection (1B), a person other than the Minister or the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is

proposing to be involved in a contravention of, section 50 or 50A.

- (1B) Where the Tribunal has, on the application of a person (in this subsection referred to as the applicant) other than the Minister or the Commission, made a declaration under subsection 50A (1) in relation to the acquisition by a person of a controlling interest in a corporation, the applicant is entitled to make an application under subsection (1) for an injunction by reason that the corporation has contravened or attempted to contravene or is proposing to contravene subsection 50A (6) in relation to that declaration.
- (2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (3) The Court may rescind or vary an injunction granted under subsection (1) or (2).
- (4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial

damage to any person if the first- mentioned person engages in conduct of that kind

(5)The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

(a)whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;

(b)whether or not 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.

(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.

Stay of injunctions

80AA. (1) Nothing in Division 7 of Part VI of the Industrial Relations Act 1988 prevents the Court, pursuant to section 80, from granting an injunction, but where:

(a) the Court has, pursuant to that section, granted an injunction in respect of conduct that constitutes or would constitute:

(i) a contravention of a provision of section 45D or of section 45E;

(ii) attempting to contravene such a provision;

(iii) aiding, abetting counselling or procuring a person to contravene such a provision;

(iv) inducing, or attempting to induce, a person, whether by threats, promises or otherwise, to contravene such a provision;

(v) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(vi) conspiring with others to contravene such a provision;

(b) there is a proceeding pending before the Australian Industrial Relations

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of Part VI of the Industrial Relations Act 1988, or before a court, tribunal or authority of a State or Territory exercising powers under a prescribed provision of a law of that State or Territory, in respect of a dispute relating to the conduct referred to in paragraph (a); and

(c) the conduct relates to the supply of goods or services to, or the acquisition of goods or services from, a person who is or becomes a party to the proceeding referred to in paragraph (b);

the Court may, on the application of a Minister or of a party to the proceeding before the Court in relation to the conduct, if it considers that to do so would be likely to facilitate the settlement of the dispute by conciliation and that in all the circumstances it would be just to do so, by order, stay the operation of the injunction.

(2) An order under subsection (1) may be of unlimited duration or may be expressed to have effect for a period specified in the order and may be varied or rescinded by the Court at any time.

(3) Nothing in subsection (1) affects the powers that the Court has apart from that subsection.

(4) The regulations shall not prescribe a provision of a law of a State or Territory for the purposes of this section unless the Governor-General is satisfied that

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powers of the relevant court, tribunal or authority under that provision are equivalent to the powers of the Australian Industrial Relations Commission under section 158 of the Industrial Relations Act 1988.

(5)Where the proceeding referred to in subsection (1) before the Australian Conciliation and Arbitration Commission, or before a court, tribunal or authority of a State or Territory, is terminated by reason that the Commission, or the court, tribunal or authority, has settled by conciliation the dispute to which the conduct in respect of which the injunction was granted related, the Court shall 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.

(6)In this section, “injunction” includes an interim injunction

Order to disclose information or publish advertisement

80A. (1)Without limiting the generality of section 80, where, on the application of the Minister or the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Part V, the

Court may make either or both of the following orders:

- (a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last- mentioned person has access;
- (b) an order requiring that person or a person involved in the contravention to publish, at his own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

Divestiture

81. (1) The Court may, on the application of the Minister, the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of the shares or assets acquired in contravention of that section.

(1A)Where:

- (a)the Court finds, in a proceeding instituted under this Part, that a person (in this subsection referred to as the “acquirer”) has acquired shares in the capital of a body corporate or any assets of a person in contravention of section 50;
 - (b)the Court finds, whether in that proceeding or any other proceeding instituted under this Part, that the person (in this section referred to as the “vendor”) from whom the acquirer acquired those shares or those assets, as the case may be, was involved in the contravention; and
 - (c)at the time when the finding referred to in paragraph (b) is made, any of those shares or those assets, as the case may be, are vested in the acquirer or, if the acquirer is a body corporate, in any body corporate that is related to the acquirer;
- the Court may, on the application of the Minister or the Commission, declare that the acquisition, in so far as it relates to the shares or assets referred to in paragraph (c), is void as from the day on which it took place and, where the Court makes such a declaration:
- (d)the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and
 - (e)the vendor shall refund to the acquirer any amount paid

to the vendor in respect of the acquisition of the shares or assets to which the declaration relates.

(1B) Where a declaration has been made under subsection 50A. (1) in relation to the obtaining of a controlling interest in a corporation, or in each or 2 or more corporations, the Court may, on the application of the Minister or the Commission, if it finds, or has in a proceeding instituted under section 80 found, that that corporation, or any of those corporations, as the case may be (in this subsection referred to as the “relevant corporation”), has contravened subsection 50A (6), by order, for the purpose of ensuring that the obtaining of that controlling interest ceases to have the result referred to in paragraph 50A (1) (a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.

(1C) Where an application is made to the Court for an order under subsection (1) or a declaration under subsection (1A), the Court may, instead of making an order under subsection (1) for the purpose of securing the disposal by a person of shares or assets or an order under subsection (1A) that the acquisition by a person of shares or assets is void, accept upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

(2)An application under subsection (1), (1A) or (1B) may be made at any time within 3 years after the date on which the contravention occurred.

(3)Where an application for directions wider subsection (1) or for a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsections (1) and (1A).

Actions for damages

82. .(1)A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V 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 wider subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

Finding in proceedings to be evidence

83. In a proceeding against a person under section 82 or in an application under subsection 87 (1A) for an order against a

person, a finding of any fact by a court made in proceedings under section 77, 80, 80A or 81, or for an offence against section 79, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part IV, IVA or V is prima facie evidence of that fact and the finding may be proved by production of a document under the seal of the court from which the finding appears.

Conduct by directors, servants or agents

84. (1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA or V applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the persons actual or apparent authority, had that state of mind.
- (2) Any conduct engaged in on behalf of a body corporate:
- (a) by a director, servant or agent of the body corporate within the scope of the persons 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, where the giving

of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;
shall be deemed, for the purposes of this Act, to have been engaged in also by the hock corporate.

(3)Where, in 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 a provision of Part IVA or V applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of the servant' s or agent' s actual or apparent authority had that state of mind.

(4)Conduct engaged in on behalf of a person other than a body corporate:

(a)by a servant or agent of the person 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 first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;

shall be deemed, for the purposes of this Act, to have been

engaged in also by the first-mentioned person.

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

Defences

85. (1) Subject to subsection (2), in a prosecution under this Part in relation to a contravention of a provision of Part V, it is a defence if the defendant establishes:

(a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake;

(b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person; or

(c) that:

(i) the contravention in respect of which the proceeding was instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and

(ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

(1A) In paragraphs (1) (b) and (c), "another person" does not

include a person who was:

(a) a servant or agent of the defendant; or

(b) in the case of a defendant being a body corporate, a director, servant or agent of the defendant;

at the time when the contravention occurred.

(2) If a defence provided by subsection (1) involves an allegation that a contravention was due to reliance on information supplied by another person or to the act or default of another person, the defendant is not, without leave of the Court, entitled to rely on that defence unless he has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing giving such information that would identify or assist in the identification of the other person as was then in his possession.

(3) In a proceeding under this Part in relation to a contravention of a provision of Part V committed by the publication of an advertisement, it is a defence if the defendant establishes that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of that Part

(4) In a proceeding under this Part in relation to a contravention

of Part V committed by the supplying of goods that did not comply with a consumer product safety standard or in relation to which the supplier did not comply with a consumer product information standard, it is a defence if the defendant establishes:

- (a) that the goods were acquired by him for the purpose of re-supply and were so acquired from a person who carried on in Australia a business of supplying such goods otherwise than as the agent of a person outside Australia; and
- (b) that he did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with that standard or that he had not complied with that standard in relation to the goods, as the case may be, or he relied in good faith on a representation by the person from whom he acquired the goods that a consumer product safety standard or a consumer product information standard, as the case may be, had not been prescribed in respect of the goods.

(5) A person is not without leave of the Court, entitled to rely on the defence provided by subsection (4) unless he has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing identifying the person from whom he acquired the goods.

(6)Where, 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 engaged in conduct in contravention of a provision of Part IV or in conduct referred to in paragraph 76 (1) (b), (c), (d), (e) or (f) but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit.

Jurisdiction of courts

86. (1)Jurisdiction is conferred on the Federal Court in any matter arising under this Act in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part.

(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 IVA or Division 1 or 1A of Part V 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.
- (4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than the jurisdiction of the several courts of the States and Territories under subsection (2) and the jurisdiction of the High Court under section 75 of the Constitution.

Transfer of matters

86A. (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 IVA or Division 1 or 1A of Part V;
- the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Courts own motion, transfer to a court of a State or Territory the matter referred to in paragraph (b) and may also transfer to that court any other matter for determination in the proceeding.

- (2) The Federal Court shall not transfer a matter to another court under subsection (1) unless the other court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:
- (a) the matter arises out of or is related to a proceeding that is pending in the other court; or
 - (b) it is otherwise in the interests of justice that the matter be determined by the other court.

- (3) Where the Federal Court transfers a matter to another court under subsection (1):
- (a) further proceedings in the matter shall be as directed by the other court; and
 - (b) the judgment of the other court in the matter is enforceable throughout Australia and external Territories as if it were a judgment of the Federal Court.

(4) Where:

- (a) a proceeding is pending in a court (other than the Supreme Court) of a State or Territory; and
- (b) a matter for determination in the proceeding arose under Part IVA or Division 1 or 1A of Part V:

the court shall, if directed to do so by the Federal Court, transfer to the Federal Court the matter referred to in paragraph (b) and such other matters for determination in

the proceeding the determination of which would, apart from any law of a State or of the Northern Territory relating to cross - vesting of jurisdiction, be within the jurisdiction of Federal Court as the Federal Court determines.

(5)Where:

(a)a proceeding a pending in a court (other than the Supreme Court) of a State or Territory; and

(b)a matter for determination in the proceeding arose under Part IVA or Division 1 or 1A of Part V:

the court may, subject to subsection (6), upon the application of a party or of the court's own motion, transfer to a court (other than the Supreme Court) of a State or Territory other than the State or Territory referred to in paragraph (a) the matter referred to in paragraph (b).

(6)A court shall not transfer a matter to another court under subsection (5) unless the other court has power to grant the remedies sought before the first-mentioned court in the matter and it appears to the first-mentioned court that:

(a)the matter arises out of or is related to a proceeding that is pending in the other court; or

(b)it is otherwise in the interests of justice that the matter be determined by the other court.

(7)Where a court transfers a matter to another court under

subsection (5), further proceedings in the matter shall be as directed by the other court.

Transfer of certain proceedings to Family Court

86B. (1) Subject to subsection (2), where:

- (a) a civil proceeding is pending in the Federal Court; and
- (b) a matter for determination in the proceeding arises under Part IVA or Division 1 or 1A of Part V:

the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the proceeding to the Family Court.

(2) A proceeding that is pending in the Federal Court at the commencement of this section shall not be transferred to the Family Court unless the parties to the proceeding consent to the transfer.

(3) Subject to subsection (4), where a proceeding is transferred to the Family Court:

- (a) the Family Court has jurisdiction to hear and determine the proceeding;
- (b) the Family Court also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether by virtue of paragraph (a) or otherwise):
 - (i) that are associated with matters arising in the proceeding; or

(ii)that, apart from subsection 32 (1) of the Federal Court of Australia Act 1976, the Federal Court would have had jurisdiction to hear and determine in the proceeding;

(c)the Family Court may, in and in relation to the proceeding:

(i)grant such remedies;

(ii)make orders of such kinds; and

(iii)issue, and direct the issue of, writs of such kinds;

as the Federal Court could have granted, made, issued or directed the issue of, as the case may be, in and in relation to the proceeding;

(d)remedies, orders and writs granted, made or issued by the Family Court in and in relation to the proceeding have effect and may be enforced by the Family Court as if they had been granted, made or issued by the Federal Court;

(e)appeals lie from judgments of the Family Court given in and in relation to the proceeding as if the judgments were judgments of the Federal Court constituted by a single Judge of that Court and do not otherwise lie; and

(f)subject to paragraphs (a) to (e) (inclusive), this Act, the regulations, the Federal Court of Australia Act 1976, the Rules of Court made under that Act, and other laws of the Commonwealth, apply in and in relation to

the proceeding as if:

- (i) a reference to the Federal Court (other than in the expression “the Court or a Judge”) included a reference to the Family Court;
- (ii) a reference to a Judge of the Federal Court (other than in the expression “the Court or a Judge”) included a reference to a Family Court Judge;
- (iii) a reference to the expression “the Court or a Judge” when used in relation to the Federal Court included a reference to Family Court Judge sifting in Chambers;
- (iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Family Court; and
- (v) any other necessary changes were made.

(4) Where any difficulty arises in the application of paragraphs (3) (c), (d) and (f) in or in relation to a particular proceeding¹ the Family Court may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty,

(5) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Act to the Family Court.

Other orders

87. (1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA or V. the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of section 80, the Court may, 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 (whether before or after the commencement of this subsection) in contravention of a provision of Part IVA or V or on the application of the Commission in accordance with subsection (1B) on behalf of such a person or 2 or more such persons, make such

order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will 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 will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(1B)Where, in a proceeding instituted for an offence against section 79 or instituted by the Commission or the Minister under section 80, a person is found to have engaged (whether before or after the commencement of this subsection) in conduct in contravention of a provision of Part IVA or V. the Commission may make an application under subsection (1A) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but the Commission shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

(1C)An application may be made under subsection (1A) in relation to a
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notwithstanding that a proceeding has not been instituted under another provision of this Part in relation to that contravention.

(1CA)An application under subsection (1A) may be commenced:

- (a)in the case of conduct in contravention of Part IVA - at any time within 2 years after the day on which the cause of action accrued; or
- (b)in any other case - at any time within 3 years after the day on which the cause of action accrued.

(1D)For the purpose of determining whether to make an order under this section in relation to a contravention of Part IVA, the Court may have regard to the conduct of parties to the proceeding since the contravention occurred.

(1E)The Court shall not make an order under this section in relation to a contravention of Part IVA in relation to a contract of insurance to which the Insurance Contracts Act 1984 applies.

(2)The orders referred to in subsection (1) and (1A) are:

- (a)an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract to be

void and, if the Court thinks fit, to have been void ab initio or at all times on and after such date before the date on which the order is made as is specified in the order;

- (b)an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;
- (ba)an order refusing to enforce any or all of the provisions of such a contract;
- (c)an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
- (d)an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
- (e)an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct at his 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 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, or a covenant given, whether before or after the commencement of the Trade Practices Amendment Act 1977:

(i)in the case of a provision of a contract, is unenforceable by reason of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or

(ii) in the case of a covenant, is unenforceable by reason of section 45B in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with 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 or of a person who would, but for subsection 45B (1), be bound by, or entitled to the benefit of, the covenant, as the case may be, make an order:

(c) varying the contract or covenant or a collateral arrangement relating to the contract or covenant in such manner as the Court considers just and equitable; or

(d) directing another party to the contract, or another person who would, but for subsection 45B (1), be bound by, or entitled to the benefit of, the covenant, to do any act in relation to the first-mentioned party or person 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 powes conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or coventant in proceedings instituted in that other court in respect of the contract or covenant.
- (6)In subsection (2), “interest” , in relation to land, has the same meaning as in section 53A.

Power of Court ot prohibit payment or transfer of moneys or other property

87A. (1)Where:

- (a)proceedings have been commenced against a person for an offence against section 79;
- (b)an application has been made under section 80 for an injunction against a person in relation to a contravention of a provision of Part IVA or V;
- (c)an action has been commenced under subsection 82 (1) against a person in relation to a contravention of a provision of Part V; or
- (d)an application for an order under subsection 87 (1A) or (1B) has been or may be made against a person in relation to a contravention of a provision of Part IVA or V;

the Court may, on the application of the Minister or the Commission, make an order or orders mentioned in subsection (2) if the Court is satisfied that:

(e) it is necessary or desirable to do so for the purpose of preserving money or other property held by or on behalf of a person referred to in paragraph (a), (b), (c) or (d), as the case may be (in this section referred to as the “relevant person”), where the relevant person is liable or may become liable under this Act to pay moneys by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or refund other property; and

(f) it will not unduly prejudice the rights and interests of any other person.

(2) The orders referred to in subsection (1) are:

(a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to an associate of the relevant person ‘from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;

(b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the relevant person or on behalf of an associate of the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of, the other property, to, or to another person at the direction or request of, the person on whose behalf the money or other property

is held;

(c)an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of money of the relevant person or of an associate fo the relevant person to a place outside the State or Territory in which the money is held;

(d)an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the other property is located; and

(e)an order appointing, where the relevant person is a natural person, a receiver or trustee of the property or of part of the property of the relevant person with such powers as are specified in the order.

(3)Subject to subsection (4), an order under this section may be expressed to operate:

(a)for a period specified in the order; or

(b)until proceedings under any other provision of this Part in relation to which the order was made have been concluded.

(4)An order under this section made on an application ex parte shall not be expressed to operate for a period exceeding 30 days.

(5)A person who contravenes or fails to comply with an

order by the Court under this section that is applicable to the person is guilty of an offence punishable on conviction:

(a) in the case of a person not being a body corporate - by a fine not exceeding \$20,000; or

(b) in the case of a person being a body corporate - by a fine not exceeding \$100,000.

(6) Nothing in this section affects the powers that the Court has apart from this section.

(7) This section has effect subject to the Bankruptcy Act 1966.

(8) A reference in this section to a person who is an associate of a relevant person is a reference to:

(a) a person holding money or other property on behalf of the relevant person; or

(b) if the relevant person is a body corporate a wholly owned subsidiary of the relevant person.

Enforcement of undertakings

87B. (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).

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

- (3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
- (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 result of the breach;
 - (d) any other order that the Court considers appropriate.

PART VII- AUTHORIZATIONS AND NOTIFICATIONS IN RESPECT OF RESTRICTIVE TRADE PRACTICES

Division 1 – Authorizations

Power of Commission to grant authorisations

88. (1) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorization to the corporation:

(a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect of substantially lessening competition within the meaning of section 45; or

(b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect of substantially lessening competition within the meaning of section 45;

and, while such an authorization remains in force:

(c) in the case of an authorization to make a contract or

arrangement or to arrive at an understanding subsection 45 (2) does not prevent the corporation from making the contract or arrangement or arriving at the understanding in accordance with the authorization and giving effect in accordance with the authorization to any provision of the contract or arrangement so made or of the understanding so arrived at;

(d) in the case of an authorization to give effect to a provision of a contract:

(i) the provision is not unenforceable by reason of subsection 45 (1); and

(ii) subsection 45 (2) does not prevent the corporation from giving effect to the provision in accordance with the authorization; or

(e) in the case of an authorization to give effect to a provision of an arrangement or understanding subsection 45 (2) does not prevent the corporation from giving effect to the provision in accordance with the authorization.

(2) Subject to subsections (3) and (4), subsection (1) does not permit the granting of an authorization in relation to:

(a) the making of a contract or arrangement, or the arriving at an understanding, that would contain a provision having the purpose, or having or being likely

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the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods supplied or acquired or to be supplied or acquired by the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other, to or from other persons who are neither proposed parties to the proposed contract arrangement or understanding nor bodies corporate related to such proposed parties; or

(b) the giving effect to such a provision of a contract arrangement or understanding.

(2A) The reference in paragraph (2) (a) to the supply or acquisition of goods by persons in competition with each other includes a reference to the supply or acquisition of goods by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods.

(3) Subsection (2) does not prevent the granting of an authorization under subsection (1) in relation to:

- (a) a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to the supply of goods in pursuance of the joint venture; or
- (b) a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, to the extent that the provision recommends or provides for recommending, or would recommend or provide for recommending, the price for, or a discount, allowance, rebate or credit in relation to, goods, where the parties to the contract, arrangement or understanding, or the proposed parties to the proposed contract, arrangement or understanding, include:
 - (i) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who supply, in trade or commerce, goods to which the provision applies; or
 - (ii) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who acquire, in trade or commerce, goods to which the provision applies.

- (4) Subsection (2) does not prevent the granting of an authorization under subsection (1) in relation to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:
- (a) in relation to the price for goods to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding, or by the proposed parties to the proposed contract, arrangement or understanding, from:
 - (i) a person who is not, or persons none of whom is, such a party or a body corporate related to such a party; or
 - (ii) a person who would not be, or persons none of whom would be, such a proposed party or a body corporate related to such a proposed party; or
 - (b) for the joint advertising of the price for the re-supply of goods so acquired.
- (5) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorization to the person:
- (a) to require the giving of, or to give, a covenant (other than a proposed covenant of a kind mentioned in subsection 45C (2) that relates to the supply or acquisition of goods) where the proposed covenant would have the purpose, or would have or might have

the effect of substantially lessening competition in a market referred to in paragraph 45B (2) (a); or

(b)to enforce the terms of a covenant (other than a covenant of a kind mentioned in subsection 45C (1) that relates to the supply or acquisition of goods);

and, while such an authorization remains in force;

(c)in the case of an authorization to require the giving of, or to give, a covenant;

(i)the covenant is not unenforceable by reason of subsection 45B (1); and

(ii)subsection 45B (2) does not apply in relation to the covenant; or

(d)in the case of an authorization to enforce the terms of a covenant:

(i)the covenant is not unenforceable by reason of subsection 45B (1); and

(ii)paragraphs 45B (2) (b) and (c) do not apply in relation to the covenant.

(6)An authorization granted by the Commission to a person under any of the preceding provisions of this section to:

(a)make a contract or arrangement or arrive at an

understanding;

(b)give effect to a provision of a contract, arrangemetn or understanding;

(c)require the giving of, or give, a covenant; or

(d)enforce the terms of a covenant;

has effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the authorization as a party to the contract, arrangement or understanding or as a proposed path- to the proposed contract, arrangement or understanding, or as a person who is or would be bound by, or entitled to the benefit of, the covenant or the proposed covenant as the case may be.

(7)Subject to this Part, the Commission may, upon application by a person, grant an authorization to the person, and to any other person acting in concert with the first-mentioned person, to engage in conduct to which section 45D would or might apply and, while such an authorization remains in force, that section does not apply in relation to die engaging in that conduct by the applicant and by any person action in concert with the applicant.

(7A)Subject to this Part the Commission may, upon application by a person, grant an authorization to the person to engage in conduct to which section 45E would or might apply and, while such an authorization remains in force, that

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does not apply in relation to the engaging in that conduct by that person.

(8) Subject to this Part, the Commission may, upon application by a corporation, grant an authorization to the corporation to engage in conduct that constitutes or may constitute the practice of exclusive dealing and, while such an authorization remains in force, section 47 does not prevent the corporation from engaging in that conduct in accordance with the authorization.

(9) Subject to this Part, the Commission may, upon application by a person:

(a) grant an authorisation to the person to acquire shares in the capital of a body corporate or to acquire assets of a person; or

(b) grant an authorisation to the person to acquire a controlling interest in a body corporate within the meaning of section 50A;

and, while such an authorisation remains in force:

(c) in the case of an authorisation under paragraph (a) - section 50 does not prevent the person from acquiring shares or assets in accordance with the authorisation; or

(d) in the case of an authorisation under paragraph (b) - section 50A does not to the extent specified in the authorisation, apply in relation to the acquisition of that

controlling interest.

(10)An authorization to a corporation under subsection (1) may be expressed so as to apply to or in relation to another person who:

- (a)in the case of an authorization to make a contract or arrangement or arrive at an understanding becomes a party to the proposed contract or arrangement at a time after it is made or becomes a party to the proposed understanding at a time after it is arrived at; or
- (b)in the case of an authorization to give effect to a provision of a contract arrangement or understanding - becomes a party to the contract arrangement or understanding at a time after the authorization is granted.

(11)An authorization under subsection (5) may be expressed so as to apply to or in relation to another person who:

- (a)in the case of an authorization to require the giving of, or to give, a covenant - becomes bound by, or entitled to the benefit of, the proposed covenant at a time after the covenant is given; or
- (b)in the case of an authorization to enforce the terms of a covenant - becomes bound by, or entitled to the benefit of, the covenant at a time after the
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granted.

- (12) The Commission does not have power to grant an authorization to a corporation to make a contract or arrangement, to arrive at an understanding or to require the giving of, or to give, a covenant if the contract or arrangement has been made, the understanding has been arrived at or the covenant has been given before the Commission makes a determination in respect of the application.
- (13) An application made to the Commission under this section for an authorization in relation to a particular contract or proposed contract may be expressed to be made also in relation to another contract or proposed contract that is or 'will be, or in relation to two or more other contracts or proposed contracts that are or will be, in similar terms to the first-mentioned contract or proposed contract and, where an application is so expressed, the Commission may grant a single authorization in respect of all the contracts or proposed contracts or may grant separate authorizations in respect of any one or more of the contracts or proposed contracts.
- (14) Where an application made to the Commission under this section for an authorization in relation to a particular contract or proposed contract is expressed in accordance with subsection (13) to be made also in relation to another

contract or contracts or proposed contract or proposed contracts:

(a)the application shall set out:

(i)the names of the parties to each other contract; and

(ii)the names of the parties to each other proposed contract where those names are known to the applicant at the time when the application is made; and

(b)if an authorization is granted in respect of a proposed contract the names of the parties to which were not so known to the applicant, the authorization shall, by force of this subsection, be deemed to be expressed to be subject to a condition that any path- to the contract will, when so required by the Commission, furnish to the Commisssion the names of all the parties to the contract.

(15)In subsections (13) and (14):

(a) “contract” includes an arrangement, understanding or covenant and “proposed contract” has a corresponding meaning; and

(b)the reference to the parties to a contract or proposed contract shall, for the purposes of the application of those subsections in relation to a covenant or proposed covenant by reason of paragraph (a) of this subsection,

be read as a reference to the persons who are or will be, or but for subsection 45B (1) would be, respectively bound by, or entitled to the benefit of, the covenant or proposed covenant.

- (16) A corporation that has made an application to the Commission for an authorisation, or a person other than a corporation who has made an application to the Commission for an authorisation under subsection (9), may at any time, by notice in writing to the commission, withdraw the application.

Procedure for applications

89. (1) An application for an authorization shall be made in writing as prescribed.
- (2) The Commission shall cause to be made public in such manner as it thinks fit notice of the receipt by the Commission of an application for an authorization,
- (3) The Commission shall keep a register of applications for authorizations received by it (including applications that have been withdrawn).
- (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 for an authorization;
 - (aa) any draft determination, and any summary of reasons,

by the Commission furnished to any person under section 90A;

(aaa)any document relating to:

(i)the revocation by the Commission of art authorisation; or

(ii)the substitution of an authorisation for an authorisation previously in force;

(ab)any record of a conference made in accordance with subsection 90A (8) and any certificate in relation to a conference given under subsection 90A (9);

(b)Particulars of any oral submission made to the Commission in relation to such an application; and

(c)the determination of the Commission on such an application 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 for an authorization or makes an oral submission to the Commission in relation to such an application, he may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (3) by reason of the confidential nature of any of the matters contained in

the document or submission.

(5A)Where such a request is made:

(a)if the document or the part of the document, or the submission or the part of the submission, to which the request relates contains particulars of:

(i)a secret formula or process;

(ii)the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or

(iii)the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (3); and

(b)in any other case - the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document or particulars of the submission or of the part of the submission, as the case may be, from that register.

(5B)If the Commission refuses a request to exclude a document

or a part of a document from the register kept under subsection (3), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him 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 withdraws the submission or that part of the submission and, in that case, paragraph (4) (b) does not apply in relation to the submission or that part of the submission, as the case may be.

(5D) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (4) (a) or particulars referred to in paragraph (4) (b) from the register kept under subsection (3).

(5E) If a person requests, in accordance with subsection (5) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from

the register kept under subsection (3), the document or part of the document, or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

- (6) A document shall not be included in the register kept under subsection (3) if a direction in relation to that document was in force under paragraph 22 (1) (b) of the Trade Practices Act 1974 immediately before the commencement of the Trade Practices Amendment Act 1977.

Determination of applications for authorisations

90. (1) The Commission shall, in respect of an application for an authorization:
- (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant by the Commonwealth, by a State or by any other person.
- (4) The Commission shall state in writing its reasons for a determination made by it.

(5)Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

(6)The Commission shall not make a determination granting an authorization under subsection 88 (1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47 (6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a)the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b)the proposed covenant were given, and were complied with; or

(c)the proposed conduct were engaged in;

as the case may be.

(7)The Commission shall not make a determination granting an authorization under subsection 88 (1) or (5) in respect of a

provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that 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, from giving effect to the provision or complying with the covenant.

(8)The Commission shall not:

(a)make a determination granting:

- (i)an authorization under subsection 88 (1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision;
 - (ii) an authorization under subsection 88 (7) or (7A) in respect of proposed conduct; or
 - (iii)an authorization under subsection 88 (8) in respect of proposed conduct to which subsection 47 (6) or (7) applies;
- unless it is satisfied in all the circumstances that the

proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorization under subsection 88 (1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an arthorization under subsection 88 (9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a)the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i)a significant increase in the real value of exports;

(ii)a significant substitution of domestic products for imported goods; and

(b)without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(10)Subject to subsections (10A), (12), (13), (14) and (15), if:

(a)the Minister, by notice published in the Gazette, fixes a date for the purposes of the application of this subsection in relation to applications for authorizations under subsection 88 (1), (5), (7), (7A) or (8); and

(b)the Commission does not determine an application for an authorization under a subsection in relation to which a date is so fixed within 4 months from that date or the date on which the application was or is received by the Commission, whichever is the later;

the Commission shall be deemed to have granted, at the expiration of that period, the authorization applied for.

(10A)If, within the latest occurring 4 month period referred to in paragraph (10) (b) in relation to an application for an

authorisation, the Commission gives the the applicant a written notice requesting the applicant to give to the Commission additional information relevant to the determination of the application, the reference in that paragraph to 4 months shall be taken to be a reference to a period consisting of 4 months 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.

(11) Subject to subsections (12), (13) and (15), if the Commission does not determine an application for an authorisation under subsection 88 (9) within:

(a) 30 days from the day on which the application is received by the Commission; or

(b) if the Commission, before the end of that period of 30 days, gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application - the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which

the applicant gives to the Commission such of the additional information as the applicant is able to provide;

the Commission shall be deemed to have granted, at the end of that period, the authorisation applied for.

(11A)The Commission may, within the 30 day period mentioned in subsection (11), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (11) to 30 days are to be treated as references to 45 days.

(12)If the applicant for an authorization informs the Commission in writing before the expiration of the period referred to in subsection (10) or (11) (in this subsection and in subsection (13) referred to as the “base period”) that the applicant agrees to the Commission taking a specified longer period for the determination of the application, a reference to that longer period shall be deemed for the purposes of that application to be substituted in subsection (10) or (11), as the case may be, 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 (10) or (11) for the reference in subsection (10) 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 wishes the Commission to hold a conference in relation to the draft determination, the period referred to in subsection (10) of this section shall be deemed to be increased by a period equal to the period commencing on the day on which the first notification in relation to the draft determination was received by the Commission and ending on the seventh day after the day specified in the certificate given by a member of the Commission in pursuance of subsection 90A (9) as the day on which the conference terminated.

(15) Where a party to a joint venture makes at the one time two or more applications for authorizations, being applications each of which deals with a matter relating to the joint venture:

(a) the Commission shall not make a determination in respect of any one of those applications unless it also makes a determination or determinations at the same time in respect of the other application or other applications; and

(b)if the Commission does not make a determination in respect of any one of the applications within the period referred to in whichever of subsections (10) and (11) is applicable in relation to that application, the Commission shall be deemed to have granted, at the expiration of that period, all the authorizations applied for.

Commission to afford opportunity for conference before determining application for authorisation

90A.(1)Before determining an application for an authorization (other than an application for an authorisation under subsection 88 (9)), 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) appliesa summary of the reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or

(d)in a case to which paragraph (b) applies - a summary of the reasons why it is satisfied that the application should be granted unconditionally.

(5)If each of the persons to whom a notice was sent under

subsection (2):

(a) notifies the Commission within the period of 14 days mentioned in that subsection that he does not wish the Commission to hold a conference in relation to the draft determination; or

(b) does not notify the Commission within that period that he wishes the Commission to hold such a conference;

(6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(7) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft determination) nominated by the Chairman;

(b) each person to whom a notice was sent under subsection (2) and any other interested person whose

presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate;

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him but a person who so assists another person at the conference is not entitled to participate in the discussion;

(d) the Minister or a person or persons appointed in writing by the Minister is or are entitled to attend and participate personally; 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 Chairman:

(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 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 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 a specified unincorporated association of which he 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.

Grant, revocation and variation of authorisations

91. (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.

(2) If the Commission considers that it is appropriate to do so:

- (a) for the purpose of enabling due consideration to be given to an application for an authorization;
- (b) pending the expiration of the time allowed for the making of an application to the Tribunal for review of a determination by the Commission of an application for an authorization and, if such an application for a review is made¹ pending the making of a determination by the Tribunal on the review;
or
- (c) for any other reason;

an authorization granted in respect of the application may be expressed to be an
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Commission may at any time revoke an authorization so expressed.

(2A) Subsections 90 (4) to (9), inclusive, do not apply in relation to an authorization that is expressed to be an interim authorization.

(3) An authorization may be expressed to be subject to such conditions as are specified in the authorization.

(4) If, at any time after the Commission has granted an authorization, it appears to the Commission that the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular, that a condition to which the authorisation was expressed to be subject has not been complied with or that there has been a material change of circumstances since the authorisation was granted:

(a) the Commission shall give notice accordingly to the corporation to which the authorization was given and any other persons who appear to the Commission to be interested and afford them a reasonable opportunity of making submissions to the Commission in the matter; and

(b) where, after so notifying the corporation and other persons (if any) and considering any submissions made by those persons, the Commission is satisfied that the authorization was granted on the basis of evidence or information that was false or misleading in a material

particular, that the condition has not been complied with or that there has been such a material change of circumstances, the Commission may make a determination revoking the authorization and, if it considers it appropriate to do so, granting a further authorization in substitution for the authorization so revoked.

Division 2 – Notifications

Notification of exclusive dealing

93. (1) Subject to subsection (2), a corporation that engages, or proposes to engage, in conduct of a kind referred to in subsection 47 (2), (3), (4) or (5) or paragraph 47 (8) (a) or (b) or (9) (a), (b) or (c) may give to the Commission notice, as prescribed, setting out particulars of the conduct or proposed conduct.

(2) A corporation is not entitled to give a notice under subsection (1) in relation to conduct or proposed conduct if:

(a) the corporation has made an application for an authorization to engage in that conduct, being an application in respect of which the Commission, or the Trade Practices Commission established under the Trade Practices Act 1974 as in force immediately before the commencement of the Trade Practices Act 1974, has made a determination.

Act 1977, has:

(i) made a determination the application, not being a determination made in circumstances where the corporation gave a notice in relation to that conduct under subsection 92 (1) or 93 (1) of the Trade Practices Act 1974 as in force immediately before the commencement of the Trade Practices Amendment Act 1977 and:

(A) in the case of a notice given under subsection 92 (1) of the Trade Practices Act 1974 as so in force - a notice was given to the corporation under subsection 92 (2) of that Act; or

(B) in the case of a notice given under subsection 93 (1) of the Trade Practices Act 1974 as so in force - a notice was given to the corporation under subsection 93 (2) of that Act; or

(ii) made a determination granting an authorization (whether or not the authorization is still in force); and

(b) the Tribunal has made a determination on an application for a review of the determination of the Commission, or for a review of the determination of the Commission, or for a review of the determination of the Trade Practices Commission established under the Trade Practices Act 1974 as in force immediately before the commencement of the Trade Practices Amendment

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time for making such an application for review has expired without an application for review having been made.

(3) If the Commission is satisfied that the engaging by a corporation in conduct or proposed conduct of a kind referred to in a notice given by the corporation to the Commission under subsection (1) 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 that in all the circumstances:

(a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or

(b) any benefit 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, would not outweigh the detriment to the public constituted by any lessening of competition 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.

(4) Before giving a notice under subsection (3) the Commission

shall comply with the requirements of section 93A.

- (5) In satisfying itself for the purposes of subsection (3) in relation to any conduct or proposed conduct referred to in a notice given to the Commission by a corporation 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 any other person or otherwise in its possession.
- (6) A corporation that has given 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 a notice under subsection (3) 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):
 - (a) in the case of a notice given before the expiration of the period of 3 months commencing on the date of commencement of the Trade Practices Amendment Act 1977, the engaging by the corporation in the conduct referred to in the notice on or after that date and before the giving of the notice shall not be taken, for the

purposes of section 47, to have had the effect of substantially lessening competition within the meaning of that section; and

(b) in any case, the engaging by the corporation in the conduct referred to in the notice after the giving of the notice shall not be taken, for the purposes of section 47, to have the purpose, or to have or be likely to have the effect of substantially lessening competition within the meaning of that section unless:

- (i) the Commission have given notice to the corporation under subsection (3) of this section in relation to the conduct and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or
- (ii) the notice has been, or is deemed to have been, withdrawn and the conduct takes place after the day on which the notice was, or is deemed to have been, withdrawn.

(8) Where:

- (a) a corporation gives a notice to the Commission under subsection (1) in relation to any conduct or proposed conduct;
- (b) before or after the notice is given the corporation makes an application to the Commission for an authorization to engage in that conduct;

(c)the Commission:

(i)makes a determination dismissing the application; or

(ii)makes a determination granting an authorization in respect of the application; and

(d)the Tribunal makes a determination on an application for a review of the determination of the Commission or the time for making such an application for review expires without an application for review having been made;

the notice shall thereupon be deemed to be withdrawn.

(9)If an application is made to the Tribunal for a review of the giving of a notice by the Commission under subsection (3), the reference in subsection (7) to the day on which the Commission gave the notice shall be read as a reference to:

(a)it the application is withdrawn - the day on which the application is withdrawn;

(b)if the Tribunal, on the application of the Commission or of any other person who the Tribunal is satisfied has an interest in the subject matter of the review, declares that the application for the review is not being proceeded with by the applicant with due diligence - the day on which the Tribunal makes the declaration; or

(c)in any other case - the day on which the Tribunal makes a determination on the review.

(10)Where:

(a)a corporation 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 in writing under subsection (3) in relation to the conduct or the proposed conduct; or

(b)a notice given by- a corporation to the Commission under subsection (1) in relation to conduct or proposed conduct is withdrawn or deemed to be withdrawn;

the corporation 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.

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

93A. (1)Before giving a notice under subsection 93 (3) in relation to any conduct or proposed conduct, the Commission shall prepare a draft notice in relation to that conduct or proposed conduct.

(2)The Commission shall, by notice in writing sent to the corporation to the conduct or proposed conduct of which the draft notice relates and to each other interested person, invite the corporation or other person to notify the

Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the corporation or other person wishes the Commission to hold a conference in relation to the draft notice.

(3)The Commission shall send with each notice under subsection (2) a copy of the draft notice and a summary of the reasons why it proposes to give the notice under subsection 93(3).

(4)If each of the persons to whom a notice was sent under subsection (2):

(a)notifies the Commission in writing within the period of 14 days mentioned in that subsection that the person does not wish the Commission to hold a conference in relation to the draft notice; or

(b)does not notify the Commission within that period that he wishes the Commission to hold such a conference;

the Commission may give the notice under subsection 93 (3) at any time after the expiration of that period.

(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 wishes the Commission to hold a conference in relation to the draft notice, the Commission shall appoint a date (being not later than 30 days after the expiration of that

period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection(2).

(6)At the conference:

- (a)the Commission shall be represented by a member of members of the Commission (being a member of members who participated in the preparation of the draft notice) nominated by the Chairman;
- (b)each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate;
- (c)a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him hut a person who so assists another person at the conference is not entitled to participate in the discussion;
- (d)the Minister or a person or persons appointed in writing by the Minister is o r a r e e n t i t l e d t o a t t e n d a n d

participate personally; 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 Chairman:

(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 is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

(c) shall give a certificate certifying the day on which the first notification under subsection (5) in relation to the draft notice was received by the Commission and the day on which the conference terminated;

and any such certificate shall be received in all courts as evidence of the matters certified.

(9)A document purporting to be a certificate referred to in subsection (8) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(10)The Commission shall take account of all matters raised at the conference and may at any time after the termination of the conference, if it is satisfied as to the matters referred to in subsection 93 (3), give a notice under that subsection in relation to the conduct or proposed conduct.

(11)For the purposes of this section, “interested person” means a person who has notified the Commission in writing that he, or a specified unincorporated association of which he 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) by the same person, or by persons being bodies corporate that are related to each other, deal with substantially similar conduct or proposed conduct, the Commission may treat the notices as if they constituted a single notice and may prepare one draft notice in relation to the notices so given to the Commission and hold one

conference in relation to that draft notice.

Register of notifications

95. (1) The Commission shall keep a register containing:

- (a) draft notices, and summaries of reasons, by the Commission furnished to any person under section 93A;
- (b) records of conferences made in accordance with subsection 93A (7) and certificates in relation to conferences given under subsection 93A (8);
- (c) notices (including notices that have been withdrawn) given to the Commission under section 93;
- (d) documents furnished to the Commission in relation to such notices;
- (e) particulars of any oral submissions made to the Commission in relation to such notices;
- (f) particulars of notices given by the Commission to corporations by which notices under section 93 were given;
- (g) particulars of any permits given by the Commission under subparagraph 93 (7)(b)(i);
- (h) records of proceedings at conferences held under section 65J or 65M; and
- (i) particulars of recommendations made to the Minister by the Commission under section 65K or 65N.

(2)Where a person furnishes a document to the Commission:

(a)in relation to a notice given to the Commission under section 93; or

(b)in relation to a conference held under section 65J or 65M;

or makes an oral submission to the Commission in relation to the notice or the conference, he 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 of shares in the capital of a body corporate or of assets of a person; or

(iii)the current costs of manufacturing, producing or marketing goods or services;

the Commission shall exclude the document or the part of

the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (1); and

(b) in any other case the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of matters contained in the document or the part of the document or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(4) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (1), the Commission shall, if the person who furnished the document to the Commission so requires, return the document or part of the document to him 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 withdraws the submission or that part of the submission and, in that

case, paragraph (1) (e) does not apply in relation to the submission or that part of the submission, as the case may be.

(7) Where the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (1) (d) or particulars referred to in paragraph (1) (e) from the register kept under subsection (1).

(8) If a person requests in accordance with subsection (2) that a document or part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (1), the document or the part of the document or particulars of the submission or of the part of the submission, shall not be included in that register until the Commission has made a determination in relation to the request.

PART VIII- RESALE PRICE MAINTENANCE

Acts constituting engaging in resale price maintenance

96. (1) Subject to this Part, a corporation (in this section called “the supplier”) engages in the practice of resale price

maintenance if that corporation does an act referred to in any of the paragraphs of subsection (3).

(2) Subject to this Part, a person (not being a corporation and also in this section called “the supplier”) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.

(3) The acts referred to in subsections (1) and (2) are the following:

(a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;

(b) the supplier inducing, or attempting to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier;

(c) the supplier entering into an agreement, or offering to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or

that would be specified, by the supplier;

(d) the supplier withholding the supply of goods to a second person for the reason that the second person:

(i) has not agreed as mentioned in paragraph (a); or

(ii) has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold;

(e) the supplier withholding the supply of goods to 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 to be supplied to him, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; and

(f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold.

(4)For the purposes of subsection (3):

- (a)where a price is specified by another person on behalf of the supplier, it supplier, he 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.

Recommended prices

97. For the purposes of paragraph 96 (3) (b), the supplier is not to

be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods:

(a) by reason only of a statement of a price being applied to the goods as mentioned in paragraph 99 (1) (a) or being applied to a covering, label, reel or thing as mentioned in paragraph 99 (1) (b), provided that the statement is preceded by the words ‘recommended price’ ; or

(b) by reason only of his having given notification in writing to the second person (not being a notification by way of a statement being applied as mentioned in paragraph (a)) of the price that he 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

98. (1) For the purposes of paragraph 96 (3) (d) or (e), the supplier shall be deemed to withhold the supply of goods to another person if:

(a) the supplier refuses or fails to supply those goods to, or

as requested by, the other person;

(b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;

(c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, method or place of delivery of otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or

(d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this subsection.

(2) Paragraph 96 (3) (d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person:

(a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods; or

(b) otherwise for the purpose of promoting the business of that other person.

(3) For the purposes of subsection (2), there shall be disregarded:

(a) a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale;

or

(b) a sale of goods that took place with the consent of the supplier.

Statements as to the minimum price of goods

99. (1) For the purposes of paragraph 96 (3) (f), if:

(a) a statement is applied to goods, whether by being woven in, impressed on, worked into or annexed or affixed to the goods or otherwise;

(b) a statement is applied to a covering, label, reel or thing in or with which goods are supplied; or

(c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to the belief that it refers to goods;

the statement shall be deemed to have been used in relation to those goods.

(2) For the purposes of subsection (1), “covering” includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and “label” includes a band or ticket.

Evidentiary provisions

100. (1) Where, in proceedings under this Act by a person (in this section referred to as “the plaintiff”) against another person (in this section referred to as “the defendant”), it is

claimed that the defendant has engaged in the practice of resale price maintenance and it is established that:

- (a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 98 (1) (a), (b), (c) or (d);
- (b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and
- (c) during the period of 6 months immediately before the time when the defendant so acted, the defendant became aware of a matter or circumstance capable of constituting a reason referred to in paragraph 96 (3)(d) or (e) for the defendant's so acting;

then, subject to subsection (2), it shall be presumed, unless the contrary is established, that that matter or circumstance was the reason for the defendant's so acting.

- (2) Subsection (1) does not apply where the plaintiff establishes the matter mentioned in paragraph 98 (1) (b) or (c) but the terms disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

(3) In the application of this section in proceedings by the Minister or 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).

PART IX - REVIEW BY TRIBUNAL OF DETERMINATIONS OF COMMISSION

Applications for review

101. (1) A person dissatisfied with a determination by the Commission in relation to an application for, or in relation to the revocation of, an 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 and, if the person was the applicant for the authorization or the Tribunal is satisfied that he has a sufficient interest, the Tribunal shall review the determination.

(1A) Where a person has, whether before or after the

commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109 (2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90 (6), (7), (8) or (9).

(1B)A presidential member may, on the application of a person concerned in an application for an authorisation under subsection 88 (9), 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 for the authorisation if the member is satisfied that special circumstances exist and that in all the circumstances it would not be unfair to do so.

(2)A review by the Tribunal is a re-hearing of the matter and subsections 90 (6), (7), (8) and (9) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

Applications for review of notices under subsection 93 (3)

101A. A person dissatisfied with the giving of a notice by the Commission under subsection 93 (3) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest the Tribunal shall review the giving of the notice.

Functions and powers of Tribunal

102. (1) Upon a review of a determination of the Commission in relation to an application for an authorization, the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

(1A) if a person applies to the Tribunal for review of a determination of the Commission relating to:

(a) the grant of an authorisation under subsection 88 (9); or

(b) the revocation of an authorisation granted under that paragraph;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

- (1B)The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.
- (1C)If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.
- (2)A determination by the Tribunal affirming, setting aside or varying a determination of the Commission in relation to an application for an authorization shall, for the purposes of this Act other than this Part, be deemed to be a determination by the Commission.
- (3)Upon a review by the Tribunal, the Tribunal shall comply with any directions given by the Minister to the Commission under paragraph 29 (1) (a) as if those directions had been given to the Tribunal.
- (4)Subject to subsection (3), 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 in all the circumstances:
 - (i)the conduct or proposed conduct to which the notice relates has resulted or is likely to result, or would result or be likely to result, as the case may be, in a benefit to the public; and

(ii) that benefit would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct;

the Tribunal shall make a determination setting aside the notice; or

(b) if the person who applied for the review does not satisfy the Tribunal — the Tribunal shall make a determination affirming the notice.

(5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93 (3), then, after the setting aside of the notice, subsection 93 (7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.

(6) For the purposes of a review by the Tribunal, 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, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connection with the making of the determination, or the giving of the notice, to which the review relates.

Division 2 - Procedure and Evidence

Procedure generally

103. (1) in proceedings before the Tribunal:

- (a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
 - (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence.
- (2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by the Tribunal constituted by a presidential member.

Regulations as to certain matters

104. The regulations may make provision:

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and

Power to take evidence on oath

105. (1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation,
- (2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons,

Hearings to be in public except in special circumstances

106. (1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.
- (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may;
- (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

107. 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

108. The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on its behalf, with such limitations (if any) as the Tribunal so constituted directs, and, where such an authority is given:
- (a) that member may take evidence accordingly; and
 - (b) for the purposes of this Act that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

Participants in proceedings before Tribunal

109. (1) A person to whom an authorization 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) 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

110, In proceedings before the Tribunal:

- (a) a natural person may appear in person;
- (aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;
- (b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;
- (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.

PART X - INTERNATIONAL LINER CARGO SHIPPING

Division 1 - Preliminary

Objects of Part

10.01. (1)The principal objects of this Part are:

- (a)to ensure that Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive;
 - (b)to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories; and
 - (c)to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade.
- (2)It is the intention of the Parliament that the principal objects of this Part should be achieved:
- (a)by permitting continued conference operations while enhancing the competitive environment for outwards liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power, particularly by:

- (i)enacting additional restrictive trade practice provisions applying to ocean carriers;
 - (ii)equiring conference agreements to meet certain minimum standards;
 - (iii)making conference agreements generally publicly available;
 - (iv)permitting only partial and conditional exemption from restrictive trade practice prohibitions; and
 - (v)requiring conferences to take part in negotiations with representative shipper bodies;
- (b)through increased reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters; and
- (c)by the exercise of jurisdiction, consistent with international law:
- (i)over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services; and
 - (ii)to enable remedies for contravention of the provisions of this Part to be enforced within Australia.

Interpretation

10.02. (1)In this Part, unless the contrary intention appears:

“agreement” means any contract agreement, arrangement or understanding, whether made in or outside Australia;

“association” includes a body corporate;

“Australian exporter” means a person who exports goods from Australia;

“Australian flag shipping operator” means a person

(a) is an Australian citizen or a body corporate incorporated by or under the law of the Commonwealth or of a State or Territory;

(b) provides, or proposes normally to use, in providing the services only:

(c) normally uses, or proposes normally to use, in providing the services only:

(i) a ship that is registered in Australia; or

(ii) 2 or more ships, all or most of which are registered in Australia;

“authorised officer” means an officer of the Department who is authorised, in writing, by the Minister for the purposes of this Part;

“conference” means an unincorporated association of 2 or more ocean carriers carrying on 2 or more businesses each of which includes, or is proposed to include, the provision of liner cargo shipping services;

“conference agreement” means an agreement between

members of a conference in relation to outwards liner cargo shipping services provided, or proposed to be provided, by them, and includes a varying conference agreement;

“designated peak shipper body” means an association specified in a notice under subsection 10.03 (1);

“designated secondary shipper body” means an association specified in a notice under subsection 10.03 (2);

“designated shipper body” means a designated peak shipper body or a designated secondary shipper body;

“freight rate charges” in relation to a conference agreement means those parts of the conference agreement that specify freight rates (including base freight rates, surcharges, rebates and allowances) for outwards liner cargo shipping services;

“international liner cargo shipping service” means a liner cargo shipping service for the transport of cargo by sea from a place in Australia to a place outside Australia or from a place outside Australia to a place in Australia;

“inwards liner cargo shipping service” means an international liner cargo shipping service commencing at a place outside Australia;

“liner cargo shipping service” means a scheduled service for the transport of various types of general cargo by sea on particular routes, generally by container and generally at predetermined freight rates;

“loyalty agreement” means an agreement

(a) between an ocean carrier or conference and a shipper or designated shipper body; and

(b) that makes provision, in relation to outwards liner cargo shipping services, having the purpose or effect of giving certain benefits to the shipper, or a shipper represented by the designated shipper body, if the shipper ships with the ocean carrier, or members of the conference;

(i) all or particular cargo, or a particular portion of all or particular cargo, shipped by the shipper; or

(ii) a particular quantity of cargo or of particular cargo;

“ocean carrier” means a person who provides, or proposes to provide, international liner cargo shipping services;

“outwards liner cargo shipping service” means an international liner cargo shipping service commencing at a place in Australia;

“pricing practice” means the fixing, controlling or maintaining by an ocean carrier of prices charged for, or

the giving or allowing by an ocean carrier of discounts, allowances, rebates or credits in relation to, liner cargo shipping services provided by the ocean carrier;

“provisionally registered conference agreement” means a conference agreement that is provisionally registered under this Part;

“registered agent” in relation to an ocean carrier, means the person specified in the register of ocean carrier agents as the agent of the ocean carrier;

“registered conference agreement” means a conference agreement that is finally registered under this Part;

“registered non-conference ocean carrier with substantial market power” means an ocean carrier specified in the register of non-conference ocean carriers with substantial market power;

“Registrar” means the Registrar of Liner Shipping;

“vary” in relation to a conference agreement includes vary by way of:

- (a) omitting or altering any of the provisions of, or parties to, the agreement;
- (b) adding new provisions or parties to the agreement or
- (c) substituting new provisions or parties for any of the provisions of, or parties to, the agreement

“varying conference agreement” means an agreement

(a) that varies a conference agreement; or

(b) that otherwise affects a conference agreement (including an agreement referred to in subsection (3)).

(2) A reference in this Part to the minimum level of outwards liner cargo shipping services provided, or proposed to be provided, under a conference agreement includes a reference to the frequency of sailings, cargo carrying capacity, and ports of call, of outwards liner cargo shipping services provided, or proposed to be provided, under the agreement.

(3) A reference in this Part to an agreement that affects a conference agreement includes a reference to an agreement between parties to the conference agreement or between parties to the conference agreement and other ocean carriers:

(a) that affects the conduct of parties to the conference agreement in relation to outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement

(b) that affects the minimum level of outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement; or

(c) that otherwise affects:

- (i) the operation, or proposed operation, of the conference agreement; or
- (ii) outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement.

Designated shipper bodies

10.03. (1) If the Minister is of the opinion that an association represents the interests, in relation to outwards liner cargo shipping services, of Australian shippers generally, the Minister may declare that the association is a designated peak shipper body for the purposes of this Part.

(2) If the Minister is of the opinion:

(a) that an association represents the interests, in relation to outwards liner cargo shipping services, of all or any of the following kinds of persons:

- (i) Australian shippers in a particular trade;
- (ii) Australian shippers of particular kinds of goods;
- (iii) shippers in a particular part of Australia;
- (iv) producers of goods of a kind exported, or proposed to be exported, from Australia; and

(b) that it is desirable that the association be a designated secondary shipper body for the purposes of this Part; the Minister may declare that the association is a

designated secondary shipper body for the purposes of this Part.

- (3) Where the Minister declares that an association is a designated peak shipper body, or a designated secondary shipper body, for the purposes of this Part, the Registrar shall enter particulars of the association in the register of designated shipper bodies.
- (4) The particulars entered in the register shall include whether the association is a designated peak shipper body or a designated secondary shipper body.
- (5) The Minister may make guidelines to be applied by the Registrar in the exercise of the Registrar's powers to nominate designated secondary shipper bodies for the purposes of sections 10.29, 10.41 and 10.52.
- (6) The Registrar shall enter particulars of any nomination of a designated secondary shipper body for the purposes of section 10.29, 10.41 or 10.52 in the register of designated shipper bodies.
- (7) A declaration under subsection (1) or (2), and a guideline under subsection (5), must be made in writing, and are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901.

Division 2- Additional restrictive trade practice provisions applying to ocean carriers

Application of section 46 in relation to conference agreements

10.04. (1) For the purposes of section 46, if the parties to a conference agreement together have a substantial degree of power in a market in which any party to the agreement provides international liner cargo shipping services under the agreement, each party to the conference agreement shall be taken to have a substantial degree of power in the market.

Discrimination between shippers prohibited

10.05. (1) An ocean carrier shall not discriminate between shippers requiring similar outwards liner cargo shipping services on a particular trade route (whether the discrimination is in relation to freight rates, levels of shipping services, the provision of equipment and facilities or otherwise) if the

discrimination is of such a magnitude or such a recurring or systematic character that it has, or is likely to have, the effect of substantially lessening competition in a market for goods or services, being a market in which the shippers supply goods or the ocean carrier supplies outwards liner cargo shipping services.

(2) In a proceeding against an ocean carrier for contravention of subsection (1), it is a defence if the ocean carrier proves:

(a) that the discrimination made only reasonable allowance for differences in the cost or likely cost of providing outwards liner cargo shipping services resulting from:

- (i) the different ports from or to which the services were required;
- (ii) the different quantities of cargo required to be carried; or
- (iii) the different kinds of cargo required to be carried;

(b) that the discrimination made only reasonable allowance for:

- (i) the capacity of the ocean carrier to carry cargo or a particular kind of cargo, whether at all times or particular times; or

(ii) the different times at which the outwards liner cargo shipping services were required to be provided; or

(c) that the discrimination was constituted by the doing of an act in good faith to meet freight rates, levels of service, equipment or faculties, or benefits, offered by a competitor of the ocean carrier.

(3) A person shall not:

(a) knowingly induce, or attempt to induce, an ocean carrier to discriminate between shippers in contravention of subsection (1); or

(b) enter into a transaction that, to the knowledge of the person, would result in the person receiving the benefit of a discrimination between shippers that contravenes subsection (1).

(4) In a proceeding against a person for a contravention of subsection (3), it is a defence if the person proves:

(a) that the discrimination was of a kind referred to in subsection (2); or

(b) that the person reasonably believed that the discrimination was of a kind referred to in subsection (2).

(5) Section 5 and Part VI apply in relation to subsections (1) to (4) (inclusive) as if those subsections were provisions of Part IV.

Division 3- Minimum standards for conference agreements

Application of Australian law to conference agreements and withdrawal from agreements

10.05 (1)A conference agreement must expressly provide for a question arising under the agreement in relation to an outwards liner cargo shipping service provided, or proposed to be provided, under the agreement to be determined in Australia in accordance with Australian law unless the parties and the Minister agree, in writing, to the particular question being otherwise determined.

(2)A conference agreement must expressly permit any party to the agreement to withdraw from the agreement on reasonable notice without penalty.

Minimum levels of shipping services to be specified in conference agreements

10.07. A conference agreement must contain provisions specifying the minimum level of outwards liner cargo shipping services to be provided under the agreement.

Conference agreements may include only certain restrictive trade practice provisions

10.08. (1) If a conference agreement includes a provision:

- (a) that is an exclusionary provision; or
- (b) that has the purpose, or has or is likely to have the effect, of substantially lessening competition (within the meaning of section 45);
the provision, so far as it is an exclusionary provision or has or is likely to have that effect must either:
 - (c) deal only with the following matters:
 - (i) the fixing or other regulation of freight rates;
 - (ii) the pooling or apportionment of earnings, losses or traffic;
 - (iii) the restriction or other regulation of the quantity or kind of cargo to be carried by parties to the agreement;
 - (iv) the restriction or other regulation of the entry of new parties to the agreement; or
 - (b) be necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

(2) If a conference agreement includes a provision that permits or requires the practice of exclusive dealing (within the meaning of section 47), the provision, so far as it permits or requires that practice, must be necessary for the effective operation of the agreement and of

overall benefit to Australian exporters.

- (3) This section does not apply in relation to a provision of a conference agreement so far as the provision requires or permits a party to the agreement to enter into a loyalty agreement.

Where may consequences of conference agreements not complying with minimum standards be found?

10.09. The consequences of a conference agreement not complying with this Division are to be found in the following provisions:

- (a) section 10.28 (decision on application for provisional registration);
- (b) section 10.33 (decision on application for final registration);
- (c) section 10.45 (circumstances in which Minister may exercise powers in relation to registered conference agreements).

Division 4- Registers and files and public inspection of them

Registers and conference agreement files open to public inspection

10.10. (1)The registers and conference agreement files kept by the Registrar and the Commission under this Part are open to public inspection.

(2)A person is entitled, on application to the Registrar or the Commission, as the case requires, and payment of the prescribed fee, to obtain a copy of the whole or any part of:

- (a)an entry in a register kept under this Part; or
- (b)a conference agreement file kept under this Part.

What registers are to be kept by the Registrar?

10.11. (1) The Registrar shall keep:

- (a)a register of conference agreements;
- (b)a register of designated shipper bodies;
- (c)a register of non-conference ocean carriers with substantial market power;
- (d)a register of obligations concerning unfair pricing practices; and
- (e)a register of ocean carrier agents.

(2)An entry in register must contain such particulars as are prescribed in relation to the register.

What conference agreement files are to be kept by the Registrar?

10.12 (1)The Registrar shall keep a file, to be known as the conference agreement file, for each conference agreement (other than a varying conference agreement).

(2)The conference agreement file for a conference agreement must include:

(a)documents filed with the Registrar under Division 6 in relation to the agreement or any relevant varying conference agreement (other than any part of a document that is not open to public inspection);

(b)abstracts accepted by the Registrar under section 10.36 in relation to such documents (being abstracts of those parts of the documents that are not open to public inspection); and

(c)notifications given to the Registrar under subsection 10.40 (1) or 10.43 (1) in relation to the agreement or any relevant varying conference agreement.

What register is to be kept by the Commission?

10.13 (1)The Commission shall keep a register of Commission investigations.

(2)Subject to section 10.88, the register of Commission

investigations shall contain:

- (a) references given to the Commission by the Minister under subsections 10.47 (1) and 10.57 (1);
- (b) particulars of decisions made by the Commission under subsections 10.48 (2) and 10.58 (2) to hold investigations;
- (c) requests made to the Commission by the Minister under subsections 10.48 (3) and 10.58 (3);
- (d) documents given to the Commission in relation to investigations by it under this Part;
- (e) particulars of oral submissions made to the Commission in relation to such investigations; and
- (f) reports given to the Minister by the Commission in relation to such investigations.

Division 5 - Exemptions from certain restrictive trade practice prohibitions

Subdivision A - Exemptions relating to conference agreements

Exemptions apply only to “blue-water” parts of service and activities outside Australia etc.

10.14 (1) Subject to subsection (2), where an outwards liner cargo shipping service consists of the transport of cargo by sea

and other activities (including, for example, stevedoring operations and the transport of the cargo by land or air), the exemptions provided by this Subdivision apply only in relation to:

- (a) the parts of the service that consist of the transport of the cargo by sea; and
- (b) activities that take place outside Australia.

(2) The exemptions provided by this Subdivision extend to:

- (a) the fixing of door-to-door freight rates for an outwards liner cargo shipping service, if freight rates are also fixed for shippers wishing to use only those parts of the service that consist of:
 - (i) the transport of cargo by sea;
 - (ii) activities that take place in Australia within the limits of a wharf appointed under section 15 of the Customs Act 1901, being the limits fixed under that section; and
 - (iii) activities that take place outside Australia at a wharf or adjacent terminal facilities; and
- (b) the determination of common terms and conditions for bills of lading for use in relation to an outwards liner cargo shipping service.

When do exemptions commence to apply in relation to registered conference agreements?

10.15. The exemptions provided by this Subdivision apply in relation to the operation of a registered conference agreement only after the end of 30 days after the conference agreement is finally registered.

Exemptions do not apply to variations of conference agreement unless varying agreement registered

10.16. Where a registered conference agreement is varied or otherwise affected by a varying conference agreement the exemptions provided by this Subdivision apply only in relation to the operation of the registered conference agreement itself, and not that agreement as varied or otherwise affected, unless the varying conference agreement has been finally registered.

Exemptions from section 45

10.17. (1)Section 45 does not apply in relation to the making of a contract or arrangement, or the arriving at an understanding, if:

- (a)the contract, arrangement or understanding is a conference agreement and
- (b)the parties apply for its provisional registration under this Part within 30 days after the making of the contract or arrangement or arriving at the understanding.

(2)Section 45 does not apply in relation to conduct engaged in by a party to a registered conference agreement so far as the conduct gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service.

**Exemptions from section 45 for conference agreement to the extent that they specify
freight rates**

10.17A. (1)Section 45 does not apply to the making of the freight rate charges in a conference agreement.

(2)Section 45 does not apply to conduct engaged in by a party to a conference agreement so far as the conduct gives effect to the freight rate charges in the agreement.

Exemption from section 47

10.18. (1) Section 47 does not apply in relation to conduct engaged in by a party to a registered conference agreement so far as the conduct gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service.

(2)The exemption provided by subsection (1) does not apply in relation to subsections 47 (6) and (7),

**Exemptions from section 47 for conference agreements to the extent that they specify
freight rates**

10.18A. (1) Section 47 does not apply to conduct engaged in by a party to a conference agreement so far as the conduct gives effect to the freight rate charges in the agreement.

(2) The exemption provided by subsection (1) does not apply in relation to subsections 47 (6) and (7).

Subdivision B - Exemptions relating to loyalty agreements

Exemptions from section 45

10.19 (1) Section 45 does not apply in relation to the making of a contract or arrangement, or the arriving at an understanding, if the contract, arrangement or understanding is a loyalty agreement.

(2) Section 45 does not apply in relation to conduct engaged in by a party to a loyalty agreement so far as the conduct gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service.

Exemption from sections 47 and 10.05

10.20 (1)Section 47 and 10.05 do not apply in relation to conduct engaged in by a party to a loyalty agreement in relation to another party to the agreement so far as the conduct gives effect to a provision of the agreement in relation to an outwards liner cargo shipping service.

(2)The exemption provided by subsection (1) does not apply in relation to subsections 47 (6) and (7).

Exemptions cease to apply in relation to a shipper at the shipper' s option

10.21. The exemptions provided by this Subdivision in relation to the operation of a loyalty agreement cease to apply in relation to conduct engaged in by an ocean carrier in relation to a shipper if the shipper notifies, as prescribed, the Commission and each ocean carrier who is a party to the agreement that the shipper no longer wishes the exemptions to apply.

Subdivision C - Exemption relating to inwards liner cargo shipping services

Exemption applies only to “blue-water” parts of service and activities outside Australia etc.

10.22. (1)Subject to subsection (2), where an inwards liner cargo shipping service consists of the transport of cargo by sea

and other activities (including, for example, stevedoring operations and the transport of the cargo by land or air), the exemption provided by this Subdivision applies only in relation to)

- (a) the parts of the service that consist of the transport of the cargo by sea; and
- (b) activities that take place outside Australia.

(2) The exemption provided by this Subdivision extends to:

- (a) the fixing of door-to-door freight rates for an inwards liner cargo shipping service, if freight rates are also fixed for shippers wishing to use only those parts of the service that consist of:
 - (i) the transport of cargo by sea;
 - (ii) activities that take place in Australia within the limits of a wharf appointed under section 15 of the Customs Act 1901, being the limits fixed under that section; and
 - (iii) activities that take place outside Australia at a wharf or adjacent terminal facilities; and
- (b) the determination of common terms and conditions for bills of lading for use in relation to an inwards liner cargo shipping service.

Exemption from sections 45 and 47

10.23. (1) Section 45 and 47 do not apply in relation to conduct

engaged in by a person so far as the conduct relates to the provision, or proposed provision, of art inwards liner cargo shipping service.

(2)The exemption provided by subsection (1) does not apply in relation to subsections 47 (6) and (7).

Subdivision D - Other exemptions

Exemptions from sections 45 and 47 in relation to certain negotiations

10.24. (1)Section 45 and 47 do not apply in relation to conduct engaged in by an ocean carrier, conference, shipper or designated shipper body so far as the conduct relates to the determination of terms and conditions of loyalty agreements.

(2)Section 45 and 47 do not apply in relation to conduct engaged in by an ocean carrier, conference, shipper or designated shipper body so far as the conduct relates to the obligations of an ocean carrier under any of the following provisions:

- (a)section 10.29 (parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement);
- (b)section 10.41 (parties to registered conference agreement to negotiate with certain designated shipper bodies etc.);

- (c)section 10.52 (non-conference ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc.).
- (3)The exemptions provided by this section do not apply in relation to subsections 47 (6) and (7).

Division 6- Registration of conference agreements

Subdivision A - Provisional registration

Application for provisional registration of conference agreement

- 10.25. (1)The parties to a conference agreement may apply for its provisional registration under this Part.
- (2)The application must comply with the following provisions;
- (a)subsections 10.26 (1) and (2) (how application is to be made and verified);
 - (b)section 10.27 (copy of agreement to be filed with application etc.).

How application is to be made and verified

- 10.26 (1)An application for the provisional registration of a conference agreement must be:

- (a) in the appropriate prescribed form;
 - (b) made to the Registrar in accordance with the regulations; and
 - (c) accompanied by the appropriate prescribed fee.
- (2) The application must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.
- (3) The application may be made by a party to the agreement on behalf of the party and other parties to the agreement.

Copy of agreement to be filed with application etc.

- 10.27. (1) Subject to subsections (1A) and (1B), an application for the provisional registration of a conference agreement must be accompanied by:
- (a) a complete copy of the agreement so far as it is in writing (including all provisions of the agreement so far as they are in writing); and
 - (b) a written memorandum that fully sets out the agreement so far as it is not in writing (including all provisions of the agreement so far as they are not in writing);
- other than any parts of the agreement that relate to the minimum level of outwards liner cargo shipping services to be provided under the agreement or a conference

agreement that is varied or otherwise affected by the agreement.

(1A)The copy of the agreement referred to in paragraph (1) (a) need not include the freight rate charges in the agreement.

(1B)The written memorandum referred to in paragraph (1) (b) need not include the freight rate charges in the agreement.

(2)A document that accompanies an application for the provisional registration of a conference agreement must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

Decision on application for provisional registration

10.28. (1)If the Registrar is satisfied:

(a)that an application has properly been made for the provisional registration of a conference agreement;

(b)that the agreement complies with section 10.06 (application of Australian law to conference agreement and withdrawal from agreements) or, if the agreement varies or otherwise affects another conference agreement that the other conference agreement as varied or affected complies with that section; and

(c)that provisional registration of the agreement is not prevented by one or more of the following provisions:

(i)section 10.38 (application for registration to be returned where request for confidentiality refused etc.);

(ii)section 10.39 (application also to be made for registration of varying agreements);

(iii)subsection 10.40 (1) (notification of happening of affecting events prior to final registration etc.);

the Registrar shall, within 14 days after the making of the application, provisionally register the agreement by entering in the register of conference agreements:

(d)particulars of the agreement; and

(e)a notation to the effect that the agreement has been provisionally registered.

(2)If the Registrar is not so satisfied, the Registrar shall, within that 14 day period, refuse to provisionally register the agreement.

(3) When the Registrar provisionally registers the agreement or refuses to provisionally register the agreement, the Registrar shall immediately notify the applicants.

**Parties to conference agreement to negotiate minimum level of shipping services after
provisional registration of agreement**

10.29. (1) The parties to a provisionally registered conference agreement shall:

- (a) take part in negotiations with the designated peak shipper bodies or, if there is not at that time a designated peak shipper body, the designated secondary shipper bodies nominated by the Registrar for the purposes of the agreement for the purposes of this section, in relation to the minimum level of outwards liner cargo shipping services to be provided under the agreement (including any provisions of the agreement that affect the level of those services) and consider the matters raised, and representations made, by the shipper bodies;
- (b) if a shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties make the information available to the shipper body; and
- (c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify

an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2) Subsection (1) does not apply in relation to a conference agreement if the shipper bodies notify, as prescribed, the Registrar and the parties to the agreement that they do not wish to have negotiations in relation to the agreement.

(3) The nomination of a designated secondary shipper body for the purposes of a provisionally registered conference agreement must be made by written notice given to the parties to the agreement.

Subdivision B - Final registration

Application for final registration of conference agreement

10.30, (1) The parties to a provisionally registered conference agreement may apply for its final registration under this Part.

(2) The application must comply with the following provisions:

(a) subsections 10.31 (1) and (2) (how application is to be made and verified);

(b)section 10.32 (copy of agreement to be filed with application etc.).

How application is to be made and verified

10.31. (1)An application for the final registration of a conference agreement must be:

- (a)in the appropriate prescribed form;
 - (b)made to the Registrar in accordance with the regulations; and
 - (c)accompanied by the appropriate prescribed fee.
- (2)The application must comply with any regulations requiring its verification (in whole or part) by or on behalf to the applicants.
- (3)The application may be made by a party to the agreement on behalf of the party and other parties to the agreement.

Copy of agreement to be filed with application etc.

10.32. (1)Subject to subsections (1A) and (1B), an application for the final registration of a conference agreement must be accompanied by:

- (a)a complete copy of the agreement so far as it is in writing (including all provisions of the agreement so far as they are in writing); and
- (b)a written memorandum that fully sets out the

agreement so far as it is not in writing (including all provisions of the agreement so far as they are not in writing).

(1A)The copy of the agreement referred to in paragraph (1) (a) need not include the freight rate charges in the agreement.

(1B)The writtem memorandum referred to in paragraph (1) (b) need not include the freight rate charges in the agreement.

(2)A document that accompanies an application for the final registration of a conference agreement must comply with any regulations requiring its verification (in whole or part) by or on behalf of the applicants.

Decision on application for final registration

10.33. (1) If the Registrar is satisfied:

(a)that an application has properly been made for the final registration of a conference agreement;

(b)that the agreement complies with section 10.07 (minimum levels of shipping services to be specified in conference agreements) and section 10.08 (conference agreements may include only certain restrictive trade practice provisions) or, if the agreement varies or otherwise affects another conference agreement, that the other conference agreement as varied or affected complies with those

sections;

(c)that subsection 10.29 (1) (parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement) has been complied with, or does not apply, in relation to the agreement; and

(d)that final registration of the agreement is not prevented by one or more of the following provisions:

(i)section 10.38 (application for registration to be returned where request for confidentiality refused etc.);

(ii)section 10.39 (application also to be made for registration of varying conference agreements);

(iii)section 10.40 (1) (notification of happening of affecting events prior to final registration etc.);

the Registrar shall, within 14 days after the making of the application, finally register the agreement by entering in the register of conference agreements a notation to the effect that the agreement has been finally registered.

(2)If the Registrar is not so satisfied, the Registrar shall, within that 14 day period, refuse to finally register the agreement.

(3) When the Registrar finally registers the agreement or refuses to finally register the agreement, the Registrar

shall immediately notify the applicants.

Subdivision C - Confidentiality requests

Request for confidentiality

- 10.34. (1) An application for the provisional or final registration of a conference agreement may include a request that a specified part of the application, or of a document accompanying the application, not be open to public inspection under this Part.
- (2) If such a request is included in the application, the application must include a statement of reasons in support of the request.

Abstract to accompany request for confidentiality

- 10.35. (1) Where a request is made under section 10.34 that a part of the application in which the request is included, or of a document accompanying the application, not be open to public inspection under this Part, the application must be accompanied by an abstract of the part of the application or other document in relation to which the request is made.
- (2) The abstract must:
- (a) be in the appropriate prescribed form; and
 - (b) comply with any regulations requiring its verification

(in whole or part) by or on behalf of the applicants.

Examination of abstract

10.36. (1) Where:

- (a) a request is properly made under section 10.34 that a part of a document not be open to public inspection under this Part; and
- (b) the request is accompanied by an abstract of the part of the document the Registrar shall first determine whether to accept the abstract.

(2) If the Registrar is satisfied:

- (a) that the abstract adequately describes the scope of the part of the document and
 - (b) that the abstract complies with subsection 10.35 (2);
- the Registrar shall accept the abstract.
- (3) If the Registrar is not so satisfied, the Registrar shall;
- (a) refuse to accept the abstract and
 - (b) refuse the request and immediately notify the applicants of the decision.

Decision on request for confidentiality

10.37. (1) If:

- (a) the Registrar is satisfied that a request has properly

been made under section 1034 that a part of a document not be open to public inspection under this Part;

(b)the Registrar has, under section 1036, accepted an abstract for the part of the document; and

(c)the Registrar is also satisfied, on the basis of the statement of reasons in support of the request that is included in the application for provisional or final registration of the conference agreement concerned:

(i)that granting the request would not disadvantage Australian exporters; and

(ii)that the request is justified because disclosure of the part of the document would disclose:

(A)trade secrets;

(B)information (other than trade secrets) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(C)any other information concerning a person in relation to the person's business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking, the disclosure of which would, or could reasonably be

expected to, unreasonably affect the person adversely in relation to the persons lawful business or professional affairs or the organisation or undertaking in relation to its lawful business, commercial or financial affairs;

The Registrar shall, within 14 days after the making of the request, direct that the part of the document not be open to public inspection under this Part.

(2) If the Registrar is not so satisfied, the Registrar shall, within that 14 day period, refuse the request and immediately notify the applicants of the decision.

Application for registration to be returned where request for confidentiality refused etc.

10.38. Where:

(a) an application for the provisional or final registration of a conference agreement includes a request under section 10.34 that a part of a document not be open to public inspection under this Part; and

(b) the request is refused by the Registrar;

the Registrar shall also refuse the application, and shall return the application, and any documents that accompanied the application, to the applicants.

Subdivision B – Miscellaneous

Application also to be made for registration of varying conference agreements

10.39. (1) Subject to subsection (2), if;

(a) application has been made for the provisional or final registration of a conference agreement (in this section called the ‘original agreement’), but the original agreement has not been finally registered; and

(b) another conference agreement that varies or otherwise affects the original agreement is or has been made or arrived at;

the Registrar shall not provisionally or finally register the original agreement unless application has been made for the provisional registration of the other conference agreement.

(2) Subsection (1) does not apply if the conference agreement referred to in paragraph (1) (b) consists solely of freight rate charges.

Notification of happening of affecting events prior to final registration etc.

10.40. (1) If:

(a) application has been made for the provisional or final registration of a conference agreement, but the agreement has not been finally registered; and

(b) either of the following subparagraphs applies:

(i) the proposed operation of the conference agreement is affected, or outwards liner cargo shipping services proposed to be provided under the agreement are affected, by the happening of an event or otherwise than by a varying conference agreement;

(ii) parties to the conference agreement have made or arrived at an agreement with other ocean carriers that affects outwards liner cargo shipping services provided, or that would, but for the agreement have been provided, by the other ocean carriers;

the Registrar shall not provisionally or finally register the original agreement unless the parties to the agreement have notified the Registrar of the matter.

(2) The notice must be:

(a) the appropriate prescribed form; and

(b) given to the Registrar in accordance with the regulations.

(3) The notice must comply with any regulations requiring its verification (in whole or part).

(4) Where the parties to a conference agreement give a notice under subsection (1), the Registrar may make such variations (if any) to the particulars entered in the register of conference agreements in relation to the agreement as the Registrar considers necessary or

desirable to take account of the notice.

Division 7 - Obligations of ocean carriers in relation to registered conference agreements

Parties to registered conference agreement to negotiate with certain designated shipper bodies etc.

10.41. (1) The parties to a registered conference agreement shall:

- (a) take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements (including any provisions of the agreement that affect those arrangements) whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body;
- (b) if the shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties make the information available to the shipper body; and
- (c) provide an authorised officer with such information as

the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2) The parties to the agreement shall give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

(3) In this section:

“negotiable shipping arrangements” means the arrangements for, or the terms and conditions applicable to, outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, frequency of sailings and ports of call);

“relevant designated shipper body” means:

(a) a designated peak shipper body; or

(b) a designated secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section.

Application to be made for registration of varying conference agreements

- 10.42. (1) Subject to subsection (3), where a conference agreement that varies or otherwise affects a registered conference agreement is made or arrived at, application shall be made for its provisional registration.
- (2) The application must be made within 30 days after the making of or arriving at the agreement.
- (3) Subsection (1) does not apply to a conference agreement that consists solely of freight rate charges.

Parties to registered conference agreement to notify happening of affecting events etc.

10.43. (1) Where:

- (a) the operation, or proposed operation, of a registered conference agreement is affected, or outwards liner cargo shipping services provided, or proposed to be provided, under the agreement are affected, by the happening of an event or otherwise than by a varying conference agreement; or
- (b) parties to a registered conference agreement make or arrive at an agreement with other ocean carriers that affects outwards liner cargo shipping services provided, or that would, but for the agreement have been provided, by the other ocean carriers;

the parties to the registered conference agreement shall notify the Registrar of the matter.

(2)The notice must be:

(a)in the appropriate prescribed form; and

(b)given to the Registrar in accordance with the regulations within 30 days after the operation, or proposed operation, of the agreement is affected, the services are affected or the agreement is made or arrived at, as the case may be.

(3)The notice must comply with any regulations requiring its verification (in whole or part).

(4) Where the parties to a registered conference agreement give a notice under subsection (1), the Registrar may make such variations (if any) to the particulars entered in the register of conference agreements in relation to the agreement as the Registrar considers necessary or desirable to take account of the notice.

Division 8- Powers of Minister in relation to registered conference agreements

Powers exercisable by Minister in relation to registered conference agreements etc.

10.44 (1)Subject to sections 10.45 and 10.46, the Minister may

direct the Registrar:

- (a) to cancel the registration of a registered conference agreement or
- (b) to cancel the registration of a registered conference agreement so far as it relates to:
 - (i) a particular provision of the agreement;
 - (ii) a particular party to the agreement; or
 - (iii) particular conduct.

- (2) Where the Minister gives a direction under subsection (1) the Registrar shall immediately enter particulars of the direction in the register of conference agreements.
- (3) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement the exemptions provided by Subdivision A of Division 5 cease to apply in relation to the agreement.
- (4) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement so far as it relates to a particular provision of the agreement the exemptions provided by Subdivision A of Division 5 cease to apply in relation to the provision.
- (5) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement so far as it relates to a

particular party to the agreement the exemptions provided by Subdivision A of Division 5 cease to apply in relation to the party.

(6) On the entry in the register of conference agreements of particulars of a direction to cancel the registration of a registered conference agreement, so far as it relates to a particular conduct, the exemptions provided by Subdivision A of Division 5 cease to apply in relation to conduct of that kind in relation to the agreement.

(7) A direction under subsection (1) must be given in writing, and the Registrar shall serve a copy of the direction on the parties to the conference agreement concerned.

Circumstances in which Minister may exercise powers in relation to registered conference agreements

10.45. The Minister shall not give a direction under subsection 10.44 (1) in relation to a registered conference agreement unless:

(a) the Minister is satisfied of one or more of the following matters:

(i) that the agreement does not comply with one or more of the following provisions:

(A) section 10.06 (application of Australian law to

- conference agreements and withdrawal from agreements);
- (B)section 10,07 (minimum levels of shipping services to be specified in conference agreements);
- (C)section 10+08 (conference agreements may include only certain restrictive trade practice provisions);
- (ii)that parties to the agreement have contravened, or propose to contravene, either or both of the following provisions:
 - (A)section 10.41 (parties to registered conference agreement to negotiate with certain designated shipper bodies etc.);
 - (B)subsection 10.43 (1) (parties to registered conference agreement to notify happening of affecting events etc.);
- (iii)that section 10.42 (application to be made for registration of varying conference agreements) has not been complied with in relation to a conference agreement that varies or otherwise affects the agreement;
- (iv)that parties to the agreement have given effect to or applied, or propose to give effect to or apply, the agreement without due regard to the need for out-wards liner cargo shipping services provided under the agreement to be:

- (A) efficient and economical; and
- (B) provided at the capacity and frequency reasonably required to meet the needs of shippers who use, and shippers who may reasonably be expected to need to use, the services;
- (v) that parties to the agreement have given effect to or applied, or propose to give effect to or apply, the agreement in a manner that prevents or hinders an Australian flag shipping operator from engaging efficiently in the provision of outwards liner cargo shipping services to an extent that is reasonable;
- (vi) that provisional or final registration of the agreement was granted on the basis of a statement or information that was false or misleading in a material particular;
- (vii) that parties to the agreement have breached an undertaking given by the parties to the agreement under section 10.49;
- (b) that Minister has carried on or attempted to carry on, either personally or through authorised officers, consultations with the parties to the agreement directed at obtaining an undertaking or action by the parties that would have made a direction under subsection 10.44 (1) unnecessary; and

(c) either of the following subparagraphs applies:

- (i) the Commission has reported to the Minister under section 10.47 or 10.48 in relation to matters referred to in paragraph (a) of which the Minister is satisfied and the Minister has taken the report into account
- (ii) the Minister is satisfied that the special circumstances of the case make it desirable to give the direction before he or she receives such a report from the Commission.

Action to be taken where powers exercised by Minister without first obtaining Commission report

10.46. (1) Where the Minister gives a direction under subsection 10.44 (1) before receiving a report under section 10.47 or 10.48 in relation to matters referred to in paragraph 10.45 (a) of which the Minister was satisfied before giving the direction, the Minister shall immediately refer the matters to the Commission under section 10.47.

(2) The Commission shall report to the Minister within a period of not more than 60 days in relation to those matters and any other matters that the Commission is then investigating under this Division in relation to the conference agreement concerned.

(3) If, after taking the Commission's report into account the

Minister is satisfied of one or more of the matters referred to in paragraph 10.45 (a), the Minister may, within 21 days after receiving the Commission' s report, direct the Registrar not to take action under subsection (4) in relation to the agreement, and may also give such further directions under subsection 10.44 (1) in relation to the agree-ment as the Minister considers appropriate.

- (4)The Registrar shall delete the particulars of the direction under subsection 1044 (1) from the register of conference agreements at the end of 21 days after the Minister receives the Commissions report unless the Minister has given a direction under subsection (3) in relation to the agreement.
- (5)On the deletion of the particulars of the direction, Subdivision A of Division 5 applies in relation to the agreement to the extent to which it would have applied but for the entry of the particulars.
- (6)Subsection (1) shall not be taken by implication to limit the matters that may be referred to the Commission under section 10.47.
- (7)A direction under subsection (3) must be given in writing.

Investigation and report by Commission on reference by Minister

- 10.47. (1)The Minister may refer to the Commission for investigation and report the question whether grounds exist for the Minister to be satisfied in relation to a registered conference agreement of one or more specified matters referred to in paragraph 10.45 (a).
- (2)The Commission shall hold an investigation into the question and report to the Minister.
- (3)In its investigation, the Commission shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Commission.

Investigation and report by Commission on application by affected person

- 10.48, (1)A person affected by the operation of a registered conference agreement may apply to the Commission for an investigation into the question whether grounds exist for the Minister to be satisfied in relation to the agreement of one or more specified matters referred to in paragraph 10.45 (a).
- (2)The Commission may hold an investigation into the question, and, if it decides to do so, it shall inform the Minister of its decision and report to the Minister.
- (3)In its investigation, the Commission shall give special

consideration to such matters (if any) as the Minister requests it to give special consideration,

(4) A request under subsection (3) must be made in writing.

(5) Without limiting subsection (1), each of the following persons shall be taken to be a person affected by the operation of a registered conference agreement

(a) a party to the agreement;

(b) a designated shipper body;

(c) an Australian flag shipping operator;

(d) a shipper who uses, or may reasonably be expected to need to use, outwards liner cargo shipping services provided, or proposed to be provided, under the agreement;

(e) an association representing shippers who use, or may reasonably be expected to need to use, such services.

Undertakings by parties to registered conference agreement

10.49. (1) The parties to a registered conference agreement may, at any time, offer to give an undertaking to do, or not to do, a specified act or thing.

(2) The offer must be:

(a) in the appropriate prescribed form; and

(b) made to the Minister in accordance with the

regulations.

(3) If the Minister accepts the offer, the Minister may do one or more of the following.

(a) revoke any reference made to the Commission under section 10.47 in relation to the agreement

(b) direct the Commission, in writing, to cease holding any investigation being held by it under section 10.48 in relation to the agreement;

(c) revoke any direction given under subsection 10.44 (1) in relation to the agreement.

(4) If the Minister accepts the offer, the parties shall be taken to have given the undertaking, and the Registrar shall immediately register the undertaking by entering particulars of it in the register of conference agreements.

(5) If the Minister revokes a direction given under subsection 10.44 (1), the Registrar shall immediately include in the register a notation to the effect that the direction has been revoked.

(6) On the inclusion of the notation, Subdivision A of Division 5 applies in relation to the agreement to the extent to which it would have applied but for the entry of the particulars of the direction.

Division 9- obligations of non- conference ocean carriers with substantial market power

Inquiries by Tribunal into market power of ocean carriers

- 10.50. (1)The Minister may refer to the Tribunal for inquiry and report the question whether an ocean carrier has a substantial degree of market power in the provision of outwards liner cargo shipping services on a trade route otherwise than because the ocean carrier is a party to a conference agreement.
- (2)The Tribunal shall hold an inquiry into the question and report to the Minister.
- (3)In its inquiry, the Tribunal shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Tribunal.

Determination by Minister of market power of ocean carriers

10.51. (1) Where:

- (a) the Tribunal reports to the Minister under section 10.50-that an ocean carrier has a substantial degree of market power in the provision of outwards liner cargo shipping services on a trade route otherwise

- than because the ocean carrier is a party to a conference agreement; or
- (b) an ocean carrier agrees, in writing, to the Minister giving a direction under this subsection in relation to the ocean carrier in relation to trade route;
- the Minister may direct the Registrar to register the ocean carrier as a non-conference ocean carrier with substantial market power in relation to the trade route.
- (2) Where the Minister gives a direction under subsection (1), the Registrar shall immediately enter particulars of the ocean carrier and the trade route in the register of non-conference ocean carriers with substantial market power.
- (3) A direction under subsection (1) must be in writing, and the Registrar shall serve a copy of the direction on the ocean carrier concerned.

Non-conference ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc.

- 10.52. (1) A registered non-conference ocean carrier with substantial market power shall:
- (a) take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements whenever reasonably requested by the

shipper body, and consider the matters raised, and representations made, by the shipper body;

(b)if the shipper body requests the ocean carrier to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the ocean carrier make the information available to the shipper body; and

(c)provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2)The ocean carrier shall give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

(3)In this section:

“negotiable shipping arrangements” means the arrangements for, or the terms and conditions applicable to, outwards liner cargo shipping services provided, or

proposed to be provided, by the ocean carrier on the relevant trade route (including, for example, freight rates, frequency of sailings and ports of call);

“relevant designated shipper body” means:

(a) a designated peak shipper body; or

(b) a designated secondary shipper body nominated by the Registrar (by written notice given to the ocean carrier) for the purposes of the relevant trade route;

“relevant trade route” means the trade route specified in relation to the ocean carrier in the register of non-conference ocean carriers with substantial market power.

Non-conference ocean carrier with substantial market power not to hinder Australian flag shipping operators etc.

10.53. A registered non-conference ocean carrier with substantial market power shall not prevent or hinder an Australian flag shipping operator from engaging efficiently in the provision of outwards liner cargo shipping services to an extent that is reasonable.

**Division 10- Powers of Minister in relation non-conference ocean carriers
with substantial market power**

**Powers exercisable by Minister in relation to obligations of non-conference ocean carriers
with substantial market power**

10.54. (1) Subject to sections 10.55 and 10.56, the Minister may, by writing served on a registered non-conference ocean carrier with substantial market power, order the ocean carrier to comply with any of the ocean carriers obligations under Division 9.

(2) Where the Minister makes an order under subsection (1), the Registrar shall immediately enter particulars of the order in the register of non-conference ocean carriers with substantial market power.

Circumstances in which Minister may exercise powers

10.55. The Minister shall not make any order under subsection 10.54 (1) unless:

- (a) the Minister is satisfied that the ocean carrier concerned has contravened, or proposes to contravene, either or both of the following provisions:
 - (i) section 10.52 (non-conference ocean carrier with

substantial market power to negotiate with certain designated shipper bodies
etc.);

(ii)section 10.53 (non-conference ocean carrier with substantial market power
to hinder Australian flag shipping operators etc.);

(b)the Minister has carried on or attempted to carry on, either personally or through
authorised officers, consultations with the ocean carrier directed at obtaining an
undertaking or action by the ocean carrier that would have made an order
under subsection 10.54 (1) unnecessary; and

(c)either of the following subparagraphs applies:

(i)the Commission has reported to the Minister under section 10.57 or 10.58 in
relation to mailers referred to in paragraph (a) of which the Minister is
satisfied and the Minister has taken the report into account

(ii)the Minister is satisfied that the special circumstances of the case make it
desirable to make the order before he or she receives such a report from the
Commission.

**Action to be taken where powers exercised by Minister without first obtaining
Commission report**

10.56. (1) Where the Minister makes an order under subsection 10.54 (1) before
receiving a report under section 10.57

or 10.58 in relation to matters referred to in paragraph 10.55 (a) of which the Minister was satisfied before making the order, the Minister shall immediately refer the matters to the Commission under section 10.57.

(2) The Commission shall report to the Minister within a period of not more than 60 days in relation to those matters and any other matters that the Commission is then investigating under this Division in relation to the ocean carrier concerned.

(3) If, after taking the Commission's report into account, the Minister is satisfied of one or more of the matters referred to in paragraph 10.55 (a), the Minister may, within 21 days after receiving the Commission (4) in relation to the ocean carrier, and may also make such further orders under subsection 10.54 (1) in relation to the ocean carrier as the Minister considers appropriate.

(4) The Registrar shall delete the particulars of the order under subsection 10.54 (1) from the register of non- conference ocean carriers with substantial market power at the end of 21 days after the Minister receives the Commission's report unless the Minister has given a direction under subsection (3) in relation to the ocean carrier.

(5) Subsection (1) shall not be taken by implication to limit the matters that may be referred to the Commission

under section 10.57.

(6) A direction under subsection (3) must be given in writing.

Investigation and report by Commission on reference by Minister

10.57. (1) The Minister may refer to the Commission for investigation and report the question whether grounds exist for the Minister to be satisfied in relation to a registered non-conference ocean carrier with substantial market power of one or more specified matters referred to in paragraph 10.55 (a).

(2) The Commission shall hold an investigation into the question and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Commission.

Investigation and report by Commission on application by affected person

10.58. (1) A person affected by the conduct of a registered non-conference ocean carrier with substantial market power may apply to the Commission for an investigation into the question whether grounds exist for the Minister to be satisfied in relation to the ocean carrier of one or

more specified mailers referred to in paragraph 10.55 (a).

(2) The Commission may hold an investigation into the question, and, if it decides to do so, it shall inform the Minister of its decision and report to the Minister.

(3) In its investigation, the Commission shall give special consideration to such matters (if any) as the Minister requests it to give special consideration.

(4) A request under subsection (3) must be made in writing.

(5) Without limiting subsection (1), each of the following persons shall be taken to be a person affected by the conduct of a registered non-conference ocean carrier with substantial market power:

(a) a designated shipper body;

(b) an Australian flag shipping operator;

(c) a shipper who uses, or may reasonably be expected to need to use, outwards liner cargo shipping services provided, or proposed to be provided, on the trade route specified in relation to the ocean carrier in the register of non—conference ocean carriers with substantial market power;

(d) an association representing shippers who use, or may reasonably be expected to need to use, such services.

Undertakings by ocean carrier

10.59. (1) A registered non-conference ocean carrier with substantial market power may, at any time, offer to give an undertaking to do, or not to do, a specified act or thing.

(2) The offer must be:

(a) in the appropriate prescribed form; and

(b) made to the Minister in accordance with the regulations.

(3) If the Minister accepts the offer, the Minister may do one or more of the following:

(a) revoke any reference made to the Commission under section 10.57 in relation to the ocean carrier;

(b) direct the Commission, in writing, to cease holding any investigation being held by it under section 10.58 in relation to the ocean carrier;

(c) revoke any order made under subsection 10.54 (1) in relation to the ocean carrier.

(4) If the Minister accepts the offer, the ocean carrier shall be taken to have given the undertaking, and the Registrar shall immediately register the undertaking by entering particulars of it in the register of non-conference ocean carriers with substantial market power.

(5) If the Minister revokes an order made under subsection 10.54 (1), the Registrar shall immediately include in the

register a notation to the effect that the order has been revoked.

Enforcement of orders and undertakings

10.60 (1) An ocean carrier shall not contravene an order made under subsection 10.54 (1) or an undertaking given under section 10.59.

(2) Part VI applies in relation to subsection (1) as if that subsection were a provision of Part P7.

Division 11 - Unfair pricing practices

Powers exercisable by Minister in relation to pricing practices etc.

10.61 (1) Subject to section 10.62, the Minister may, by writing served on an ocean carrier, order the ocean carrier not to engage in a pricing practice.

(2) Where the Minister makes an order under subsection (1), the Registrar shall immediately enter particulars of the order in the register of obligations concerning unfair pricing practices.

Circumstances in which Minister may exercise powers

10.62 The Minister shall not make an order under subsection 10.61

(1) unless:

(a) the Minister is satisfied:

- (i) that the ocean carrier concerned has engaged in the pricing practice concerned in relation to outwards liner cargo shipping services provided on a particular trade route;
- (ii) that the practice has resulted in the freight rates charged by the ocean carrier for all or some outwards liner cargo shipping services provided on the trade route being less than normal freight rates for services of that kind (as determined in accordance with section 10.66);
- (iii) that the practice is of such a magnitude or such a recurring or systematic character that it has prevented or hindered, or threatens to prevent or hinder, the provision of outwards liner cargo shipping services on the trade route that are:

(A) efficient and economical; and

(B) provided at the capacity and frequency reasonably required to meet the needs of shippers who use, and shippers who may reasonably be expected to need to use, the services; and

- (iv) that the practice is contrary to the national interest (as determined in accordance with section 10.67);

(b) the Minister has carried on or attempted to carry on, either

personally or throughs authorised officers, consultations with the ocean carrier directed at obtaining an undertaking or action by the ocean carrier that would have made an order under subsection 10.61 (1) unnecessary; and

(c)the Tribunal has reported to the Minister under section 10.63 in relation to the ocean carrier in relation to outwards liner cargo shipping services provided on the trade route and the Minister has taken the report into account.

Inquiry and report by Tribunal

- 10.63 (1)The Minister may, on the complaint of an affected person or otherwise, refer to the Tribunal for inquiry and report the question whether grounds exist for the Minister to be satisfied, in relation to an ocean carrier in relation to outwards liner cargo shipping services provided on a trade route, of the matters referred to on paragraph 10,62 (a).
- (2)The Tribunal shall hold an inquiry into the question and report to the Minister.
- (3)In its inquiry, the Tribunal shall give special consideration to any matters specified in the reference as matters to be given special consideration by the Tribunal.

Undertakings not to engage in pricing practices

10.64 (1) An ocean carrier may, at any time, offer to give an undertaking:

- (a) not to engage in a pricing practice; and
- (b) to give the Registrar such information as the Registrar from time to time requires (verified as the Registrar requires) for the purpose of ascertaining whether the ocean carrier is engaging in, or has engaged in, the pricing practice.

(2) The offer must be:

- (a) in the appropriate prescribed form; and
- (b) made to the Minister in accordance with the regulations.

(3) If the Minister accepts the offer, the Minister may do either or both of the following.

- (a) revoke any reference made to the Tribunal under subsection 10.63 (1) in relation to the ocean carrier;
- (b) revoke any order made under subsection 10.61 (1) in relation to the ocean carrier.

(4) If the Minister accepts the offer, the ocean carrier shall be taken to have given the undertaking, and the Registrar shall immediately register the undertaking by entering particulars of it in the register of obligations concerning unfair pricing practices.

(5) If the Minister revokes an order made under subsection 10.61 (1), the Registrar shall immediately include in the

register a notation to the effect that the order has been revoked.

Enforcement of orders and undertakings

10.65. (1) An ocean carrier shall not contravene an order made under subsection 10.61 (1) or an undertaking given under section 10.64.

(2) Part Vi applies in relation to subsection (1) as if that subsection were a provision of Part Iv.

Determination of normal freight rates for shipping services

10.66 (1) The normal freight rates for outwards liner cargo shipping services provided on a trade route are, subject to subsection (2), the freight rates actually charged in the ordinary course of shipping business for the same or similar services on the same or a comparable trade route by ocean carriers who do not enjoy non-commercial advantages given by a government (including a government of a foreign country).

(2) If such actual freight rates do not exist or it is not possible to ascertain satisfactorily what they are, the normal freight rates for the services may be determined by:

(a) comparing the costs of the ocean carrier concerned

and comparable ocean carriers who do not enjoy non-commercial advantages given by a government (including a government of a foreign country); and

(b)allowing reasonable margins of profit.

(3)The comparison shall:

(a)take into account all costs incurred in the ordinary course of shipping business, whether the costs are fixed or variable; and

(b)allow for reasonable overhead expenses.

Determination of whether practice contrary to national interest

10.67. In determining whether a pricing practice is contrary to the national interest regard shall be had, in particular, to:

(a)the effect that the practice has had, or is likely to have, in relation to:

(i)continued access by Australian exporters to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive; and

(ii)stable access to export markets for exporters in all States and Territories;

(b)the extent to which any advantages provided by the practice or similar practices are enjoyed by competitors

- of Australian exporters; and
- (c) the effect that denial of any advantages provided by the practice would have on the competitiveness of Australian industries.

Division 12 - Registration of ocean carrier agents

Ocean carrier who provides international liner cargo shipping services to have registered agent

10.68. (1) Every ocean carrier who provides international liner cargo shipping services shall, at all times, be represented for the purposes of this Act by a person who:

- (a) is an individual resident in Australia;
- (b) has been appointed by the ocean carrier as the ocean carrier's agent for the purposes of this Act and
- (c) is specified in the register of ocean carrier agents as the ocean carrier's agent.

(2) An ocean carrier who, without reasonable excuse, contravenes subsection (1) is guilty of an offence punishable, on conviction, by a fine not exceeding. (a) in the case of a natural person \$2,000; and (b) in the case of a body corporate — \$1,000.

Representation of ocean carrier by registered agent

- 10.69 (1) Everything done by or in relation to an ocean carrier's registered agent in that capacity shall, for the purposes of this Act, be taken to be done by or in relation to the ocean carrier.
- (2) Without limiting subsection (1), a document required or permitted to be served on, or given to, an ocean carrier under or for the purposes of this Act (including the process of any court) may be served on, or given to, the ocean carrier by serving it on, or giving it to, the ocean carrier's registered agent.
- (3) A document that is, under subsection (2), permitted to be served on, or given to, an ocean carrier's registered agent may be served on, or given to, the agent by:
- (a) delivering it to the agent personally; or
 - (b) leaving it at, or sending it by pre-paid post to, the address for service specified in relation to the agent in the register of ocean carrier agents.
- (4) Subsection (3) does not affect:
- (a) the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorises the service of a document otherwise than as provided in that subsection; or
 - (b) the power of a court to authorise service of a document otherwise than as provided in that

subsection.

Application by ocean carrier for registration of agent

10.70. (1) An ocean carrier may apply for the registration of a person as the ocean carriers agent for the purposes of this Act.

(2) The person must:

- (a) be an individual resident in Australia;
- (b) have been appointed by the ocean carrier as the ocean carriers agent for the purposes of this Act; and
- (c) have an address for service in Australia.

(3) The application must be:

- (a) made to the Registrar;
- (b) made in the prescribed form and in accordance with the regulations; and
- (c) accompanied by the prescribed fee.

Registration of agent

10.71. (1) Where an ocean carrier properly applies under section 10.70 for the registration of an agent, the Registrar shall register the agent by entering particulars of the ocean carrier and the agent in the register of ocean carrier agents.

(2) The particulars entered in the register must include:

- (a) the name of the ocean carrier; and
- (b) the name, and address for service, of the agent.

Change of agent etc.

10.72. (1) An ocean carrier may, by notice given to the Registrar:

- (a) revoke the appointment of the ocean carrier's registered agent and, subject to subsection (2), appoint a new agent for the purposes of this Act;
- (b) change the address for service of the ocean carrier's registered agent to another address in Australia; or
- (c) request the Registrar to vary any of the particulars entered in the register of ocean carrier agents in relation to the ocean carrier.

(2) A new agent appointed under paragraph (1) (a) must:

- (a) be an individual resident in Australia; and
- (b) have an address for service in Australia.

(3) A notice under paragraph (1) (a), (b) or (c):

- (a) must be in the appropriate prescribed form;
- (b) must be given to the Registrar in accordance with the regulations; and
- (c) may be expressed to take effect on and from a specified future day.

(4) Where an ocean carrier properly gives a notice under

paragraph (1) (a) or (b), the Registrar shall immediately make such variations to the particulars entered in the register of ocean carrier agents in relation to the ocean carrier as are necessary to give effect to the notice.

- (5) Where an ocean carrier properly gives a notice under paragraph (1) (c), the Registrar shall make such variations (if any) to the particulars entered in the register of ocean carrier agents in relation to the ocean carrier as the Registrar considers necessary or desirable to give effect to the notice.

Division 13 - General provisions relating to registers and conference agreement file

Form of registers and conference agreement files

- 10.73. (1) The registers and conference agreement files kept by the Registrar may be kept in such form (whether or not documentary form) as the Registrar considers appropriate.
- (2) The register of Commission investigations may be kept in such form (whether or not documentary form) as the Commission considers appropriate.

Deletion of entries wrongly existing in certain registers

10.74. Where the Registrar is satisfied that an entry wrongly exists in a register kept by the Registrar, the Registrar shall delete the entry,

Deletion of obsolete entries in certain registers

10.75. Where the Registrar is satisfied that an entry in a register kept by the Registrar is obsolete, the Registrar may delete the entry.

Correction of clerical errors and other mistakes in certain registers etc.

10.76. Where the Registrar is satisfied that a clerical error or other mistake exists in particulars entered in a register kept by the Registrar or that matters included in particulars entered in a register kept by the Registrar are obsolete, the Registrar may vary the particulars for the purpose of correcting the error or mistake or removing the obsolete matters.

Division 14- Administration

Registrar of Liner Shipping

10.77. There shall be a Registrar of Liner Shipping.

Appointment of Registrar etc.

10.78. The Registrar shall be appointed by the Minister, and holds office during the pleasure of the Minister.

Acting Registrar

10.79. The Minister may appoint a person to act as Registrar:

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

Registrar and staff to be public servants

10.80. The Registrar, and any staff of the Registrar, shall be persons appointed or employed under the Public Service Act 1922.

Delegation by Minister

10.81. The Minister may, by signed writing, delegate to the Registrar, or a person occupying a specified office in the Department, all or any of the Ministers powers under or in relation to this Part (other than powers under section 10.03, subsections 10.06 (1) and 10.44 (1), sections 10.46, 10.47, 10.48 and 10.50, subsection 10.54 (1), sections 10.56, 10.57

arid 10.58, subsection 10.61 (1) and section 10.63).

Delegation by Registrar

10.82. The Registrar may, by signed writing, delegate to a person occupying a specified office in the Department all or any of the Registrars powers under this Part

Division 15 - Miscellaneous

Act not to affect rights under Freedom of Information Act

10.83. Nothing in this Part affects a right that a person may have under the Freedom of Information Act 1982.

Review of decisions of Registrar

10.84. (1)Application may be made to the Administrative Appeals Tribunal for review of a reviewable decision.

(2)In subsection (1):

“decision” has the same meaning as in the administrative Appeals Tribunal Act 1975; “reviewable decision” means a decision of the Registrar under this Part other than:

(a)a decision to provisionally or finally register a conference agreement or

(b)a decision as to the form of a register.

Statement to accompany notices of Registrar

10.85. (1) where the Registrar makes a reviewable decision (within the meaning of section 10.84) and gives to a person whose interests are affected by the decision written notice of the making of the decision, the notice must include:

(a) a statement to the effect that application may be made • to the Administrative Appeals Tribunal under the Administrative Appeals Tribunal Act 1975 for review of a decision of the Registrar under this Part; and

(b) a statement to the effect that person who is entitled to apply to the Administrative Appeals Tribunal for review of a decision may, under section 28 of that Act, request a statement that includes reasons for the decision.

(2) Paragraph (1) (b) does not apply in relation to a case to which subsection 28 (4) of the Administrative Appeals Tribunal Act 1975 applies.

(3) A contravention of subsection (1) in relation to a decision does not affect the validity of the decision.

Evidence

10.86. (1) A certificate signed by the Registrar stating any matter in relation to the registration under this Part of an ocean carrier, ocean carriers agent conference agreement,

direction, undertaking, determination or order, or any other matter in relation to a register, or conference agreement file, kept by the Registrar under this Part, is prima facie evidence of the matter.

(2) Without limiting subsection (1), the matters that may be certified under that subsection include:

- (a) whether an ocean carrier, ocean carrier's agent, conference agreement, undertaking, determination or order is or is not registered under this Part;
- (b) the name and address for service of an ocean carrier's agent; and
- (c) the provisions and their particulars of a conference agreement, direction, undertaking, determination or order.

(3) A document purporting to be a certificate under subsection (1) shall, unless the contrary is established, be taken to be such a certificate and to have been properly given.

Notification by Commission of references etc.

10.87. The Commission may make public, in such manner as it considers appropriate:

- (a) receipt of references under subsections 10.47 (1) and 10.57 (1); and
- (b) decisions made by it under subsections 10.48 (2) and 10.58 (2) to hold investigations.

Exclusion of documents etc. from register of Commission investigations

10.88. (1) Where:

(a) a person gives a document to the Commission in relation to an investigation; or

(b) a person makes an oral submission to the Commission in relation to an investigation;

the person may, at the same time, request that the document or the particulars of the submission, be excluded from the register because of the confidential nature of matters contained in the document or submission.

(2) If the Commission is satisfied that the request is justified because disclosure of matters contained in the document or submission would disclose:

(a) trade secrets;

(b) information (other than trade secrets) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(c) any other information concerning a person in relation to the person's business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking, the disclosure of which would, or could reasonably be expected to, unreasonably affect the person adversely

in relation to the persons lawful business or professional affairs or the organisation or undertaking in relation to its lawful business, commercial or financial affairs;

the Commission shall exclude the document or the particulars of the submission, from the register.

(3)If:

(a)the Commission refuses a request to exclude a document from the register;
and

(b)the person who gave the document requests the Commission to return it;
the Commission shall return the document and, in that case, paragraph 10.13

(2) (d) does not apply in relation to the document.

(4)If:

(a)the Commission refuses a request to exclude the particulars of an oral submission from the register; and

(b)the person who made the submission withdraws it;
paragraph 10.13 (2) (e) does not apply in relation to the submission.

(5)If the Commission is satisfied that it is otherwise desirable to do so, the Commission may exclude a

document, or the particulars of a submission, from the register.

(6) If a person makes a request under subsection (1), the document or the particulars of the submission concerned must not be included in the register until the Commission has dealt with the request

(7) In this section:

“document” includes a part of a document “investigation” means an investigation under section 10.47, 10.48, 10.57 or 10.58;

“register” means the register of Commission investigations;

“submission” includes a part of a submission.

Disclosure of confidential information

10.89. (1) In this section:

“court” includes any tribunal, authority or person having power to require the production of documents or the answering of questions; “give” includes permit access to;

“officer” means a person who is or has been:

(a) the Registrar;

(b) a member of the staff assisting the Registrar; or

(c) a person to whom powers under this Part have been delegated by the Minister or the Registrar;

“produce” includes permit access to.

(2) This section applies in relation to information if the information relates to a person and was obtained by an officer, either directly or indirectly, from a part of a document fled with the Registrar, being a part that is not open to public inspection.

(3) This section applies in relation to a part to a document fled with the Registrar, being a part that is not open to public inspection.

(4) An officer shall not:

(a) make a record of any information to which this section applies;

(b) divulge or communicate to a person any information to which this section applies; or

(c) give a person a part of a document to which this section applies;

unless the record is made, the information divulged or communicated or the part of the document given:

(d) for the purposes of this Act; or

(e) in relation to the performance of a duty or the exercise of a power under or in relation to this Act.

Penalty: \$5,000 or imprisonment for 2 years, or both.

(5) Subsection (4) applies in relation to the divulging or communicating of information whether directly or indirectly, but does not apply in relation to the divulging

or communicating of information to, or the giving of a part of a document to, the Minister.

(6) An officer shall not be required:

- (a) to produce in a court a part of a document to which this section applies; or
- (b) to divulge or communicate to a court any information to which this section applies;

except so far as it is necessary to do so for the purposes of carrying into effect the provisions of this Act.

Fees

10.90. (1) The regulations may prescribe fees for the purposes of this Part, including fees payable on applications and requests made under this Part.

(2) The regulations shall not fix fees exceeding:

- (a) in the case of an application for provisional registration of a conference agreement — \$600; and
- (b) in case of an application for final registration of a conference agreement — \$350; and
- (c) in the case of an application for the registration of a person as an ocean carrier's agent — \$80; and
- (ca) in the case of variation of the register of ocean carrier agents following a notice under subsection 10.72 (1) — \$80; and

(d)in the case of an application to obtain a copy of, the whole or any part of, an entry in a register kept under this Part or a conference agreement file kept under this Part 5100.

Application of section 155 to investigations under Part

10.91. (1)Section 155 applies in relation to an investigation by the Commission under this Part as if the investigation were an investigation by the Commission relating to a matter that constitutes, or may constitute, a contravention of this Act.

(2)Subsection (1) shall not be taken to limit by implication any powers that the Commission has apart from that subsection.

Constitution of Tribunal for inquiries under Part etc.

10.92. For the purposes of an inquiry under this Part:

(a)the Tribunal shall, subject to section 43, be constituted by a Division of the Tribunal consisting of a presidential member and 2 members who are not presidential members;

(b)section 43 applies as if the holding of the inquiry, and the making of a report on the inquiry, were the hearing and determining of proceedings; and

(c)sections 109 and 110 do not apply.

Participation in inquiries by Tribunal under Part etc.

10.93. (1)In an inquiry by the Tribunal under this Part in relation to an ocean carrier, each of the following persons is entitled to participate:

- (a) the Minister; (b)the ocean carrier;
- (c)a designated peak shipper body;
- (d)a designated secondary shipper body that the Tribunal is satisfied has a sufficient interest in the inquiry.

(2)The Tribunal may grant leave to participate to any other person or association appearing to it to have a sufficient interest the inquiry.

(3)The representation of a person or body shall be by:

- (a)a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State or Territory; or
- (b)a person approved by the Tribunal.

PART XI- TRANSITIONAL

Continuation of certain appointments and proceedings

147. (1) A person named in an instrument of appointment to an office made under a provision of the Restrictive Trade Practices Act 1971 or of that Act as amended, but not including a person who had ceased to hold his office before the commencing date, shall, if a corresponding office exists under this Act, be deemed to have been appointed to that corresponding office and holds office for the remainder of the period of his appointment under the Restrictive Trade Practices Act 1971-1973 as if appointed under this Act.

(2) Any proceedings instituted by the Commissioner of Trade Practices before the commencing date under section 102 of the Restrictive Trade Practices Act 1971-1973 have effect as if they had been instituted by the Commission under section 80 of this Act on that date and everything done in relation to those proceedings before that date has effect as if had been done under this Act or the regulations, as the case requires.

Commission may retain certain documents

148. The Commission is entitled to obtain and retain custody of:

(a) any document or copy of, extract from, a document retained immediately before the commencing date by the Commissioner of Trade Practices under section 148 of the Restrictive Trade Practices Act 1971-1973;

- (b)any document furnished under section 42 of the Restrictive Trade Practices Act 1971 or of that Act as amended;
- (c)any document produced under section 166 of the Restrictive Trade Practices Act 1971 or of that Act as amended and retained immediately before the commencing date by the Commissioner of Trade Practices under section 167 of the Restrictive Trade Practices Act 1971-1973; and
- (d)any copy of, or extract from, a document made or taken under section 167 of the Restrictive Trade Practices Act 1971 or of that Act as amended.

Secrecy in relation to documents furnished under previous law

149. (1)Subject to subsection (3), a member of the Commission or a member of the staff assisting the Commission shall not, either directly or indirectly, except in the performance of a duty under or in connexion with this Act:
- (a)make a record of, or divulge or communicate to any person, any information concerning the affairs of any other person acquired from:
 - (i)a document, copy or extract referred to in section 148; or
 - (ii)a document acquired by any person by reason of

any office or employment under or for the purposes of the Trade Practices Act 1965, or that Act as amended, or the Restrictive Trade Practices Act 1971, or that Act as amended; or

(b) produce to any person such a document, copy or extract.

Penalty: \$1,000 or imprisonment for 3 months.

(2) A member of the Commission or a member of the staff assisting the Commission shall not be required to produce in a court a document copy or extract referred to in subsection (1), or to divulge or communicate to any court any information concerning the affairs of any other person acquired by him from such a document, copy or extract.

(3) Nothing in subsection (1) or (2) applies in relation to:

(a) the communication of information to, or the production of a document copy or extract to, the Minister or an officer acting on behalf of, and with the authority of, the Minister; or

(b) the communication or production to a person of, or of information, documents, copies or extracts concerning, particulars of an agreement to which, according to those particulars, that person is or has been a party.

(3A) For the purposes of paragraph (3) (b), the communication or production of any matter or document to a person

authorized by writing under the common seal of a body corporate to represent the body corporate for the purposes of this section shall be deemed to be communication or production to that body corporate.

(3B) This section applies to persons who were members of the Trade Practices Commission established by the Trade Practices Act 1974 as in force at the commencement of this subsection in like manner as it applies to members of the Commission.

(4) In this section:

“court” includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

“produce” includes permit access to and “production” has a corresponding meaning.

PART XII – MISCELLANEOUS

Power to obtain information, documents and evidence

155. (1) Where the Commission, the Chairman or the Deputy Chairman has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may

constitute, a contravention of this Act, or is relevant to the making of a decision by the Commission under subsection 93 (3), a member of the Commission may, by notice in writing served on that person, require that person:

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

(2) Where the Commission, the Chairman or the Deputy Chairman has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of this Act a member of the Commission may, for the purpose of ascertaining by the examination of documents in the possession or control of the person whether the person has engaged or is engaging in that conduct, authorize, by writing signed by the member, a member of the staff assisting the Commission

(in this section referred to as an “authorized officer”) to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents.

(3) The Commission may require the evidence referred to in paragraph (1) (c) to be given on oath or affirmation and for that purpose any member of the Commission may administer an oath or affirmation.

(4) Where:

(a) particulars of an agreement were furnished to the Commissioner of Trade Practices under section 42 of the Restrictive Trade Practices Act 1971 or of that Act as amended; or

(b) particulars of an agreement were furnished to the Commissioner of Trade Practices under section 42 of the Trade Practices Act 1965 or of that Act as amended, being particulars that would have been required to be furnished under section 42 of the Restrictive Trade Practices Act 1971 if that Act had been in force when they were furnished;

and it appears to a member of the Commission that the agreement would, if still in force:

(c) constitute a contract, arrangement or understanding to which section 45 of this Act applies; or

(d) provide for the engaging in conduct that is prohibited

by this Act;

the member of the Commission may, by notice in writing served on a person who appeared from those particulars to be a party to the agreement, require that person to inform the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, whether any action was taken by the parties to the agreement to terminate the agreement and, if so, the nature and full particulars that action.

(5)A person shall not:

- (a)refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it;
- (b)in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading; or
- (c)obstruct or hinder an authorized officer acting in pursuance of subsection (2).

(6)The occupier or person in charge of any premises that an authorized officer enters in pursuance of subsection (2) shall provide the authorized officer with all reasonable facilities and assistance for the effective exercise of his powers under that subsection.

(6A)A person who contravenes subsection (5) or (6) is guilty

of an offence punishable on conviction:

(a) in the case of a person not being a body corporate by a fine not exceeding \$2,000 or imprisonment for 12 months; or

(b) in the case of a person being a body corporate by a fine not exceeding \$10,000.

(7) A person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person, but the answer by a person to any question asked in a notice under this section or the furnishing by a person of any information in pursuance of such a notice, or any document produced in pursuance of such a notice or made available to an authorized officer for inspection, is not admissible in evidence against the person:

(a) in the case of person not being a body corporate in any criminal proceedings other than proceedings under this section; or

(b) in the case of a body corporate in any criminal proceedings other than proceedings under this Act.

(8) Nothing in this section implies that notices may not be served under this section and section 155A in relation to the same conduct.

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

- 155A. (1) Where the Commission, the Chairman or the Deputy Chairman has reason to believe that a person is capable of furnishing information or producing documents relating to a matter that constitutes, or may constitute, a contravention of section 46A, a member of the Commission may, by written notice served on the person in New Zealand, require person:
- (a) to furnish to the Commission, by writing signed by the person or, in the case of body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information; or
 - (b) to produce to the Commission, or to a person specified in the notice acting on behalf of the Commission, in accordance with the notice, any such documents.
- (2) The person may comply with the notice by providing the information or document to the New Zealand Commerce Commission for transmission to the Trade Practices Commission.
- (3) Nothing in this section implies that notices may not be served under this section and section 155 in relation to the same conduct.

(4) This section binds the Crown in all its capacities.

Trade Practices Commission may receive information and documents on behalf of New Zealand Commerce Commission

155B (1) Where, by notice under section 98H of the Commerce Act 1986 of New Zealand, the New Zealand Commerce Commission requires a person to furnish any information or produce any document, the information or document may be provided to the Trade Practices Commission for transmission to the New Zealand Commerce Commission.

(2) As soon as practicable after the information or document is provided to the Trade Practices Commission, the Trade Practices Commission is to transmit it to the New Zealand Commerce Commission.

(3) A person must not:

- (a) without reasonable excuse, contravene a notice under section 981-1 of the Commerce Act 1986 of New Zealand; or
- (b) in purported compliance with such a notice, knowingly furnish information that is false or misleading in a material particular.

Penalty:

- (a) in the case of a person other than a body corporate

\$2,000; and

(b) in the case of a body corporate — \$10,000.

(4) A person is not excused from furnishing information or producing a document under a notice under section 98H of the Commerce Act 1986 of New Zealand on the ground that the information, or the production of the document, may tend to incriminate the person, but:

(a) any information furnished or document produced under such a notice; and

(b) any information, document or thing obtained as a direct or indirect consequence of furnishing the information or producing the document;

is not admissible in evidence against the person in any criminal proceedings, other than proceedings for an offence against subsection (3).

(5) This section binds the Crown in all its capacities, but nothing in this section permits the Crown in any of its capacities to be prosecuted for an offence.

(6) This section applies in and outside Australia.

Inspection of documents by Commission

156. (1) A member of the Commission, or a person authorized by a member of the Commission, may inspect a document produced in pursuance of a notice under section 155 or 155A and may make copies of, or take extracts from, the

document.

- (2) The Commission may, for the purposes of this Act, take, and retain for as long as is necessary for those purposes, possession of a document produced in pursuance of a notice under section 155 or 155A but 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 Commission under his hand to be a true copy and the certified copy shall be received in all courts as evidence as if it were the original.
- (3) Until such a certified copy is supplied, the Commission shall, at such times and places as it thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorized by that person, to inspect and make copies of or take extracts from the document.

Disclosure of documents by Commission

157. (1) Where:

- (a) a corporation makes an application to the Commission for an authorization;
- (b) the Commission gives a notice under subsection 91 (4) to a corporation to which an authorization has been given;
- (c) a proceeding is instituted against a corporation or other

person under section 77, 80 or 81; or

(d)an application is made under section 80A or subsection 87 (1A) or 87A (1) for an order against a corporation or other person;

the Commission shall, at the request of the corporation or other person and upon payment of the prescribed fee (if any), furnish to the corporation or other person:

(e)a copy of every document that has been furnished to, or obtained by, the Commission in connexion with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person; and

(f)a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connexion with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person;

not being a document obtained from the corporation or other person or prepared by an officer or professional adviser of the Commission.

(2)If the Commission does not comply with a request under subsection (1), the Court shall, subject to subsection (3), upon application by the corporation which, or other person who, made the request make an order directing the Commission to comply with the request.

- (3)The Court may refuse to make an order under subsection (2) in respect of a document or part of a document if the Court considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person, or for any other reason.
- (4)Before the Court gives a decision on an application under subsection (2), the Court may require any documents to be produced to it for inspection.
- (5)An order under this section may be expressed to be subject to conditions specified in the order.

Protection of members of Tribunal, barristers and witnesses

158. (1)A member of the Tribunal has, in the performance of his duty as a member, the same protection and immunity as a Justice of the High Court.
- (2)A barrister, solicitor or other person appearing before the Tribunal on behalf of a person has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.
- (3)Subject to this Act, a person appearing before the Tribunal or the Commission to give evidence has the same protection, and is, in addition to the penalties provided by this Act, subject to the same liabilities, in any civil or

criminal proceedings as witness in proceedings in the High Court.

Incriminating answers

159, (1) A person appearing before the Commission to give evidence or produce documents is not excused from answering a question, or producing a document on the ground that the answer to the question, or the document may tend to incriminate him.

(2) Evidence given by a person before the Commission is not admissible against him in any criminal proceedings other proceedings for offences against this Part.

Failure of witness to attend

160. (1) A person served, as prescribed, with a summons to appear as a witness before the Tribunal shall not without reasonable excuse:

- (a) fail to attend as required by the summons; or
- (b) fail to appear and report himself from day to day unless excused, or released from further attendance, by a member of the Tribunal.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction:

- (a) in the case of a person not being a body corporate — by a fine not exceeding \$2,000 or imprisonment for 12 months; or

(b)in the case of a person being a body corporate by a fine not exceeding \$10,000.

Refusal to be sworn or to answer questions

161. (1)A person appearing as a witness before the Tribunal shall not, without reasonable excuse:

(a)refuse or fail to be sworn or to make an affirmation:

(b)refuse or fail to answer a question that he is required to answer by the member presiding at the proceedings; or

(c)refuse or fail to produce a document that he was required to produce by a summons under this Act served on him as prescribed.

(2)It is a reasonable excuse for a person to refuse or fail to answer a question that he is required to answer under this section that the answer to the question may tend to incriminate him.

(3)A person who contravenes subsection (1) is guilty of an offence punishable on conviction:

(a)in the case of a person not being a body corporate by a fine not exceeding \$2,000 or imprisonment for 12 months; or

(b)in the case of a person being a body corporate by a fine not exceeding \$10,000.

Contempt

162. (1)A person shall not:

- (a)insult a member of the Tribunal or a member of the Commission in the exercise of his powers or functions as a member;
 - (b)interrupt the proceedings of the Tribunal or a conference held by the Commission under section on 65J, 65M, 90A or 93A;
 - (c)create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the Tribunal is sitting or the Commission is holding such a conference; or
 - (d)do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court,
- (2)A person who contravenes subsection (1) is guilty of an offence punishable on conviction:
- (a)in the case of a person not being a body corporate by a fine not exceeding \$2,000 or imprisonment for 12 months; or
 - (b)in the case of a person being a body corporate — by a fine not exceeding \$10,000.

Intimidation etc.

162A. A person who:

- (a) threatens, intimidates or coerces another person; or
- (b) causes or procures damage, loss or disadvantage to another person; for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission or to the Tribunal or for on account of the other person proposing to appear or having appeared as a witness before the Tribunal is guilty of an offence punishable on conviction:
- (c) in the case of a person not being a body corporate by a fine not exceeding 52,000 or imprisonment for 12 months; and
- (d) in the case of a person being a body corporate by a fine not exceeding 510,000.

Prosecutions

163. (1) Prosecutions for offences against this Act shall be brought only in the Court.
- (2) Jurisdiction is conferred on the Court to hear and determine prosecutions under this Act.
- (3) The jurisdiction of the Court in respect of an offence against a provision of Division 3 or 4 or Part X shall be exercised by not less than 3 Judges.
- (4) Proceedings before the Court under this section, other than proceedings instituted by:

- (a)the Commission;
 - (b)a person authorised in writing by the Commission; or
 - (c)a person authorised in writing by the Secretary to the Department;
- shall not be instituted except with the consent in writing of the Minister or of a person authorised by the Minister in writing to give such consents.
- (5)A prosecution for an offence against section 118, 155 or 155B may be commenced at any time after the commission of the offence.

Jurisdiction of Court to make declarations and orders

- 163A. (1)Subject to this section, a person may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of:
- (a)a declaration in relation to the operation or effect of any provision of this Act other than Division 2, 2A or 3 of Part V or in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act; or
 - (b)an order by way of, or in the nature of, prohibition, certiorari or mandamus;
- or both such a declaration and such an order, and the Court has jurisdiction to hear and determine the

proceeding.

- (2) The Minister may institute a proceeding in the Court under this section and may intervene in any proceeding instituted in the Court under this section or in a proceeding instituted in any other court in which a party is seeking the making of a declaration of a kind mentioned in paragraph (1) (a) or an order of a kind mentioned in paragraph (1) (b).
- (3) The Commission is not entitled to institute a proceeding in the Court under this section but may intervene in a proceeding instituted in the Court or in any other court being a proceeding:
 - (a) that involves a matter arising under Part W other than a matter arising under section 48; and
 - (b) in which a party is seeking the making of a declaration of a kind mentioned in paragraph (1) (a).
- (4) The jurisdiction of the Court to make:
 - (a) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act by the Tribunal; or
 - (b) an order of a kind mentioned in paragraph (1) (b) directed to the Tribunal;shall be exercised by not less than 3 Judges.
- (5) In this section, “proceeding” includes a cross-proceeding.

Inspection of, furnishing of copies of, and evidence of, documents

165. (1) A person may, on application in accordance with the regulations and on payment of the prescribed fee (if any):

(a) inspect any document contained in the register kept under subsection 89 (3) or 95 (1); and

(b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy under the hand of a person authorized by the Commission to certify such copies).

(2) Subject to subsection (3) and to any direction under subsection 106 (2), a person may, on application in accordance with the regulations and on payment of the prescribed fee (if any):

(a) inspect the document recording a declaration under section 50A or a determination of the Tribunal or any document furnished to, or recorded in the records of, the Tribunal in pursuance of this Act or the regulations; and

(b) obtain a copy of such a document (including, where the person so requests, a copy certified to be a true copy under the hand of the Registrar or of Deputy Registrar).

- (3) Unless the Tribunal in a particular case otherwise directs, subsection (2) does not apply in relation to a document furnished to the Tribunal by the person by whom the document was furnished claiming, as prescribed, that the document contains matter of a confidential nature.
- (4) A copy of a determination of the Commission, certified to be a true copy by a person authorized by the Commission to certify copies of determinations of the Commission, shall be received in all courts as evidence of the determination.
- (5) A document purporting to be a copy of a determination of the Commission and to be certified to be a true copy in accordance with subsection (4) shall, unless the contrary is established, be deemed to be such a copy and to be so certified.
- (6) A copy of a declaration under section 50A or a determination of, or undertaking given to, the Tribunal, certified to be a true copy under the hand of the Registrar or of a Deputy Registrar, shall be received in all courts as evidence of the declaration, determination or undertaking.

Certificates as to furnishing of particulars to Commission

166. (1) Where particulars of, or of a provision of, a contract,

arrangement or understanding have been furnished to the Commission for the purposes of paragraph 51 (2) (g), the Commission shall, on application by a party to the contract or to the arrangement or understanding, cause to be furnished to the party a certificate signed by a member of the Commission specifying the particulars so furnished and the date on which the particulars were furnished.

(2)A certificate referred to in subsection (1) shall be received in all courts as evidence that the particulars specified in the certificate were furnished to the Commission on the date so specified.

(3)A person is not entitled to inspect any particulars of, or of a provision of, a contract, arrangement or understanding that have been furnished to the Commission for the purposes of paragraph 51 (2) (g), but the Commission may make those particulars available to the Minister or to an officer acting on behalf of, and with the authority of, the Minister or to a court.

Judicial notice

167. (1)All courts shall take judicial notice of:

(a)the official signature of any person who holds or has held the office of President, Deputy President, member

of the Tribunal, Chairman, Deputy Chairman, member of the Commission, Registrar or Deputy Registrar and the fact that that person holds or has held that office; and

(b) the official seal of the Tribunal or of the Commission;

if the signature or seal purports to be attached or appended to an official document.

(1A) All courts must take judicial notice of:

(a) the official signature of a person who holds or has held the office of Chairman, Deputy Chairman, or member (including associate member) of the New Zealand Commerce Commission and of the fact that the person holds or has held the office; and

(b) the imprint of the common seal of the New Zealand Commerce Commission;

if the signature or imprint purports to be attached or appended to an official document

(2) In this section, “court” includes a Federal Court or a court of a State or Territory and all persons authorized by law or by consent of parties to receive evidence.

Legal and financial assistance

170. (1) A person:

- (a) who has instituted, or proposes to institute, a proceeding before the Commission or the Tribunal or a proceeding before the Court under Part VA, Part VI or section 163A;
- (b) who is entitled to participate, or has been permitted to intervene, in a proceeding before the Commission or the Tribunal; or
- (c) against whom a proceeding before the Court has been instituted under Part VA, Part VI or section 163A;

may apply to the Attorney-General for a grant of assistance under this section in respect of the proceeding.

- (2) Where an application is made by a person under subsection (1), the Attorney-General, or an officer of the Australian Public Service authorized in writing by the Attorney-General, may, if he is satisfied that it would involve hardship to that person to refuse the application and that, in all the circumstances, it is reasonable that the application should be granted, authorize the grant by the Commonwealth to the person, either unconditionally or subject to such conditions as the Attorney-General or officer determines, of such legal or financial assistance in relation to the proceeding as the Attorney-General or officer determines.

(3)In this section:

- (a)a reference to a proceeding before the Commission is a reference to a proceeding in relation to an application for, or in relation to the revocation of, an authorization; and
- (b)a reference to a proceeding before the Tribunal is a reference to an application to the Tribunal for a declaration under subsection 50A (1) or for a review of a determination, or of the giving of a notice, by the Commission.

Annual report by Commission

171. The Commission shall, within 60 days after each year ending on 30 June, furnish to the Minister, for presentation to the Parliament a report with respect to its operations in that year.

Charges by the Commission

171A. (1)The Commission may make a charge of an amount or at a rate, determined by the Commission for:

- (a)supplying a person with material published by the Commission in the course of carrying out its functions or exercising its powers; or
- (b)permitting a person to attend or take part in a prescribed activity arranged by or on behalf of the Commission for the purpose of carrying out any of

its functions.

(2)Where:

- (a)the Commission provides a discretionary service for a person; and
 - (b)this Act does not otherwise provide for a charge for the service;
- the Commission may make a charge of such amount, or at such a rate, as is agreed between the Commission and the person.

(3)In this section, a reference to the provision by the Commission of a discretionary service for a person is a reference to the doing of an act by the Commission, being a prescribed act that

- (a)the Commission has power to do but is not required to do by or under any law; and
- (b)the Commission does at the person' s request.

Regulations

172. (1)The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, prescribing.

- (a)matters in connexion with the procedure of the Tribunal and the Commission; and (b)the fees and expenses of

- witnesses in proceedings before the Tribunal and the Commission; and
 - (c) matters for and in relation to the costs, if any, that may be awarded by the Court in proceedings before the Court under this Act; and
 - (d) the fees payable to the Commission on making a prescribed application, or giving a prescribed notice, to the Commission under this Act or the regulations.
- (2) The regulations may, either unconditionally or subject to such conditions as are specified in the regulations, exempt from the application of this Act or of the provisions of this Act specified in the regulations:
- (a) conduct engaged in by a specified organization or body that performs functions in relation to the marketing of primary products;
 - (b) a prescribed contract or proposed contract, contracts included in a prescribed class of contracts, or prescribed conduct being a contract, proposed contract or class of contracts made, or conduct engaged in, in pursuance of or for the purposes of a specified agreement, arrangement or understanding between the Government of Australia and the Government of a country outside Australia; or
 - (c) prescribed conduct engaged in in the course of a business carried on by the Commonwealth or by a prescribed authority of the Commonwealth.

(3) Strict compliance with a form of application or notice prescribed for the purposes of this Act is not, and shall be deemed never to have been, required and substantial compliance is, and shall be deemed always to have been, sufficient.

外國消費者保護法規翻譯叢書索引

(第一輯至第六輯)

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